CIVIL REMEDIES FOR UNAUTHORIZED DISCLOSURE OF INTIMATE IMAGES ACT

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-TWENTY-SIXTH YEAR
SAN DIEGO, CALIFORNIA
JULY 14 - JULY 20, 2017

CIVIL REMEDIES FOR UNAUTHORIZED DISCLOSURE OF INTIMATE IMAGES ACT

Copyright © 2017
By
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

June 5, 2017
DRAFTING COMMITTEE ON CIVIL REMEDIES FOR UNAUTHORIZED DISCLOSURE OF INTIMATE IMAGES ACT

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Act consists of the following individuals:

VINCENT P. CARDI, West Virginia University College of Law, P.O. Box 6130, 101 Law Center Dr., Morgantown, WV 26506, Chair
LOUISE M. NADEAU, Connecticut General Assembly, Legislative Office Bldg., Room 5500 Hartford, CT 06106-1591, Vice Chair
MARTIN D. CARR, 2523 J St., Suite 201, Sacramento, CA 95816
JENNIFER S. CLARK, State Capitol, 600 East Blvd., Bismarck, ND 58505-0360
AMY M. ELLIOTT, Office of Attorney General, 15th Floor, Strawberry Square, Harrisburg, PA 17120
LORIE FOWLKE, 2696 N. University Ave., #220, Provo, UT 84604
PETER F. LANGROCK, P.O. Drawer 351, Middlebury, VT 05753-0351
CLAIRE LEVY, 1395 Kalmia Ave., Boulder, CO 80304
FRANK E. PEREZ, 300 Mexico Blvd., P.O. Box 3490, Brownsville, TX 78520
MICHELE L. TIMMONS, 5035 Lyndale Ave. S., Minneapolis, MN 55419
MARY ANNE FRANKS, University of Miami School of Law, 1311 Miller Rd, Office G385, Coral Gables, FL 33146-2300, Reporter

EX OFFICIO
RICHARD T. CASSIDY, 100 Main St., P.O. Box 1124, Burlington, VT 05401, President
NORA WINKELMAN, Pennsylvania House of Representatives, Main Capitol Bldg., Room 620, Harrisburg, PA 17120, Division Chair

AMERICAN BAR ASSOCIATION ADVISORS
JEFFREY M. ALLEN, Graves & Allen, 436 14th St., Suite 1400, Oakland, CA 94612-2716, ABA Advisor

EXECUTIVE DIRECTOR
LIZA KARSAI, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, Executive Director

Copies of this act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, IL 60602
312/450-6600
www.uniformlaws.org
CIVIL REMEDIES FOR UNAUTHORIZED DISCLOSURE
OF INTIMATE IMAGES ACT

TABLE OF CONTENTS

PREFATORY NOTE .................................................................................................................. 1
SECTION 1. SHORT TITLE. ................................................................................................. 3
SECTION 2. DEFINITIONS ................................................................................................ 3
SECTION 3. PROTECTION OF PRIVATE VISUAL MATERIAL .............................................. 3
SECTION 4. CIVIL ACTION ............................................................................................... 4
SECTION 5. STATUTE OF LIMITATIONS ............................................................................ 6
SECTION 6. LIMITATIONS ................................................................................................. 6
[SECTION 7. SEVERABILITY............................................................................................... 6
SECTION 8. UNIFORMITY OF APPLICATION AND CONSTRUCTION .............................. 6
SECTION 9. REPEALS; CONFORMING AMENDMENTS .................................................. 6
The Unauthorized Disclosure of Intimate Images Act addresses a growing form of privacy violation that causes immediate and in many cases irreversible harm. While many states have recently passed criminal legislation addressing the problem, such legislation does not generally compensate victims for the harm they have suffered. What is more, the various state criminal laws offer conflicting and often unjustifiably narrow definitions of the prohibited conduct. This Act provides a clear and comprehensive definition of the abuse that protects the right to intimate privacy while respecting First Amendment freedom of expression.

A 2016 survey from the Data & Society Research Institute and the Center for Innovative Public Health found that 4% of U.S. Internet users – 1 in 25 Americans, or roughly 10.4 million Americans – “have been threatened with or experienced the posting of explicit images without their consent.” 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.” 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. Some victims have seen their private intimate images end up on as many as 11,000 websites, in addition to being widely distributed through social media, blogs, emails, and texts.

A single intimate image can quickly 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 often fired from their jobs, expelled from their schools, and forced to move from their homes. They are routinely threatened with sexual assault, stalked, and harassed. Victims often develop post-traumatic stress disorders, depression, anxiety, agoraphobia, and difficulty maintaining intimate relationships. Some victims have committed suicide.

The key features of this Act are (1. Prohibiting the disclosure of a photograph or visual recording depicting a person’s intimate image or that person engaged in sexual conduct if the

---

The person depicted is identifiable, had an expectation that the image would remain private, and has not consented to disclosure of the image; (2. Prescribing remedies for the depicted person, including actual damages, reasonable attorney’s fees, punitive damages, and disgorgement of profit made by the wrongful act; and (3. Allowing depicted persons to protect their identity in court proceedings.

The Act exempts disclosures made for lawful and common practices such as law enforcement and medical treatment and notes that the liability of interactive computer service providers for content provided by another party is restricted by federal law.

The other provisions of the Act define key terms such as “consent,” “disclose,” “identifying characteristics,” “intimate image,” “online identifiers,” as well as addressing severability and the statute of limitations.

The primary drafting issues revolve around the scope of liability created by the Act. In particular, there are questions about whether the Act should apply only to primarily disclosers or also to secondary disclosers; to only intentional disclosures or also reckless or negligent disclosures; only to disclosers with actual knowledge of either lack of consent to disclosure or of the unlawful means by which the image was made available or also to those who are reckless or negligent with regard to consent or the unlawful means by which the image was made available; what disclosures should be exempt; and the extent to which the Act should apply to interactive computer service providers with regard to content provided by a third party.

Other issues include whether consent to disclosure can be implied, or whether it must be explicit and affirmative; whether allowing plaintiffs to proceed pseudonymously presents First Amendment, administrative, or other difficulties; whether statutory minimum damages should be included; and how attorney’s fees should be awarded.

Finally, given that the Act regulates what some consider to be expressive conduct, First Amendment concerns of overbreadth, content-based distinctions, and vagueness must be taken into consideration throughout.
CIVIL REMEDIES FOR UNAUTHORIZED DISCLOSURE OF INTIMATE IMAGES ACT

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

SECTION 2. DEFINITIONS. In this [act]:

(1) “Consent” means affirmative, conscious, and voluntary authorization.

(2) “Disclose” includes transferring, publishing, and distributing.

(3) “Identifying characteristics” includes any information that could be used to help identify the depicted individual. The term includes an online identifier.

(4) “Intimate image” means a photograph, film, videotape, or other visual recording, that depicts:

   (A) the uncovered genitals, pubic area, anus, or female post-pubescent nipple of an individual; or

   (B) an individual engaging in sexual conduct. The term includes masturbation; genital, anal, or oral sex; sexual penetration with objects; and the transfer or transmission of semen on any part of the depicted individual’s body.

(5) “Online identifier” means an access name, access code, account name, alias, avatar, credential, gamer tag, display name, handle, login name, member name, online identity, pseudonym, screen name, user account, user identification, username, or other personally identifiable information or signifier that would tie a depicted individual to an electronic service or Internet application, website, or platform account.

SECTION 3. PROTECTION OF PRIVATE VISUAL MATERIAL.

(a) Except as otherwise provided in subsection (b), a person may not:

   (1) disclose or threaten to disclose an intimate image of an individual without the
consent of the individual if the individual can be identified from the intimate image itself or from
the image and identifying characteristics displayed in connection with the image; and

(A) the person knows or should have known that the depicted individual
did not consent to the disclosure; or

(B) the person knows or should have known that access to the intimate
image was made possible by theft, bribery, extortion, fraud, false pretenses, or exceeding
authorized access to property or to an account, message, file, device, or resource.

(2) Silence or lack of protest or resistance by itself is not consent.

(b) A person disclosing material under subsection (a) is not liable if:

(1) the image was created under circumstances in which the depicted individual
had no reasonable expectation that the material would remain private; or

(2) the disclosure of the image is made:

(A) in the public interest; or

(B) for the lawful and common practices of:

(i) law enforcement;

(ii) reporting of criminal activity;

(iii) legal proceedings; or

(iv) medical treatment.

(c) The fact that the depicted individual is a public figure does not, by itself, establish that
the disclosure was made in the public interest under subsection (b).

SECTION 4. CIVIL ACTION.

(a) An individual aggrieved by a violation of this [act] may bring an action for relief.

(b) In an action brought under this section, a court may award the plaintiff:
(1) actual damages [or statutory damages in the amount of $__, whichever is greater];

(2) punitive damages;

(3) an amount equal to any profit made from the disclosure of the image by a person who wrongfully disclosed the image;

(4) reasonable attorney's fees and costs; and

(5) additional relief the court deems necessary and proper, including injunctive relief.

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

(d) The plaintiff in a civil action under subsection (a) may proceed using a pseudonym in place of the true name of the plaintiff and may exclude or redact from all pleadings and documents filed in the action other identifying characteristics of the plaintiff. A plaintiff who proceeds using a pseudonym and 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 plaintiff's name and other identifying characteristics excluded or redacted. The court shall seal the plaintiff's name and excluded or redacted characteristics. In so doing, the following rules apply:

(1) In cases where the plaintiff is permitted to proceed using a pseudonym, the parties shall use the pseudonym in all pleadings, papers, at any hearings and in open court, and in other statements and documents that are matters of public record.

(2) The defendant and the defendant's agent, servant, employee, attorney, and any person in active concert or participation with the defendant, may not publicly reveal the identity
of the plaintiff in connection with the action, including to a member of the media.

(3) All court decisions, orders, petitions, and other documents, including motions and papers filed by the parties, must be worded so as to protect the name or other identifying characteristics of the plaintiff from public disclosure.

(4) The responsibility for excluding or redacting the name or identifying characteristics of a plaintiff from all documents filed with the court is solely with the parties and their attorneys. The court is not required to review pleadings or other papers for compliance with this subsection.

(5) The court may enter further orders as necessary to protect the privacy of a plaintiff.

SECTION 5. STATUTE OF LIMITATIONS. An action under this [act] may be brought not later than four years after the cause of action accrues.

SECTION 6. LIMITATIONS. This [act] may not be construed to alter or negate any right, obligation, or immunity of an interactive computer service provider under 47 U.S.C. 230.

SECTION 7. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] that can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.

SECTION 8. 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.

SECTION 9. REPEALS; CONFORMING AMENDMENTS.
1 (b) . . . .
2 (c) . . . .