

Department of Legislative Services
Maryland General Assembly
2024 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

Senate Bill 858

(Senator Hester, *et al.*)

Judicial Proceedings

Judiciary

Revenge Porn - Civil Action and Reporting Requirement

This bill authorizes a person to bring and maintain a civil action for defamation *per se* against another who distributes a computer-generated visual representation that is indistinguishable from an actual visual representation of the person and is of a sexual or intimate nature, as specified. The bill also alters provisions of the State's prohibition against revenge porn (§ 3-809 of the Criminal Law Article) to prohibit a person from knowingly distributing a computer-generated visual representation that is indistinguishable from another actual and identifiable person that displays the other person with his or her intimate parts exposed or while engaged in an act of sexual activity. Violators are subject to the existing penalty under § 3-809. **The bill contains a severability provision and takes effect July 1, 2024.**

Fiscal Summary

State Effect: Potential minimal increase in general fund revenues and expenditures due to the expanded application of an existing penalty provision; additional minimal expenditures to handle civil cases may be incurred, as discussed below.

Local Effect: Potential minimal increase in local revenues and expenditures due to the bill's expanded application of an existing penalty provision.

Small Business Effect: Minimal.

Analysis

Bill Summary/Current Law:

Civil Cause of Action (New under the Bill)

Under the bill, a person may bring and maintain a civil action for defamation *per se* against another who distributes a computer-generated visual representation that is indistinguishable from an actual visual representation of the person and falsely depicts the person with his or her intimate parts exposed or engaged in sexual activity.

“Indistinguishable from an actual visual representation of the person” means that an ordinary person would conclude that the visual representation is an actual visual representation of the person. It includes a computer-generated visual representation that has been created, adapted, or modified to appear genuine, but does not include images or items depicting a person that are drawings, cartoons, sculptures, or paintings.

Revenge Porn – § 3-809 of the Criminal Law Article

Under current law, § 3-809 of the Criminal Law Article prohibits a person from knowingly distributing a visual representation of another identifiable person that displays the other person with his or her intimate parts exposed or while engaged in an act of sexual activity (1) with the intent to harm, harass, intimidate, threaten, or coerce the other person; (2) under circumstances in which the person knew that the other person did not consent to the distribution or with reckless disregard as to whether the person consented to the distribution; and (3) under circumstances in which the other person had a reasonable expectation that the image would remain private. Violators are guilty of a misdemeanor, punishable by imprisonment for up to two years and/or a \$5,000 maximum fine.

The bill (1) expands this prohibition to include knowing distribution of a computer-generated visual representation that is indistinguishable from another actual and identifiable person under these same conditions; (2) clarifies that the reasonable expectation of privacy portion of this statute applies if the visual representation was created or generated with permission from the other person; and (3) subjects violators to the existing penalty under § 3-809.

Under the bill, “indistinguishable from another actual and identifiable person” means that an ordinary person would conclude that the visual representation is of an actual and identifiable person. It includes a computer-generated visual representation that has been created, adapted, or modified to appear as an actual and identifiable person, but does not include visual representations or items depicting a person that are drawings, cartoons, sculptures, or paintings.

Under current law, the prohibition does not apply to (1) lawful and common practices of law enforcement, the reporting of unlawful conduct, or legal proceedings or (2) situations involving voluntary exposure in public or commercial settings. An interactive computer service, as defined in 47 U.S.C. § 230(f)(2), is not liable for content provided by another person.

Under current law, a visual representation of a victim that is part of a court record in a case prosecuting revenge porn may not be available for public inspection and, except as otherwise ordered by the court, may only be made available to specified individuals for inspection in relation to a criminal charge for revenge porn. The bill expands this restricted inspection to a computer-generated visual representation of a victim.

State Fiscal Effect: According to the Judiciary, 342 *criminal actions* (286 in the District Court and 56 in the circuit courts) under § 3-809 of the Criminal Law Article (revenge porn) were filed in the State’s trial courts during fiscal 2023. The Judiciary cautions that these cases do not include unreported acts, which may be the basis for civil actions under the bill. However, the Department of Legislative Services advises that while the bill may address activity that occurs fairly frequently, given the resources needed by an aggrieved party to bring a civil suit, and considering the overall civil caseloads of the courts, any potential additional expenditures for the Judiciary solely attributable to the bill are likely to be minimal.

Additional Information

Recent Prior Introductions: Similar legislation has not been introduced within the last three years.

Designated Cross File: None.

Information Source(s): Office of the Attorney General; Judiciary (Administrative Office of the Courts); Department of Legislative Services

Fiscal Note History: First Reader - February 28, 2024
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