



# Ohio Legislative Service Commission

## Bill Analysis

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### H.B. 132

128th General Assembly  
(As Introduced)

**Reps.** Maag, Uecker, Bulp, McClain, Stebelton, Huffman, J. Adams. Derickson, Grossman

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## BILL SUMMARY

- Prohibits a minor, by use of a telecommunications device, from recklessly creating, receiving, exchanging, sending, or possessing a photograph or other material showing a minor in a state of nudity.
- Specifies that a violation of the prohibition described in the preceding dot point is a delinquent act that would be a misdemeanor of the first degree if it could be committed by an adult.

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## CONTENT AND OPERATION

### Background

The term "sexting" is used to describe the following practices: when a person under 18 years of age takes nude or seminude photographs of himself or herself and sends them electronically by e-mail or through a cell phone to another person under 18 years of age (such as a boyfriend or girlfriend), takes nude or seminude photographs of another person under 18 years of age (such as a boyfriend or girlfriend) with the other person's consent and retains them on a cell phone, or possesses nude or seminude photographs of himself or herself or nude or seminude photographs of another person under 18 years of age (such as a boyfriend or girlfriend) that were taken with the other person's consent and that, often, were sent by the other person electronically by e-mail or through a cell phone. The existing prohibitions that could apply to this type of conduct, and the penalties for them, are described below in "**Existing prohibitions that could apply to the "sexting" conduct.**"

## Operation of the bill

The bill prohibits a "minor," by use of a telecommunications device, from recklessly creating, receiving, exchanging, sending, or possessing a photograph, video, or other "material" that shows a minor in a state of "nudity" (see **COMMENT 1** for definition of terms in quotation marks; "telecommunications device" is not defined for purposes of this provision). It is no defense to a charge under this prohibition that the minor creates, receives, exchanges, sends, or possesses a photograph, video, or other material that shows themselves in a state of nudity. A violation of the prohibition is the offense of "illegal use of a telecommunications device" involving a minor in a state of nudity, a delinquent act (see **COMMENT 2**) that would be a misdemeanor of the first degree if it could be committed as an adult. (R.C. 2907.324.)

The bill does not specify that any of the existing prohibitions described below in **"Existing prohibitions that could apply to the "sexting" conduct"** no longer would apply to conduct of the type described in the preceding paragraph.

### Existing prohibitions that could apply to "sexting" conduct

The following existing prohibitions could apply to the conduct described in the second preceding paragraph (none of the discussed Revised Code sections are in the bill):

(1) R.C. 2907.31, in relevant part, prohibits a person, with knowledge of its character or content, from recklessly: (a) directly delivering, furnishing, disseminating, providing, exhibiting, or presenting to a "juvenile" or group of juveniles any material that is "obscene" or "harmful to juveniles," (b) directly offering or agreeing to deliver, furnish, disseminate, provide, exhibit, or present to a juvenile or group of juveniles any material that is obscene or harmful to juveniles, or (c) while in the physical proximity of the juvenile, allowing any juvenile to review or peruse any material that is harmful to juveniles. A violation of the prohibition is the offense of "disseminating matter harmful to juveniles." If the material involved is harmful to juveniles, the offense is a misdemeanor of the first degree. If the material involved is obscene, the offense generally is a felony of the fifth degree, but if the juvenile involved in the offense is under 13 years of age, it is a felony of the fourth degree.

(2) R.C. 2907.321, in relevant part, prohibits a person, with knowledge of the character of the material involved, from: (a) creating, reproducing, or publishing any obscene material that has a minor as one of its participants, (b) promoting or advertising for dissemination; delivering, disseminating, displaying, exhibiting, presenting, or providing; or offering or agreeing to deliver, disseminate, display, exhibit, present, or provide, any obscene material that has a minor as one of its participants, (c) procuring,

possessing, or controlling any obscene material that has a minor as one of its participants, or (d) bringing or causing to be brought into Ohio any obscene material that has a minor as one of its participants. A violation of the prohibition is the offense of "pandering obscenity involving a minor." A violation based on clause (a), (b), or (d) of the prohibition is a felony of the second degree. A violation based on clause (c) of the prohibition generally is a felony of the fourth degree, but if the offender previously has been convicted of pandering obscenity involving a minor or a violation of R.C. 2907.322 or 2907.323, it is a felony of the third degree.

(3) R.C. 2907.322, in relevant part, prohibits a person, with knowledge of the character of the material involved, from: (a) creating, recording, photographing, filming, developing, reproducing, or publishing any material that shows a minor participating or engaging in "sexual activity," masturbation, or bestiality, (b) advertising for dissemination, distributing, transporting, disseminating, exhibiting, or displaying any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality, (c) knowingly soliciting, receiving, exchanging, possessing, or controlling any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality, or (d) bringing or causing to be brought into Ohio any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality. A violation of the prohibition is the offense of "pandering sexually oriented matter involving a minor." A violation based on clause (a), (b), or (d) of the prohibition is a felony of the second degree. A violation based on clause (c) of the prohibition generally is a felony of the fourth degree, but if the offender previously has been convicted of pandering sexually oriented matter involving a minor or a violation of R.C. 2907.321 or 2907.323, it is a felony of the third degree.

(4) R.C. 2907.323, in relevant part, prohibits a person from doing any of the following: (a) photographing any minor who is not the person's child or ward in a state of nudity, or creating, producing, or transferring any material that shows the minor in a state of nudity, or (b) possessing or viewing any material that shows a minor who is not the person's child or ward in a state of nudity. Neither prohibition applies if the material is disseminated, displayed, possessed, controlled, brought or caused to be brought into Ohio, or presented for a *bona fide* artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing *bona fide* studies or research, librarian, member of the clergy, prosecutor, judge, or other person having a proper interest in the material. The prohibition in clause (a) does not apply if the minor's parents, guardian, or custodian consents in writing to the photographing of the minor, to the use of the minor in the material or performance, or to the transfer of the material and to the specific manner in which the material or performance is to be used. The prohibition in clause (b) does not apply if the person knows that the parents,

guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material is used or transferred. A violation of the prohibition is the offense of "illegal use of a minor in a nudity-oriented material or performance." A violation based on clause (a) of the prohibition is a felony of the second degree, and, if the offender is convicted of a specification of the type described in R.C. 2941.1422, the court must sentence the offender to a mandatory prison term and order the offender to make restitution. A violation based on clause (b) of the prohibition generally is a felony of the fifth degree, but if the offender previously has been convicted of illegal use of a minor in a nudity-oriented material or performance or a violation of R.C. 2907.321 or 2907.322, it is a felony of the fourth degree.

(5) R.C. 2919.24, in relevant part, prohibits a person from: (a) aiding, abetting, inducing, causing, encouraging, or contributing to a child or a ward of the juvenile court becoming an "unruly child" or a "delinquent child" (see **COMMENT 2** for definitions of terms in quotation marks), or (b) acting in a way tending to cause a child or a ward of the juvenile court to become an unruly child or a delinquent child. A violation of the prohibition is the offense of "contributing to the unruliness or delinquency of a child," a misdemeanor of the first degree. Each day of violation of the prohibition is a separate offense.

(6) R.C. 2919.22, in relevant part, prohibits a person from enticing, coercing, permitting, encouraging, compelling, using, or allowing a child under 18 years of age or a mentally or physically handicapped child under 21 years of age to act, model, or in any other way participate in, or be photographed for, the production, presentation, dissemination, or advertisement of any material that the offender knows or reasonably should know is obscene, is "sexually oriented matter," or is "nudity-oriented matter." A violation of the prohibition is the offense of "endangering children, a felony of the second degree. If the offender also is convicted of a specification of the type described in R.C. 2941.1422, the court must sentence the offender to a mandatory prison term and order the offender to make restitution.

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## COMMENT

1. The following definitions apply to the existing offenses that could apply to the behavior prohibited by the bill and to the bill (R.C. 2907.01, not in the bill, unless another section is specified):

*"Harmful to juveniles"* means that quality of any material or performance describing or representing nudity, sexual conduct, sexual excitement, or sado-masochistic abuse in any form to which all of the following apply: (a) the material or

performance, when considered as a whole, appeals to the prurient interest of juveniles in sex, (b) the material or performance is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for juveniles, and (c) the material or performance, when considered as a whole, lacks serious literary, artistic, political, and scientific value for juveniles.

**"Juvenile"** means an unmarried person under the age of 18.

**"Material"** means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch and includes an image or text appearing on a computer monitor, television screen, liquid crystal display, or similar display device or an image or text recorded on a computer hard disk, computer floppy disk, compact disk, magnetic tape, or similar data storage device.

**"Minor"** means a person under the age of 18.

**"Nudity"** means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

**"Obscene"** means that, when considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is "**obscene**" if any of the following apply: (a) its dominant appeal is to prurient interest, (b) its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite, (c) its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality, (d) its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose, or (e) it contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

**"Sado-masochistic abuse"** means flagellation or torture by or upon a person or the condition of being fettered, bound, or otherwise physically restrained.

**"Sexual activity"** means sexual conduct or sexual contact, or both. As used in this definition, **"sexual conduct"** means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another (penetration, however slight, is sufficient to complete vaginal or anal intercourse); and **"sexual contact"** means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

**"Sexual excitement"** means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

**"Nudity-oriented matter"** means any material or performance that shows a minor in a state of nudity and that, taken as a whole by the average person applying contemporary community standards, appeals to prurient interest (R.C. 2919.22, not in the bill).

**"Sexually oriented matter"** means any material or performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality (R.C. 2919.22, not in the bill).

2. Existing R.C. 2152.02, which is not in the bill, specifies that "delinquent child" includes any of the following: (a) *any child, except a juvenile traffic offender, who violates any law of Ohio or the United States, or any ordinance of a political subdivision of the state, that would be an offense if committed by an adult*, (b) any child who violates any lawful order of the court made under R.C. Chapter 2151. or 2152. other than an order issued under R.C. 2151.87, (c) *any child who violates R.C. 2907.39(C), 2903.211(A), or 2925.55(C)(1) or (D)*, (d) any child who is a habitual truant and who previously has been adjudicated an unruly child for being a habitual truant, or (e) any child who is a chronic truant.

Under existing R.C. 2151.022, which is not in the bill, "unruly child" includes any of the following: (a) any child who does not submit to the reasonable control of the child's parents, teachers, guardian, or custodian, by reason of being wayward or habitually disobedient, (b) any child who is an habitual truant from school and who previously has not been adjudicated an unruly child for being an habitual truant, (c) any child who behaves in a manner as to injure or endanger the child's own health or

morals or the health or morals of others, or (d) *any child who violates a law, other than R.C. 2907.39(C), 2923.211(A), 2925.55(C)(1) or (D), or 2151., that is applicable only to a child.*

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## HISTORY

ACTION	DATE
Introduced	04-14-09

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