

D R A F T
FOR DISCUSSION ONLY

CIVIL REMEDIES FOR UNAUTHORIZED DISCLOSURE OF INTIMATE IMAGES ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

March 26, 2018 Interim Draft

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ON UNIFORM STATE LAWS

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March 26, 2018

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1 **CIVIL REMEDIES FOR UNAUTHORIZED DISCLOSURE**
2 **OF INTIMATE IMAGES ACT**

3
4 **PREFATORY NOTE**

5
6 [This is a partial draft of the Prefatory Note. The reporter will update commentary as the
7 project proceeds.]
8

9 The Civil Remedies for Unauthorized Disclosure of Intimate Images Act addresses a
10 growing form of abuse that causes immediate and in many cases irreversible harm. According to
11 a nationally representative 2017 study conducted by the Cyber Civil Rights Initiative, more than
12 1 in 8 American adult social media users has been victimized or threatened with the unauthorized
13 distribution of private, sexually explicit images or videos, and over 1 in 20 adult social media
14 users have engaged in such distribution.¹
15

16 A single intimate image can quickly dominate the first several pages of search engine
17 results for the victim's name, as well as being emailed or otherwise exhibited to the victim's
18 family, employers, co-workers, and peers. Victims have been fired from their jobs, expelled from
19 their schools, and forced to move from their homes. They have been threatened with sexual
20 assault, stalked, and harassed. Victims have developed post-traumatic stress disorders,
21 depression, anxiety, agoraphobia, and difficulty maintaining intimate relationships. Some victims
22 have committed suicide²
23

24 Intimate images include footage obtained by hidden cameras, consensually exchanged
25 images within a confidential relationship, stolen photos, and recordings of sexual assaults. There
26 are many motives for unauthorized disclosure, including discouraging domestic violence victims
27 from reporting abuse; punishing former intimate partners for exiting the relationship; further
28 humiliating or extorting sexual assault victims; or profiting from voyeuristic "entertainment."
29 The Internet has greatly facilitated the rise of nonconsensual pornography, as dedicated "revenge
30 porn" sites and other forums openly solicit private intimate images and expose them to millions
31 of viewers, while allowing the posters themselves to hide in the shadows. Some victims' private
32 intimate images have been published on over 10,000 websites, in addition to being widely
33 distributed through social media, blogs, emails, and texts.
34

¹ The study recruited 3,044 adults using a stratified sampling technique in the form of a Facebook poll shown to equal numbers of men and women in each of the 50 states in the United States. The number of subjects polled in each state was proportional to the representation of each state in the total population of the nation. The study addressed all nonconsensual, sexually explicit disclosures. Asia A. Eaton et al., *2017 Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration: A Summary Report*, CYBER C.R. INITIATIVE 11 (June 12, 2017), <https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf>

² See Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345 (2014).

1 The key features of this Act are (1. Creating a cause of action for the unauthorized
2 disclosure of private, intimate images; (2. Prescribing remedies for the depicted individual,
3 including actual damages, reasonable attorney’s fees, punitive damages, and disgorgement of
4 profit made by the wrongful act; and (3. Allowing depicted individuals to protect their identity in
5 court proceedings.
6

7 The Act applies only to images created under circumstances in which the depicted
8 individual had a reasonable expectation of privacy. It also exempts disclosures that are made in
9 the ordinary course of law enforcement; legal proceedings; or medical education or treatment;
10 are made in the reasonable reporting or investigation of unlawful conduct, or unsolicited and
11 unwelcome conduct; are matters of public concern or public interest; or are reasonably intended
12 to assist the depicted individual. The Act notes that the liability for providers and users of
13 interactive computer services for content provided by another party as restricted by federal law.
14

15 The majority of states have passed criminal legislation addressing the problem within the
16 last few years, but such legislation does not generally compensate victims for the harm they have
17 suffered. Only a dozen or so states have enacted specific civil legislation to address the problem.
18 What is more, the criminal and civil laws that have been passed by the several states differ
19 considerably in their definitions, scope, form, remedies, and constitutionality. This lack of
20 uniformity creates confusion and inefficiency, especially given the frequently “borderless”
21 nature of the wrongful act.
22

23 This Act provides a clear and comprehensive definition of the abuse that is broad enough
24 to protect the right to intimate privacy and narrow enough to respect the First Amendment right
25 to freedom of speech.
26

1 **CIVIL REMEDIES FOR UNAUTHORIZED DISCLOSURE**
2 **OF INTIMATE IMAGES ACT**

3 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Civil Remedies for
4 Unauthorized Disclosure of Intimate Images Act.

5 **SECTION 2. DEFINITIONS.** In this [act]:

6 (1) “Consent” means affirmative, conscious, and voluntary authorization by an individual
7 who is capable of giving authorization.

8 (2) “Depicted individual” means an individual whose body or portion thereof is shown in
9 an intimate image.

10 (3) “Disclose” means to transfer, publish, or distribute to one or more persons.

11 (4) “Identifiable” means that an individual is identifiable from an image itself or from the
12 image and identifying characteristics displayed in connection with the image.

13 (5) “Identifying characteristic” means information that may be used to identify a depicted
14 individual.

15 (6) “Individual” means a human being.

16 (7) “Intimate image” means a photograph, film, or video, or other visual depiction that a
17 reasonable person would believe is an actual photograph, film, or video, which shows:

18 (A) the genitals, pubic area, anus, or female post-pubescent nipple of the depicted
19 individual; or

20 (B) the depicted individual engaging in sexual conduct.

21 (8) “Person” means an individual, estate, business or nonprofit entity, public corporation,
22 government or governmental subdivision, agency, or instrumentality, or other legal entity.

23 (9) “Sexual conduct” means:

24 (A) masturbation;

- (B) genital, anal, or oral sex;
- (C) sexual penetration with an object;
- (D) bestiality; or
- (E) the transfer of semen onto the depicted individual.

Comment

The definition of consent as “affirmative, conscious, and voluntary authorization” is meant to exclude the possibility of implied, tacit, or coerced consent. While consent need not be in writing, it cannot be inferred from silence or lack of protest, nor can it be obtained through coercion.

Consent is also disclosure-specific. For example, consent to disclose an intimate image to an intimate partner is not consent to disclose to the general public. “There is an obvious and substantial difference between the disclosure of private facts to an individual—a disclosure that is selective and based on a judgment as to whether knowledge by that person would be felt to be objectionable—and the disclosure of the same facts to the public at large.” *Virgil v. Time, Inc.*, 527 F.2d 1122, 1126–27 (9th Cir. 1975). When the nature or scope of consent is ambiguous, it is the responsibility of the would-be discloser to obtain clarification before disclosing.

Identifying characteristics can include the depicted individual’s face, birthmarks, tattoos, or other physical identifiers.

The specification of “individual” is used to distinguish from the broader definition of “person,” which can include non-human entities and people who are deceased.

The definition of “intimate image” is limited to images of individuals that are actual visual representations, or virtually indistinguishable from such actual visual representations, of individuals. It does not include paintings, drawings, or other figurative representations of an individual. Images that are not or would not be mistaken for actual representations of an individual do not impose the severe privacy harm that is the focus of this act. Also, such representations enjoy extensive First Amendment protection. See *Hustler v. Falwell* (485 U.S. 46 (1988)).

The definition of disclosure includes providing a URL to a website that features the intimate image.

SECTION 3. CIVIL ACTION.

(a) Except as otherwise provided in Section 4, a depicted individual who has been harmed by the disclosure or threatened disclosure of an intimate image of the individual has a

1 cause of action against a person that intentionally disclosed or threatened to disclose the intimate
2 image of the individual if the person knew or had reckless disregard for whether:

3 (1) the individual did not consent to the disclosure that is the subject of the action;

4 (2) the intimate image

5 (A) was created or obtained under circumstances in which the depicted
6 individual had a reasonable expectation of privacy

7 (B) was made accessible through theft, bribery, extortion, fraud, false
8 pretenses, voyeurism, or exceeding authorized access to property or to an account, message, file,
9 device, or resource; or

10 (3) the depicted individual is identifiable.

11 (b) Consent by a depicted individual to the creation of an intimate image, or previous
12 confidential disclosure of the image by the depicted individual does not establish by itself that
13 the depicted individual had no reasonable expectation of privacy.

14 (c) An individual who does not consent to the sexual act or the viewing of the body parts
15 depicted in the intimate image, such as in a sexual assault, retains a reasonable expectation of
16 privacy even if the individual is in a public place.

17 ***Legislative Note:*** *States should consult appropriate state law for specific definitions of*
18 *“voyeurism.”*

19
20 **Comment**

21 It is the intent of the Committee that the question whether a cause of action under this act
22 survives the death of the depicted individual should be left to the states.

23
24 **SECTION 4. EXCEPTIONS TO LIABILITY.**

25 (a) A person is not liable under Section 3 if the disclosure of or threat to disclose the
26 intimate image is:

(1) made in good faith in the ordinary course of:

(A) law enforcement;

(B) legal proceedings; or

(D) medical education or treatment; or

(2) made in good faith in the reasonable reporting or investigation of

(A) unlawful conduct; or

(B) unsolicited and unwelcome conduct; or

(3) a matter of public concern or public interest; or

(4) reasonably intended to assist the depicted individual.

(b) A parent, guardian, legal custodian of a minor, or primary caretaker is not liable under Section 3 if the disclosure of an intimate image of the minor is

(1) not prohibited by law, and

(2) not made for the purpose of sexual arousal, gratification, humiliation, degradation, or monetary or commercial gain.

(c) That a depicted individual is a public figure by itself does not establish that the disclosure of an intimate image is a matter of public concern or public interest.

Comment

A disclosure under the act can only give rise to liability if, first, the act of disclosure is intentional, as opposed to accidental, and the individual is identifiable either from the image itself or an identifying characteristic displayed in connection with the image. A person is not liable under the act unless he knows or recklessly disregards the fact that the individual has not consented to the disclosure, that the image was created or obtained under circumstances in which the depicted individual had a reasonable expectation of privacy.

The following examples can help illustrate the scope and applicability of this act.

Example 1. A gives B an identifiable, sexually explicit image of herself during their intimate relationship with the understanding that it would remain private. After A and B end their relationship, B uploads the image of A to a “revenge porn” website without A’s consent.

1 Because B knows that A did not consent to the disclosure, knows that A has a reasonable
2 expectation of privacy with regard to the image, and knows that A is identifiable in the image, B
3 is likely liable under the act.

4
5 Example 2. B finds an identifiable, sexually explicit image of A on a mainstream adult
6 pornographic website. B forwards the link to the website to C without A's consent. B is likely
7 not liable under the act, as it will be difficult for A to show that B knew or recklessly disregarded
8 the fact that A had a reasonable expectation of privacy, given the fact that A's image was
9 displayed on a mainstream pornographic website.

10
11 Example 3. B finds an identifiable, sexually explicit image of A on a "revenge porn"
12 website that clearly indicates that the material displayed on the site is private and disclosed
13 without consent by the individuals depicted. B forwards the link to the website to C without A's
14 consent. B is likely liable under the act, as it would appear that B either knew or recklessly
15 disregarded the fact that A had a reasonable expectation of privacy based on the clear advertising
16 of the "revenge porn" website.

17
18 Example 4. B finds an identifiable, sexually explicit image of A on a "revenge porn"
19 website. B forwards the link to A to alert her that her image appears on the site so that A can take
20 steps to remove it. B is not liable because B's actions are reasonably intended to assist A.

21
22 The burden of proving an exemption under subsection (c) should be on the defendant.

23
24 The act's "public concern" exception allows for the possibility that a disclosure of a
25 private, sexually explicit image might be a matter of public concern. In *Dun & Bradstreet, Inc. v.*
26 *Greenmoss Builders, Inc.*, the Supreme Court distinguished between speech on "matters of
27 public concern" and "matters of purely private concern," noting that it is the former that is "at the
28 heart of the First Amendment's protection" while "speech on matters of purely private concern is
29 of less First Amendment concern." 472 U.S. 749, 758–59 (1985) (quoting *First Nat'l Bank of*
30 *Bos. v. Bellotti*, 435 U.S. 765, 776 (1978)). In *City of San Diego v. Roe*, the Court stated that
31 the distribution of homemade sexually explicit material "does not qualify as a matter of public
32 concern under any view." 543 U.S. 77, 84 (2004) (per curiam). In *Snyder v. Phelps*, the
33 Supreme Court reaffirmed this longstanding principle that while speech on public matters
34 deserves rigorous protection in order to prevent the stifling of debate essential to democratic self-
35 governance, speech about purely private matters receives less vigorous protection because the
36 threat of liability would not risk chilling the "meaningful dialogue of ideas." The Court pointed
37 to *San Diego v. Roe* to make the point that homemade sexual imagery exemplified the sort of
38 "purely private matters" that deserve less heightened protection under the First Amendment, and
39 that the prohibition of unauthorized disclosure of such material poses "no threat to the free and
40 robust debate of public issues; there is no potential interference with a meaningful dialogue of
41 ideas." *Snyder*, 562 U.S. at 452 (quotation omitted).

42
43 The "publication of private facts" tort also provides some helpful elaboration of the
44 concept. The tort is widely accepted by the majority of courts as compliant with the First
45 Amendment, although the Supreme Court has yet to rule explicitly on the constitutionality of this
46 tort with regard to matters not of public record. According to the Restatement (Second) of Torts

§ 652D (1977), the offense involves giving “publicity to a matter concerning the private life of another is subject to liability...., if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.” An explanatory comment further notes that “[i]n determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern. The limitations, in other words, are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure.”

SECTION 5. PLAINTIFFS’ PRIVACY. In an action under this [act]:

(1) a plaintiff may proceed using a pseudonym in place of the true name of the plaintiff in accordance with [applicable state law or procedural rule];

[(2) the court may exclude or redact from all pleadings and documents filed in the action other identifying characteristics of the plaintiff [as provided by statute or court rule]; and

(3) a plaintiff who proceeds using a pseudonym, or excluding or redacting identifying characteristics as provided in this section shall file with the court and serve upon the defendant a confidential information form that includes the excluded or redacted plaintiff’s name and other identifying characteristics.

(4) the court may make further orders as necessary to protect the identity and privacy of a plaintiff.]

Legislative Note: *If a state’s rules of civil procedure does not provide for the possibility of plaintiffs to use pseudonyms, the bracketed language above can serve as a guideline.*

Comment

The fear of further notoriety or abuse deters many victims from pursuing legal remedies. This fear can be mitigated by clear procedures allowing victims to use pseudonyms.

1 **SECTION 6. REMEDIES.**

2 (a) In an action under this [act], a court may award a prevailing plaintiff:

3 (1) (A)(i) economic and noneconomic damages [, subject to the limitation
4 specified in [insert citation to statute that limits recoverable noneconomic damages]] and (ii)
5 punitive damages [if economic or noneconomic damages are awarded under this paragraph,]
6 subject to the limitation specified in [insert citation of statute that limits recoverable punitive
7 damages]; or

8 (B) if no damages are awarded under paragraph (A), [statutory
9 damages][nominal damages] in the amount of \$10,000 against each defendant found liable;

10 (2) an amount equal to the profit made by the defendant from the disclosure of the
11 intimate image;

12 (3) reasonable attorney’s fees and costs; and

13 (4) additional relief, including injunctive relief.

14 (b) This [act] does not affect a right or remedy available under law of this state other
15 than this [act].

16 **Comment**

17 Many victims are deterred from initiating legal action both by the psychological toll and
18 the financial cost of litigation. According to attorneys who deal with these cases, a typical
19 “revenge porn” case can cost between \$10,000 and \$60,000 and involve an average of 500 hours
20 of labor on the part of the victim. Many victims will already be in financial straits due to loss of
21 employment, therapy, relocation expenses, or other typical harms that flow from the exposure of
22 private intimate imagery. As many defendants will be judgment proof, there are few incentives
23 for victims to risk financial ruin along with the potential for increased exposure of their private
24 material. Providing reasonable attorney’s fees and costs to prevailing plaintiffs will encourage
25 some victims who could not otherwise sustain the financial burden of litigation to bring claims.
26 The possibility of statutory damages provides an opportunity for victims to recover for harms
27 they have suffered without being forced to testify in intimate detail about those harms.
28

SECTION 7. STATUTE OF LIMITATIONS. An action under this [act] may be brought not later than [] years after the cause of action accrues [as provided in section [cite statute providing statute of limitations for similar civil cause of action]].

Legislative Note: Insert a reference to the state's existing statute of limitations for a negligence action; computer tort, or other claim to incorporate corresponding discovery and tolling provisions.

Comment

The nature of the Internet can complicate the determination of the appropriate length of the statute of limitations for the unauthorized disclosure of intimate images. For example, a plaintiff might reasonably decide, upon discovering that such a disclosure was made, not to file an action if the disclosure does not appear at the time to have a wide audience. Years later, however, if the image goes “viral” or appears to be about to do so (e.g., because the plaintiff is about to embark on a political campaign or has achieved recent celebrity status), she may wish to initiate an action.

SECTION 8. LIMITATIONS.

(a) This [act] may not be construed to alter or conflict with 47 U.S.C. Section 230.

(b) This [act] may not be construed to alter or conflict with the law of this state on sovereign immunity.

Comment

This section responds to the specific language of the Communications Decency Act and is intended to avoid preemption of state law under that federal legislation. According to CDA Section 230(c)(1), “No provider or user of an [interactive computer service](#) shall be treated as the publisher or speaker of any information provided by another information content provider.” CDA 230(c)(2) prohibits holding providers or users of interactive computer services civilly liable on the basis of good faith restrictions in accessing objectionable material or for making information about the technical means of restricting access to such material. CDA 230(e)(3) provides that “[n]o cause of action may be brought and no liability may be imposed under any [State](#) or local law that is inconsistent with this section.”

SECTION 9. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

1 **[SECTION 10. SEVERABILITY.** If any provision of this [act] or its application to any
2 person or circumstance is held invalid, the invalidity does not affect other provisions or
3 applications of this [act] which can be given effect without the invalid provision or application,
4 and to this end the provisions of this [act] are severable.]

5 ***Legislative Note:** Include this section only if this state lacks a general severability statute or a*
6 *decision by the highest court of this state stating a general rule of severability.*

7
8 **SECTION 11. REPEALS; CONFORMING AMENDMENTS.**

9 (a)

10 (b)

11 (c)

12 **SECTION 12. EFFECTIVE DATE.** This [act] takes effect