



**DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL**

MEMORANDUM

DATE: February 10, 2015

TO: Honorable Floyd Prozanski, Chair
Senate Committee on Judiciary

FROM: Aaron Knott, Legislative Director

SUBJECT: SB 188 – Creates crime of unlawful dissemination of an intimate image

This testimony is presented in support of SB 188.

BACKGROUND

Within the last few years, the Internet has hosted an explosion of so called “revenge porn.” These are intimate images generally depicting sexual acts or explicit nudity, most often taken consensually within a romantic relationship and then uploaded without the consent of the person depicted upon the conclusion of that relationship. Initially a form of explicit content traded on usenet groups and other relatively obscure corners of the internet, “revenge porn” has become dramatically more common with the rise of social media and websites specifically dedicated to the hosting of these images. These images are often uploaded alongside an individual’s personal identifying information, including their name, address, workplace, email and social media addresses. This has the dual effect of exposing the victim to anonymous criticism and harassment via all forms of digital communication, as well as guaranteeing that an Internet search of that person made by any employer, landlord, family member or friend would likely reveal the explicit images. Because these images are functionally permanent once uploaded to the Internet and tagged in this way, the reputational damage caused by the dissemination of these intimate images is profound and potentially lifelong. These images are also appropriated within abusive relationships to coerce, punish or blackmail, or to deter the reporting of abuse.

Sixteen states criminalize, in some way, the dissemination of an intimate image via the Internet without the consent of the person depicted. Any such criminalization effort must operate in the space between two principles – the limitations imposed on state regulation by the Communications Decency Act, and the constraints required by the First Amendment.

The Communications Decency Act shields websites and service providers from liability for content posted by users. If user-generated content posted to a website does not violate copyright laws or a very limited subset of criminal laws most typically prohibiting child pornography, sites have no obligation to remove the content and cannot be compelled to do so by state law. This

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necessitates that any criminalization focus exclusively on the person uploading the images, not on the websites hosting them.

Oregon's state constitution affords extremely robust protection to speech, and any legislation which limits speech must do so within narrow parameters. Oregon's framework for the protection of speech has endured for nearly 30 years, as articulated in *State v. Robertson*, 293 Or 402 (1982). The key to surviving a *Robertson* test is crafting a law narrowly focused on the harm that results from the disclosure. As applied to unlawful dissemination of an intimate image, this requires that the person be harmed via the suffering of humiliation or harassment, that the harm be intentional, and that a reasonable person be so harmed by the conduct. Any law unable to meet this significant burden will be exposed to constitutional challenge.

SB 188 IS A CONSTITUTIONAL SOLUTION TO THE PROBLEM OF "REVENGE PORN"

The Department of Justice consulted with ODAA, OCDLA, the ACLU and Legislative Counsel over the course of a six-month workgroup dedicated to crafting a statutory proposal that would criminalize the unlawful dissemination of an intimate image within the parameters of Oregon's constitutional free speech protections. SB 188 criminalizes this conduct while providing constitutionally necessary exceptions and safe harbors which strike an appropriate balance between punishing this immeasurably damaging behavior and upholding the sanctity of our constitutional protections. SB 188 creates the crime of unlawful dissemination of an intimate image as a Class A misdemeanor, elevated to a Class C felony for a second or subsequent conviction under this section.

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