The following is a point-by-point response by the Cyber Civil Rights Initiative (CCRI) to objections raised by the Motion Picture Association (MPAA) to Minnesota's proposed legislation to safeguard sexual privacy, HF 2741, available here.

For more information about nonconsensual pornography, often referred to as "revenge porn" and the Cyber Civil Rights Initiative's work on supporting victims, educating the public, and working with legislators and the tech industry to protect sexual privacy, please visit www.endrevengeporn.org. For further information specifically about First Amendment questions regarding legislation, please consult CCRI's Guide for Legislators.

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The Motion Picture Association of America, Inc. (MPAA) and its member companies[1] oppose HF 2741 as currently drafted. MPAA's members are the leading producers and distributors of motion pictures and television programs for theatrical exhibition and for subsequent release on DVD, videocassette, pay, cable, satellite, Internet and broadcast television. Our member companies also have affiliates that are in the business of investigating and reporting on newsworthy events and developments, including entertainment and sports programming.

- The bill in its current form could limit the distribution of a wide array of mainstream, Constitutionally-protected material, including items of legitimate news, commentary, and historical interest. These items are part of news, public affairs, entertainment or sports programming, and are distributed in motion pictures, television programs, audiovisual works of all kinds, via the Internet and other media.

[1] The Motion Picture Association of America, Inc. includes: The Walt Disney Studios Motion Pictures; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal Studios LLC; and Warner Bros. Entertainment Inc.

- For example, images of Holocaust victims, or prisoners at Abu Ghraib, or the Pulitzer-Prize winning photograph entitled "Napalm Girl," which shows a young girl running screaming from her village, naked, following a Napalm attack, could be prohibited under the terms of this legislation.

CCRI Response: This bill cannot plausibly be read as a threat to the distribution of constitutionally protected material of legitimate interest to the public.

The Supreme Court has stated that while "laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect - at best a prediction - cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. … overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601(1973).

The plainly legitimate sweep of this statute is to prohibit the unauthorized distribution of private, sexually explicit photos and videos. The statute only applies to distributors who "know or should know" that the image was created under circumstances intended to remain private and explicitly exempts material that "relates to a matter of public concern and dissemination serves a lawful purpose."

Regarding the MPAA's specific examples, concentration camps, prisons, and public streets are, first, not places that are generally considered private. Second, images of Holocaust victims, Abu Ghraib prisoners, or victims of war crimes plainly "relate to a matter of public concern and dissemination [of such images] serves a lawful purpose."

- In order to remedy these infirmities, we urge the inclusion of an "intent to harass" requirement in the definition of the crime. Six other states have included "intent to harass" in their statutes dealing with this issue.

CCRI Response: The inclusion of an "intent to harass" requirement is non-responsive to the objection raised above. The motive of a distributor has no bearing on whether the material is newsworthy or a matter of public concern. A photograph of a dirty restaurant kitchen is not rendered less newsworthy because the distributor intends to harass the restaurant owner; nor would the Abu Ghraib photos be of less legitimate public concern if they were distributed by someone who held a personal grudge against the jailers.

If an "intent to harass" provision were included, the law would be rendered both incoherent and vulnerable to constitutional attack. It would allow people to distribute private, sexually explicit material of no public concern unless it could be proven beyond a reasonable doubt that their motive was to harass. This would mean it would be legal to distribute such material for *any other motive*, including for profit, entertainment, social validation, or no reason at all.

To be clear, that would mean that revenge porn site operators would be free to destroy the lives, careers, reputations, and personal relationships of thousands of people, mostly women, because they are not motived by a desire to harass but by a desire to make money. That would mean that the people who distributed the private, intimate photos of celebrities such as Jennifer Lawrence would be free to do so with impunity because they were just hoping to provide "entertainment." That would mean that rapists who distribute the recordings they made of their sexual assaults on social media in order to brag about their exploits would be free to continue to do so.

The kinds of absurd outcomes are not only troubling from a policy perspective but would also render the law vulnerable to First Amendment attacks on the ground of under-inclusiveness. If the goal of the law is to protect privacy, how can that goal be served by restricting its application to violations motivated by harassment while allowing violations motivated by all other purposes?

Unsurprisingly, the vast majority of criminal legislation regarding other forms of private information does not include arbitrary motive requirements. Both state and federal criminal laws prohibit the unauthorized disclosure of private material such as medical records, financial data, and cell phone usage information. None of these statutes requires that perpetrators act with the intent to harass their victims.

- In 2014, the state of Arizona passed a similar law, Arizona Revised Statute 13-1425, that did not include an "intent to harass" provision. The law was immediately challenged in federal court. (Antigone Books v. Brnovich). The state declined to defend the law, law, acknowledging the law's constitutional infirmities. In 2015, the court permanently barred enforcement of the law with Arizona agreeing to pay the plaintiffs' attorneys' fees. This year the Arizona legislature introduced a bill that added the "intent to harass" element to the definition of the crime, and that bill is expected to pass the legislature in the next couple weeks.

CCRI Response: The claim that Arizona acknowledged "constitutional infirmities" of its original law is false. Arizona officials agreed to stay the law and redraft it in the hopes of taking victims' cases out of the limbo that the lawsuit had placed them in, but never made any concessions about the law's constitutionality. Nor was there ever any ruling made regarding the constitutionality of Arizona's law.

Even more importantly, HF 2741 differs from Arizona's original law in many significant respects, the most notable being the inclusion of an exemption for matters of public concern. The lack of such a provision was the chief constitutional deficiency of Arizona's original law.

- While the bill does include an exemption for an image that "relates to a matter of public concern and dissemination serves a lawful purpose," this alone does not offer MPAA member companies sufficient protection, as the final determination of whether the material in question constitutes a "matter of public concern" would be left to a jury. Editors and producers would have no way of knowing in advance whether an image would be deemed to fall into this category or not, which would create a substantial and unconstitutional chilling effect on speech.

CCRI Response: Here again, it is prudent to look to the Supreme Court for guidance: "there are limitations in the English language with respect to being both specific and manageably brief." CSC v. Letter Carriers, 413 U.S. 548 (1973). No statute will "satisfy those intent on finding fault at any cost," but the Constitution does not require the satisfaction of impossible standards. What is required, rather, is that laws be "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." Id.

The MPAA has offered no evidence that editors and producers, who deal regularly with defamation, copyright, and a range of privacy laws - many of which require complex determinations regarding newsworthiness and public concern - will somehow be uniquely and unjustifiably confused or chilled by the prohibition against publishing private, sexually explicit material that is not a matter of public concern without the consent of those depicted.

For these reasons, MPAA opposes HF 2741 as currently drafted.

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