

"CYBER REVENGE": DISSEMINATION OF SEXUALLY EXPLICIT MATERIALS

Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

Senate Bill 508 (S-3 as reported by House committee)
Sponsor: Sen. Steven Bieda

Analysis available at
<http://www.legislature.mi.gov>

Senate Bill 509 (as reported by House committee without amendment)
Sponsor: Sen. Rick Jones

House Committee: Criminal Justice
Senate Committee: Judiciary
Complete to 3-3-16

(Enacted as Public Acts 89 and 90 of 2016)

SUMMARY:

Senate Bill 508 would, under certain circumstances, make it a separate crime to disseminate sexually explicit visual material of an adult (e.g., a photograph or video) on a computer or other electronic device or medium of communication such as a cell phone or a website without consent from the person who is the subject of the material; some exemptions from the prohibition would apply.

Senate Bill 509 would create a misdemeanor penalty for a violation of Senate Bill 508 and an enhanced penalty for repeat violations. The bills would take effect 90 days after enactment.

Senate Bill 508 adds a new section to the Michigan Penal Code (750.145e, proposed). The bill would prohibit a person from intentionally, and with the intent to threaten, coerce, or intimidate, disseminate any sexually explicit visual material of another person if all of the following conditions apply:

- The other person is at least 18 years of age.
- The other person is identifiable from the visual material itself or by information displayed in connection with the material (e.g., by a name, phone number, or address). This provision would not apply if the identifying information is supplied by someone other than the person disseminating the material.
- The material had been obtained by the disseminator under circumstances in which a reasonable person would know or understand that the material was to remain private.
- The person knew or reasonably should know that the other person did not consent to the dissemination of the material.

"Disseminate" would be defined to mean post, distribute, or publish on a computer device, computer network, website, or other electronic device or medium of communication.

"Sexually explicit visual material" would mean a photograph or video that depicts nudity, erotic fondling, sexual intercourse, or sadomasochistic abuse. "Nudity" would mean displaying a person's genitalia or anus or, if the person is a female, her nipples or areola.

A person who violated the bill's prohibition could still be charged with, convicted of, or punished for another violation of law committed while violating or attempting to violate the bill.

Exemptions

The bill would not apply to any of the following:

- To the extent that the content is provided by another person, certain service providers as listed in the bill (included would be a person providing an interactive computer service, information service, telecommunications service, cable service, commercial mobile service, direct-to-home satellite service, and a video service).
- A person who disseminates sexually explicit visual material that is part of a news report or commentary or an artistic work (e.g., performance, work of art, literary or musical work, motion picture, film, or audiovisual work).
- A law enforcement officer, or a corrections officer or guard in a correctional facility or jail, who is engaged in the official performance of duties.
- A person disseminating sexually explicit visual material in the reporting of a crime.

Senate Bill 509 would add Section 145f to the Michigan Penal Code to specify that a person who violates Senate Bill 508 would be guilty of a misdemeanor punishable by imprisonment for not more than 93 days and/or a maximum fine of \$500. A second or subsequent violation would be a misdemeanor punishable by imprisonment for not more than one year and/or a maximum fine of \$1,000.

FISCAL IMPACT:

The bills would have an indeterminate fiscal impact on the state and on local units of government. Information is not available on the number of persons that might be convicted under the provisions of the bills. The bills could result in increased costs to local correctional systems. New misdemeanor convictions could increase costs related to county jails and/or local misdemeanor probation supervision. The costs of local incarceration in a county jail and local misdemeanor probation supervision vary by jurisdiction. Any increase in penal fine revenues would increase funding for local libraries, which are the constitutionally-designated recipients of those revenues. Also, the bills could have a fiscal impact on the judiciary and local court funding units. The fiscal impact would depend on how the provisions of the bills affected court caseloads and related administrative costs.

BACKGROUND INFORMATION AND BRIEF DISCUSSION OF THE ISSUES:

"Cyber revenge," or "cyber porn," generally refers to an act whereby a person, often an "ex", posts on a website or social media site a sexually explicit image of another, such as a video or photograph, without that other person's consent or knowledge. The act may be

driven by anger, hurt, or a desire for power and control, but often is intended to hurt, shame, humiliate, and/or damage the other person's reputation. At least 26 states and the District of Columbia have criminalized cyber revenge.

Michigan does not currently make cyber revenge a separate crime. In the 2013-14 legislative session, a similar package, Senate Bills 924 and 925 of 2014, passed the Senate but stalled in the House. School boards are mandated to adopt an anti-bullying policy that must address cyber-bullying, and Michigan does have both a criminal stalking and aggravated stalking statute. However, stalking requires contact between the parties or a credible threat of physical harm, whereas posting a naked picture of an old girlfriend or boyfriend is not necessarily intended to be seen by that person, but by other acquaintances and the general public. Thus, an act of cyber revenge may not meet the elements necessary to prosecute a person under the stalking statutes.

Michigan also makes it a crime to post electronic messages without consent (referred to as "unlawful posting of a message" or "cyberstalking"). Though, like Senate Bills 508 and 509, this includes the use of online posts or text messages, to meet the elements of the crime, the person posting the messages has to know or have reason to know that doing so could cause two or more separate noncontinuous acts of unconsented contact with the victim and must have posted the message with the intent to harass, scare, or threaten the victim. Moreover, the posting must be sufficient to cause a reasonable person in the same position to feel harassed, threatened, or scared, and must actually have evoked one of those emotions in the victim. However, cyber revenge, by disseminating sensitive and personal images, is generally used as a method to wreak havoc on the life of another from afar, not necessarily to bring about contact of any kind with the victim. And a victim's life can be irreparably impacted even if the posting would not or did not harass, scare, or threaten the victim or meet the reasonable person standard.

Therefore, a victim of cyber revenge in Michigan may only have civil remedies, such as bringing a civil action against the person who posted the images. But suing someone is costly and cases may take years to resolve. Internet service providers and website owners are generally protected from liability under federal law because the pictures were received from third parties, and legal experts say that the chances of successfully suing the ex-boyfriend or girlfriend are low and that many don't have sufficient assets to cover all the damages suffered by the victim. Plus, once the images are released in cyberspace, they are difficult, if not impossible, to totally retrieve. In other words, the victim gets revictimized every time the image resurfaces.

Discussion in support

Senate Bills 508 and 509 address the issue by creating a specific crime category for cyber revenge. Under the bills, it would be a misdemeanor to post sexually explicit images of another without that person's consent. It would only apply to images of adults—those 18 years of age and older—because it is already a crime to post, produce, distribute, or even possess sexually explicit images of minors, regardless of consent. It would not apply to incidents whereby an image was accidentally sent to another as the new crime includes a

mens rea provision (the poster must *intend* to disseminate the material, and must *intend* the dissemination to threaten, coerce, or intimidate the victim). Further, the image must in some way identify the person, such as including the person's name, phone number, address, town, etc. or the person must be clearly recognizable in the image. The bill also exempts Internet service providers, among others; law enforcement or corrections officers when performing official duties; and disseminations that are part of a news story or an artistic work. Therefore, the bill is not anticipated to infringe on free speech.

The bills create misdemeanor penalties, with harsher penalties for repeat offenses. It is hoped that if people know cyber revenge is against the law, and that they can go to jail and/or pay criminal fines, that they will not engage in such destructive conduct in the first place.

Discussion in opposition

Though no opposition to the bills was raised in committee testimony, a review of legal writings and news clippings reveal that the penalties proposed for cyber revenge by the bill package may be a slap on the wrist compared to the lifetime of repercussions a victim faces. For instance, an article in the *Ohio State Journal of Criminal Law*, entitled "Criminalizing Revenge Porn: The Debate", the author writes that "revenge porn victims suffer substantial personal and psychological harm with around half of the victims considering suicide due to the negative repercussions." Because images stay accessible on the Internet pretty much forever, and because many employers search the Internet and social media sites for information on job applicants and current employees, many victims of cyber revenge experience long term impacts on their careers.

Plus, some may say one of the main reasons someone publicly releases an intimate photograph of another is to shame or embarrass that person in the eyes of an employer and acquaintances. For example, a law school student recently had sexually-explicit pictures sent to all of her professors by her ex-boyfriend. Yet the bills likely would not apply in such situations as they require the motivation for the dissemination to be an intention to "threaten, coerce, or intimidate." Thus, in attempting to narrowly craft the language of the bills to address free speech concerns and not to apply to innocent or accidental releases of sensitive images, the bills may be too narrow to adequately capture many instances of cyber revenge.

POSITIONS:

The Prosecuting Attorneys Association indicated support for the bills. (2-23-16)

The Michigan Domestic & Sexual Violence Prevention & Treatment Board indicated support for the bills. (2-23-16)

The ACLU-Michigan indicated a neutral position on the bills. (2-23-16)

The Criminal Defense Attorneys of Michigan (CDAM) indicated a neutral position on the bills. (2-23-16)

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Robin Risko

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.