

DRAFT
FOR DISCUSSION ONLY

CIVIL REMEDIES FOR UNAUTHORIZED DISCLOSURE OF INTIMATE IMAGES ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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October 31, 2017

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PREFATORY NOTE

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

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

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.²

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' private intimate images have been published on as many as 11,000 websites, in addition to being widely distributed through social media, blogs, emails, and texts.

The key features of this Act are (1. Prohibiting the unauthorized disclosure of private images depicting an identifiable individual's intimate parts or depicting an individual engaged in sexual conduct; (2. Prescribing remedies for the depicted individual, including actual damages, reasonable attorney's fees, punitive damages, and disgorgement of profit made by the wrongful act; and (3. Allowing depicted individuals to protect their identity in court proceedings.

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 Act does not apply to images created under circumstances in which the depicted
2 individual had no reasonable expectation of privacy. It also exempts disclosures made in the
3 public interest as well as for the lawful and common practices of law enforcement, reporting of
4 unlawful activity, legal proceedings, and medical treatment. The Act notes that the liability for
5 providers and users of interactive computer services for content provided by another party is
6 restricted by federal law.
7

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

16 This Act provides a clear and comprehensive definition of the abuse that is broad enough
17 to protect the right to intimate privacy and narrow enough to respect the First Amendment right
18 to freedom of speech.
19

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 of a specific
7 disclosure or kind of disclosure.

8 (2) “Disclose” includes to transfer, publish, or distribute.

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

11 (4) “Individual” means a living human being.

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

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

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

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

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

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.

To disclose is, in effect, to display or make available for display to a larger audience.

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.

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)).

SECTION 3. PROTECTION OF PRIVATE VISUAL MATERIAL.

(a) Except as otherwise provided in subsection (b), a person may not 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 image itself or from the image and identifying characteristics displayed in connection with the image; and

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

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

6 (b) A person disclosing an intimate image under subsection (a) is not liable if:

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

9 (2) the disclosure of the image is made:

10 (A) in the public interest; or

11 (B) for the lawful and common practices of:

12 (i) law enforcement;

13 (ii) reporting of unlawful activity;

14 (iii) legal proceedings; or

15 (iv) medical treatment.

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

18 **Comment**

19 The question of intent is a complex one. It is not just a question whether the threatened or
20 actual disclosure is intentional, but what level of intent is required with regard to the element of
21 non-consent or non-authorization. The act uses a negligence standard for both. Therefore, the act
22 would cover a person who deliberately discloses an intimate image without consent as well as a
23 person who fails to take reasonable steps to ensure that an intimate image is not disclosed, e.g., a
24 person who has intimate images of an individual on his cell phone and fails to secure the cell
25 phone with a password.

26 There is also a question about original versus secondary disclosers. If person A discloses
27 intimate images of individual B to person C, and C then discloses those images to D, B is

1 potentially liable if he is negligent with regard to non-consent or non-authorization. This raises
2 concerns about being too wide of a net for online transmission in particular, as it is not
3 uncommon for people to forward images sent to them by others. However, this concern should
4 be allayed by Section 230 of the Communications Decency Act, referred to in Section 7. The
5 CDA forbids treating a “provider or user of an interactive computer service” as the “publisher or
6 speaker” of content provided by another party. Accordingly, in the scenario just mentioned, if A
7 emailed (or transmitted in some other online fashion) intimate images of B to C, and C then
8 emailed or posted those images to D, B would not be liable. “[S]ection 230(c)(1) immunizes
9 individual 'users' of interactive computer services no practical or principled distinction can be
10 drawn between active and passive use.” *Barrett v. Rosenthal* (40 Cal. 4th 33, 2006).

11 The burden of proving an exemption under subsection (b) should be on the defendant.
12

13 Guidance on the question of what constitutes “public interest” can be found in the
14 Restatement (Second) of Torts § 652D (1977): “The extent of the authority to make public
15 private facts is not, however, unlimited. There may be some intimate details of her life, such as
16 sexual relations, which even the actress is entitled to keep to herself. In determining what is a
17 matter of legitimate public interest, account must be taken of the customs and conventions of the
18 community; and in the last analysis what is proper becomes a matter of the community mores.
19 The line is to be drawn when the publicity ceases to be the giving of information to which the
20 public is entitled, and becomes a morbid and sensational prying into private lives for its own
21 sake, with which a reasonable member of the public, with decent standards, would say that he
22 had no concern. The limitations, in other words, are those of common decency, having due
23 regard to the freedom of the press and its reasonable leeway to choose what it will tell the public,
24 but also due regard to the feelings of the individual and the harm that will be done to him by the
25 exposure.”

26 **SECTION 4. CIVIL ACTION.**

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

28 (b) In an action brought under this section, a court may award the [prevailing] plaintiff:

29 (1) actual damages [or statutory damages in the amount of \$____, whichever is
30 greater];

31 (2) punitive damages;

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

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

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

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

5 (d) The plaintiff in a civil action under subsection (a) may proceed using a pseudonym in
6 place of the true name of the plaintiff and may exclude or redact from all pleadings and
7 documents filed in the action other identifying characteristics of the plaintiff. A plaintiff who
8 proceeds using a pseudonym and excluding or redacting identifying characteristics as provided in
9 this subsection shall file with the court and serve upon the defendant a confidential information
10 form that includes the plaintiff's name and other identifying characteristics excluded or redacted.
11 The court shall seal the plaintiff's name and excluded or redacted characteristics. In so doing, the
12 following rules apply:

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

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

19 (3) Each court decision, order, petition, and other documents, including motions
20 and papers filed by the parties, must be worded to protect the name or other identifying
21 characteristics of the plaintiff from public disclosure.

22 (4) The responsibility for excluding or redacting the name or identifying
23 characteristics of a plaintiff from each document filed with the court is solely with the parties and

1 their attorneys. The court is not required to review pleadings or other papers for compliance with
2 this subsection.

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

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

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

9 **Comment**

10 This section responds to the specific language of the Communications Decency Act and
11 is intended to avoid preemption of state law under that federal legislation.

12
13 **SECTION 7. SEVERABILITY.** If any provision of this [act] or its application to any
14 person or circumstance is held invalid, the invalidity does not affect other provisions or
15 applications of this [act] that can be given effect without the invalid provision or application, and
16 to this end the provisions of this [act] are severable.

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

19
20 **SECTION 8. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
21 applying and construing this uniform act, consideration must be given to the need to promote
22 uniformity of the law with respect to its subject matter among states that enact it.

23 **SECTION 9. REPEALS; CONFORMING AMENDMENTS.**

24 (a)

25 (b)

26 (c)