

**2013 DRAFTING REQUEST**

**Senate Substitute Amendment (SSA-SB367)**

Received: 3/14/2014 Received By: phurley  
Wanted: As time permits Same as LRB: s0392  
For: Glenn Grothman (608) 266-7513 By/Representing:  
May Contact: Drafter: phurley  
Subject: Criminal Law - miscellaneous Addl. Drafters:  
Extra Copies:

Submit via email: YES  
Requester's email: Sen.Grothman@legis.wisconsin.gov  
Carbon copy (CC) to:

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**Pre Topic:**

No specific pre topic given

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**Topic:**

Revenge pornography

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**Instructions:**

Incorporate assembly amendment for public figures, plus changes

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**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	phurley 3/14/2014	evinz 3/14/2014		_____			
/1	phurley 3/14/2014	evinz 3/14/2014	jfrantze 3/14/2014	_____	srose 3/14/2014	srose 3/14/2014	
/2			rschluet 3/14/2014	_____	srose 3/14/2014	srose 3/14/2014	

FE Sent For:

<END>

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/?	phurley 3/14/2014	evinz 3/14/2014		_____			
/1			jfrantze 3/14/2014	_____	srose 3/14/2014	srose 3/14/2014	

FE Sent For:

1 eeV  
3/14/14

  
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/?	phurley	1 eeV 3/14/14	11 eeV 3/14/14	 3/14/14			

FE Sent For:

<END>

## Hurley, Peggy

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**From:** Sappenfield, Anne  
**Sent:** Thursday, March 13, 2014 9:30 AM  
**To:** Hurley, Peggy  
**Subject:** FW: SB 367

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**From:** Sappenfield, Anne  
**Sent:** Thursday, March 13, 2014 8:51 AM  
**To:** Cady, Dean; Gibbs, Adam  
**Subject:** SB 367

Hi Dean and Adam,

Here is an approach I think would work:

Whoever posts or publishes a representation depicting a nude or partially nude identifiable person or of an identifiable person engaging in sexually explicit conduct is guilty of a Class A misdemeanor if the actor knows that he or she is posting or publishing the representation without the consent of the person depicted or if the actor and the person depicted agree or understand that the representation shall remain private.

My hope is that "post or publish" gets to the Internet and not texting, etc... The first offense—knowing there is no consent, would apply to a website that is notified that it should take down a picture and does not. The second offense is meant to get at the initial actor.

For the second offense (i.e., that the representation shall remain private), there are a couple of options. One would be to create a definition of "private representation" as was suggested by the WDAA. Another is to require that the representation is posted or published with intent to frighten, intimidate, threaten, abuse or harass.

Please let me know if you need anything else.

Anne

*Anne Sappenfield*  
Principal Attorney  
WI Legislative Council  
(608) 267-9485

## Hurley, Peggy

---

**From:** Hurley, Peggy  
**Sent:** Thursday, March 13, 2014 1:06 PM  
**To:** Sappenfield, Anne  
**Subject:** Revenge pornography

Hi Anne,

Here's what I've drafted to so far.

1. Page 2, line 1: before that line insert:

Section 1g. 942.09 (1) (bg) of the statutes is created to read:

942.09 (1) (bg) "Post or publish" includes posting or publishing on the Internet.

Section 1m. 942.09 (1) (bn) "Private representation" means a representation depicting a nude or partially nude person or depicting a person engaging in sexually explicit conduct that is intended by the person depicted in the representation to be captured, viewed, or possessed only by the person who, with the consent of the person depicted, captured the presentation or to whom the person depicted directly and intentionally gave possession of the representation.

2. Page 2, line 5: delete lines 5 to 10 and substitute:

942.09 (3m) (a) Whoever does any of the following is guilty of a Class A misdemeanor:

1. Posts, publishes, or knowingly causes to be posted or published a representation depicting a nude or partially nude identifiable person or of an identifiable person engaging in sexually explicit conduct if the actor knows that the person depicted does not consent to the posting or publication of the representation.
2. Posts, publishes, or knowingly causes to be posted or published, a private representation of a person without that person's consent.

I think that this would split the two separate ways of violating this statute into two clear categories: a website that posts a nude picture knowing that the person doesn't consent and an ex who posts or sends in for posting a private representation. I have a bit of an issue with taking the "private representation" requirement out of the website category, in that it no longer has to be "revenge porn" for the website to run afoul of the law – if the person objects to any nude photos being posted (say, a photo of a person at topless beach), the website has to take them down. That might be fine, but it does expand the scope of the bill.

Alternatively, the bill could be drafted like this:

- (a) Whoever posts, publishes, or knowingly causes to be posted or published, a private representation is guilty of a Class A misdemeanor if the actor knows that the person depicted in the private representation does not consent to the posting or publication.

This doesn't separate the two categories, but I'm not sure it has to. It doesn't matter if it's the boyfriend sending it in, or if it's the website posting, if the person depicted objects, then it is illegal to post or publish them. We can play around with the intent/knowledge elements, too: options include requiring (or not) the actor to know that it was a private representation at the time he or she posts or publishes, requiring (or not) the actor to know that the person depicted does not consent to the publication, or some combination:

- (a) Whoever does any of the following is guilty of a class A misdemeanor:

1. Posts, publishes, or knowingly causes to be posted or published, a private representation if the actor knows that the person depicted does not consent to the posting or publication of the private representation.

(This would allow, I think, a website to post a picture until it knows that the person objects. It doesn't require the website to know that the depiction is a private representation at the time it posts it, but it would require the website to take it down once it knows the person objects. This phrasing would also allow a website to post nudes, even over a person's objection, that are not private representations.)

2. Posts, publishes, or knowingly causes to be posted or published, a depiction of a person that he or she knows is a private representation, without the consent of the person depicted.

(This would ban the posting or publishing or sending in a photo that the person knows is supposed to be private and does not require the person depicted to make an objection before the act becomes criminal)

Looking back at it, I think I like that last option best, but I'm not sure it captures the intent of the requester. I am going to be out of the office until about 3, but we can discuss the options later today or tomorrow. Cheers!

Peggy Hurley  
Legislative Reference Bureau  
608 266 8906



## 2013 SENATE BILL 367

October 24, 2013 - Introduced by Senators VUKMIR, L. TAYLOR, LEHMAN and RISSER, cosponsored by Representatives SPIROS, JOHNSON, BALLWEG, BARCA, BERCEAU, BIES, BROOKS, CZAJA, KAHL, KLEEFISCH, MARKLEIN, NASS, OHNSTAD, A. OTT, PRIDEMORE, THIESFELDT and TITTL. Referred to Committee on Judiciary and Labor.

1 AN ACT *to create* 942.09 (1) (d) and 942.09 (3m) of the statutes; **relating to:**  
2 distributing a sexually explicit image without consent and providing a penalty.

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### *Analysis by the Legislative Reference Bureau*

Under current law, no one may photograph, videotape, or otherwise capture an image of a nude or partially nude person (depicted person) without the depicted person's knowledge and consent. A person who does so, or who possesses, reproduces, or distributes the image with the knowledge that the image was captured without the depicted person's knowledge or consent, is generally guilty of a Class I felony, and may be fined up to \$10,000, imprisoned for up to three years and six months, or both.

Under this bill, no one may reproduce, distribute, exhibit, publish, transmit, or otherwise disseminate (distribute) an image of a person who is nude or partially nude or who is engaging in sexually explicit behavior without the consent of the person, regardless of whether the depicted person consented to the capture of the image. A person who does so is guilty of a Class A misdemeanor and may be fined up to \$10,000, imprisoned for up to nine months, or both.

Under the bill, the prohibition does not apply if the person depicted consented to the distribution for commercial purposes. The bill creates exceptions for parents or legal guardians who distribute otherwise legal representations of their minor children for noncommercial purposes, for law enforcement officers acting in their official capacity, and for persons who distribute the representations for the purpose of reporting or assisting with the investigation of a crime.

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a

**SENATE BILL 367**

report concerning the proposed penalty and the costs or savings that are likely to result if the bill is enacted.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

1           **SECTION 1.** 942.09 (1) (d) of the statutes is created to read:

2           942.09 (1) (d) "Sexually explicit conduct" has the meaning given in s. 948.01  
3           (7).

4           **SECTION 2.** 942.09 (3m) of the statutes is created to read:

5           942.09 (3m) (a) Whoever, without the consent of the person represented,  
6           reproduces, distributes, exhibits, publishes, transmits, or otherwise disseminates a  
7           representation of a nude or partially nude person or of a person engaging in sexually  
8           explicit conduct is guilty of a Class A misdemeanor. The consent of the person  
9           represented to the capture of the representation or to the possession of the  
10          representation by the actor is not a defense to a violation of this subsection.

11          (b) This subsection does not apply to any of the following:

12          1. The parent, guardian, or legal custodian of the person represented if the  
13          representation does not violate s. 948.05 or 948.12 and the reproduction,  
14          distribution, exhibition, publication, transmission, or other dissemination is not for  
15          commercial purposes.

16          2. A law enforcement officer or agent acting in his or her official capacity in  
17          connection with the investigation or prosecution of a crime.

18          3. A person who is not the actor and who reproduces, distributes, exhibits,  
19          publishes, transmits, or otherwise disseminates the representation to a law  
20          enforcement officer or agency for the purpose of reporting a crime or for the purpose

posting  
or  
publication

posts  
publishes -  
Does this  
make  
sense.

**SENATE BILL 367**

1 of assisting a law enforcement officer or agent in an investigation or prosecution of  
2 a crime.

3 (c) This subsection does not apply if the person represented consented to the  
4 ~~reproduction, distribution, exhibition, publication, transmission, or other~~  
5 ~~dissemination~~ of the representation for commercial purposes.

6 (END)

*posting of  
posting of*



State of Wisconsin  
2013 - 2014 LEGISLATURE



LRBs039177

PJH:/:.....

mmr  
eev

**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

**SENATE SUBSTITUTE AMENDMENT,**

**TO SENATE BILL 367**

SAJ  
xref N/A

by noon

gen cat

1 AN ACT <sup>gen cat</sup>; relating to: posting or publishing a sexually explicit image without  
2 consent and providing a penalty.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

3 SECTION 1. 942.09 (1) (bg) of the statutes is <sup>✓</sup>created to read:

4 942.09 (1) (bg) "Post or publish" includes posting or publishing on the Internet.

5 SECTION 2. 942.09 (1) (bn) of the statutes is <sup>✓</sup>created to read:

6 942.09 (1) (bn) "Private representation" means a representation depicting a  
7 nude or partially nude person or depicting a person engaging in sexually explicit  
8 conduct that is intended by the person depicted in the representation to be captured,  
9 viewed, or possessed only by the person who, with the consent of the person depicted,

1 captured the representation or to whom the person depicted directly and  
2 intentionally gave possession of the representation.

3 **SECTION 3.** 942.09 (1) (d) of the statutes is created to read:

4 942.09 (1) (d) "Sexually explicit conduct" has the meaning given in s. 948.01  
5 (7).

6 **SECTION 4.** 942.09 (3m) of the statutes is created to read:

7 **942.09 (3m) (a)** Whoever does any of the following is guilty of a class A  
8 misdemeanor:

9 1. Posts, publishes, or causes to be posted or published, a private representation  
10 if the actor knows that the person depicted does not consent to the posting or  
11 publication of the private representation.

12 2. With the intent to cause humiliation or embarrassment to the person  
13 depicted, posts, publishes, or causes to be posted or published, a depiction of a person  
14 that he or she knows is a private representation, without the consent of the person  
15 depicted.

16 (b) This subsection does not apply to any of the following:

17 1. The parent, guardian, or legal custodian of the person depicted if the private  
18 representation does not violate s. 948.05 or 948.12 and the posting or publication is  
19 not for commercial purposes.

20 2. A law enforcement officer or agent acting in his or her official capacity in  
21 connection with the investigation or prosecution of a crime.

22 3. A person who posts or publishes a private representation that is newsworthy  
23 or of public importance.

24 (END)



State of Wisconsin  
2013 - 2014 LEGISLATURE



LRBs0391/1  
PJH:eevjf

- Now -

2  
(mnr)

SENATE SUBSTITUTE AMENDMENT,  
TO SENATE BILL 367

if the web site may be viewed by the general public

1 AN ACT *to create* 942.09 (1) (bg), 942.09 (1) (bn), 942.09 (1) (d) and 942.09 (3m)  
2 of the statutes; **relating to:** posting or publishing a sexually explicit image  
3 without consent and providing a penalty.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

a web site on

4 SECTION 1. 942.09 (1) (bg) of the statutes is created to read:  
5 942.09 (1) (bg) "Post or publish" includes posting or publishing on the Internet.

6 SECTION 2. 942.09 (1) (bn) of the statutes is created to read:  
7 942.09 (1) (bn) "Private representation" means a representation depicting a  
8 nude or partially nude person or depicting a person engaging in sexually explicit  
9 conduct that is intended by the person depicted in the representation to be captured,  
10 viewed, or possessed only by the person who, with the consent of the person depicted,

1 captured the representation or to whom the person depicted directly and  
2 intentionally gave possession of the representation.

3 SECTION 3. 942.09 (1) (d) of the statutes is created to read:

4 942.09 (1) (d) "Sexually explicit conduct" has the meaning given in s. 948.01  
5 (7).

6 SECTION 4. 942.09 (3m) of the statutes is created to read:

7 942.09 (3m) (a) Whoever does any of the following is guilty of a Class A  
8 misdemeanor:

9 1. Posts, publishes, or causes to be posted or published, a private representation  
10 if the actor knows that the person depicted does not consent to the posting or  
11 publication of the private representation.

12 2. With the intent to cause humiliation or embarrassment to the person  
13 depicted, posts, publishes, or causes to be posted or published, a depiction of a person  
14 that he or she knows is a private representation, without the consent of the person  
15 depicted.

16 (b) This subsection does not apply to any of the following:

17 1. The parent, guardian, or legal custodian of the person depicted if the private  
18 representation does not violate s. 948.05 or 948.12 and the posting or publication is  
19 not for commercial purposes.

20 2. A law enforcement officer or agent acting in his or her official capacity in  
21 connection with the investigation or prosecution of a crime.

22 3. A person who posts or publishes a private representation that is newsworthy  
23 or of public importance.

24 (END)

4. A provider of electronic communication services that provides internet access service to customers.

**Hurley, Peggy**

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**From:** Sappenfield, Anne  
**Sent:** Friday, March 14, 2014 12:50 PM  
**To:** Hurley, Peggy  
**Subject:** FW: how's about this??

I'll let you know if I hear otherwise, but I think you can go ahead.

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**From:** Gibbs, Adam  
**Sent:** Friday, March 14, 2014 12:49 PM  
**To:** Sappenfield, Anne; Cady, Dean  
**Subject:** RE: how's about this??

Looks Good!

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**From:** Sappenfield, Anne  
**Sent:** Friday, March 14, 2014 12:41 PM  
**To:** Cady, Dean; Gibbs, Adam  
**Subject:** how's about this??

Does not apply to a provider of electronic communication services that provides Internet access service to customers and stores data for use by its customers

*Anne Sappenfield*  
Principal Attorney  
WI Legislative Council  
(608) 267-9485

**Hurley, Peggy**

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**From:** Sappenfield, Anne  
**Sent:** Friday, March 14, 2014 12:36 PM  
**To:** Hurley, Peggy  
**Subject:** FW: sub.

This is what they want at this point.

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**From:** Gibbs, Adam  
**Sent:** Friday, March 14, 2014 12:35 PM  
**To:** Sappenfield, Anne; Cady, Dean; Rostan, Jason  
**Subject:** RE: sub.

“provider of electronic communication service” was used in a bill we did earlier in the session.

That, I believe, would only refer to the company with the electronic infrastructure, not the website or website hosting company.

I will check more into it, but I wanted to pass that along.

Sincerely,

*Adam Gibbs*

**Office of Senator Grothman**  
20<sup>th</sup> Senate District  
(608) 266-7513

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**From:** Sappenfield, Anne  
**Sent:** Friday, March 14, 2014 12:19 PM  
**To:** Cady, Dean; Gibbs, Adam  
**Subject:** sub.

Hi Adam and Dean,

Do you know of language that would exempt AT&T but not website operators? Peggy and I are concerned that phrases such as “Internet service provider” may be too broad.

Thanks,  
Anne

*Anne Sappenfield*  
Principal Attorney  
WI Legislative Council  
(608) 267-9485