

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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February 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 Unauthorized Disclosure of Intimate Images Act addresses a growing form of abuse
10 that causes immediate and in many cases irreversible harm. According to a nationally
11 representative 2017 study conducted by the Cyber Civil Rights Initiative, more than 1 in 8
12 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

35 The key features of this Act are (1. Creating a cause of action for the unauthorized
36 disclosure of private, intimate images; (2. Prescribing remedies for the depicted individual,

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 including actual damages, reasonable attorney's fees, punitive damages, and disgorgement of
2 profit made by the wrongful act; and (3. Allowing depicted individuals to protect their identity in
3 court proceedings.
4

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

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

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

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 body part is shown in an
9 intimate image.

10 (3) “Disclose” means to transfer, publish, or distribute,

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, videotape, or other visual depiction that a
17 reasonable person would believe is an actual photograph, film, or videotape of an individual
18 which shows:

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

21 (B) the individual engaging in sexual conduct.

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

24 (9) “Sexual conduct” includes:

- 1 (A) masturbation;
- 2 (B) genital, anal, or oral sex;
- 3 (C) sexual penetration with an object; or
- 4 (D) the transfer of semen onto the depicted individual.

5 **Comment**

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

10
11 Consent is also disclosure-specific. For example, consent to disclose an intimate image to
12 an intimate partner is not consent to disclose to the general public. “There is an obvious and
13 substantial difference between the disclosure of private facts to an individual—a disclosure that is
14 selective and based on a judgment as to whether knowledge by that person would be felt to be
15 objectionable—and the disclosure of the same facts to the public at large.” *Virgil v. Time, Inc.*, 527
16 F.2d 1122, 1126–27 (9th Cir. 1975). When the nature or scope of consent is ambiguous, it is the
17 responsibility of the would-be discloser to obtain clarification before disclosing.

18
19 Identifying characteristics can include the depicted individual’s face, birthmarks, tattoos,
20 or other physical identifiers.

21
22 The specification of “individual” is used to distinguish from the broader definition of
23 “person,” which can include non-human entities and people who are deceased.

24
25 The definition of “intimate image” is limited to images of individuals that are actual
26 visual representations, or virtually indistinguishable from such actual visual representations, of
27 individuals. It does not include paintings, drawings, or other figurative representations of an
28 individual. Images that are not or would not be mistaken for actual representations of an
29 individual do not impose the severe privacy harm that is the focus of this act. Also, such
30 representations enjoy extensive First Amendment protection. See *Hustler v. Falwell* (485 U.S. 46
31 (1988)).

32
33 **SECTION 3. CIVIL ACTION.**

34 (a) Except as otherwise provided in Section 4, a depicted individual who has been
35 harmed by the disclosure or threatened disclosure of an intimate image of the individual has a
36 cause of action against a person that intentionally disclosed or threatened to disclose the intimate
37 image of the individual if the person knows or should have known that:

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

2 (2) the intimate image

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

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

8 (3) the depicted individual is identifiable.

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

12 (c) Each disclosure of the same intimate image is a separate disclosure under this [act.]

13 (d) A depicted individual must be living at the time of the action and the action does not
14 survive the death of the depicted individual.

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

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

18 (1) made in the course of lawful and common practices of:

19 (A) law enforcement;

20 (B) reporting of unlawful or unauthorized activity;

21 (C) legal proceedings;

22 (D) medical treatment; or

23 (E) education.

1 (2) a matter of public concern or public interest; or

2 (3) reasonably intended to assist the depicted individual.

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

5 (1) not prohibited by law other than this act, and

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

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

10 **Comment**

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

17
18 The following examples can help illustrate when the act would apply.

19
20 Example 1. A gives B an identifiable, sexually explicit image of herself during their
21 intimate relationship with the understanding that it would remain private. After A and B end their
22 relationship, B uploads the image of A to a “revenge porn” website without A’s consent.
23 Because B knows that A did not consent to the disclosure, knows that A has a reasonable
24 expectation of privacy with regard to the image, and knows that A is identifiable in the image,
25 this act would apply.

26
27 Example 2. B finds an identifiable, sexually explicit image of A on a mainstream adult
28 pornographic website. B forwards the link to the website to C without A’s consent. The act
29 would not apply to B if he can demonstrate that there is no reason he should have known that A
30 had a reasonable expectation of privacy, given the fact that A’s image was displayed on a
31 mainstream pornographic website.

32
33 Example 3. B finds an identifiable, sexually explicit image of A on a “revenge porn”
34 website that clearly indicates that the material displayed has been obtained or disclosed without
35 consent by the individuals depicted. B forwards the link to the website to C without A’s consent.

1 The act would apply to B because he had reason to know that A had a reasonable expectation of
2 privacy based on the fact that the image appeared on a “revenge porn” website.
3

4 Example 4. B finds an identifiable, sexually explicit image of A on a “revenge porn”
5 website. B forwards the link to A to alert her that her image appears on the site so that A can take
6 steps to remove it. The act would not apply to B because the disclosure is reasonably intended to
7 assist A.
8

9 The burden of proving an exemption under subsection (c) should be on the defendant.
10

11 The act’s “public concern” exception allows for the possibility that a disclosure of a
12 private, sexually explicit image might be a matter of public concern. The Supreme Court has
13 offered some useful guidance on the definition of “public concern” and whether the publication
14 of “homemade sexually explicit material” can constitute such concern. In *Dun & Bradstreet, Inc.*
15 *v. Greenmoss Builders, Inc.*, the Court distinguished between speech on “matters of public
16 concern” and “matters of purely private concern,” noting that it is the former that is “at the heart
17 of the First Amendment’s protection” while “speech on matters of purely private concern is of
18 less First Amendment concern.” 472 U.S. 749, 758–59 (1985) (quoting *First Nat’l Bank of Bos.*
19 *v. Bellotti*, 435 U.S. 765, 776 (1978)). In *City of San Diego v. Roe*, the Court stated that the
20 distribution of homemade sexually explicit material “does not qualify as a matter of public
21 concern under any view.” 543 U.S. 77, 84 (2004) (per curiam). In *Snyder v. Phelps*, the Court
22 stated that the prohibition of unauthorized disclosure of such material poses “no threat to the free
23 and robust debate of public issues; there is no potential interference with a meaningful dialogue
24 of ideas.” *Snyder*, 562 U.S. at 452 (quotation omitted).
25

26 The “publication of private facts” tort also provides some helpful elaboration of the
27 concept. The tort is widely accepted by the majority of courts as compliant with the First
28 Amendment, although the Supreme Court has yet to rule explicitly on the constitutionality of this
29 tort with regard to matters not of public record. According to the Restatement (Second) of Torts
30 § 652D (1977), the offense involves giving “publicity to a matter concerning the private life of
31 another is subject to liability...., if the matter publicized is of a kind that (a) would be highly
32 offensive to a reasonable person, and (b) is not of legitimate concern to the public.” An
33 explanatory comment further notes that “[i]n determining what is a matter of legitimate public
34 interest, account must be taken of the customs and conventions of the community; and in the last
35 analysis what is proper becomes a matter of the community mores. The line is to be drawn when
36 the publicity ceases to be the giving of information to which the public is entitled, and becomes a
37 morbid and sensational prying into private lives for its own sake, with which a reasonable
38 member of the public, with decent standards, would say that he had no concern. The limitations,
39 in other words, are those of common decency, having due regard to the freedom of the press and
40 its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of
41 the individual and the harm that will be done to him by the exposure.”

42 **SECTION 5. COURT PROCEEDINGS.** In an action under this [act]:
43

44 (1) a plaintiff may proceed using a pseudonym in place of the true name of the plaintiff;

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

SECTION 6. REMEDIES.

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

(1) (A) economic and noneconomic damages [, subject to the limitation specified in [insert citation to statute that limits recoverable noneconomic damages]] [,or (B) \$1000, whichever is greater];

(2) punitive damages, but only if damages are awarded under §6(a)(1)(A) or §6(a)(3), subject to the limitation specified in [insert citation of statute that limits recoverable punitive damages];

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

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

(5) additional relief, including injunctive relief.

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

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.

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]].

1 **Legislative Note:** Insert a reference to the state’s existing statute of limitations for a negligence
2 action; computer tort, or other claim to incorporate corresponding discovery and tolling
3 provisions.
4

5 **Comment**

6 The nature of the Internet can complicate the determination of the appropriate length of
7 the statute of limitations for the unauthorized disclosure of intimate images. For example, a
8 plaintiff might reasonably decide, upon discovering that such a disclosure was made, not to file
9 an action if the disclosure does not appear at the time to have a wide audience. Years later,
10 however, if the image goes “viral” or appears to be about to do so (e.g., because the plaintiff is
11 about to embark on a political campaign or has achieved recent celebrity status), she may wish to
12 initiate an action.
13

14 **SECTION 8. LIMITATIONS.**

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

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

18 **Comment**

19 This section responds to the specific language of the Communications Decency Act and
20 is intended to avoid preemption of state law under that federal legislation.
21

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

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

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

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

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

2 (a)

3 (b)

4 (c)

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