

D R A F T

FOR APPROVAL

UNIFORM CIVIL REMEDIES FOR UNAUTHORIZED DISCLOSURE OF INTIMATE IMAGES ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM CIVIL REMEDIES FOR UNAUTHORIZED DISCLOSURE OF INTIMATE IMAGES ACT

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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June 14, 2018

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OF INTIMATE IMAGES ACT**

TABLE OF CONTENTS

PREFATORY NOTE.....	1
SECTION 1. SHORT TITLE.	3
SECTION 2. DEFINITIONS.....	3
SECTION 3. CIVIL ACTION.....	5
SECTION 4. EXCEPTIONS TO LIABILITY.....	7
SECTION 5. PLAINTIFF'S PRIVACY.	9
SECTION 6. REMEDIES.....	10
SECTION 7. STATUTE OF LIMITATIONS.....	11
SECTION 8. CONSTRUCTION.....	12
SECTION 9. UNIFORMITY OF APPLICATION AND CONSTRUCTION.....	12
[SECTION 10. SEVERABILITY.]	12
SECTION 11. REPEALS; CONFORMING AMENDMENTS.	12
SECTION 12. EFFECTIVE DATE.....	12

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

3
4 **PREFATORY NOTE**
5

6 The Civil Remedies for Unauthorized Disclosure of Intimate Images Act addresses an
7 increasingly common form of abuse that causes immediate and in many cases irreversible harm.
8 This form of abuse is often colloquially but misleadingly referred to as “revenge porn.”
9

10 A single intimate image can quickly dominate the first several pages of search engine
11 results for the victim’s name, as well as being emailed or otherwise exhibited to the victim’s
12 family, employers, co-workers, and peers. Victims routinely experience emotional distress as
13 well as depression, anxiety, agoraphobia, difficulty maintaining intimate relationships, and post-
14 traumatic stress disorder. Some victims are fired from their jobs, expelled from their schools, or
15 forced to move from their homes. Some victims have been threatened with sexual assault,
16 stalked, or harassed. Some victims have committed suicide.¹
17

18 A common misperception about “revenge porn” is that the intimate images are originally
19 obtained or created with consent. Many such images, however, are obtained without consent,
20 including through recording by hidden cameras or surreptitious photography, computer hacking,
21 and theft. In some cases, the nudity or sexual activity that is depicted in the intimate image is
22 itself nonconsensual, as in the case of photographs and videos of sexual assaults.
23

24 Another common misperception, reinforced by the term “revenge porn,” is that the
25 perpetrators of this abuse necessarily intend to harm their victims. Some perpetrators do engage
26 in this conduct to abuse, stalk, or otherwise harass particular victims, including those who want
27 to control, punish, or extort their former intimate partners. Other perpetrators seek to destroy the
28 reputation of professional or personal rivals; discourage domestic violence victims from
29 reporting abuse; or further humiliate or intimidate victims of sexual assault.
30

31 Many other perpetrators, however, actively hide their actions from their victims, and
32 some do not know their victims at all. A perpetrator’s indifference to harm, however, does not
33 mean that no harm is caused. There are many instances of this abuse that do not involve a
34 specific intent to harm but nonetheless inflict great harm, from profit-seeking “revenge porn”
35 websites to surreptitious exchanges of sexually explicit photos of unsuspecting women and men
36 among friends, coworkers and other groups. The Internet has greatly facilitated the demand for
37 and access to this material, as dedicated “revenge porn” sites and other forums openly solicit
38 private intimate images and expose them to millions of viewers. Some victims’ private intimate
39 images have been published on over 10,000 websites,² in addition to being widely distributed
40 through social media, blogs, emails, and texts.

¹ See Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345 (2014).

² See Mary Anne Franks, “Revenge Porn” Reform: A View from the Front Lines, 69 Fla. L. Rev. 1251, 1260 (2017)

1 Considerable progress has been made in recent years to address this issue. Beginning in
2 2013, many state legislatures enacted criminal prohibitions of this abuse. As of January 2018,
3 thirty-eight states have passed such laws. While criminal legislation can serve as an important
4 deterrent, these laws typically have no mechanism to compensate victims for the harm they have
5 suffered. Only a dozen or so states have enacted specific civil legislation to address the problem.
6

7 The criminal and civil laws passed by various states differ considerably in their
8 definitions, scope, effectiveness, remedies, and constitutional implications. This lack of
9 uniformity, especially in light of the “borderless” nature of the abuse, creates confusion and
10 inefficiency and leaves victims without a clear path to justice.
11

12 This Act seeks to provide a comprehensive, coherent, and constitutionally sound
13 definition of this harmful conduct as well as a clear and fair remedy for the harm it causes.
14

15 The key features of this Act are (1. Creating a cause of action for the unauthorized
16 disclosure of private, intimate images; (2. Outlining procedures enabling victims to protect their
17 identity in court proceedings, and (3. Providing various remedies for victims, including actual
18 damages, statutory damages, attorney’s fees, punitive damages, and disgorgement of profits.
19

20 The Act is narrowly drafted to avoid infringing upon protected First Amendment
21 expression. Like many existing privacy laws, the Act applies only to sensitive content created or
22 obtained under circumstances in which the individual has a reasonable expectation of privacy.
23 Also similar to existing privacy laws, the Act includes limited exceptions for certain disclosures,
24 including those made in the course of legal proceedings, medical treatment, or investigations of
25 misconduct. It also includes an exception for disclosures relating to matters of public concern or
26 public interest. The Act further notes the limitations of liability for providers and users of
27 interactive computer services provided by federal law.
28

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

3 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Civil Remedies
4 for 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 with legal capacity to give authorization.

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

10 (3) “Disclosure” means transfer, publish, or distribute to another person. “Disclose” has a
11 corresponding meaning.

12 (4) “Identifiable” means recognizable:

13 (A) from an image itself; or
14 (B) from the image and identifying characteristic displayed in connection with the
15 image.

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

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

19 (7) “Intimate image” means a photograph, film, video recording, or other medium that
20 shows:

21 (A) the uncovered genitals, pubic area, anus, or female post-pubescent nipple of
22 the depicted individual; or
23 (B) the depicted individual engaging in sexual conduct.

24 (8) “Person” means an individual, estate, business or nonprofit entity, public corporation,

1 government or governmental subdivision, agency, or instrumentality, or other legal entity.

2 (9) “Sexual conduct” means:

3 (A) masturbation;

4 (B) genital, anal, or oral sex;

5 (C) sexual penetration with an object;

6 (D) bestiality; or

7 (E) the transfer of semen onto the depicted individual.

8 **Comment**

9 The definition of consent as “affirmative, conscious, and voluntary authorization” is
10 intended to make clear that consent in this context cannot be tacit or coerced. While consent need
11 not be in writing, it cannot be inferred solely from silence or lack of protest, nor can it be
12 obtained through coercion.

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

20
21 The definition of harm is intended to recognize that the unauthorized disclosure of
22 private, intimate images causes a broad range of harms. This harm can be physical, as when the
23 disclosure of the intimate images leads to sexual and other physical assaults. It can also be
24 economic, in the form of job loss, relocation costs, legal fees, and the costs of psychological
25 counseling or therapy. The disclosure commonly causes emotional and psychological harm,
26 including agoraphobia, anxiety, depression, difficulty maintaining intimate relationships, and
27 post-traumatic stress stemming either directly from the disclosure or from the stalking and
28 harassment that follows in its wake. In some cases, individuals whose intimate images have been
29 disclosed without consent have committed suicide. As one federal court stated in describing the
30 harm inflicted by a stolen sex tape, “[t]he injury inflicted is therefore to the plaintiffs’ ‘human
31 dignity and peace of mind,’” noting in addition that in the case of disclosures made accessible
32 online, “[t]he nature of the Internet aggravates the irreparable nature of the injury.” *Michaels v.
33 Internet Entm’t Grp., Inc.*, 5 F. Supp. 2d 823, 842 (C.D. Cal. 1998).

34
35 Identifying characteristics can include the depicted individual’s face, birthmarks, tattoos,
36 or other physical identifiers.

1 The specification of “individual” is used to distinguish from the broader definition of
2 “person,” which can include non-human entities.

3

4 The definition of “intimate image” is limited to images of individuals that are actual
5 visual representations. It does not include paintings, drawings, or other figurative representations
6 of an individual.

7

8 Images that are not and would not be mistaken for actual representations of an individual
9 do not impose the severe privacy harm that is the focus of this act; the Supreme Court has held
10 that such representations enjoy First Amendment protection in some circumstances. See *Hustler*
11 *v. Falwell* (485 U.S. 46 (1988)).

12

13 The unauthorized disclosure of intimate images that are not actual representations, but in
14 some ways can be virtually indistinguishable from actual representations of an individual, e.g.
15 those created through sophisticated digital manipulation (sometimes referred to as
16 “photoshopped” or “deepfake” imagery) does cause harm similar to the unauthorized disclosure
17 of actual intimate images and can in some cases be even more harmful. However, this conduct is
18 doctrinally and conceptually distinct from an invasion of privacy, and is more appropriately
19 addressed by causes of action such as defamation, false light, or misappropriation of image.

20

21 A disclosure under the act includes providing a URL to a website that features the
22 intimate image.

23

24 **SECTION 3. CIVIL ACTION.**

25

26 (a) In this section, “harm” includes physical harm, economic harm, and emotional
distress whether or not accompanied by physical or economic harm.

27

28 (b) Except as otherwise provided in Section 4, a depicted individual who suffers harm by
the disclosure or threatened disclosure of an intimate image of the individual has a cause of
29 action against a person that, without the individual’s consent, intentionally disclosed or
30 threatened to disclose the image if the person knew or acted with reckless disregard for whether:

31 (1) the individual did not consent to the disclosure;

32 (2) the intimate image:

33

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

35 (B) was made accessible through theft, bribery, extortion, fraud, false

1 pretenses, voyeurism, or exceeding authorized access to property or to an account, message, file,
2 device, or resource; and

3 (3) the depicted individual is identifiable.

4 (c) The following conduct by a depicted individual does not establish by itself that the
5 individual consented to the disclosure of the intimate image that is the subject of the action or
6 that the individual lacked a reasonable expectation of privacy:

7 (1) consent by the individual to creation of the image; or
8 (2) previous confidential disclosure of the image.

9 (d) A depicted individual who does not consent to sexual conduct or the showing of the
10 part of the body depicted in the intimate image of the individual retains a reasonable expectation
11 of privacy even if the image was created when the individual was in a public place.

12 ***Legislative Note:*** *The state should insert appropriate state law for the terms in subsection
13 (b)(2)(B).*

14

15 Comment

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

18 The basic elements of this cause of action are (1. intentional disclosure or threat to
19 disclose (2. an intimate image (3. of an identifiable individual (4. without the consent of the
20 depicted individual. Additionally, the Act limits liability to those who (5. know or show reckless
21 disregard for whether the depicted individual had a reasonable expectation of privacy or know or
22 show reckless disregard for whether the intimate image was made accessible through unlawful
23 means such as theft, bribery, or similarly unlawful means.

25 “Reckless disregard” should be understood as “recklessly” is defined in the Restatement
26 (Third) of Torts, i.e.:

27 “A person acts recklessly in engaging in conduct if:

28 (a) the person knows of the risk of harm created by the conduct or knows facts that make
29 the risk obvious to another in the person's situation, and

30 (b) the precaution that would eliminate or reduce the risk involves burdens that are so

1 slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution
2 a demonstration of the person's indifference to the risk." Restatement (Third) of Torts: Phys. &
3 Emot. Harm § 2 (2010).

4 **SECTION 4. EXCEPTIONS TO LIABILITY.**

5 (a) In this section:

6 (1) "Consistent caretaker" means an individual who, without expectation of
7 compensation:

8 (A) lived with a child for at least 12 months, unless the court finds good
9 cause to accept a shorter period;

10 (B) regularly exercised care and supervision of the child;

11 (C) made decisions regarding the child solely or in cooperation with a
12 parent or other custodian or as a result of a complete failure or inability of any legal parent to
13 perform parenting functions; and

14 (D) established a bonded and dependent relationship with the child with
15 the explicit or tacit support of a parent of the child, or without the consent if no parent has been
16 able or willing to perform parenting.

17 (2) "Parent" means an individual of any age recognized as a parent under law of
18 this state other than this [act].

19 (b) A person is not liable under Section 3 if the disclosure of or threat to disclose the
20 intimate image is:

21 (1) made in good faith in:

22 (A) law enforcement;

23 (B) a legal proceeding; or

24 (C) medical education or treatment;

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

(A) unlawful conduct; or

(B) unsolicited and unwelcome conduct;

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

(4) reasonably intended to assist the depicted individual.

(c) A child's parent, guardian, legal custodian, or consistent caretaker is not liable under

Section 3 if a disclosure of an intimate image of the child is:

(1) not prohibited by law; and

(2) not made for the purpose of sexual arousal, gratification, humiliation,

10 degradation, or monetary or commercial gain.

(d) The disclosure of an intimate image is not a matter of public concern or public interest

12 solely because the depicted individual is a public figure.

Comment

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

1 The “publication of private facts” tort also provides some helpful elaboration of the
2 concept of “public concern.” The tort is widely accepted by the majority of courts as compliant
3 with the First Amendment, although the Supreme Court has yet to rule explicitly on the
4 constitutionality of this tort with regard to matters not of public record. According to the
5 Restatement (Second) of Torts § 652D (1977), giving “publicity to a matter concerning the
6 private life of another is subject to liability..., if the matter publicized is of a kind that (a) would
7 be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.” An
8 explanatory comment further notes that “[i]n determining what is a matter of legitimate public
9 interest, account must be taken of the customs and conventions of the community; and in the last
10 analysis what is proper becomes a matter of the community mores. The line is to be drawn when
11 the publicity ceases to be the giving of information to which the public is entitled, and becomes a
12 morbid and sensational prying into private lives for its own sake, with which a reasonable
13 member of the public, with decent standards, would say that he had no concern. The limitations,
14 in other words, are those of common decency, having due regard to the freedom of the press and
15 its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of
16 the individual and the harm that will be done to him by the exposure.”

17 **SECTION 5. PLAINTIFF’S PRIVACY.** In an action under this [act]:

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

20 [(2) the court may exclude or redact from all pleadings and documents filed in the action
21 other identifying characteristics of the plaintiff [as provided by applicable state law or procedural
22 rule]; and

23 (3) a plaintiff to whom subsection (1) or (2) applies shall file with the court and serve on
24 the defendant a confidential information form that includes the excluded or redacted plaintiff’s
25 name and other identifying characteristics; and

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

28 ***Legislative Note:** If a state’s rules of civil procedure do not provide for the possibility of
29 plaintiffs to use pseudonyms, delete the bracketed language.*

30
31 **Comment**

32 The fear of further notoriety or abuse deters many victims from pursuing legal remedies.
33 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 prevailing plaintiff may recover:

3 (1) the greater of:

4 (A) economic and noneconomic damages proximately caused by the

5 defendant's disclosures or threatened disclosures, including damages for emotional distress

6 whether or not accompanied by other damages; or

7 (B) statutory damages not to exceed \$10,000 against each defendant found

8 liable under this [act] for all disclosures by the defendant of which the plaintiff reasonably

9 should have had knowledge when filing the action or which came to light during the pendency of

10 the action. In determining the amount of statutory damages consideration shall be given to the

11 age of the defendant at the time of the disclosure, the number of disclosures made by the

12 defendant, the breadth of distribution of the image by the defendant, and other exacerbating or

13 mitigating factors; and

14 (2) an amount equal to the gain made by the defendant from disclosure of the

15 intimate image if applicable.

16 (b) In an action under this [act], the court may also award a prevailing plaintiff:

17 (1) punitive damages;

18 (2) reasonable attorney's fees and costs; and

19 (3) additional relief, including injunctive relief.

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

21 this [act].

22 **Comment**

23 Many victims are deterred from initiating legal action both by the psychological toll and
24 the financial cost of litigation. Victims of privacy invasions, especially those involving nudity or

1 sexual activity, are often reluctant to subject themselves to further exposure through the court
2 system. Victims of sexual and other intimate abuse often find the prospect of having to recount
3 their experiences in detail traumatizing. What is more, the process of seeking legal redress often
4 forces victims to confront negative, judgmental, and malicious attitudes, resulting in what is
5 often referred to as the “secondary victimization” of sexual abuse victims.

6
7 According to attorneys experienced in these kinds of cases, a typical “revenge porn” case
8 can cost between \$10,000 and \$60,000 and involve an average of 500 hours of labor on the part
9 of the victim. Many victims will already be in financial straits due to loss of employment,
10 therapy, relocation expenses, or other typical harms that flow from the unauthorized disclosure
11 of intimate images.

12
13 Considering all of this, as well as the fact that many defendants will be judgment proof,
14 there are few incentives for victims to risk financial ruin in addition to increased psychological
15 trauma. Providing the possibility of reasonable attorney’s fees and costs to prevailing plaintiffs
16 will encourage some victims who could not otherwise sustain the financial burden of litigation to
17 bring claims to seek a civil remedy. The possibility of statutory damages provides an opportunity
18 for victims to recover for harms they have suffered without requiring them to testify in invasive
19 detail about those harms.

20
21 **SECTION 7. STATUTE OF LIMITATIONS.** An action under this [act] may be

22 brought not later than [] years from the date the unauthorized disclosure was discovered or
23 should have been discovered with the exercise of reasonable diligence.

24 **Comment**

25 The nature of Internet communication complicates the determination of the appropriate
26 length of the statute of limitations for the unauthorized disclosure of intimate images. While
27 some victims are quickly made aware of the disclosure of their images, whether by being directly
28 informed by the defendant or alerted by a third party, many victims do not discover that their
29 images have been disclosed for a long period of time. The images may be distributed on websites
30 or social media platforms that the victim is not in the habit of visiting, or sent to someone the
31 victim does not know. Thus, many years could pass before a victim discovers the unauthorized
32 disclosure.

33
34 In addition, even after discovering the disclosure, a reasonable person might not initially
35 undertake the costs and risks of litigation in the hopes that the disclosure might go largely
36 unnoticed. For example, a person might reasonably decide, upon discovering that such a
37 disclosure was made, not to file an action if the disclosure does not appear at the time to have a
38 wide audience. Years later, however, if the image goes “viral” or it appears that the image is
39 about to go “viral” (e.g., because the person is about to embark on a political campaign or has
40 achieved recent celebrity status), a reasonable person may wish to initiate an action.

1 **SECTION 8. CONSTRUCTION.**

2 (a) This [act] does not alter or conflict with the Communications Decency Act of 1996,

3 47 U.S.C. Section 230.

4 (b) This [act] does not alter or conflict with the law of this state on sovereign immunity.

5 **Comment**

6 This section emphasizes that the federal Communications Decency Act (CDA) Section
7 230 may preempt certain state law claims. According to CDA Section 230(c)(1), “No provider or
8 user of an interactive computer service shall be treated as the publisher or speaker of any
9 information provided by another information content provider.” CDA 230(c)(2) prohibits
10 holding providers or users of interactive computer services civilly liable on the basis of good
11 faith restrictions in accessing objectionable material or for making information about the
12 technical means of restricting access to such material. CDA 230(e)(3) provides that “[n]o cause
13 of action may be brought and no liability may be imposed under any State or local law that is
14 inconsistent with this section.”

15 **SECTION 9. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

16 applying and construing this uniform act, consideration must be given to the need to promote
17 uniformity of the law with respect to its subject matter among states that enact it.

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

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

24 **SECTION 11. REPEALS; CONFORMING AMENDMENTS.**

25 (a)

26 (b)

27 (c)

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