



## Ohio Legislative Service Commission *122nd House Bill Analysis*

### **Sub. H.B. 565**

122nd General Assembly  
(As Passed by the House)

**Reps. Terwilleger, Wise, Kasputis, Buchy, Amstutz, Garcia, Reid, Padgett, Grendell, Roman, Schuler, Colonna, Verich, Logan, Schuring, Perz, Vesper, Carey, Allen, Willamowski, Householder, Taylor, Ogg, Mason, Core, Brading, Tavares, Healy**

- Prohibits a person, having devised a scheme to defraud, from knowingly disseminating, transmitting, or causing to be disseminated or transmitted by means of wire, radio, satellite, telecommunication, telecommunications device, or telecommunications service any writing, data, sign, signal, picture, sound, or image with purpose to execute or otherwise further the scheme to defraud.
- Prohibits a person from knowingly manufacturing, possessing, delivering, offering to deliver, or advertising a counterfeit telecommunications device with purpose to use it criminally and prohibits a person from knowingly doing any of those things with purpose to use a counterfeit telecommunications device or to allow another person to use it, or knowing or having reason to know that another person may use it, to obtain or attempt to obtain telecommunications service with purpose to avoid a lawful charge, or to conceal the existence, place of origin, or destination of a telecommunications service.
- Prohibits a person, without privilege to do so, from knowingly introducing or causing the introduction of information, knowledge, facts, concepts, instructions, or a computer program into a computer, computer system, computer network, computer program, or computer software with the purpose to affect the performance of, or to disable, damage, or destroy, any of those items.
- Prohibits a person, knowing or having reasonable cause to believe that the materials are intended to be, or will be, used to commit a violation of the Sex Offenses Law, from compiling, possessing, disseminating, transmitting, or reproducing specified information about a minor.
- Expands the offenses of disseminating matter harmful to juveniles, pandering obscenity, pandering obscenity involving a minor, pandering sexually oriented matter involving a minor, and illegal use of a minor in a nudity-oriented material or performance to include prohibitions against disseminating or transmitting specified material or performances by means of a computer, computer system, computer network, telecommunication, telecommunications device, or telecommunications service.
- Codifies in the statutory provisions pertaining to the offense of disseminating matter harmful to juveniles the holdings in two appellate court decisions relative to meaning of the phrase "present to a juvenile."
- Expands the offense of pandering obscenity involving a minor to also prohibit a person, with knowledge of the character of the material involved, from promoting or advertising for "delivery" an obscene material that has a minor as one of its participants or portrayed observers.

- Expands the offense of unauthorized use of computer property to also prohibit a person from knowingly gaining access to, attempting to gain access to, or causing access to be gained to any telecommunications device or telecommunications service without the consent of, or beyond the consent of, the owner of the device or service or other person authorized to give consent, and renames the offense "unauthorized use of computer or telecommunication property."
- Restructures the penalties for tampering with records when data or computer software are involved in the offense or when the writing, data, computer software, or record is kept by or belongs to a local, state, or federal government entity.
- Specifies that, if an offender is being tried under the statute prohibiting theft "for the commission of a series of offenses against more than one victim pursuant to a scheme or course of conduct," the value of the property or services involved is the aggregate value of all property and services involved in the series of offenses.
- Renames the offense of telephone harassment as "telecommunications harassment," rephrases the offense to include harassment, abuse, and threats by any form of telecommunication, and eliminates annoyance as one of the types of purposes associated with the offense.
- Provides that a person who, by means of a computer, computer system, computer network, telecommunication, telecommunications device, or telecommunications service, causes or knowingly permits any writing, data, image, or other telecommunication to be disseminated or transmitted into Ohio in violation of Ohio law is subject to criminal prosecution in Ohio.
- Specifies that an offense that involves a computer, computer system, computer network, telecommunication, telecommunications device, or telecommunications service may be tried in any jurisdiction from which or into which any writing, data, or image is disseminated or transmitted by means of a computer, computer system, computer network, telecommunication, telecommunications device, or telecommunications service.
- Enacts several new telecommunication-related definitions, amends the definition of "data" for purposes of the Theft and Fraud Law and certain other statutes, expands the definitions of "property" and "contraband" for purposes of the entire Revised Code, expands the definition of "material" for purposes of the Sex Offenses Law, and enacts or modifies certain other definitional-related provisions.

## CONTENT AND OPERATION

The bill creates four new criminal offenses related to telecommunications or computers, expands several existing offenses by adding telecommunications and computer-related provisions, and includes telecommunications and computer-related provisions in the existing statutes that govern criminal jurisdiction in Ohio and the venue of a criminal prosecution.

### New offenses

#### Telecommunications fraud

The bill prohibits a person, having devised a scheme to defraud, from knowingly disseminating, transmitting, or causing to be disseminated or transmitted by means of wire, radio, satellite, "telecommunication," "telecommunications device," or "telecommunications service" (see "**Definitions**," below) any writing, data, sign, signal, picture, sound, or image with purpose to execute or otherwise further the scheme to defraud. A person who violates the prohibition is guilty of telecommunications fraud. The offense generally is a felony of the fifth degree. If the value of the benefit obtained by the offender or of the detriment to the victim of the fraud is \$5,000 or more but less than \$100,000, telecommunications fraud is a felony of the fourth degree. If the value of the benefit or the detriment is \$100,000 or more, telecommunications fraud is a felony of the third degree. (R.C. 2913.05.) The bill also includes telecommunications fraud

in the definition of "theft offense" used in the Theft and Fraud Law and in the list of offenses that constitute "corrupt activity" for purposes of the prohibition against engaging in a pattern of corrupt activity (R.C. 2913.01(K) and 2923.31(I)(2)(a)).

### **Unlawful use of a telecommunications device**

The bill prohibits a person from knowingly manufacturing, possessing, delivering, offering to deliver, or advertising a counterfeit telecommunications device (see "**Definitions**," below) with purpose to use it criminally (R.C. 2913.06(A)). It also prohibits a person from knowingly manufacturing, possessing, delivering, offering to deliver, or advertising a counterfeit telecommunications device with purpose to use that device or to allow that device to be used, or knowing or having reason to know that another person may use that device, to do any of the following (R.C. 2913.06(B)):

- (1) Obtain or attempt to obtain telecommunications service with purpose to avoid a lawful charge for that service or aid or cause another person to obtain or attempt to obtain telecommunications service with purpose to avoid a lawful charge for that service;
- (2) Conceal the existence, place of origin, or destination of a telecommunications service.

A person who violates either prohibition is guilty of unlawful use of a telecommunications device, a felony of the fifth degree (R.C. 2913.06(C)). However, the provisions related to this offense do not (1) prohibit or restrict a person who holds an amateur service license issued by the Federal Communications Commission from possessing a radio receiver or transceiver that is intended primarily or exclusively for use in the amateur radio service and is used for lawful purposes, or (2) preclude a person from disputing charges imposed for telecommunications service by the provider of that service (R.C. 2913.06(D) and (E)). The bill also includes unlawful use of a telecommunications device in the definition of "theft offense" used in the Theft and Fraud Law and in the list of offenses that constitute "corrupt activity" for purposes of the prohibition against engaging in a pattern of corrupt activity (R.C. 2913.01(K) and 2923.31(I)(2)(a)).

### **Intentionally causing a computer virus**

The bill prohibits a person, without privilege to do so, from knowingly introducing or causing the introduction of information, knowledge, facts, concepts, instructions, or a computer program into a computer, computer system, computer network, computer program, or computer software with the purpose to affect the performance of, or to disable, damage, or destroy, a "computer," "computer system," "computer network," "computer program," or "computer software" (see "**Definitions**" below). A person who violates the prohibition is guilty of intentionally causing a computer virus. The offense generally is a felony of the fifth degree. If the value of the benefit obtained by the offender or the detriment to the victim of the computer virus is \$5,000 or more but less than \$100,000, intentionally causing a computer virus is a felony of the fourth degree. If the value of the benefit obtained by the offender or the detriment to the victim of the computer virus is \$100,000 or more, intentionally causing a computer virus is a felony of the third degree. (R.C. 2913.07.) The bill also includes intentionally causing a computer virus in the definition of "theft offense" used in the Theft and Fraud Law and in the list of offenses that constitute "corrupt activity" for purposes of the prohibition against engaging in a pattern of corrupt activity (R.C. 2913.01(K) and 2923.31(I)(2)(a)).

### **Illegal use of information about a minor**

The bill prohibits a person, knowing or having reasonable cause to believe that the materials are intended to be, or will be, used to commit a violation of the Sex Offenses Law or a violation of similar laws of another state, from compiling, possessing, disseminating, transmitting, or reproducing, by any means, any statement, notice, advertisement, descriptive information, or identifying information about a minor, including, but not limited to, the minor's name, telephone number, place of residence, physical characteristics, Social Security number, or Internet address. A person who violates the prohibition is guilty of illegal use of information about a minor, a felony of the fifth degree. (R.C. 2907.324.)

### **Disseminating matter harmful to juveniles**

#### **Existing law**

**Statutory law.** Existing law prohibits a person, with knowledge of its character or content, from recklessly doing any of the following (R.C. 2907.31(A)):

- (1) Selling, delivering, furnishing, disseminating, providing, exhibiting, renting, or *presenting to a juvenile* any material or performance that is obscene or harmful to juveniles;
- (2) Offering or agreeing to sell, deliver, furnish, disseminate, provide, exhibit, rent, or *present to a juvenile* any material or performance that is obscene or harmful to juveniles;
- (3) Allowing a juvenile to review or peruse any material or view any live performance that is harmful to juveniles.

A person who violates the prohibition is guilty of disseminating matter harmful to juveniles. If the material or performance involved is harmful to juveniles, a violation is a misdemeanor of the first degree. If the material or performance is obscene and the juvenile involved in the violation is 13 years of age or older, a violation is a felony of the fifth degree. If the material or performance is obscene and the juvenile involved in the violation is under 13 years of age, a violation is a felony of the fourth degree. Three affirmative defenses are available to a person charged with a violation that involves material or a performance that is harmful to juveniles but is not obscene, and one affirmative defense is available with respect to a charge that involves material or a performance that is obscene or harmful to juveniles. Mistake of age generally is not a defense to a charge. (R.C. 2907.31(B), (C), and (D).)

***Court decisions.*** The Court of Appeals for Hamilton County in *State v. Loshin* (1980), 19 O.O. 3d 141, 142-143 and in *State v. Zeh* (1982), 7 Ohio App. 3d 235, 237 (motion for leave to appeal to Sup. Ct. overruled 12/22/82) construed the phrase "present to a juvenile" in R.C. 2907.31 to mean "a direct presentation to a *specific* juvenile or group of juveniles as opposed to a presentation to the general public" (emphasis added) and, as so construed, to *not conflict* with the United States Constitution or the Ohio Constitution. In addition, in *Grosser v. Woolett* (1974), 45 Ohio Misc. 15, 27-28 (affirmed 8th Dist. Ct. App; motion to certify record to Sup. Ct. overruled), the Court of Common Pleas of Cuyahoga County held section 2907.31 to be "constitutional and in accordance with the current standards stated by the United States Supreme Court."

### ***Operation of the bill***

The bill expands the offense of disseminating matter harmful to juveniles by adding a new prohibition that prohibits a person, with knowledge of its character or content, from *purposefully* (see **COMMENT 1**) *disseminating or transmitting, or offering or agreeing to disseminate or transmit, directly to a specific juvenile or group of juveniles*, as opposed to disseminating, transmitting, or offering or agreeing to disseminate or transmit to the general public, by means of a computer, computer system, computer network, telecommunication, telecommunications device, or telecommunications service, any material or performance that is obscene or harmful to juveniles. A violation of this prohibition carries the same penalties as under existing law for disseminating matter harmful to juveniles. (R.C. 2907.31(A)(2) and (D).)

The bill also amends two of existing law's prohibitions to specify that disseminating matter harmful to juveniles is committed if a person, with knowledge of its character or content, "recklessly" (see **COMMENT 1**) *directly presents* (or offers or agrees to *directly present*) to a *specific juvenile or group of juveniles, as opposed to presents to the general public* (italicized words added by the bill), any material or performance that is obscene or harmful to juveniles (R.C. 2907.31(A)(1)(a) and (b)). The bill states in uncodified law that it is the intent of the General Assembly in so amending section 2907.31 to *codify* the holdings of the Court of Appeals for Hamilton County in *Loshin* and *Zeh* as discussed under "***Court decisions***," above (Section 3).

### ***Pandering obscenity***

#### ***Existing law***

Existing law prohibits a person, with knowledge of the character of the material or performance involved, from doing any of the following (R.C. 2907.32(A)):

- (1) Creating, reproducing, or publishing any "obscene" material (see **COMMENT 2**), when the offender knows that the material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when the offender is reckless in that regard;
- (2) Promoting or advertising for sale, delivery, or dissemination; selling, delivering, publicly disseminating, publicly displaying, exhibiting, presenting, renting, or providing; or offering or agreeing to sell, deliver, publicly disseminate, publicly display, exhibit, present, rent, or provide, any obscene material;
- (3) Creating, directing, or producing an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when the offender is reckless in that regard;
- (4) Advertising or promoting an obscene performance for presentation, or presenting or participating in presenting an obscene performance, when the performance is presented publicly, or when admission is charged;
- (5) Buying, procuring, possessing, or controlling any obscene material with purpose to violate the prohibition described in paragraph (2) or (4), above.

A person who violates the prohibition is guilty of pandering obscenity. The offense generally is a felony of the fifth degree. If the offender previously has been convicted of pandering obscenity or of disseminating matter harmful to juveniles, pandering obscenity is a felony of the fourth degree. One specified affirmative defense is available to a person charged with pandering obscenity (see **COMMENT 3**). (R.C. 2907.32(B) and (C).)

### **Operation of the bill**

The bill expands the offense of pandering obscenity so that it also prohibits a person, with knowledge of the character of the material involved, from disseminating or transmitting, or offering or agreeing to disseminate or transmit, any obscene material by means of a computer, computer system, computer network, telecommunication, telecommunications device, or telecommunications service. A violation of this prohibition carries the same penalties as under existing law for pandering obscenity. (R.C. 2907.32(A)(2) and (C).)

### **Pandering obscenity involving a minor**

#### **Existing law**

Existing law prohibits a person, with knowledge of the character of the material or performance involved, from doing any of the following (R.C. 2907.321(A)):

- (1) Creating, reproducing, or publishing any obscene material that has a minor as one of its participants or portrayed observers;
- (2) Promoting or advertising for sale or dissemination; selling, *delivering*, disseminating, displaying, exhibiting, presenting, renting, or providing; or offering or agreeing to sell, *deliver*, disseminate, display, exhibit, present, rent, or provide any obscene material that has a minor as one of its participants or portrayed observers;
- (3) Creating, directing, or producing an obscene performance that has a minor as one of its participants;
- (4) Advertising or promoting for presentation, presenting, or participating in presenting an obscene performance that has a minor as one of its participants;
- (5) Buying, procuring, possessing, or controlling any obscene material that has a minor as one of its participants;
- (6) Bringing or causing to be brought into Ohio any obscene material that has a minor as one of its participants or portrayed observers.

A person who violates the prohibition is guilty of pandering obscenity involving a minor. A violation of the prohibition described in paragraph (1), (2), (3), (4), or (6), above, is a felony of the second degree, and a violation of the prohibition described in paragraph (5), above, generally is a felony of the fourth degree. If the offender previously has been convicted of or pleaded guilty to pandering obscenity involving a minor, pandering sexually oriented matter involving a minor, or illegal use of a minor in a nudity-oriented material or performance, pandering obscenity involving a minor in violation of the prohibition described in paragraph (5), above, is a felony of the third degree. One specified affirmative defense is available to a person charged with the offense, and mistake of age is not a defense. (R.C. 2907.321(B) and (C).)

### **Operation of the bill**

The bill expands the second existing prohibition included within the offense of pandering obscenity so that it also prohibits a person, with knowledge of the character of the material involved, from promoting or advertising for *delivery* any obscene material that has a minor as one of its participants or portrayed observers and from disseminating, transmitting, receiving, or offering or agreeing to disseminate, transmit, or receive by means of a computer, computer system, computer network, telecommunication, telecommunications device, or telecommunications service any obscene material that has a minor as one of its participants or portrayed observers. A violation of the expanded prohibition is a felony of the second degree as in existing law.

In addition, the bill creates a seventh prohibition within the offense. The new prohibition prohibits a person, with knowledge of the character of the material or performance involved, from creating, reproducing, or publishing; promoting or advertising for sale, delivery, or dissemination; selling, delivering, disseminating, displaying, exhibiting, presenting, renting, or providing; offering or agreeing to sell, deliver, disseminate, display, exhibit, present, rent, or provide; disseminating or transmitting, or offering or agreeing to disseminate or transmit, by means of a computer, computer system, computer network, telecommunication, telecommunications device, or telecommunications service; buying, procuring, possessing, or controlling; or bringing or causing to be brought into Ohio, *a computer generated, modified, or reproduced obscene material* that contains *what is represented or depicted to be a minor*, but is not actually a minor, as one of its participants or portrayed observers. A violation of this prohibition generally is a felony of the fourth degree but is a felony of the third degree if the offender previously has been convicted of or pleaded guilty to pandering obscenity, pandering sexually oriented matter involving a minor, or illegal use of a minor in a nudity-oriented material or performance. (R.C. 2907.321(A)(7) and (D).)

The bill also enacts a new affirmative defense that is available to a person who is charged with pandering obscenity involving a minor *in a manner covered by the seventh prohibition*, as enacted in the bill. Specifically, it is an affirmative

defense to a charge of a violation of the seventh prohibition that *all* of the following apply (R.C. 2907.321(C)):

- (1) The alleged obscene material that contains what is represented or depicted to be a minor as one of its participants or portrayed observers was produced by using an actual person or persons engaging in sexual conduct.
- (2) Each person referred to in paragraph (1), above, was an adult at the time that the alleged obscene material was produced.
- (3) The defendant did not create, reproduce, or publish; promote or advertise for sale, delivery, or dissemination; sell, deliver, disseminate, display, exhibit, present, rent, or provide; offer or agree to sell, deliver, disseminate, display, exhibit, present, rent, or provide; disseminate or transmit, or offer or agree to disseminate or transmit, by means of a computer, computer system, computer network, telecommunication, telecommunications device, or telecommunications service; buy, procure, possess, or control; or bring or cause to be brought into Ohio a computer generated, modified, or reproduced obscene material in a manner that creates the impression that it contains a visual representation or depiction of a minor engaging in sexual conduct.

#### **Pandering sexually oriented matter involving a minor**

##### **Existing law**

Existing law prohibits a person, with knowledge of the character of the material or performance involved, from doing any of the following with respect to any material or a performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality (R.C. 2907.322(A)):

- (1) Creating, recording, photographing, filming, developing, reproducing, or publishing the material;
- (2) Advertising the material for sale or dissemination, or selling, distributing, transporting, disseminating, exhibiting, or displaying the material;
- (3) Creating, directing, or producing the performance;
- (4) Advertising for presentation, presenting, or participating in presenting the performance;
- (5) Soliciting, receiving, purchasing, exchanging, possessing, or controlling the material;
- (6) Bringing the material or causing it to be brought into Ohio; or bringing, causing to be brought, or financing the bringing of a minor into or across Ohio with the intent that the minor engage in sexual activity, masturbation, or bestiality in a performance or for the purpose of producing material containing a visual representation depicting the minor engaged in sexual activity, masturbation, or bestiality.

A person who violates the prohibition is guilty of pandering sexually oriented matter involving a minor. A violation of the prohibition described in paragraph (1), (2), (3), (4), or (6), above, is a felony of the second degree. A violation of the prohibition described in paragraph (5), above, generally is a felony of the fifth degree, but is a felony of the fourth degree if the offender previously has been convicted of or pleaded guilty to this offense, pandering obscenity involving a minor, or illegal use of a minor in a nudity-oriented material or performance. One affirmative defense is specified for a person charged with the offense, and mistake of age is not a defense. (R.C. 2907.322(B)(1) and (2) and (C).) (See **COMMENT 4**.)

##### **Operation of the bill**

The bill expands the second prohibition included within the offense of pandering sexually oriented matter involving a minor so that it also prohibits a person, with knowledge of the character of the material involved, from disseminating or transmitting by means of a computer, computer system, computer network, telecommunication, telecommunications device, or telecommunications service any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality. A violation of the second prohibition continues to be a felony of the second degree. (R.C. 2907.322(A)(2) and (C).)

#### **Illegal use of a minor in a nudity-oriented material or performance**

##### **Existing law**

Existing law prohibits a person from doing any of the following (R.C. 2907.323(A)):

- (1) Photographing a minor who is not the person's child or ward in a state of nudity or creating, directing, producing, or transferring any material or performance that shows the minor in a state of nudity, unless both of the following apply:

(a) The material or performance is, or is to be, sold, 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, clergyman (changed by the bill to "cleric"), prosecutor, judge, or other person having a proper interest in the material or performance (hereafter, "a bona fide purpose").

(b) 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.

(2) Consenting to the photographing of the person's minor child or ward, or photographing the person's minor child or ward, in a state of nudity or consenting to the use of the person's minor child or ward in a state of nudity in any material or performance, or using or transferring a material or performance of that nature, unless the material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into Ohio, or presented for a bona fide purpose;

(3) Possessing or viewing any material or performance that shows a minor who is not the person's child or ward in a state of nudity unless one of the following applies: (a) the material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into Ohio, or presented for a bona fide purpose or (b) 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 or performance is used or transferred.

A person who violates the prohibition is guilty of illegal use of a minor in a nudity-oriented material or performance. A violation of the prohibition described in paragraph (1) or (2), above, is a felony of the second degree, and a violation of the prohibition described in paragraph (3), above, generally is a felony of the fifth degree. If the offender previously has been convicted of or pleaded guilty to this offense, pandering obscenity involving a minor, or pandering sexually oriented matter involving a minor, a violation of the prohibition described in paragraph (3), above, is a felony of the fourth degree. (R.C. 2907.323(B).)

#### **Operation of the bill**

The bill expands the first prohibition included within the offense of illegal use of a minor in a nudity-oriented material or performance so that it also prohibits a person from disseminating or transmitting by means of a computer, computer system, computer network, telecommunication, telecommunications device, or telecommunications service any material or performance that shows the minor in a state of nudity unless (1) a bona fide purpose exists and (2) 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 (existing law), *dissemination, or transmittal* (added by the bill) of the material and to the specific manner in which the material or performance is to be used. A violation of this prohibition continues to be a felony of the second degree. (R.C. 2907.323(A)(1) and (B).)

#### **Unauthorized use of computer property**

##### **Existing law**

Existing law prohibits a person from knowingly gaining access to, attempting to gain access to, or causing access to be gained to any computer, computer system, or computer network without the consent of, or beyond the scope of the express or implied consent of, the owner of the computer, computer system, or computer network or other person authorized to give consent by the owner. A person who violates the prohibition is guilty of unauthorized use of computer property, a felony of the fifth degree. (R.C. 2913.04(B) and (E).)

#### **Operation of the bill**

The bill expands the offense of unauthorized use of computer property to also prohibit a person from knowingly gaining access to, attempting to gain access to, or causing access to be gained to any telecommunications device or telecommunications service without the consent of, or beyond the scope of the express or implied consent of, the owner of the telecommunications device or telecommunications service or other person authorized to give consent by the owner. It renames the offense "unauthorized use of computer or telecommunication property." The offense continues to be a felony of the fifth degree. (R.C. 2913.04(B) and (E).)

#### **Tampering with records**

##### **Existing law**

Existing law prohibits a person, knowing the person has no privilege to do so, and with purpose to defraud or knowing that the person is facilitating a fraud, from doing any of the following (R.C. 2913.42(A)):

(1) Falsifying, destroying, removing, concealing, altering, defacing, or mutilating any writing, computer software, data, *computer data*, or record;

(2) Uttering any writing or record, knowing it to have been tampered with as provided in paragraph (1), above.

A person who violates the prohibition is guilty of tampering with records, the penalties for which are as follows (R.C. 2913.42(B)):

(1) If the offense does not involve data, tampering with records is a misdemeanor of the first degree, except that, if the writing or record is a will unrevoked at the time of the offense or a record kept by or belonging to a governmental agency, it is a felony of the fifth degree.

(2) If the offense involves data, tampering with records generally is a misdemeanor of the first degree. However, if the value of the data involved in the offense or the loss to the victim is \$500 or more and is less than \$5,000, it is a felony of the fifth degree. If the value of the data involved in the offense or the loss to the victim is \$5,000 or more and is less than \$100,000, it is a felony of the fourth degree. If the value of the data involved in the offense or the loss to the victim is \$100,000 or more or if the offense is committed for the purpose of devising or executing a scheme to defraud or to obtain property or services and the value of the property or services or the loss to the victim is \$5,000 or more, it is a felony of the third degree. (R.C. 2913.42(B).)

### **Operation of the bill**

The bill removes the term "computer data" from the list of items that existing law specifically prohibits a person from falsifying, destroying, removing, concealing, altering, defacing, or mutilating in committing tampering with records. However, the bill continues to use the term "data" in that list of items, and the bill's revised definition of that term (see "**Definitions**" below) covers information, etc., intended for use in a *computer, computer system, or computer network*. (R.C. 2913.01(R) and 2913.42(A)(1).)

The bill makes several changes to the penalty for tampering with records. Generally, under the bill, if the offense does not involve data or *computer software* (added by the bill), tampering with records is a misdemeanor of the first degree, except that, if the writing or record is a will unrevoked at the time of the offense, it is a felony of the fifth degree. The bill correspondingly generally expands the existing penalty structure described in paragraph (2), above, to apply to an offense that involves data or *computer software* (added by the bill). Finally, the bill provides that if the writing, data, computer software, or record involved is kept by or belongs to a local, state, or federal government entity, tampering with records is a felony of the third degree. (R.C. 2913.42(B)(2), (3), and (4).)

### **Aggregation of amounts when an offender is charged with theft**

Existing law provides that when a person is charged with a theft offense involving property or services valued at \$500 or more, valued at \$500 or more and less than \$5,000, valued at \$5,000 or more and less than \$100,000, or valued at \$100,000 or more, the jury or court trying the accused must determine the value of the property or services as of the time of the offense and, if a guilty verdict is returned, must return the finding of value or "aggregate value" as part of the verdict (R.C. 2913.61(A) and (B)).

Under the bill, if an offender is being tried under the statute prohibiting theft "for the commission of a series of offenses against more than one victim pursuant to a scheme or course of conduct," the value of the property or services involved, for the purpose of determining the value as required by the existing law described in the preceding paragraph, is the aggregate value of all property and services involved in the series of offenses (R.C. 2913.61(C)(2)).

### **Telephone harassment**

#### **Existing law**

Existing law generally prohibits a person from knowingly making or causing to be made a *telephone call* to another, or knowingly permitting a telephone call to be made from a telephone under the person's control to another, if the caller does any of the following (hereafter, "the first prohibition") (R.C. 2917.21(A)):

(1) Fails to identify the caller to the recipient of the telephone call and makes the telephone call with purpose to harass, abuse, or annoy any person at the premises to which the telephone call is made, whether or not conversation takes place during the telephone call;

(2) Describes, suggests, requests, or proposes that the caller, the recipient of the telephone call, or any other person engage in any sexual activity, and the recipient of the telephone call or another person at the premises to which the telephone call is made has requested, in a previous telephone call or in the immediate telephone call, the caller not to make a telephone call to the recipient or to the premises;

(3) During the telephone call, commits the offense of aggravated menacing;

(4) Knowingly states to the recipient of the telephone call that the caller intends to cause damage to or destroy public or private property, and the recipient, any member of the recipient's family, or any other person who resides at the premises to which the telephone call is made owns, leases, resides, or works in, will at the time of the destruction or damaging be near or in, has the responsibility of protecting, or insures the property that will be destroyed or damaged;

(5) Knowingly makes the telephone call to the recipient of the telephone call, to another person at the premises, or to the premises, and the recipient or another person at the premises previously has told the caller not to call those premises or not to call any persons at those premises.

Existing law also prohibits a person from making or causing to be made a telephone call, or permitting a telephone call to be made from a telephone under the person's control, with purpose to abuse, threaten, *annoy*, or harass another person (hereafter, "the second prohibition") (R.C. 2917.21(B)).

A person who violates the first prohibition or the second prohibition is guilty of telephone harassment. A violation of the first prohibition in the manner described in paragraph (1), (2), (3), or (5), above, and a violation of the second prohibition is a misdemeanor of the first degree on a first offense and a felony of the fifth degree on each subsequent offense *involving the same person, recipient, or premises*. A violation of the first prohibition in the manner described in paragraph (4), above, generally is a misdemeanor of the first degree on a first offense and a felony of the fifth degree on each subsequent offense, but, if a violation of that nature results in economic harm, telephone harassment is a felony of the fifth degree if the economic harm is \$500 or more but less than \$5,000, a felony of the fourth degree if the economic harm is \$5,000 or more but less than \$100,000, or a felony of the third degree if the economic harm is \$100,000 or more. (R.C. 2917.21(C) and (D).)

### **Operation of the bill**

The bill renames the offense "telecommunications harassment," rephrases the offense to include harassment, abuse, and threats by any form of telecommunication, and eliminates *annoyance* as one of the types of purposes associated with the offense. Specifically, the bill prohibits a person from knowingly making or causing to be made a telecommunication to another, or knowingly permitting a telecommunication to be made from a telecommunications device under the person's control to another, if the caller does any of the following (hereafter, "the revised first prohibition") (R.C. 2917.21(A)):

(1) Fails to identify the caller to the recipient of the telecommunication and makes the telecommunication with purpose to harass or abuse any person at the premises to which the telecommunication is made, whether or not actual communication takes place between the caller and a recipient;

(2) Describes, suggests, requests, or proposes that the caller, the recipient of the telecommunication, or any other person engage in sexual activity, and the recipient or another person at the premises to which the telecommunication is made has requested, in a previous telecommunication or in the immediate telecommunication, that the caller not make a telecommunication to the recipient or to the premises to which the telecommunication is made;

(3) During the telecommunication, commits the offense of aggravated menacing;

(4) Knowingly states to the recipient of the telecommunication that the caller intends to cause damage to or destroy public or private property, and the recipient, any member of the recipient's family, or any other person who resides at the premises to which the telecommunication is made owns, leases, resides, or works in, will at the time of the destruction or damaging be near or in, has the responsibility of protecting, or insures the property that will be destroyed or damaged;

(5) Knowingly makes the telecommunication to the recipient of the telecommunication, to another person at the premises to which the telecommunication is made, or to those premises, and the recipient or another person at those premises previously has told the caller not to make a telecommunication to those premises or to any persons at those premises.

The bill also prohibits a person from making or causing to be made a telecommunication, or permitting a telecommunication to be made from a telecommunications device under the person's control, with purpose to abuse, threaten, or harass another person (hereafter, "the revised second prohibition") (R.C. 2917.21(B)).

A person who violates the revised first prohibition or the revised second prohibition is guilty of telecommunications harassment. A violation of the revised prohibitions carries the same penalties as under existing law for telephone harassment. (R.C. 2917.21(C).)

For purposes of the offense, the bill defines a "caller" as the person described in the revised first prohibition who makes or causes to be made a telecommunication or who permits a telecommunication to be made from a telecommunications device under that person's control (R.C. 2917.21(D)(2)).

## **Criminal jurisdiction in an offense involving telecommunications**

### **Existing law**

Existing law provides that a person is subject to criminal prosecution and punishment in Ohio if any of the following occurs (R.C. 2901.11(A)):

- (1) The person commits an offense under the laws of Ohio, any element of which takes place in Ohio.
- (2) While in Ohio, the person conspires or attempts to commit, or is guilty of complicity in the commission of, an offense in another jurisdiction, which offense is an offense under both the laws of Ohio and the other jurisdiction.
- (3) While out of Ohio, the person conspires or attempts to commit, or is guilty of complicity in the commission of, an offense in Ohio.
- (4) While out of Ohio, the person omits to perform a legal duty imposed by Ohio laws, which omission affects legitimate interests of the state in protecting, governing, or regulating any person, property, things, transaction, or activity in Ohio.
- (5) While out of Ohio, the person unlawfully takes or retains property and subsequently brings any of the unlawfully taken or retained property into Ohio.
- (6) While out of Ohio, the person unlawfully takes or entices another and subsequently brings the other person into Ohio.

### **Operation of the bill**

The bill adds a seventh set of circumstances under which a person is subject to criminal prosecution in Ohio: the person, by means of a computer, computer system, computer network, telecommunication, telecommunications device, or telecommunications service, causes or knowingly permits any writing, data, image, or other telecommunication to be disseminated or transmitted into Ohio in violation of Ohio law (R.C. 2901.11(A)(7) and (E)).

### **Venue of a criminal prosecution involving telecommunications**

Existing law contains 11 provisions with respect to the venue of a criminal prosecution in Ohio. One of the provisions specifies that, when the offense involves a computer, computer system, or computer network, the offender may be tried in any jurisdiction containing any location of the computer, computer system, or computer network of the victim of the offense or in any jurisdiction in which the alleged offender commits any activity that is an essential part of the offense. (R.C. 2901.12(I).)

The bill expands the above-described venue provision to specify that, when the offense involves a computer, computer system, computer network, *telecommunication*, *telecommunications device*, or *telecommunications service*, the offender may be tried in any jurisdiction authorized under the existing provision and also may be tried in any jurisdiction from which or into which, as part of the offense, any writing, data, or image is disseminated or transmitted by means of a computer, computer system, computer network, telecommunication, telecommunications device, or telecommunications service (R.C. 2901.12(I)).

### **Definitions**

#### **New "telecommunication-related" definitions**

The bill defines the following terms (R.C. 2913.01(X), (Y), (Z), and (AA)):

- (1) "Telecommunication" means the origination, emission, dissemination, transmission, or reception of data, images, signals, sounds, or other intelligence or equivalence of intelligence of any nature over any communications system by any method, including, but not limited to, a fiber optic, electronic, magnetic, optical, digital, or analog method.
- (2) "Telecommunications device" means any instrument, equipment, machine, or other device that facilitates telecommunication, including, but not limited to, a computer, computer network, computer chip, computer circuit, scanner, telephone, cellular telephone, pager, personal communications device, transponder, receiver, radio, modem, or device that enables the use of a modem.
- (3) "Telecommunications service" means the providing, allowing, facilitating, or generating of any form of telecommunication through the use of a telecommunications device over a telecommunications system.
- (4) "Counterfeit telecommunications device" means a telecommunications device that, alone or with another telecommunications device, has been altered, constructed, manufactured, or programmed to acquire, intercept, receive, or otherwise facilitate the use of a telecommunications service without the authority or consent of the provider of the

telecommunications service. "Counterfeit telecommunications device" includes, but is not limited to, a clone telephone, clone microchip, tumbler telephone, or tumbler microchip; a wireless scanning device capable of acquiring, intercepting, receiving, or otherwise facilitating the use of telecommunications service without immediate detection; or a device, equipment, hardware, or software designed for, or capable of, altering or changing the electronic serial number in a wireless telephone.

### **Continued and modified "computer-related" definitions**

**Continued definitions.** The bill continues *without modification* the definitions of the following terms (R.C. 2913.01(L), (M), (N), (O), (P), and (Q)):

- (1) "Computer services" includes, but is not limited to, the use of a computer system, computer network, computer program, data that is prepared for computer use, or data that is contained within a computer system or computer network.
- (2) "Computer" means an electronic device that performs logical, arithmetic, and memory functions by the manipulation of electronic or magnetic impulses and includes, but is not limited to, all input, output, processing, storage, computer program, or communication facilities that are connected, or related, in a computer system or network to an electronic device of that nature.
- (3) "Computer system" means a computer and related devices, whether connected or unconnected, including, but not limited to, data input, output, and storage devices, data communications links, and computer programs and data that make the system capable of performing specified special purpose data processing tasks.
- (4) "Computer network" means a set of related and remotely connected computers and communication facilities that includes more than one computer system that has the capability to transmit among the connected computers and communication facilities through the use of computer facilities.
- (5) "Computer program" means an ordered set of data representing coded instructions or statements that, when executed by a computer, cause the computer to process data.
- (6) "Computer software" means computer programs, procedures, and other documentation associated with the operation of a computer system.

**Amended definition of "data".** Existing law generally defines the term "data" to mean a representation of information, knowledge, facts, concepts, or instructions that are being or have been prepared in a formalized manner *and that are intended for use in a computer system or computer network*. The bill expands this definition to generally also include information, etc., that is being or has been prepared in a formalized manner and that is intended for use in a *computer* as defined under "**Continued definitions**" above (R.C. 2913.01(R)). This definition change has the effect of expanding the meaning of "data" in the *tampering with records* statute and other computer-related statutes that use that term and results in the bill's repeal of a few references in existing law to "computer data" as well as to "data" (R.C. 2901.01(A)(10)(a), 2901.11(A)(7) and (E), 2901.12(I), 2907.01(J) and (N), and 2913.42(A)(1)). (See **COMMENT 5.**)

### **Expansion of miscellaneous definitions in existing law**

**Property.** The bill expands the existing definition of "property" that applies throughout the Revised Code. Currently "property" means any property, real or personal, tangible or intangible, and any interest or license in that property. "Property" includes, but is not limited to, cable television service, *computer data*, computer software, financial instruments associated with computers, and other documents associated with computers, or copies of the documents, whether in machine or readable form.

The bill adds other telecommunications service, telecommunications devices, *computers*, trade secrets, trademarks, copyrights, patents, and property protected by a trademark, copyright, or patent to the definition of "property." It also repeals existing law's term "computer data" in, and substitutes the expanded definition of "data" in, the definition of "property" (see "**Amended definition of "data"**" above). (R.C. 2901.01(A)(10)(a).) For purposes of the revised definition of "property," "trade secret" means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following: (1) it derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (2) it is the subject of efforts that are reasonable under the circumstances to maintain its secrecy (R.C. 2901.01(A)(10)(b), by reference to R.C. 1333.61--not in the bill).

**Contraband.** The bill also expands one part of the definition of "contraband" that applies throughout the Revised Code. "Contraband" currently, in part, includes any computer, computer system, computer network, or computer software that is used in a conspiracy to commit, an attempt to commit, or the commission of any offense if the owner of the computer,

computer system, computer network, or computer software is convicted of or pleads guilty to the offense in which it is used. The bill adds "other telecommunications device" to the list of this category of contraband. (R.C. 2901.01(A)(13)(j).)

**Material.** "Material," as used in the Sex Offenses Law, is defined in existing law as 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. The bill expands the list to include graphics, undeveloped film, and negatives; data that is stored on computer disk or by other electronic means and that is capable of being converted into a visual image; and a pictorial representation produced or recorded by any mechanical, chemical, photographic, or electrical means (R.C. 2907.01(J)(1)). The bill also specifies that "material" includes any data that is stored on, or disseminated or transmitted by, computer disk or other electronic means and that is capable of being converted into any of the items listed as being "material" in existing law or added by the bill to existing law's list of "material" (R.C. 2907.01(J)(2)).

### **Contextual meaning of definitions**

The bill provides that the definitions that it continues, modifies, or enacts in section 2907.01 for purposes of the Sex Offenses Law and in section 2913.01 for purposes of the Theft and Fraud Law apply in the respective Laws "unless the context requires that a term be given a different meaning" (R.C. 2907.01 and 2913.01). These provisions reflect the bill's use in the Sex Offenses Law and the Theft and Fraud Law of the term "data" *both* (1) in a specifically defined manner that relates *solely* to computers, computer systems, and computer networks (see "**Amended definition of "data"**" above) and (2) in *potentially different or broader* manners in the definition of a "writing" set forth in the Theft and Fraud Law (see **COMMENT 5**) and in the definition of "material" set forth in the Sex Offenses Law (see "**Material**" above).

## **COMMENT**

1. Section 2901.22 (not in the bill) defines the culpable mental states that relate to criminal offenses committed in Ohio. With respect to the offenses *covered by the bill*, (a) an offender acts *purposely* when it is the offender's specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish by the conduct, it is the offender's specific intention to engage in conduct of that nature, (b) an offender acts *knowingly*, regardless of the offender's purpose, when the offender is aware that the offender's conduct will probably cause a certain result or will probably be of a certain nature, and (c) an offender acts *recklessly* when, with heedless indifference to the consequences, the offender perversely disregards a known risk that the offender's conduct is likely to cause a certain result or is likely to be of a certain nature.

2. Existing R.C. 2907.01(F) defines the term "obscene" for purposes of the state's Sex Offenses Law. Ohio courts do not apply the *precise* wording of R.C. 2907.01(F)'s definition of "obscene" in pandering obscenity or other pornography cases because of the potential "facial" constitutional infirmities in that wording. Instead, Ohio courts apply the obscenity test or "guidelines" that the United States Supreme Court set forth in *Miller v. California* (1973), 413 U.S. 15, and that the Ohio Supreme Court in *State v. Burgun* (1978), 56 Ohio St. 2d 354, "authoritatively construed" to be part of section 2907.01(F)'s definition of "obscene." The syllabus in *Burgun* reads in part as follows:

1. R.C. 2907.01(F), which sets forth the definition of "obscenity," is neither unconstitutionally overbroad nor void for vagueness when it is authoritatively construed to incorporate the guidelines prescribed in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419.

56 Ohio St. 2d at 354.

In *Burgun*, the appellants contended that section 2907.01(F)'s definition of obscenity as incorporated in the pandering obscenity statute (R.C. 2907.32) was "both overbroad and vague and therefore in violation of their rights under the First and Fourteenth Amendments to the United States Constitution." 56 Ohio St. 2d at 356. The appellants essentially contended that the definition was overbroad "on its face" because an item could be considered "obscene" if *any* of the characteristics listed in the definition were present. The appellants argued that, "[s]ince the statute is written in disjunctive rather than conjunctive language, . . . a conviction can be obtained without a finding that the tripartite test in *Miller v. California* . . . has been satisfied." 56 Ohio St. 2d at 357.

In *Burgun*, the Ohio Supreme Court initially commented upon the U.S. Supreme Court's holding in *Miller*, stating as follows:

In that case the United States Supreme Court . . . described the permissible scope of state regulation of obscenity and the three-pronged inquiry to be adopted by the trier of fact as follows:

" \* \* \* As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a

whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

"The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest \* \* \*; (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. \* \* \* If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." . . .

56 Ohio St. 2d at 357-358.

After setting forth the *Miller* "guidelines," the Ohio Supreme Court addressed the appellants' bottom-line argument that the Ohio definition of obscenity "not only has not been "limited, as *written*," in light of the *Miller* guidelines but also is incapable of a "narrowing *construction*" in conformity with that decision." 56 Ohio St. 2d 358. The Ohio Supreme Court held that the appellants were wrong in this regard, stating as follows:

The United States Supreme Court did not intend for every state legislature to rewrite its obscenity statutes as a result of the *Miller* decision. As indicated, an "authoritative construction" of applicable state law limiting the regulation of obscenity by the guidelines in that decision would be constitutionally sufficient.

. . .

We hold that R.C. 2907.01(F) is neither unconstitutionally overbroad nor void for vagueness when it is read in *pari materia* with the *Miller* decision. The *Miller* test for defining obscenity is therefore incorporated into that statute by an "authoritative" state court construction specifically sanctioned by *Miller*. In addition, a close reading of R.C. 2907.01 in its entirety shows that the statute is not vague but rather extremely precise in defining what conduct is prohibited. Thus, since the current statutory definition has been effectively narrowed to constitutionally permitted parameters, the appellants' proposition of law has no merit.

56 Ohio St. 2d at 358-361.

The *Burgum* holding continues to be precedent in Ohio.

3. The affirmative defense *in existing law* and *continued* by the bill that generally is common to the Sex Offenses Law offenses covered by the bill is as follows: that a material or performance involved was "furnished" (one statute), "sold, displayed, possessed, controlled, or brought or caused to be brought into Ohio" (several statutes), or disseminated or presented (all relevant statutes) for a bona fide "artistic" (one statute only), medical, scientific, educational, "religious" (not in every statute), governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, "person pursuing bona fide studies or research" (not in every statute), librarian, cleric, prosecutor, judge, or other person having a proper interest in the material or performance (R.C. 2907.31(C)(1), 2907.32(B), 2907.321(B)(1), 2907.322(B)(1), and 2907.323(A)(1)(a), (2), and (3)(a)).

4. With respect to the constitutionality of aspects of section 2907.322 or 2907.323, *see Osborne v. Ohio* (1990), 495 U.S. 103; *New York v. Ferber* (1982), 458 U.S. 747; *State v. Young* (1988), 37 Ohio St. 3d 249; *State v. Meadows* (1986), 28 Ohio St. 3d 43; *State v. Robinson* (1986), 28 Ohio St. 3d 65; *State v. Modeen* (1986), 28 Ohio St. 3d 64; and *State v. Stover* (1985), 25 OBR 349 (Franklin Cty. Mun. Ct.).

5.(a) Existing law specifies that the general definition of "data" discussed under "***Amended definition of "data"***," above, applies to the offense of *insurance fraud* proscribed by section 2913.47 (not in the bill), but that "data" also has the additional meaning set forth in section 2913.47 in connection with that offense. Consequently, as a result of the bill's amendments, "data" also includes in connection with the offense of insurance fraud any *noncomputer-, noncomputer system-, or noncomputer network-*related information, knowledge, facts, concepts, or instructions that are being or have been prepared in a formalized manner (R.C. 2913.01(R) and 2913.47(A)(1)).

(b) The definition of a "writing" in the existing Theft and Fraud Law is as follows: any computer software, document, letter, memorandum, note, paper, plate, *data*, film, or other thing having in or upon it any written, typewritten, or printed matter, and any token, stamp, seal, credit card, badge, trademark, label, or other symbol of value, right, privilege, license, or identification (R.C. 2913.01(F)).

# HISTORY

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