

SOON
2001 - 2002 LEGISLATURE

LRB-0795/1 2
RLR&MGD:jld:jf

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DOA:.....Statz - Crimes related to computers, obscenity, nudity, and pornography

FOR 2001-03 BUDGET — NOT READY FOR INTRODUCTION

Don't gen

1 AN ACT ...; relating to: the budget.

Analysis by the Legislative Reference Bureau

CRIMES

Crimes related to computers

Under current law no person may willfully, knowingly, and without authorization modify, destroy, copy, take possession of, or access computer data, computer programs, or supporting documentation of a computer system. A person who violates this prohibition may generally be fined not more than \$10,000, imprisoned for not more than nine months, or both. If the violation occurs under certain circumstances, the maximum fine remains the same, but the person may face a longer term of confinement. Specifically, if the person committed the violation in order to defraud another or obtain the property of another a court may impose on the person a bifurcated sentence, consisting of confinement in prison and extended supervision, not to exceed five years. If the violation causes more than \$2,500 of damage or if it causes an interruption or impairment of governmental operations, public communication, transportation, or a supply of water, gas, or other public service, a court may impose on the person a bifurcated sentence, consisting of confinement in prison and extended supervision, not to exceed ten years. Finally, if the violation creates a substantial and unreasonable risk of death or great bodily harm to another, a court may impose upon the person a bifurcated sentence, consisting of confinement in prison and extended supervision, not to exceed 15 years.

This bill prohibits an additional activity related to computers, intentionally interrupting computer service by sending to a computer, computer program, computer system, or computer network a message that is too complex, or multiple messages that are too voluminous, for the computer, computer program, computer system, or computer network to process. The penalty for intentionally interrupting computer service is a fine not to exceed \$10,000, imprisonment not to exceed nine months, or both. The penalty may be increased if the crime is committed under a circumstance permitting an increased penalty.

The bill also increases the penalties for violations of crimes related to computers that are committed under specified circumstances. If the violation results in damage valued at more than \$1,000 but not more than \$2,500, the penalty is increased to a fine not to exceed \$10,000 or a bifurcated sentence, consisting of confinement in prison and extended supervision, not to exceed five years, or both a fine and a bifurcated sentence. If the violation results in an interruption or impairment of government operations, public communication, transportation, or a supply of water, gas, or other public service, the penalty is increased to a fine not to exceed \$10,000 or a bifurcated sentence not to exceed 15 years, or both.

The bill authorizes courts to enhance the penalties for violations of crimes related to computers if the person committing the crime disguises the identity or location of the computer at which he or she is working by accessing another person's computer to commit the violation with the intent to make it less likely that he or she will be identified with the crime. For a misdemeanor, which is an offense punishable by confinement in jail, the court may increase the fine by up to \$1,000 and increase the maximum term of imprisonment ~~by up to~~ 12 months. For a felony, which is an offense punishable by confinement in state prison, the court may increase the fine by up to \$2,500 and increase the term of the bifurcated sentence by up to two years.

a fine and a bifurcated sentence

a total of

Prohibitions related to images depicting nudity

Current law prohibits production, possession, and distribution of a photograph, motion picture, videotape, or other visual representation or reproduction that depicts nudity if the person depicted nude did not consent to the representation or reproduction and if the person who makes, possesses, or distributes the representation or reproduction knows or should know that the person depicted nude did not consent to the nude depiction. Current law exempts from criminal liability parents, guardians, and legal custodians who make or possess visual representations depicting their children nude, or who distribute the representations for other than commercial purposes.

The Wisconsin supreme court recently found the state statute prohibiting nude representations unconstitutional, because it prohibits all depictions of nudity made without consent, including artistic, political, or newsworthy depictions that are protected by the First Amendment. *State v. Stevenson*, 236 Wis. 2d 86 (2000).

This bill narrows the scope of the prohibition against making an original representation that depicts nudity by requiring that, at the time the representation is made, the subject of the depiction be both nude and in a place and circumstance in which he or she can reasonably expect privacy. The bill applies the prohibition against making a reproduction that depicts nudity only to the act of reproducing an

If the violation results in damage valued at more than \$2,500, the penalty is increased to a fine not to exceed \$10,000 or a bifurcated sentence not to exceed 15 years, or both a fine and a bifurcated sentence.

original representation that the reproducer knows or should know was made in violation of the prohibition against making an original representation, although the bill exempts a reproducer from criminal liability if the subject of the representation does consent to the reproduction even if he or she did not consent to the original representation. The bill treats the prohibitions against possessing and distributing representations depicting nudity similarly to the prohibition against making reproductions. The bill prohibits possessing or distributing a representation that is unlawfully made, unless the subject of the representation consents to the possession or distribution even if he or she did not consent to the making of the representation.

Crimes against providing and describing harmful material to children

Current law criminalizes the acts of providing and describing harmful material to a child and criminalizes possession of harmful material with intent to transfer the harmful material to a child. Harmful material includes nudity, sexually explicit images, and images of torture and brutality. Current law does not require that the state prove that the defendant knows or should know that the recipient of the materials is a child. The law does, however, establish an affirmative defense under which the defendant may avoid criminal liability by proving that he or she reasonably believed that the recipient was 18 years of age or older. In order to prove that he or she reasonably believed the recipient was 18 years of age or older, the defendant must show that the recipient provided the defendant some form of identification documentation purporting to establish that the recipient was at least 18 years of age.

The Wisconsin supreme court recently ruled that the statute that prohibits exposure of a child to harmful materials is unconstitutional as applied to a defendant who sent harmful material over the Internet to a 17-year-old, and to other instances in which the defendant does not have face-to-face contact with the recipient. *State v. Weidner*, 235 Wis. 2d 306 (2000). The supreme court found the statute unconstitutional as applied in this case because knowledge of the recipient's age is not an element of the crime. The supreme court distinguished the case at issue in *Weidner* (transmitting harmful material over the Internet) from instances in which the defendant meets the recipient face-to-face. The supreme court did not disturb a lower court ruling that found the statute constitutional as applied to instances in which the defendant meets the recipient face-to-face, because the face-to-face meeting provides the defendant opportunity to assess the recipient's age.

The bill makes knowledge of the recipient's status as a child an element of the crime if the defendant does not have a face-to-face contact with the child. The bill does not add the knowledge-of-age element for cases in which the defendant has face-to-face contact with the recipient. Instead, in instances in which the defendant does have face-to-face contact with the recipient, the bill maintains the affirmative defense that requires the defendant to prove that he or she reasonably believed that the recipient was at least 18 years of age by showing that the recipient provided documentation of age.

Inclusion of computer images in prohibitions related to certain images

Several criminal laws prohibit activities related to images of nudity, or images and sounds of obscenity or of children engaged in sexually explicit conduct. Those

crimes are: 1) making, possessing, reproducing or distributing images of nudity; 2) importing, printing, selling, transferring, exhibiting, or possessing for publication, sale, exhibition, or transfer, obscene material; 3) photographing, filming, videotaping, or making a sound recording of a child engaged in sexually explicit conduct, or enticing a child to go into a secluded place in order to take a picture of make a sound recording of the child engaged in sexually explicit conduct; 4) exposing a child to harmful images and sounds; and 5) producing, performing in, profiting from, importing, possessing, and other activities related to child pornography. These prohibitions do not specifically apply to computer-generated images, sounds, or the stored data version of images or sounds.

The bill expands the prohibitions related to images of nudity, and images or sounds of obscenity or of children engaged in sexual conduct, to include images and sounds recorded using digital technology as well as the data that represents an image or a sound.

New crime related to obscene e-mail

The bill makes it a crime to send an unsolicited e-mail message that contains obscenity or sexually explicit conduct, if the person sending the e-mail message does not label the e-mail message as "Adult advertisement" in the subject line. The penalty for violating the prohibition against obscene e-mail is a fine not to exceed \$10,000 or imprisonment not to exceed nine months, or both.

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

1 **SECTION 1.** 943.70 (1) (a) of the statutes is renumbered 943.70 (1) (am).

2 **SECTION 2.** 943.70 (1) (ag) of the statutes is created to read:

3 943.70 (1) (ag) "Access" means to instruct, communicate with, interact with,
4 intercept, store data in, retrieve data from, or otherwise use the resources of.

5 **SECTION 3.** 943.70 (1) (gm) of the statutes is created to read:

6 943.70 (1) (gm) "Interruption in service" means inability to access a computer,
7 computer program, computer system, or computer network, or an inability to
8 complete a transaction involving a computer.

9 **SECTION 4.** 943.70 (2) (a) (intro.) of the statutes is amended to read:

1 943.70 (2) (a) (intro.) Whoever ~~wilfully~~ willfully, knowingly and without
2 authorization does any of the following may be penalized as provided in par. pars. (b)
3 and (c):

4 SECTION 5. 943.70 (2) (a) 3. of the statutes is amended to read:

5 943.70 (2) (a) 3. Accesses ~~data~~, computer programs or supporting
6 documentation.

7 SECTION 6. 943.70 (2) (am) of the statutes is created to read:

8 943.70 (2) (am) Whoever intentionally causes an interruption in service by
9 submitting a message, or multiple messages, to a computer, computer program,
10 computer system, or computer network that exceeds the processing capacity of the
11 computer, computer program, computer system, or computer network may be
12 penalized as provided in pars. (b) and (c).

13 SECTION 7. 943.70 (2) (b) (intro.) of the statutes is amended to read:

14 943.70 (2) (b) (intro.) Whoever violates ~~this subsection~~ par. (a) or (am) is guilty
15 of:

16 SECTION 8. 943.70 (2) (b) 1. of the statutes is amended to read:

17 943.70 (2) (b) 1. A Class A misdemeanor unless ~~subd. any of subds. 2., 3. or to~~
18 4. applies.

19 SECTION 9. 943.70 (2) (b) 3. of the statutes is amended to read:

20 943.70 (2) (b) 3. A Class ~~D~~ E felony if the offense results in damage is greater
21 valued at more than \$1,000 but not more than \$2,500 ~~or if it causes an interruption~~
22 ~~or impairment of governmental operations or public communication, of~~
23 ~~transportation or of a supply of water, gas or other public service.~~

24 SECTION 10. 943.70 (2) (b) 3g. of the statutes is created to read:

1 943.70 (2) (b) 3g. A Class ~~D~~^C felony if the offense results in damage valued at
2 more than \$2,500.

3 SECTION 11. 943.70 (2) (b) 3r. of the statutes is created to read:

4 943.70 (2) (b) 3r. A Class C felony if the offense causes an interruption or
5 impairment of governmental operations or public communication, of transportation,
6 or of a supply of water, gas, or other public service.

7 SECTION 12. 943.70 (2) (c) of the statutes is created to read:

8 943.70 (2) (c) If a person disguises the identity or location of the computer at
9 which he or she is working while committing an offense under par. (a) or (am) with
10 the intent to make it less likely that he or she will be identified with the crime, the
11 penalties under par. (b) may be increased as follows:

12 1. In the case of a misdemeanor, the maximum fine prescribed by law for the
13 crime may be increased by not more than \$1,000 and the maximum term of
14 imprisonment prescribed by law for the crime may be increased so that the revised
15 maximum term of imprisonment is 12 months.

16 2. In the case of a felony, the maximum fine prescribed by law for the crime may
17 be increased by not more than \$2,500 and the maximum term of imprisonment
18 prescribed by law for the crime may be increased by not more than 2 years.

19 SECTION 13. 944.205 (title) of the statutes is amended to read:

20 944.205 (title) ~~Photographs, motion pictures, videotapes or other~~
21 ~~visual representations~~ **Recordings showing nudity.**

22 SECTION 14. 944.205 (1) of the statutes is renumbered 944.205 (1) (intro.) and
23 amended to read:

24 944.205 (1) (intro.) In this section, ~~"nudity"~~:

25 (b) "Nudity" has the meaning given in s. 948.11 (1) (d).

1 **SECTION 15.** 944.205 (1) (a) of the statutes is created to read:

2 944.205 (1) (a) “Exhibit” has the meaning given in s. 948.01 (1d).

3 **SECTION 16.** 944.205 (1) (c) of the statutes is created to read:

4 944.205 (1) (c) “Recording” has the meaning given in 948.01 (3r).

5 **SECTION 17.** 944.205 (2) (a) of the statutes is amended to read:

6 944.205 (2) (a) ~~Takes a photograph or makes a motion picture, videotape or~~
7 ~~other visual representation or reproduction that depicts~~ Records an image of nudity
8 without the knowledge and consent of the person who is depicted nude while that
9 person is nude in a place and circumstance in which he or she has a reasonable
10 expectation of privacy, if the person recording the image knows or has reason to know
11 that the person who is depicted nude does not know of and consent to the ~~taking or~~
12 ~~making of the photograph, motion picture, videotape or other visual representation~~
13 ~~or reproduction~~ recording.

14 **SECTION 18.** 944.205 (2) (b) of the statutes is repealed and recreated to read:

15 944.205 (2) (b) Copies, possesses, exhibits, stores, or distributes a recording of
16 an image if all of the following apply:

17 1. The recording was done in violation of par. (a) or was previously copied in
18 violation of this paragraph.

19 2. The actor knows or has reason to know that the violation described under
20 subd. 1. has occurred.

21 3. The person depicted nude in the recording did not consent to the copying,
22 possession, exhibition, storage, or distribution of the recording under par. (b) (intro.).

23 4. The recording depicts the same nudity recorded in violation of par. (a).

24 **SECTION 19.** 944.205 (3) of the statutes is amended to read:

1 944.205 (3) Notwithstanding sub. (2) (a) and (b), if the person depicted in a
2 photograph, motion picture, videotape or other visual representation or reproduction
3 recording of an image is a child and the making recording, copying, possession,
4 exhibition, storage, or distribution of the photograph, motion picture, videotape or
5 other visual representation or reproduction recording does not violate s. 948.05 or
6 948.12, a parent, guardian, or legal custodian of the child may do any of the following:

7 (a) Make and Record, copy, possess, exhibit, or store the photograph, motion
8 picture, videotape or other visual representation reproduction of the child recording.

9 (b) Distribute a photograph, motion picture, videotape or other visual
10 representation or reproduction made or recording that was recorded, copied,
11 possessed, exhibited, or stored under par. (a) if the distribution is not for commercial
12 purposes.

13 **SECTION 20.** 944.205 (4) of the statutes is amended to read:

14 944.205 (4) This section does not apply to a person who receives a photograph,
15 motion picture, videotape or other visual representation or reproduction of recording
16 of an image depicting a child from a parent, guardian, or legal custodian of the child
17 under sub. (3) (b), if the possession and, copying, exhibition, storage, or distribution
18 are is not for commercial purposes.

19 **SECTION 21.** 944.21 (2) (am) of the statutes is created to read:

20 944.21 (2) (am) “Exhibit” has the meaning given in s. 948.01 (1d).

21 **SECTION 22.** 944.21 (2) (c) (intro.) of the statutes is amended to read:

22 944.21 (2) (c) (intro.) “Obscene material” means a writing, picture, sound
23 recording or film which, or other recording that:

24 **SECTION 23.** 944.21 (2) (dm) of the statutes is created to read:

25 944.21 (2) (dm) “Recording” has the meaning given in s. 948.01 (3r).

1 **SECTION 24.** 944.21 (3) (a) of the statutes is amended to read:

2 944.21 (3) (a) Imports, prints, sells, has in his or her possession for sale,
3 publishes, exhibits, plays, or ~~transfers~~ distributes any obscene material.

4 **SECTION 25.** 944.21 (4) (a) and (b) of the statutes are amended to read:

5 944.21 (4) (a) ~~Transfers or Distributes~~, exhibits, or plays any obscene material
6 to a person under the age of 18 years.

7 (b) Has in his or her possession with intent to ~~transfer or~~ distribute, exhibit,
8 or play to a person under the age of 18 years any obscene material.

9 **SECTION 26.** 944.21 (9) of the statutes is amended to read:

10 944.21 (9) In determining whether material is obscene under sub. (2) (c) 1. and
11 3., a judge or jury shall examine individual pictures, recordings of images, or
12 passages in the context of the work in which they appear.

13 **SECTION 27.** 944.25 of the statutes is created to read:

14 **944.25 Sending obscene or sexually explicit electronic messages. (1)**

15 In this section:

16 (a) “Electronic mail solicitation” means an electronic mail message, including
17 any attached program or document, that is sent for the purpose of encouraging a
18 person to purchase property, goods, or services.

19 (b) “Obscene material” has the meaning given in s. 944.21 (2) (c).

20 (c) “Sexually explicit conduct” has the meaning given in s. 948.01 (7).

21 (2) Whoever sends an unsolicited electronic mail solicitation to a person that
22 contains obscene material or a depiction of sexually explicit conduct without
23 including the words “ADULT ADVERTISEMENT” in the subject line of the
24 electronic mail solicitation is guilty of a Class A misdemeanor.

25 **SECTION 28.** 948.01 (1d) of the statutes is created to read:

1 948.01 (1d) “Exhibit,” with respect to a recording of an image that is not
2 viewable in its recorded form, means to convert the recording of the image into a form
3 in which the image may be viewed.

4 **SECTION 29.** 948.01 (3r) of the statutes is created to read:

5 948.01 (3r) “Recording” includes the creation of a reproduction of an image or
6 a sound or the storage of data representing an image or a sound.

7 **SECTION 30.** 948.05 (1) (a) of the statutes is amended to read:

8 948.05 (1) (a) Employs, uses, persuades, induces, entices, or coerces any child
9 to engage in sexually explicit conduct for the purpose of ~~photographing, filming,~~
10 ~~videotaping,~~ recording the sounds of or displaying in any way the conduct.

11 **SECTION 31.** 948.05 (1) (b) of the statutes is amended to read:

12 948.05 (1) (b) ~~Photographs, films, videotapes, records the sounds of~~ Records or
13 displays in any way a child engaged in sexually explicit conduct.

14 **SECTION 32.** 948.05 (1m) of the statutes is amended to read:

15 948.05 (1m) Whoever produces, performs in, profits from, promotes, imports
16 into the state, reproduces, advertises, sells, distributes, or possesses with intent to
17 sell or distribute, any undeveloped film, photographic negative, photograph, motion
18 picture, videotape, sound recording or other reproduction of a child engaging in
19 sexually explicit conduct is guilty of a Class C felony if the person knows the
20 character and content of the sexually explicit conduct involving the child and if the
21 person knows or reasonably should know that the child engaging in the sexually
22 explicit conduct has not attained the age of 18 years.

23 **SECTION 33.** 948.07 (4) of the statutes is amended to read:

24 948.07 (4) ~~Taking a picture or making an audio recording of~~ Recording the child
25 engaging in sexually explicit conduct.

1 **SECTION 34.** 948.11 (1) (ar) 2. of the statutes is amended to read:

2 948.11 (1) (ar) 2. Any book, pamphlet, magazine, printed matter however
3 reproduced or sound recording that contains any matter enumerated in subd. 1., or
4 explicit and detailed verbal descriptions or narrative accounts of sexual excitement,
5 sexually explicit conduct, sadomasochistic abuse, physical torture or brutality and
6 that, taken as a whole, is harmful to children.

7 **SECTION 35.** 948.11 (1) (bm) of the statutes is repealed.

8 **SECTION 36.** 948.11 (1) (c) of the statutes is repealed.

9 **SECTION 37.** 948.11 (2) (a) of the statutes is renumbered 948.11 (2) (a) (intro.)
10 and amended to read:

11 948.11 (2) (a) (intro.) Whoever, with knowledge of the nature the character and
12 content of the material, sells, rents, exhibits, ~~transfers~~ plays, distributes, or loans to
13 a child any harmful material, with or without monetary consideration, is guilty of a
14 Class E felony. if any of the following applies:

15 **SECTION 38.** 948.11 (2) (a) 1. and 2. of the statutes are created to read:

16 948.11 (2) (a) 1. The person knows or reasonably should know that the child
17 has not attained the age of 18 years.

18 2. The person has face-to-face contact with the child before or during the sale,
19 rental, exhibit, playing, distribution, or loan.

20 **SECTION 39.** 948.11 (2) (am) of the statutes is renumbered 948.11 (2) (am)
21 (intro.) and amended to read:

22 948.11 (2) (am) (intro.) Any person who has attained the age of 17 and who, with
23 knowledge of the nature character and content of the description or narrative
24 account, verbally communicates, by any means, a harmful description or narrative

1 account to a child, with or without monetary consideration, is guilty of a Class E
2 felony: if any of the following applies:

3 SECTION 40. 948.11 (2) (am) 1. and 2. of the statutes are created to read:

4 948.11 (2) (am) 1. The person knows or reasonably should know that the child
5 has not attained the age of 18 years.

6 2. The person has face-to-face contact with the child before or during the
7 communication.

8 SECTION 41. 948.11 (2) (b) of the statutes is renumbered 948.11 (2) (b) (intro.)
9 and amended to read:

10 948.11 (2) (b) (intro.) Whoever, with knowledge of the nature character and
11 content of the material, possesses harmful material with the intent to sell, rent,
12 exhibit, ~~transfer~~ play, distribute, or loan the material to a child is guilty of a Class A
13 misdemeanor: if any of the following applies:

14 SECTION 42. 948.11 (2) (b) 1. and 2. of the statutes are created to read:

15 948.11 (2) (b) 1. The person knows or reasonably should know that the child
16 has not attained the age of 18 years.

17 2. The person has face-to-face contact with the child.

18 SECTION 43. 948.11 (2) (c) of the statutes is amended to read:

19 948.11 (2) (c) It is an affirmative defense to a prosecution for a violation of ~~this~~
20 section pars. (a) 2., (am) 2., and (b) 2. if the defendant had reasonable cause to believe
21 that the child had attained the age of 18 years, and the child exhibited to the
22 defendant a draft card, driver's license, birth certificate or other official or
23 apparently official document purporting to establish that the child had attained the
24 age of 18 years. A defendant who raises this affirmative defense has the burden of
25 proving this defense by a preponderance of the evidence.

1 **SECTION 44.** 948.12 of the statutes is renumbered 948.12 (1m), and 948.12 (1m)
2 (intro.) and (b), as renumbered, are amended to read:

3 **948.12 (1m)** (intro.) Whoever possesses any undeveloped film, photographic
4 negative, photograph, motion picture, videotape, or other pictorial reproduction, or
5 audio recording of a child engaged in sexually explicit conduct under all of the
6 following circumstances is guilty of a Class E felony:

7 (b) The person knows the character and content of the sexually explicit conduct
8 shown in the material.

9 **SECTION 45.** 948.12 (2m) of the statutes is created to read:

10 **948.12 (2m)** Whoever exhibits or plays a recording of a child engaged in
11 sexually explicit conduct, if all of the following apply, is guilty of a Class E felony:

12 (a) The person knows that he or she has exhibited or played the recording.

13 (b) Before the person exhibited or played the recording, he or she knew the
14 character and content of the sexually explicit conduct.

15 (c) Before the person exhibited or played the recording, he or she knew or
16 reasonably should have known that the child engaged in sexually explicit conduct
17 had not attained the age of 18 years.

18 **SECTION 9359. Initial applicability; other.**

19 (1) **CRIMES RELATED TO COMPUTERS AND CRIMES RELATED TO RECORDINGS OF NUDITY,**
20 **HARMFUL MATERIAL, OR OBSCENITY.** The treatment of sections 943.70 (1) (a) and (ag),
21 (2) (a) (intro.) and 3., (b) (intro.), 1., 3., 3g., and 3r., and (c), 944.205 (title), (2) (a) and
22 (b), (3), and (4), 944.21 (2) (am), (c) (intro.), and (dm), (3) (a), (4) (a) and (b), and (9),
23 948.01 (1d) and (3r), 948.05 (1) (a) and (b) and (1m), 948.07 (4), and 948.11 (1) (ar)
24 2., (bm), and (c) and (2) (c) of the statutes; the renumbering of section 948.12 of the
25 statutes; the renumbering and amendment of sections 944.205 (1), 948.11 (2) (a),

1 (am), and (b), and 948.12 of the statutes; and the creation of sections 944.205 (1) (a)
2 and (c), 948.11 (2) (a) 1. and 2., (am) 1. and 2., and (b) 1. and 2., and 948.12 (2m) of
3 the statutes first apply to offenses committed on the effective date of this subsection.

4 (END)



State of Wisconsin
2001 - 2002 LEGISLATURE

LRB-0795/2
RLR&MGD:jld:jf

DOA:.....Statz - Crimes related to computers, obscenity, nudity, and
pornography

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This bill prohibits an additional activity related to computers, intentionally interrupting computer service by sending to a computer, computer program, computer system, or computer network a message that is too complex, or multiple messages that are too voluminous, for the computer, computer program, computer system, or computer network to process. The penalty for intentionally interrupting computer service is a fine not to exceed \$10,000, imprisonment not to exceed nine months, or both. The penalty may be increased if the crime is committed under a circumstance permitting an increased penalty.

The bill also increases the penalties for violations of crimes related to computers that are committed under specified circumstances. If the violation results in damage valued at more than \$1,000 but not more than \$2,500, the penalty is increased to a fine not to exceed \$10,000 or a bifurcated sentence, consisting of confinement in prison and extended supervision, not to exceed five years, or both a fine and a bifurcated sentence. If the violation results in damage valued at more than \$2,500, the penalty is increased to a fine not to exceed \$10,000 or a bifurcated sentence not to exceed 15 years, or both a fine and a bifurcated sentence. If the violation results in an interruption or impairment of government operations, public communication, transportation, or a supply of water, gas, or other public service, the penalty is increased to a fine not to exceed \$10,000 or a bifurcated sentence not to exceed 15 years, or both a fine and a bifurcated sentence.

The bill authorizes courts to enhance the penalties for violations of crimes related to computers if the person committing the crime disguises the identity or location of the computer at which he or she is working by accessing another person's computer to commit the violation with the intent to make it less likely that he or she will be identified with the crime. For a misdemeanor, which is an offense punishable by confinement in jail, the court may increase the fine by up to \$1,000 and increase the maximum term of imprisonment to a total of 12 months. For a felony, which is an offense punishable by confinement in state prison, the court may increase the fine by up to \$2,500 and increase the term of the bifurcated sentence by up to two years.

Prohibitions related to images depicting nudity

Current law prohibits production, possession, and distribution of a photograph, motion picture, videotape, or other visual representation or reproduction that depicts nudity if the person depicted nude did not consent to the representation or reproduction and if the person who makes, possesses, or distributes the representation or reproduction knows or should know that the person depicted nude did not consent to the nude depiction. Current law exempts from criminal liability parents, guardians, and legal custodians who make or possess visual representations depicting their children nude, or who distribute the representations for other than commercial purposes.

The Wisconsin supreme court recently found the state statute prohibiting nude representations unconstitutional, because it prohibits all depictions of nudity made without consent, including artistic, political, or newsworthy depictions that are protected by the First Amendment. *State v. Stevenson*, 236 Wis. 2d 86 (2000).

This bill narrows the scope of the prohibition against making an original representation that depicts nudity by requiring that, at the time the representation

is made, the subject of the depiction be both nude and in a place and circumstance in which he or she can reasonably expect privacy. The bill applies the prohibition against making a reproduction that depicts nudity only to the act of reproducing an original representation that the reproducer knows or should know was made in violation of the prohibition against making an original representation, although the bill exempts a reproducer from criminal liability if the subject of the representation does consent to the reproduction even if he or she did not consent to the original representation. The bill treats the prohibitions against possessing and distributing representations depicting nudity similarly to the prohibition against making reproductions. The bill prohibits possessing or distributing a representation that is unlawfully made, unless the subject of the representation consents to the possession or distribution even if he or she did not consent to the making of the representation.

Crimes against providing and describing harmful material to children

Current law criminalizes the acts of providing and describing harmful material to a child and criminalizes possession of harmful material with intent to transfer the harmful material to a child. Harmful material includes nudity, sexually explicit images, and images of torture and brutality. Current law does not require that the state prove that the defendant knows or should know that the recipient of the materials is a child. The law does, however, establish an affirmative defense under which the defendant may avoid criminal liability by proving that he or she reasonably believed that the recipient was 18 years of age or older. In order to prove that he or she reasonably believed the recipient was 18 years of age or older, the defendant must show that the recipient provided the defendant some form of identification documentation purporting to establish that the recipient was at least 18 years of age.

The Wisconsin supreme court recently ruled that the statute that prohibits exposure of a child to harmful materials is unconstitutional as applied to a defendant who sent harmful material over the Internet to a 17-year-old, and to other instances in which the defendant does not have face-to-face contact with the recipient. *State v. Weidner*, 235 Wis. 2d 306 (2000). The supreme court found the statute unconstitutional as applied in this case because knowledge of the recipient's age is not an element of the crime. The supreme court distinguished the case at issue in *Weidner* (transmitting harmful material over the Internet) from instances in which the defendant meets the recipient face-to-face. The supreme court did not disturb a lower court ruling that found the statute constitutional as applied to instances in which the defendant meets the recipient face-to-face, because the face-to-face meeting provides the defendant opportunity to assess the recipient's age.

The bill makes knowledge of the recipient's status as a child an element of the crime if the defendant does not have a face-to-face contact with the child. The bill does not add the knowledge-of-age element for cases in which the defendant has face-to-face contact with the recipient. Instead, in instances in which the defendant does have face-to-face contact with the recipient, the bill maintains the affirmative defense that requires the defendant to prove that he or she reasonably believed that the recipient was at least 18 years of age by showing that the recipient provided documentation of age.

Inclusion of computer images in prohibitions related to certain images

Several criminal laws prohibit activities related to images of nudity, or images and sounds of obscenity or of children engaged in sexually explicit conduct. Those crimes are: 1) making, possessing, reproducing or distributing images of nudity; 2) importing, printing, selling, transferring, exhibiting, or possessing for publication, sale, exhibition, or transfer, obscene material; 3) photographing, filming, videotaping, or making a sound recording of a child engaged in sexually explicit conduct, or enticing a child to go into a secluded place in order to take a picture of make a sound recording of the child engaged in sexually explicit conduct; 4) exposing a child to harmful images and sounds; and 5) producing, performing in, profiting from, importing, possessing, and other activities related to child pornography. These prohibitions do not specifically apply to computer-generated images, sounds, or the stored data version of images or sounds.

The bill expands the prohibitions related to images of nudity, and images or sounds of obscenity or of children engaged in sexual conduct, to include images and sounds recorded using digital technology as well as the data that represents an image or a sound.

New crime related to obscene e-mail

The bill makes it a crime to send an unsolicited e-mail message that contains obscenity or sexually explicit conduct, if the person sending the e-mail message does not label the e-mail message as "Adult advertisement" in the subject line. The penalty for violating the prohibition against obscene e-mail is a fine not to exceed \$10,000 or imprisonment not to exceed nine months, or both.

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

1 **SECTION 1.** 943.70 (1) (a) of the statutes is renumbered 943.70 (1) (am).

2 **SECTION 2.** 943.70 (1) (ag) of the statutes is created to read:

3 943.70 (1) (ag) "Access" means to instruct, communicate with, interact with,
4 intercept, store data in, retrieve data from, or otherwise use the resources of.

5 **SECTION 3.** 943.70 (1) (gm) of the statutes is created to read:

6 943.70 (1) (gm) "Interruption in service" means inability to access a computer,
7 computer program, computer system, or computer network, or an inability to
8 complete a transaction involving a computer.

9 **SECTION 4.** 943.70 (2) (a) (intro.) of the statutes is amended to read:

1 943.70 (2) (a) (intro.) Whoever ~~wilfully~~ willfully, knowingly and without
2 authorization does any of the following may be penalized as provided in ~~par.~~ pars. (b)
3 and (c):

4 **SECTION 5.** 943.70 (2) (a) 3. of the statutes is amended to read:

5 943.70 (2) (a) 3. Accesses ~~data,~~ computer programs or supporting
6 documentation.

7 **SECTION 6.** 943.70 (2) (am) of the statutes is created to read:

8 943.70 (2) (am) Whoever intentionally causes an interruption in service by
9 submitting a message, or multiple messages, to a computer, computer program,
10 computer system, or computer network that exceeds the processing capacity of the
11 computer, computer program, computer system, or computer network may be
12 penalized as provided in pars. (b) and (c).

13 **SECTION 7.** 943.70 (2) (b) (intro.) of the statutes is amended to read:

14 943.70 (2) (b) (intro.) Whoever violates ~~this subsection~~ par. (a) or (am) is guilty
15 of:

16 **SECTION 8.** 943.70 (2) (b) 1. of the statutes is amended to read:

17 943.70 (2) (b) 1. A Class A misdemeanor unless ~~subd. any of subds. 2., 3. or to~~
18 4. applies.

19 **SECTION 9.** 943.70 (2) (b) 3. of the statutes is amended to read:

20 943.70 (2) (b) 3. A Class ~~D~~ E felony if the offense results in damage is greater
21 valued at more than \$1,000 but not more than \$2,500 ~~or if it causes an interruption~~
22 ~~or impairment of governmental operations or public communication, of~~
23 ~~transportation or of a supply of water, gas or other public service.~~

24 **SECTION 10.** 943.70 (2) (b) 3g. of the statutes is created to read:

1 943.70 (2) (b) 3g. A Class C felony if the offense results in damage valued at
2 more than \$2,500.

3 **SECTION 11.** 943.70 (2) (b) 3r. of the statutes is created to read:

4 943.70 (2) (b) 3r. A Class C felony if the offense causes an interruption or
5 impairment of governmental operations or public communication, of transportation,
6 or of a supply of water, gas, or other public service.

7 **SECTION 12.** 943.70 (2) (c) of the statutes is created to read:

8 943.70 (2) (c) If a person disguises the identity or location of the computer at
9 which he or she is working while committing an offense under par. (a) or (am) with
10 the intent to make it less likely that he or she will be identified with the crime, the
11 penalties under par. (b) may be increased as follows:

12 1. In the case of a misdemeanor, the maximum fine prescribed by law for the
13 crime may be increased by not more than \$1,000 and the maximum term of
14 imprisonment prescribed by law for the crime may be increased so that the revised
15 maximum term of imprisonment is 12 months.

16 2. In the case of a felony, the maximum fine prescribed by law for the crime may
17 be increased by not more than \$2,500 and the maximum term of imprisonment
18 prescribed by law for the crime may be increased by not more than 2 years.

19 **SECTION 13.** 944.205 (title) of the statutes is amended to read:

20 **944.205 (title) ~~Photographs, motion pictures, videotapes or other~~**
21 **~~visual representations~~ Recordings showing nudity.**

22 **SECTION 14.** 944.205 (1) of the statutes is renumbered 944.205 (1) (intro.) and
23 amended to read:

24 944.205 (1) (intro.) In this section, “nudity”:

25 (b) “Nudity” has the meaning given in s. 948.11 (1) (d).

1 **SECTION 15.** 944.205 (1) (a) of the statutes is created to read:

2 944.205 (1) (a) “Exhibit” has the meaning given in s. 948.01 (1d).

3 **SECTION 16.** 944.205 (1) (c) of the statutes is created to read:

4 944.205 (1) (c) “Recording” has the meaning given in 948.01 (3r).

5 **SECTION 17.** 944.205 (2) (a) of the statutes is amended to read:

6 944.205 (2) (a) ~~Takes a photograph or makes a motion picture, videotape or~~
7 ~~other visual representation or reproduction that depicts~~ Records an image of nudity
8 without the knowledge and consent of the person who is depicted nude while that
9 person is nude in a place and circumstance in which he or she has a reasonable
10 expectation of privacy, if the person recording the image knows or has reason to know
11 that the person who is depicted nude does not know of and consent to the ~~taking or~~
12 ~~making of the photograph, motion picture, videotape or other visual representation~~
13 ~~or reproduction~~ recording.

14 **SECTION 18.** 944.205 (2) (b) of the statutes is repealed and recreated to read:

15 944.205 (2) (b) Copies, possesses, exhibits, stores, or distributes a recording of
16 an image if all of the following apply:

17 1. The recording was done in violation of par. (a) or was previously copied in
18 violation of this paragraph.

19 2. The actor knows or has reason to know that the violation described under
20 subd. 1. has occurred.

21 3. The person depicted nude in the recording did not consent to the copying,
22 possession, exhibition, storage, or distribution of the recording under par. (b) (intro.).

23 4. The recording depicts the same nudity recorded in violation of par. (a).

24 **SECTION 19.** 944.205 (3) of the statutes is amended to read:

1 944.205 (3) Notwithstanding sub. (2) (a) and (b), if the person depicted in a
2 photograph, motion picture, videotape or other visual representation or reproduction
3 recording of an image is a child and the ~~making~~ recording, copying, possession,
4 exhibition, storage, or distribution of the ~~photograph, motion picture, videotape or~~
5 ~~other visual representation or reproduction~~ recording does not violate s. 948.05 or
6 948.12, a parent, guardian, or legal custodian of the child may do any of the following:

7 (a) ~~Make and Record, copy, possess, exhibit, or store~~ the ~~photograph, motion~~
8 ~~picture, videotape or other visual representation reproduction of the child~~ recording.

9 (b) Distribute a ~~photograph, motion picture, videotape or other visual~~
10 ~~representation or reproduction made or~~ recording that was recorded, copied,
11 possessed, exhibited, or stored under par. (a) if the distribution is not for commercial
12 purposes.

13 **SECTION 20.** 944.205 (4) of the statutes is amended to read:

14 944.205 (4) This section does not apply to a person who receives a ~~photograph,~~
15 ~~motion picture, videotape or other visual representation or reproduction of~~ recording
16 of an image depicting a child from a parent, guardian, or legal custodian of the child
17 under sub. (3) (b), if the possession ~~and, copying, exhibition, storage, or~~ distribution
18 ~~are~~ is not for commercial purposes.

19 **SECTION 21.** 944.21 (2) (am) of the statutes is created to read:

20 944.21 (2) (am) "Exhibit" has the meaning given in s. 948.01 (1d).

21 **SECTION 22.** 944.21 (2) (c) (intro.) of the statutes is amended to read:

22 944.21 (2) (c) (intro.) "Obscene material" means a writing, picture, ~~sound~~
23 ~~recording or film which,~~ or other recording that:

24 **SECTION 23.** 944.21 (2) (dm) of the statutes is created to read:

25 944.21 (2) (dm) "Recording" has the meaning given in s. 948.01 (3r).

1 **SECTION 24.** 944.21 (3) (a) of the statutes is amended to read:

2 944.21 (3) (a) Imports, prints, sells, has in his or her possession for sale,
3 publishes, exhibits, plays, or ~~transfers~~ distributes any obscene material.

4 **SECTION 25.** 944.21 (4) (a) and (b) of the statutes are amended to read:

5 944.21 (4) (a) ~~Transfers or Distributes~~, exhibits, or plays any obscene material
6 to a person under the age of 18 years.

7 (b) Has in his or her possession with intent to ~~transfer or distribute~~, exhibit,
8 or play to a person under the age of 18 years any obscene material.

9 **SECTION 26.** 944.21 (9) of the statutes is amended to read:

10 944.21 (9) In determining whether material is obscene under sub. (2) (c) 1. and
11 3., a judge or jury shall examine individual pictures, recordings of images, or
12 passages in the context of the work in which they appear.

13 **SECTION 27.** 944.25 of the statutes is created to read:

14 **944.25 Sending obscene or sexually explicit electronic messages. (1)**

15 In this section:

16 (a) “Electronic mail solicitation” means an electronic mail message, including
17 any attached program or document, that is sent for the purpose of encouraging a
18 person to purchase property, goods, or services.

19 (b) “Obscene material” has the meaning given in s. 944.21 (2) (c).

20 (c) “Sexually explicit conduct” has the meaning given in s. 948.01 (7).

21 (2) Whoever sends an unsolicited electronic mail solicitation to a person that
22 contains obscene material or a depiction of sexually explicit conduct without
23 including the words “ADULT ADVERTISEMENT” in the subject line of the
24 electronic mail solicitation is guilty of a Class A misdemeanor.

25 **SECTION 28.** 948.01 (1d) of the statutes is created to read:

1 948.01 (1d) “Exhibit,” with respect to a recording of an image that is not
2 viewable in its recorded form, means to convert the recording of the image into a form
3 in which the image may be viewed.

4 **SECTION 29.** 948.01 (3r) of the statutes is created to read:

5 948.01 (3r) “Recording” includes the creation of a reproduction of an image or
6 a sound or the storage of data representing an image or a sound.

7 **SECTION 30.** 948.05 (1) (a) of the statutes is amended to read:

8 948.05 (1) (a) Employs, uses, persuades, induces, entices, or coerces any child
9 to engage in sexually explicit conduct for the purpose of ~~photographing, filming,~~
10 ~~videotaping,~~ recording the sounds of or displaying in any way the conduct.

11 **SECTION 31.** 948.05 (1) (b) of the statutes is amended to read:

12 948.05 (1) (b) ~~Photographs, films, videotapes, records the sounds of~~ Records or
13 displays in any way a child engaged in sexually explicit conduct.

14 **SECTION 32.** 948.05 (1m) of the statutes is amended to read:

15 948.05 (1m) Whoever produces, performs in, profits from, promotes, imports
16 into the state, reproduces, advertises, sells, distributes, or possesses with intent to
17 sell or distribute, any undeveloped film, ~~photographic negative, photograph, motion~~
18 ~~picture, videotape, sound recording or other reproduction~~ of a child engaging in
19 sexually explicit conduct is guilty of a Class C felony if the person knows the
20 character and content of the sexually explicit conduct involving the child and if the
21 person knows or reasonably should know that the child engaging in the sexually
22 explicit conduct has not attained the age of 18 years.

23 **SECTION 33.** 948.07 (4) of the statutes is amended to read:

24 948.07 (4) ~~Taking a picture or making an audio recording of~~ Recording the child
25 engaging in sexually explicit conduct.

1 **SECTION 34.** 948.11 (1) (ar) 2. of the statutes is amended to read:

2 948.11 (1) (ar) 2. Any book, pamphlet, magazine, printed matter however
3 reproduced or sound recording that contains any matter enumerated in subd. 1., or
4 explicit and detailed verbal descriptions or narrative accounts of sexual excitement,
5 sexually explicit conduct, sadomasochistic abuse, physical torture or brutality and
6 that, taken as a whole, is harmful to children.

7 **SECTION 35.** 948.11 (1) (bm) of the statutes is repealed.

8 **SECTION 36.** 948.11 (1) (c) of the statutes is repealed.

9 **SECTION 37.** 948.11 (2) (a) of the statutes is renumbered 948.11 (2) (a) (intro.)
10 and amended to read:

11 948.11 (2) (a) (intro.) Whoever, with knowledge of the nature the character and
12 content of the material, sells, rents, exhibits, ~~transfers~~ plays, distributes, or loans to
13 a child any harmful material, with or without monetary consideration, is guilty of a
14 Class E felony: if any of the following applies:

15 **SECTION 38.** 948.11 (2) (a) 1. and 2. of the statutes are created to read:

16 948.11 (2) (a) 1. The person knows or reasonably should know that the child
17 has not attained the age of 18 years.

18 2. The person has face-to-face contact with the child before or during the sale,
19 rental, exhibit, playing, distribution, or loan.

20 **SECTION 39.** 948.11 (2) (am) of the statutes is renumbered 948.11 (2) (am)
21 (intro.) and amended to read:

22 948.11 (2) (am) (intro.) Any person who has attained the age of 17 and who, with
23 knowledge of the nature character and content of the description or narrative
24 account, verbally communicates, by any means, a harmful description or narrative

1 account to a child, with or without monetary consideration, is guilty of a Class E
2 felony: if any of the following applies:

3 **SECTION 40.** 948.11 (2) (am) 1. and 2. of the statutes are created to read:

4 948.11 (2) (am) 1. The person knows or reasonably should know that the child
5 has not attained the age of 18 years.

6 2. The person has face-to-face contact with the child before or during the
7 communication.

8 **SECTION 41.** 948.11 (2) (b) of the statutes is renumbered 948.11 (2) (b) (intro.)
9 and amended to read:

10 948.11 (2) (b) (intro.) Whoever, with knowledge of the nature character and
11 content of the material, possesses harmful material with the intent to sell, rent,
12 exhibit, transfer play, distribute, or loan the material to a child is guilty of a Class A
13 misdemeanor: if any of the following applies:

14 **SECTION 42.** 948.11 (2) (b) 1. and 2. of the statutes are created to read:

15 948.11 (2) (b) 1. The person knows or reasonably should know that the child
16 has not attained the age of 18 years.

17 2. The person has face-to-face contact with the child.

18 **SECTION 43.** 948.11 (2) (c) of the statutes is amended to read:

19 948.11 (2) (c) It is an affirmative defense to a prosecution for a violation of ~~this~~
20 ~~section pars. (a) 2., (am) 2., and (b) 2.~~ if the defendant had reasonable cause to believe
21 that the child had attained the age of 18 years, and the child exhibited to the
22 defendant a draft card, driver's license, birth certificate or other official or
23 apparently official document purporting to establish that the child had attained the
24 age of 18 years. A defendant who raises this affirmative defense has the burden of
25 proving this defense by a preponderance of the evidence.

1 **SECTION 44.** 948.12 of the statutes is renumbered 948.12 (1m), and 948.12 (1m)
2 (intro.) and (b), as renumbered, are amended to read:

3 948.12 (1m) (intro.) Whoever possesses any undeveloped film, photographic
4 negative, photograph, motion picture, videotape, or other pictorial reproduction, or
5 audio recording of a child engaged in sexually explicit conduct under all of the
6 following circumstances is guilty of a Class E felony:

7 (b) The person knows the character and content of the sexually explicit conduct
8 shown in the material.

9 **SECTION 45.** 948.12 (2m) of the statutes is created to read:

10 948.12 (2m) Whoever exhibits or plays a recording of a child engaged in
11 sexually explicit conduct, if all of the following apply, is guilty of a Class E felony:

12 (a) The person knows that he or she has exhibited or played the recording.

13 (b) Before the person exhibited or played the recording, he or she knew the
14 character and content of the sexually explicit conduct.

15 (c) Before the person exhibited or played the recording, he or she knew or
16 reasonably should have known that the child engaged in sexually explicit conduct
17 had not attained the age of 18 years.

18 **SECTION 9359. Initial applicability; other.**

19 (1) CRIMES RELATED TO COMPUTERS AND CRIMES RELATED TO RECORDINGS OF NUDITY,
20 HARMFUL MATERIAL, OR OBSCENITY. The treatment of sections 943.70 (1) (a) and (ag),
21 (2) (a) (intro.) and 3., (b) (intro.), 1., 3., 3g., and 3r., and (c), 944.205 (title), (2) (a) and
22 (b), (3), and (4), 944.21 (2) (am), (c) (intro.), and (dm), (3) (a), (4) (a) and (b), and (9),
23 948.01 (1d) and (3r), 948.05 (1) (a) and (b) and (1m), 948.07 (4), and 948.11 (1) (ar)
24 2., (bm), and (c) and (2) (c) of the statutes; the renumbering of section 948.12 of the
25 statutes; the renumbering and amendment of sections 944.205 (1), 948.11 (2) (a),

1 (am), and (b), and 948.12 of the statutes; and the creation of sections 944.205 (1) (a)
2 and (c), 948.11 (2) (a) 1. and 2., (am) 1. and 2., and (b) 1. and 2., and 948.12 (2m) of
3 the statutes first apply to offenses committed on the effective date of this subsection.

4 (END)