WALTERS LAW GROUP

MEMORANDUM

FROM: **Lawrence G. Walters, Esq.** LGW

DATE: **March 8, 2013**

RE: **HB 787 – Legal Evaluation**

HB 787 presents numerous legal, constitutional, and practical concerns. This evaluation is provided primarily from the standpoint of online service providers, who make web space available to end users for the purpose of uploading digital media. Our law firm represents many such clients, who have expressed concern that the enactment of HB 787 would result in a variety of unintended consequences, and increased legal exposure, for their business operations.

Notably, proposed 847.002 requires that the digital image or video posted to a "website" or "other social networking service" involve both nudity and a depiction of personal identification information (as defined in § 817.586). The treatment of nude images differently from non-nude images in this context constitutes a content-based restriction on expressive speech that would likely be found unconstitutional by the courts. Nude imagery is presumptively protected by the First Amendment. *Ashcroft v. FSC*, 535 U.S. 234 (2002)*; Reno v. ACLU*, 521 U.S. 844 (1997).

Aside from any constitutional concerns, the statue – as drafted – could impose unreasonable and impossible burdens on social networking sites such as YouTube and Facebook, and the many variants thereof, to review massive amounts of digitally-uploaded material to determine whether the material; (1) depicts nudity; and (2) depicts personal identification information and/or counterfeit/fictitious personal identification information. This concern is partially caused by the inclusion of the clause "or *caused to be posted* to any website or any other social networking service" in proposed 847.042(1) (emphasis added). Typically there are several individuals or companies involved in the uploading of an image by an end-user onto a website or social networking service, ranging from the users themselves, to server operators, moderators, and social networking site operators. While online service providers are entitled to immunity from civil claims under 47 U.S.C. § 230, (along with safe harbor from copyright infringement claims under the Digital Millennium Copyright Act), their exposure to potential criminal prosecution is unsettled.[1] This potential liability is further complicated by the existence of accomplice liability theories such as "conspiracy" and/or "aiding and abetting" criminal behavior, whereby accomplices are punished in the same manner as principal offenders.

Online service providers who may currently have an incentive to prevent the uploading of material which violates their publishing standards, or which may be illegal, could be dissuaded from

[1] *See*, Lawrence G. Walters, *Shooting the Messenger: An Analysis of Theories of Criminal Liability Used Against Adult-Themed Online Service Providers*, 23 Stanford Law and Policy Review 1, 171-212 (2012)

undertaking such efforts if § 847.0042 is passed. In other words, if an online service provider reviews and inadvertently approves (or fails to delete) material including nudity and personal identifying information, that individual may have "caused to be posted to the website or other social networking service" the offending material. The same can be said for hosts, search engines, and others responsible (or partially responsible) for the publication, distribution, and/or transmission of digital media. These service providers would be well-removed from the production of the material at issue, and would have no way of knowing whether the publication was with or without the consent of the person depicted. Yet, the proposed statute appears to impose liability irrespective of the level of knowledge or intent associated with this element of the offense.[2]

When faced with a choice of continuing to enforce some level of publishing standards, or incurring potential criminal liability under the proposed Florida Statute, service providers may well dispense with any level of review or editorial moderation to avoid potential liability. This would result in the presumably unintended consequence of permitting the publication of widespread, un-moderated content on social networking sites throughout the nation. Alternatively, popular online service providers could choose not to make their services available in Florida, or to Florida residents. Notably, the statute seeks to assert jurisdiction over any violator if the harm to the victim's privacy interests occurs in the State of Florida. Naturally, this would potentially include any website operator or social networking service that makes its content available in the State of Florida (i.e., nearly all of them.)

Notwithstanding the concerns with service provider liability, the creation of this new criminal offense may impair countless existing contracts and model releases, which specifically permit the publication of nude images along with fictitious and/or real personal identification information. Individuals or companies that own copyrights to nude images and have already obtained releases from models involved in erotic content, would be in doubt as to whether they could continue to utilize the material that they had produced in the manner which both parties intended, if proposed § 847.0042 is passed. At a minimum, the statute should make provisions for existing contracts which allow for the publication of nude images along with some sort of identification information, without requiring each person involved in the publication process to obtain the depicted person's specific written consent to post the material to a website or other social networking service. Arguably, models who have already released their publicity rights, generally, through model releases, and who voluntarily participated in nude photography, could use the passage of § 847.0042 as a basis to extract unwarranted additional compensation from content producers who have already purchased the necessary publication rights. As such, the proposed law impairs existing contracts and unnecessarily invades the province of federal copyright law.

Finally, the proposed statute appears to be both vague and overbroad, in violation of the First and Fourteenth Amendments. Passage of the law could result in an unconstitutional chilling effect on the publication of otherwise protected expression involving nudity and fictitious "stage name" information. The statute further appears to be vague due to its failure to define "nudity" in any manner.

2 The term "knowingly" in § 847.0042(1) appears to modify the use of the computer, and potentially the posting of the depiction, but the remainder of the statute is silent on the level of intent associated with the other elements.