

TABLED

Cherokee Council House
Cherokee, Qualla Boundary (NC)

Date: May 31, 2012

ORDINANCE NO. 210 (2012)

WHEREAS, Resolution 480 authorized the Child Protection Team to propose an ordinance to deal with sexting; and

WHEREAS, The Child Protection Team after consultation with the Tribal Prosecutor and the Attorney General have drafted a child pornography ordinance and a cyberstalking ordinance.

NOW THEREFORE BE IT ORDAINED by the Tribal Council of the Eastern Band of Cherokee Indians assembled, at which a quorum is present, new Cherokee Code Sections 14-30.11 and 14-5.6 shall read as follows:

Sec. 14-30.11 Child Pornography

a) Any person who

- 1) knowingly possesses or knowingly accesses with intent to view, any book, magazine periodical, film, videotape, computer disk, or any other material that contains an image of child pornography;
- 2) knowingly advertises, promotes, presents, distributes or solicits by any means including a computer any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is or contains an obscene visual depiction of a minor engaging in sexually explicit conduct; or a visual depiction of an actual minor engaging in sexually explicit conduct;
- 3) knowingly receives or distributes child pornography.

shall be punished as provided in subsection (b).

(b) Whoever violates, or attempts to or conspires to violate paragraph (1), (2) or (3) shall be punished by imprisonment for a period of not more than three (3) years, by a fine of not more than \$15,000.00, or both.

(c) Definitions: For the purposes of this chapter, the term--

- (1) “minor” means any person under the age of eighteen years;
- (2)(A) Except as provided in subparagraph (B), “sexually explicit conduct” means actual or simulated--
 - (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
 - (ii) bestiality;
 - (iii) masturbation;
 - (iv) sadistic or masochistic abuse; or
 - (v) lascivious exhibition of the genitals or pubic area of any person;
- (B) For purposes of subsection 8 of this section, “sexually explicit conduct” means--
 - (i) graphic sexual intercourse, including genital-genital, oral- genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;
 - (ii) graphic or lascivious simulated;
 - (I) bestiality;
 - (II) masturbation; or
 - (III) sadistic or masochistic abuse; or
 - (iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person;
- (3) “producing” means producing, directing, manufacturing, issuing, publishing, or advertising;
- (4) “organization” means a person other than an individual;
- (5) “visual depiction” includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format;
- (6) “computer” has the meaning given that term in 18 USC 1030;

- (7) “custody or control” includes temporary supervision over or responsibility for a minor whether legally or illegally obtained;
- (8) “child pornography” means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where--
- (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
- (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
- (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.
- (9) “identifiable minor”--
- (A) means a person--
- (i)(I) who was a minor at the time the visual depiction was created, adapted, or modified; or
- (II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and
- (ii) who is recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and
- (B) shall not be construed to require proof of the actual identity of the identifiable minor.
- (10) “graphic”, when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted; and
- (11) the term “indistinguishable” used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.

- (d) Affirmative Defenses: It shall be an affirmative defense to a charge of violating subsection (a)(1) that the defendant—
- 1) possessed less than three images of child pornography; and
 - (2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof--
 - (A) took reasonable steps to destroy each such image; or
 - (B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

Sec. 14-5.6 Cyberstalking

(a) The following definitions apply in this section:

- (1) Electronic communication. -- Any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature, transmitted in whole or in part by a wire, radio, computer, electromagnetic, photoelectric, or photo-optical system.
- (2) Electronic mail. -- The transmission of information or communication by the use of the Internet, a computer, a facsimile machine, a pager, a cellular telephone, a video recorder, or other electronic means sent to a person identified by a unique address or address number and received by that person.

(b) It is unlawful for a person to:

- (1) Use in electronic mail or electronic communication any words or language threatening to inflict bodily harm to any person or to that person's child, sibling, spouse, or dependent, or physical injury to the property of any person, or for the purpose of extorting money or other things of value from any person.
- (2) Electronically mail or electronically communicate to another repeatedly, whether or not conversation ensues, for the purpose of abusing, annoying, threatening, terrifying, harassing, or embarrassing any person.
- (3) Electronically mail or electronically communicate to another and to knowingly make any false statement concerning death, injury, illness, disfigurement, indecent conduct, or criminal conduct of the person electronically mailed or of any member of the person's family or household with the intent to abuse, annoy, threaten, terrify, harass, or embarrass.

- (4) Knowingly permit an electronic communication device under the person's control to be used for any purpose prohibited by this section.
- (c) Any offense under this section committed by the use of electronic mail or electronic communication may be deemed to have been committed where the electronic mail or electronic communication was originally sent, originally received in this jurisdiction, or first viewed by any person in this jurisdiction.
- (d) Any person violating the provisions of this section shall be punished by imprisonment for a period of not more than one year, by a fine of not more than \$5,000.00 or both.
- (e) This section does not apply to any peaceable, nonviolent, or nonthreatening activity intended to express political views or to provide lawful information to others. This section shall not be construed to impair any constitutionally protected activity, including speech, protest, or assembly.

BE IT FURTHER ORDAINED that this ordinance shall be effective upon ratification by the Principal Chief, and all prior ordinances and resolutions that are inconsistent with this ordinance are rescinded.

Submitted by the Office of Attorney General on behalf of the Child Protection Team