

To: Uniform Law Commissioners, 2017 ULC Annual Meeting

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Drafting Committee on Civil Remedies for Unauthorized Disclosure of Intimate Images Act  
(CRUDIIA)

## ISSUES MEMO

### BACKGROUND

The unauthorized disclosure of private photographs and videos depicting nudity or sexually explicit conduct— often referred to as “revenge porn” or “nonconsensual pornography”— causes immediate, devastating, and in many cases irreversible harm. A vengeful ex-partner, opportunistic hacker, or rapist can upload an image of a victim to a website where thousands of people can view it and hundreds of other websites can share it. In a matter of days, that image can dominate the first several pages of search engine results for the victim’s name, as well as being emailed or otherwise exhibited to the victim’s family, employers, co-workers, and peers. Victims are frequently threatened with sexual assault, stalked, harassed, fired from jobs, and forced to change schools. Some victims have committed suicide.

Intimate images include footage obtained by hidden cameras, consensually exchanged images within a confidential relationship, stolen photos, and recordings of sexual assaults. The motives for unauthorized disclosure are diverse: to prevent domestic violence victims from reporting abuse; to punish former intimate partners for exiting the relationship; to further humiliate or extort sexual assault victims; or to profit from voyeuristic “entertainment.”

A recent study suggests that millions of adult Americans have been the victims of or threatened with nonconsensual pornography. Nonconsensual pornography is not a new phenomenon, but its prevalence, reach, and impact have increased in recent years. The Internet has greatly facilitated the rise of nonconsensual pornography, as dedicated “revenge porn” sites and other forums openly solicit private intimate images and expose them to millions of viewers, while allowing the posters themselves to hide in the shadows. As many as 11,000 websites feature “revenge porn,” and intimate material is also widely distributed without consent through social media, blogs, emails, and texts.

The rise of nonconsensual pornography is due in part to the fact that perpetrators do not fear the consequences of their actions. Before 2013, there were few laws – civil or criminal – in the United States explicitly addressing this invasion of sexual privacy, even as concerns over almost every other form of privacy (e.g., financial, medical, data) have captured legal and social imagination. While some existing voyeurism, surveillance, and computer hacking laws prohibit the nonconsensual observation and recording of individuals in states of undress or engaged in sexual activity, the nonconsensual disclosure of intimate images has been largely unregulated by the law until recently.

### INTRODUCTION

This First Reading Draft of the Civil Remedies for Unauthorized Disclosure of Intimate Images Act is short, and it is expected that the final Act will also be short. Yet the policy issues involved are complicated. Among others, they involve: (1) federal law which insulates interactive computer service providers from liability (to an extent that is not quite clear), (2) First Amendment limitations and concerns, (3) anonymity of wrongdoers, (4) technological problems of tracing and remedying the wrongful acts, (5) practical inability to completely erase digital images once they have spread on the internet, (6) the sheer number of participants, (7) fast evolving social habits and mores, and (8) existing tort law.

## **CREATION OF THE DRAFTING COMMITTEE**

The Unauthorized Disclosure of Intimate Images Act Drafting Committee was created in the fall of 2016 in response to the Study Committee's recommendation that an Act be drafted criminalizing such unauthorized disclosure and providing civil remedies. Recognizing that more than 34 states had already enacted criminal legislation on the subject (a number which has since increased to 37), the Scope and Program Committee authorized the drafting of a civil remedy, providing that if the Drafting Committee later determined that a criminal statute be drafted, it would formally ask Scope and Program to authorize expanding the mandate.

## **GENERAL APPROACH**

The Committee considered modeling the Act on the Uniform Trade Secrets Act. This model would prohibit "misappropriation" of an "intimate image" by improperly "acquiring" or "disclosing" the image with knowledge that the image was improperly acquired or acquired in circumstances giving rise to a duty to maintain its privacy, or derived through a person who owed a duty to maintain its privacy. Among other advantages, this approach might better withstand First Amendment challenges because it focuses on misappropriation, theft and breach of confidence, not on publication. The Committee chose to stay with its first draft approach and not change to the trade secrets model.

## **THIS DRAFT ACT**

The current Draft Act contains three operative sections. Section 3 prohibits anyone from "disclosing" a photograph or visual recording depicting a person's intimate image or that person engaged in sexual conduct if the person depicted is identifiable, had an expectation that the image would remain private, and has not consented to disclosure of the image. Disclosure is allowed for law enforcement, medical treatment and other proper needs.

Section 4 prescribes remedies for the depicted person, including actual damages, reasonable attorney's fees, punitive damages, and disgorgement of profit made by the wrongful act. Minimum statutory damages is a bracketed alternative to only actual damages. The plaintiff is allowed to use a pseudonym and otherwise protect his or her identity. Section 4 provides "limitations" designed to exclude interactive computer service providers from coverage under the act to the extent they are already protected under federal law.

The remaining sections address Title (§1), Definitions of "consent", "disclose", "identifying characteristics", "intimate image", and "online identifiers" (§2), Statute of Limitations (§5), Limitations (§6), Severability (§7), Uniformity of Application and Construction (§8) and Repeals; Conforming Amendments (§9).

## **MAJOR ISSUES CONFRONTED IN DRAFTING**

1. First and Subsequent Disclosures. Should the prohibition apply only to the first person who discloses the image without consent, or also to secondary disclosers who have reason to know that the person depicted in the image has not consented?
2. Negligent Disclosure. Should the Act prohibit "negligent" disclosure, "reckless" disclosure, or only "intentional" disclosure? Reasons for covering negligent disclosure include the feeling that if a person has possession of images the disclosure of which can cause great and in some cases irreversible harm, the person should exercise reasonable care in protecting the image and be liable for the damages if the duty is breached. Another is an expectation that basic liability insurance policies would more likely cover negligent disclosure but not intentional disclosure. One reason

for not covering negligent disclosure is a feeling that the Act should not markedly stray from the general common law. It seems clear that tort law generally imposes liability on intentional infliction of emotional distress (IIED), but except in unusual cases, not on negligent infliction of emotional distress (NIED). Another reason is a concern that imposing liability on “negligent” disclosure is much less defensible under the First Amendment. Covering “reckless” disclosure – that is, disclosures that consciously disregard a substantial and unjustified risk of harm – is a possible middle ground.

3. Consent-Implied. The Act does not apply where the depicted person consents to the disclosure or the image was taken in a situation where privacy was not reasonably expected. Should the Act require an explicit, affirmative expression of consent, or could such consent be implied?
4. Discloser’s Actual Knowledge or Reason to Know. Should the prohibition only apply when the person disclosing has actual knowledge of the lack of consent, or also apply when the person is reckless with regard to consent, or also when the person merely has reason to know there is no consent? Should the prohibition only apply when the discloser has actual knowledge that the access to the intimate image was made possible by theft, bribery, extortion, fraud, false pretenses, or exceeding authorized access, or also when the person was reckless with regard to whether the access was made possible by such means, or also merely had reason to know that access had been made possible by such means?
5. Plaintiff Proceeding Under Pseudonym. Although pursuit of civil justice is public, persons hurt by disclosure of their intimate images are reluctant to sue because the suit brings more attention to the images, and without the ability to litigate under a pseudonym redress is much less likely.
6. Damages. Should the Act only provide for recovery of the actual damages proven by the depicted person, or also provide statutory minimum damages? At least one state provides minimum damages regardless of proof as long as the unauthorized disclosure is proven. Providing minimal damages would help injured persons find an attorney to take the case - which seems to be a problem. The nature of the act of disclosing without consent seems to make it more acceptable to levy damages without proof of loss.
7. Attorney’s Fees, and Only for Prevailing Depicted Person. The technological nature of the problem makes it more costly, and more difficult to line up an attorney. Providing attorney's fees will help. Making injured parties pay defendant’s fees if they fail to recover is a risk likely to result in no lawsuit being brought.
8. Exemptions for Disclosure. What types of unauthorized disclosures should be exempted from prohibition? Certainly disclosure of intimate images to the extent necessary for medical treatment should be exempt, and the same for law enforcement needs. To what extent should the Act address the coverage of non-necessary disclosure by these exempted actors? What other areas of disclosure should be exempted?
9. Exemption for Interactive Computer Service Providers. The Draft Act must also take into account how it will interact with Section 230 of the Communications Decency Act (47 U.S.C. 230), which protects online entities from liability when they merely provide platforms for third-party content. The language of the uniform act should reflect the reality that Section 230 preempts any state law in conflict with it, but also recognize that Section 230 immunity is only provided to interactive computer service providers to the extent that these providers serve as intermediaries for third-parties placed content. State laws can regulate the conduct of online entities when they act as co-

developers or co-creators of content. To what extent should interactive computer service providers be insulated from liability under this act?

Recognizing that the issue is governed by federal law, and intending to give such providers the same immunity they enjoy under existing federal law, the initial draft provided:

“Section 5 Limitations – Nothing in this section shall be construed to alter or negate any rights, obligations, or immunities of an interactive computer service provider under Section 230 of Title 47 of the United States Code.”

An observer proposed that this be replaced by “Nothing in this Act shall be construed to impose liability on the provider of an interactive computer service, as defined in 47 U.S.C. 230 (f)(2), for content provided by another person.” The Committee believed this language significantly broadened, rather than reflected, the protections provided by the federal act and retained the original provision. Among industry concerns is a strong desire for our Act to include a statement that broadly interprets the protections provided by federal law, states the substance of these protections in the state law itself so that it gives notice of these protections to anyone reading the state law, and by providing the substance in state law, allows these protections to survive any change in federal law. This limitation issue will certainly be examined again, including an attempt to develop language which the Committee is convinced accurately represents the substance of the protections found in the federal act.

10. First Amendment Free Speech Considerations. The First Amendment applies to both criminal and civil laws. In fact, injunctive remedies and other features of civil law have the potential to create greater First Amendment problems than criminal law. Accordingly, even though civil approaches have drawn fewer First Amendment objections than criminal ones, First Amendment concerns should be afforded considerable attention in the drafting of a civil law. In particular, the Draft Act must be sensitive to the concerns of overbreadth, content-based distinctions, and vagueness with regard to the First Amendment.

These are the major issues the Committee has addressed so far. It must be emphasized that the Committee had only one drafting meeting. The Committee's discussions and the resulting 2017 first reading Draft are preliminary. Certainly, many unrecognized problems and questions will surface and policy decisions already made will change with further input and deliberations.