



To: Uniform Law Commissioners, 2017 ULC Annual Meeting

From: American Civil Liberties Union, Electronic Frontier Foundation, and Media Coalition

Re: First Reading Draft—Civil Remedies for Unauthorized Disclosure of Intimate Images Act (the "CRUDIIA")

The undersigned organizations are dedicated to protecting the exercise of free speech rights guaranteed by the United States Constitution. The ACLU works to defend and preserve the individual rights and liberties guaranteed by the Constitution and laws of the United States; the Electronic Frontier Foundation is the leading nonprofit organization defending civil liberties in the digital world; and Media Coalition Inc. protects the First Amendment right to produce and distribute books, magazines, recordings, home video and video games. All groups are committed to defending the American public's First Amendment right to access the broadest possible range of information, opinion and entertainment.

We write to express our belief that the June 5, 2017 First Reading Draft of CRUDIIA (the "Draft") violates the First Amendment. The Draft would create civil liability for the publication of images that are on their face protected by the First Amendment. For this reason, any model law penalizing such images requires particular attention to narrow definitions and clear elements of knowledge, intent, and harm. Unfortunately, this Draft does not meet that bar.

While the Issues Memorandum enumerates many of our free speech concerns, it is notable that in every instance the Draft adopts the position most threatening to free speech. Our most serious concerns with the Draft are:

- **Strict Liability for Disclosure** – The Draft lacks a *mens rea* requirement, imposing strict liability without fault for disclosing or threatening to disclose an image. (Sec. 3(a)(1)) This would create liability for any unintended or accidental publication of an image. The Issues Memorandum urges a simple negligence standard. However, the negligence standard is also insufficient to comply with the First Amendment. Intentional action should be required. Even under the negligence standard, if a lover or former lover inadvertently hits the wrong key on a computer or clicks on the wrong image, liability ensues. Even if such acts were not deemed negligent, negligence is a question for a jury at trial, imposing significant and unfair court burdens on the unfortunate discloser.

- **No Requirement of Intent to Harm, or Harm Occurring** – Under the Draft, a defendant can be held liable even if there was neither malicious intent nor harm done to the person depicted in the image.
- **Standard for Consent** – The draft provides as an element of the offense that the defendant “knows or should have known that the depicted individual did not consent to disclosure.” (Sec. 3(a)(1)(A)) Further, “silence or lack of protest or resistance” alone is not consent, meaning that consent must be an affirmative act by the person depicted in the image for a defendant to avoid liability. (Sec. 3(a)(2)) There are three problems with this consent standard.

First, a negligence standard (the defendant “should have known”) is inadequate when imposing financial penalties on First Amendment protected material. It should be deleted.

Second, a publisher must always have actual knowledge of affirmative consent prior to *each specific publication of an image* in order to avoid liability. This is a necessary conclusion of the Draft language: if you look at an image, and have no idea of the circumstances behind it, then you certainly “know or should know” that you lack consent to share it. Yet it is impractical for re-publishers to obtain affirmative consent or otherwise investigate or understand the circumstances behind a picture (including whether consent has already been given) prior to each specific publication. A subsequent publisher often does not know the circumstances surrounding the creation of an image or its initial distribution. They often do not and cannot know the stories behind many of the images they publish: whether the images were taken with consent, originally shared with consent, or subsequently published with consent. Online users, in particular, often have little or no information about the extrinsic circumstances of the photos they can see and share online, including any way of identifying or contacting those pictured.

Third, the scope of the consent standard is vague. The Draft is not clear if a single consent amounts to a universal consent. It is not clear if consent can be revoked. It does not explain if consent can be given for disclosure to one individual but not to others, even if the consent was to allow the picture to be publicly published. This vagueness will have a chilling effect on protected speech.

The consent standard will inflict practical harm on First Amendment activities. A photographer who takes an image of an unclothed person in a war or conflict zone cannot possibly be expected to obtain the person’s consent. Subjects of Edward Weston’s photographs, some of whom passed away long ago, are not available to consent to new publications. In most if not all instances, it is impossible for booksellers to ascertain whether persons depicted in books have consented to the taking or the publication of the image. And if “the disclosure” means what it implies—*e.g.*, the specific offer of a book at a particular bookstore

or library—then the Draft's reach is even more alarming, meaning that affirmative consent is not only required to publish an image in a new book, but also to distribute that book (and thus particular copies of that image) in specific ways.

- **Reasonable Expectation of Privacy** – The Draft provides a defense if the person depicted in the image had “no reasonable expectation that the material would remain private.” (Sec. 3(b)(1)) This imposes the burden of proving a negative on the defendant. Instead, this concept should be an element of the cause of action, placing the burden of proof on the plaintiff to show that she, in fact, had a reasonable expectation of privacy. Further, the concept of reasonable expectation of privacy is inherently vague, which will have an inevitable chilling effect on constitutionally protected speech.
- **Public Interest Exception** – The public interest exception fails specifically to exempt newsworthy, artistic, cultural, political, historical, and educational images, both in print and online. (Sec. 3(b)(2)(A)) The exception is limited to the much narrower “in the public interest”— a well-meaning, but vague, term that compounds rather than cures the constitutional infirmity of the Draft. This is problematic because, for example, the disclosures of former Congressman Anthony Weiner's photos or the Abu Ghraib photos, while clearly newsworthy, could be thought by some not to be in the public interest. The First Amendment will not tolerate the punishment of newsworthy or valuable speech – full stop, even in a civil context.

Additionally, the Draft would exempt only disclosures *made* “in the public interest,” suggesting that the defendant must have affirmatively intended to serve the public good. This is a subjective standard and is narrower than requiring that an image itself objectively have public interest value. Critically, the Supreme Court has noted that a subjective assessment of “public value” cannot be a predicate for constitutional protection of speech. Subjectivity here is problematic because an image with objective public interest value would nevertheless be actionable if the *discloser did not intend* to serve the public interest.

Indeed, the Draft’s exception for valuable speech is an acknowledgement that the law is drafted so broadly on its front end that such an exception is necessary.

- **Who May Bring an Action** – While the Issues Memorandum properly limits plaintiffs to the “depicted person,” the Draft provides more expansively that a civil action may be brought by “an individual aggrieved by a violation” of the act. This language is vague and overbroad. Only the “depicted person” (or the depicted person’s legal representative, such as a parent or guardian of a minor) should be able to bring a civil action under the act, and not another person who might have a claim that the disclosure of an image of a family member, friend, or associate negatively reflects on or otherwise harms them.

The Draft is not narrowly tailored. It sweeps in not just malicious violators of privacy, but also countless Internet users who repost online images without knowing all of the circumstances surrounding their creation. This Draft therefore creates a likelihood that any State law based on it will be held unconstitutional, a result that vitiates the purposes of a Uniform Act.

The Draft's impact on booksellers, book and newspaper publishers, librarians, photographers, and videographers is concrete and severe. Swept within the Draft are books of great artistic, cultural, political, historical, and educational value such as *The Bodies of Mothers: A Beautiful Body Project* and *Abu Ghraib: The Politics of Torture*. The Draft threatens liability for those who reprint the works of the greatest American photographers; not knowing whether consent had been given, they will be chilled by the lack of knowledge. And it penalizes those who share newsworthy images of art exhibits, breastfeeding, public figures caught in compromising situations, and more. At a minimum, sweeping all these images into the Draft's coverage and requiring these potential defendants to *prove* that the images they published had public value in order to avoid liability would create crushing burdens on free speech.

To the extent that the Draft requires separate consents for each individual and subsequent disclosure, it creates a burden that would be impossible in the world of publishing—particularly digital publishing. Nor is it clear whether consent can later be revoked, and how that would implicate continued or additional publication.

When the purpose of legislation is to create liability for the publication of images, the greatest care is required to avoid infringement of constitutional rights and causing a chilling effect on protected speech. The Draft should be revised so that the law only targets intentional, knowing and malicious invaders of privacy.

We ask that the Commissioners and the Drafting Committee consider these comments in further revisions to the Draft.

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