

HOUSE BILL REPORT

SHB 1165

As Passed House:
February 2, 2023

Title: An act relating to civil remedies for unauthorized disclosure of intimate images.

Brief Description: Concerning civil remedies for unauthorized disclosure of intimate images.

Sponsors: House Committee on Civil Rights & Judiciary (originally sponsored by Representatives Orwall, Reeves, Wylie and Davis; by request of Uniform Law Commission).

Brief History:

Committee Activity:

Civil Rights & Judiciary: 1/18/23, 1/20/23 [DPS].

Floor Activity:

Passed House: 2/2/23, 98-0.

Brief Summary of Substitute Bill

- Repeals the current statute imposing civil liability for wrongful disclosure of intimate images and replaces it with the Uniform Civil Remedies for the Unauthorized Disclosure of Intimate Images Act.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Hansen, Chair; Farivar, Vice Chair; Walsh, Ranking Minority Member; Graham, Assistant Ranking Minority Member; Cheney, Entenman, Goodman, Peterson, Rude, Thai and Walen.

Staff: Yelena Baker (786-7301).

Background:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

Civil Liability for Disclosure of Intimate Images.

A person is liable for distributing an intimate image of another if the person intentionally and without consent distributes an intimate image that:

- was obtained under circumstances in which a reasonable person would know or understand that the image was to remain private; or
- was knowingly obtained by the distributing person without authorization or by exceeding authorized access to the depicted person's property, accounts, messages, files, or resources.

An "intimate image" is any image or recording of an identifiable person that is taken in a private setting, is not a matter of public concern, and that depicts sexual activity or a person's intimate body parts.

Several factors may be used to determine whether a reasonable person would know or understand that an image was to remain private, including the nature of the relationship between the parties and the circumstances under which the intimate image was taken or distributed.

It is an affirmative defense that a family member of a minor distributes certain images of the minor to other family or friends without the intent to cause any harm or harassment by the disclosure. An interactive computer service, as defined in Section 230 of the federal Communications Decency Act, may not be held liable for content provided by another person.

A court must make it known to the plaintiff that the plaintiff may use a confidential identity, and the court must use the confidential identity in all petitions, filings, or other documents.

A person who distributes an intimate image of another, and at the time of such distribution knows or reasonably should know that disclosure would cause harm to the depicted person, is liable for actual damages, including pain and suffering, emotional distress, economic damages, and lost earnings, as well as reasonable attorneys' fees, and costs. The court may also award injunctive relief as it deems necessary.

Criminal Liability for Disclosure of Intimate Images.

A person commits the crime of Disclosing Intimate Images when the person knowingly discloses an intimate image of another person and the person disclosing the image:

- obtained it under circumstances in which a reasonable person would know or understand that the image was to remain private;
- knows or should have known that the depicted person has not consented to the disclosure; and
- knows or reasonably should know that disclosure would cause harm to the depicted person.

"Disclosing" means transferring, publishing, disseminating, or making a digital depiction

available for distribution or downloading through the facilities of a telecommunications network, or through other means of transferring computer programs or data to a computer.

"Intimate image" means any photograph, film, videotape, digital image, or other record of another person who is identifiable from the image itself or from information displayed with or otherwise connected to the image, and that was taken in a private setting, is not a matter of public concern, and depicts sexual activity or a person's intimate body parts.

It is an affirmative defense that the defendant is a family member of a minor and did not intend harm or harassment in disclosing images of the minor to the defendant's family or friends. Exceptions to criminal liability are also made for voluntary exposure in public or commercial settings, and disclosures made in the public interest. Interactive computer services and other specified entities are exempt from liability with regard to content provided by another person.

Disclosing intimate images is a gross misdemeanor on the first offense and a class C felony on the second or subsequent offense.

Uniform Civil Remedies for the Unauthorized Disclosure of Intimate Images Act.

The Uniform Law Commission (ULC) is an organization that authors and promotes enactment of uniform laws in areas of law where national uniformity is desirable and practical.

In 2018 the ULC promulgated the Uniform Civil Remedies for the Unauthorized Disclosure of Intimate Images Act (UCRUDIIA) which addresses the disclosure of private images of nudity or sexual conduct without consent. The UCRUDIIA creates a civil cause of action for the unauthorized disclosure of intimate images, specifies exceptions to liability, sets forth provisions to address victims' privacy, and provides various remedies, including, where appropriate, punitive damages and attorneys' fees.

The UCRUDIIA has been adopted in seven states.

Summary of Substitute Bill:

Current law imposing civil liability for wrongful disclosure of intimate images is repealed and replaced with the Uniform Civil Remedies for the Unauthorized Disclosure of Intimate Images Act (UCRUDIIA).

Key Definitions.

"Disclosure" and "intimate image" have the same meaning as in state law that imposes criminal liability for wrongful disclosure of intimate images.

"Consent" means affirmative, conscious, and voluntary authorization by an individual with legal capacity to give authorization. Consent to creation of the image or previous

consensual disclosure of the image does not by itself establish that the depicted individual consented to the disclosure of the intimate image or that the individual lacked a reasonable expectation of privacy.

"Private" means:

- created or obtained under circumstances in which a depicted individual had a reasonable expectation of privacy; or
- made accessible through theft, bribery, extortion, fraud, false pretenses, voyeurism, or exceeding authorized access to an account, message, file, device, resource, or property.

A depicted individual who does not consent to the uncovering of the part of the body depicted in an intimate image retains a reasonable expectation of privacy, even if the image was created when the individual was in a public place.

Cause of Action for Unauthorized Disclosure.

A depicted individual who is identifiable in a private intimate image and who suffers harm from a person's intentional disclosure or threatened disclosure of the image without the depicted individual's consent has a cause of action against the person if the person knew or acted with reckless disregard for whether:

- the depicted individual did not consent to the disclosure;
- the intimate image was private; and
- the depicted individual was identifiable.

A person is not liable under the UCRUDIIA if the disclosure of an intimate image was:

- made in good faith in law enforcement activities, legal proceedings, or medical education or treatment;
- made in good faith in the reporting or investigation of unlawful conduct, or unsolicited and unwelcome conduct;
- related to a matter of public concern or public interest; or
- reasonably intended to assist the depicted individual.

Disclosure of an intimate image is not a matter of public concern or public interest solely because the depicted individual is a public figure.

A defendant who is a parent, legal guardian, or individual with legal custody of a child is not liable for a disclosure of an intimate image of the child. This exception to liability does not apply if the disclosure was prohibited by law other than the UCRUDIIA or made for the purposes of sexual arousal, sexual gratification, humiliation, degradation, or monetary or commercial gain.

Subject to applicable state law and procedural rules, a plaintiff may use a pseudonym in place of the plaintiff's true name in an action under the UCRUDIIA.

A prevailing plaintiff may recover the greater of:

- economic and noneconomic damages proximately caused by the defendant's disclosure or threatened disclosure, including damages for emotional distress whether or not accompanied by other damages; or
- statutory damages not to exceed \$10,000 against each liable defendant for all disclosures or threatened disclosures.

In determining the amount of statutory damages, consideration must be given to the age of the parties at the time of the disclosure or threatened disclosure, the breadth of distribution of the image by the defendant, and other exacerbating or mitigating factors.

A prevailing plaintiff may also recover an amount equal to any monetary gain made by the defendant from disclosure of the intimate image and punitive damages. The court may award reasonable attorneys' fees and costs, and additional relief, including injunctive relief, to the prevailing plaintiff.

An action for the unauthorized disclosure of intimate images must be brought no later than four years from the date the disclosure was discovered or should have been discovered with the exercise of reasonable diligence. An action for a threat to disclose an intimate image must be brought no later than four years from the date of the threat to disclose. Actions under the UCRUDIIA are subject to tolling statutes, except that in an action by a depicted individual who was a minor on the date of the disclosure or threat to disclose, the period of limitation provided in the UCRUDIIA does not begin to run until the depicted individual attains the age of majority.

Other Provisions.

The UCRUDIIA must be construed to be consistent with Section 230 of the federal Communication Decency Act, which provides interactive computer services with broad immunity from liability for content posted by third parties.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) Disclosure of intimate images can really harm a person and lead to isolation and depression. A recent news story highlighted a famous athlete who, without consent, shared very explicit intimate images of his former wife in a social media application. The woman was easily identifiable in the images, and the athlete acted with reckless disregard for whether this would cause harm, so having strong protections around this issue is very

important because people are being harmed. This bill adopts the Uniform Civil Remedies for the Unauthorized Disclosure of Intimate Images Act (UCRUDIIA), a uniform act that has been adopted in eight jurisdictions so far and is pending in a few others.

The UCRUDIIA broadens the scope of the current civil statute, which pertains only to actual disclosure of intimate images. This bill additionally covers threatened disclosures and allows victims of any threats to seek damages for any harm they may suffer. Additionally, the bill expands the types of remedies that are available to victims of unauthorized disclosures or threatened disclosures, including by allowing punitive damages, which are not available under current law. A prevailing plaintiff may also recover any monetary gain made by the defendant from the wrongful disclosure. The bill clarifies some of the already-available exceptions and contains additional exceptions for disclosures made in matters related to public concern or public interest. The statute of limitations is tolled until the victim is 18 years old, so a person who was a minor when the person was victimized has a longer period of time to seek justice.

(Opposed) None.

Persons Testifying: Representative Tina Orwall, prime sponsor; and Kaitlin Wolff, Uniform Law Commission.

Persons Signed In To Testify But Not Testifying: None.