



March 29, 2018

Drafting Committee
Unauthorized Disclosure of Intimate Images
Uniform Law Commission

Dear Members of Drafting Committee:

The American Association for Justice (AAJ), formerly known as the Association of Trial Lawyers of America (ATLA), hereby submits comments to the Uniform Law Commission's Drafting Committee on Civil Remedies for Unauthorized Disclosure of Intimate Images Act. AAJ, with members in United States, Canada and abroad, works to preserve the constitutional right to trial by jury and to make sure people harmed by the negligence or misconduct of others have a fair chance to receive justice through the legal system. AAJ members are among the lawyers who represent individuals whose intimate images have been wrongfully disclosed.

AAJ lauds the Commission for addressing this important issue. From the perspective of representing those who have been adversely affected by an unlawful disclosure of intimate images, we believe there are a few changes that should be made to this legislation to fulfil the drafters' intent to provide a meaningful remedy to those who have suffered this wrong. We suggest the following modifications.

First, Section 3(a) [lines 37-38, p. 4] gives a cause of action to a depicted individual that has "been harmed." It is likely that this language will be interpreted to require proof of actual monetary harm or physical harm, which we believe is problematic and antithetical to the goal of the legislation. By adding this language, the remedy provided by this statute becomes illusory in many circumstances. Our original understating was that this statute presumed harm by the unlawful release of the intimate images. This belief was supported by Section 6(a)(1) [lines 3-9, p. 9] where the depicted individual would be entitled to actual damages (e.g., economic or noneconomic damages) or \$10,000 in statutory damages. From a policy perspective, this element raises the bar to recovery and implicitly sanctions the release of such intimate images—so long as it is done in a way that would not cause physical or monetary harm. Because the definition of a "depicted individual" is limited to an individual who is shown in an intimate image, we suggest removing the "who has been harmed by the disclosure or threatened disclosure of an intimate image of the individual" language from Section 3(a) of the draft.

Second, Section 3(c) [lines 14-16, p. 5] rightly makes it clear that an individual retains a reasonable expectation of privacy if they do not consent to the sexual act or viewing of the body parts depicted. However, this section contains an unnecessary qualifier of "even if the individual is in a public place," seemingly limiting this clarification only to unconsented to sexual acts or viewings done in public. This may create unintended loopholes where intimate images created from unconsented to acts are not protected. We recommend that this qualifier be removed from

the definition or modified to read “regardless of whether or not the individual is in a public place” to clarify that this is not intended as a limitation.

Third, Section 6(a)(1)(B) [lines 8-9, p. 9] makes statutory damages available only if there are “no” damages awarded under Section 6(a)(1)(A). Previously, these damages were available if the non-economic/economic damages were less than the statutory damage level. We believe creating a “minimum” statutory damage provision would make more sense than an either A or B framework. We suggest Section 6(a)(1)(B) be changed to indicate it applies only when damages awarded under Section 6(a)(1)(A) are less than \$10,000. This will further the intended goal of incentivizing those adversely affected to come forward with their claims.

Fourth, the statute of limitations section should explicitly adopt a broad discovery rule. Under the law of most states, a cause of action accrues at the time of the wrongful act. Because the Act makes the act of unauthorized disclosure the wrongful act, it could occur many years before it is discovered by the victim. Many states require that a discovery rule that informs the statute of limitations be explicit. It ought to be here. We would suggest a discovery rule like that used in the state of Washington where “the statute of limitation does not begin to run until the plaintiff has discovered or should reasonably have discovered all the essential elements of the action.” *Sahlie v. Johns-Manville Sales Corp.*, 99 Wash.2d 550, 552, 663 P.2d 473, 474 (1983).

Finally, we strongly oppose adding Section 230 specific language to this bill. Section 230 immunity has been the subject of copious scholarship, litigation, and legislation since its inception. This committee was formed to draft a law to provide a cause of action and a remedy to the victims of an unauthorized disclosure of intimate images, not weigh into the morass of Section 230 immunity. Further, Congress has recently passed legislation clarifying that Section 230 cannot be used to protect online traffickers in advertising the sale of unlawful sex acts with sex trafficking victims. Language specifically addressing Section 230 may, or may not, update as changes to Section 230 are implemented at the federal level. Specific references to federal law may require states to update their laws as Section 230 changes. As some comments have noted—Section 230 has been interpreted to preempt state law already without any need to reference it. Therefore, a specific reference to it is entirely unnecessary. We suggest removing the language at Section 8(a).

AAJ urges the committee to adopt these changes in the next iteration of the draft. If you have any questions or comments, please contact Daniel Hinkle, Senior State Affairs Counsel at Daniel.Hinkle@justice.org.

Sincerely,

Kathleen L. Nastri
President
American Association for Justice