



2020 South Dakota Legislature
House Bill 1108
ENROLLED

AN ACT

ENTITLED An Act to adopt the Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That a NEW SECTION be added:

21-67-1. Short title.

This Act may be cited as the Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act.

Section 2. That a NEW SECTION be added:

21-67-2. Definitions.

Terms used in this chapter mean:

- (1) "Consent," affirmative, conscious, and voluntary authorization by an individual with legal capacity to give authorization;
- (2) "Depicted individual," an individual whose body is shown in whole or in part in an intimate image;
- (3) "Disclosure," transfer, publication, or distribution to another person. Disclose has a corresponding meaning;
- (4) "Identifiable," recognizable by a person other than the depicted individual:
 - (A) From an intimate image itself; or
 - (B) From an intimate image and identifying characteristic displayed in connection with the intimate image;
- (5) "Identifying characteristic," information that may be used to identify a depicted individual;
- (6) "Individual," a human being;
- (7) "Intimate image," a photograph, film, video recording, or other similar medium that shows:

- (A) The uncovered genitals, pubic area, anus, or female post-pubescent nipple of a depicted individual; or
- (B) A depicted individual engaging in or being subjected to sexual conduct;
- (8) "Person," an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity;
- (9) "Sexual conduct," includes:
 - (A) Masturbation;
 - (B) Genital, anal, or oral sex;
 - (C) Sexual penetration of, or with, an object;
 - (D) Bestiality; or
 - (E) The transfer of semen onto a depicted individual.

Section 3. That a NEW SECTION be added:

21-67-3. Intentional disclosure of intimate images--Civil action.

(a) In this section:

- (1) "Harm" includes physical harm, economic harm, and emotional distress whether or not accompanied by physical or economic harm.
- (2) "Private" means:
 - (A) Created or obtained under circumstances in which a depicted individual had a reasonable expectation of privacy; or
 - (B) Made accessible through robbery, theft, bribery, extortion, fraud, false pretenses, voyeurism, or exceeding authorized access to an account, message, file, device, resource, or property.

(b) Except as otherwise provided in § 10-67-4, a depicted individual who is identifiable and who suffers harm from a person's intentional disclosure or threatened disclosure of an intimate image that was private 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:

- (1) The depicted individual did not consent to the disclosure;
- (2) The intimate image was private; and
- (3) The depicted individual was identifiable.

(c) The following conduct by a depicted individual does not establish by itself that the individual consented to the disclosure of the intimate image which is the subject of an action under this chapter or that the individual lacked a reasonable expectation of privacy:

- (1) Consent to creation of the image; or
- (2) Previous consensual disclosure of the image.

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

Section 4. That a NEW SECTION be added:

21-67-4. Exceptions to liability.

(a) In this section:

- (1) "Child" means an unemancipated individual who is less than eighteen years of age;
- (2) "Parent" means an individual recognized as a parent under law of this state other than this chapter.

(b) A person is not liable under this chapter if the person proves that disclosure of, or a threat to disclose, an intimate image was:

- (1) Made in good faith in:
 - (A) Law enforcement;
 - (B) A legal proceeding; or
 - (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) Subject to subsection (d), a defendant who is a parent, legal guardian, or custodian of a child is not liable under this chapter for a disclosure or threatened disclosure of an intimate image, as defined in § 21-67-2, of the child.

(d) If a defendant asserts an exception to liability under subsection (c), the exception does not apply if the plaintiff proves the disclosure was:

- (1) Prohibited by law other than this chapter; or
- (2) Made for the purpose of sexual arousal, sexual gratification, humiliation, degradation, or monetary or commercial gain.

(e) Disclosure of, or a threat to disclose, an intimate image is not a matter of public concern or public interest solely because the depicted individual is a public figure.

Section 5. That a NEW SECTION be added:

21-67-5. Plaintiff privacy.

In an action under this chapter:

- (1) The court may exclude or redact from all pleadings and documents filed in the action other identifying characteristics of the plaintiff under § 15-15-11;
- (2) A plaintiff to whom paragraph (1) applies shall file with the court and serve on the defendant a confidential information form that includes the excluded or redacted plaintiff's name and other identifying characteristics; and
- (3) The court may make further orders as necessary to protect the identity and privacy of a plaintiff.

Section 6. That a NEW SECTION be added:

21-67-6. Remedies.

(a) In an action under this chapter, a prevailing plaintiff may recover:

- (1) The greater of:
 - (A) 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
 - (B) Statutory damages not to exceed ten thousand dollars against each defendant found liable under this chapter for all disclosures and threatened disclosures by the defendant of which the plaintiff knew or reasonably should have known when filing the action or which became known during the pendency of the action. In determining the amount of statutory damages under this subsection, consideration must be given to the age of the parties at the time of the disclosure or threatened disclosure, the number of disclosures or threatened disclosures made by the defendant, the breadth of distribution of the image by the defendant, and other exacerbating or mitigating factors;
 - (2) An amount equal to any monetary gain made by the defendant from disclosure of the intimate image; and
 - (3) Punitive damages as allowed by § 21-3-2.
- (b) In an action under this chapter, the court may award a prevailing plaintiff:
- (1) Attorney's fees and costs as allowed by § 15-6-54(d); and
 - (2) Additional relief, including injunctive relief.

(c) This chapter does not affect a right or remedy available under law of this state other than this chapter.

Section 7. That a NEW SECTION be added:

21-67-7. Statute of limitations.

(a) An action under § 21-67-3 for:

- (1) An unauthorized disclosure may not be brought later than six years from the date the disclosure was discovered or should have been discovered with the exercise of reasonable diligence; and
- (2) A threat to disclose may not be brought later than six years from the date of the threat to disclose.

(b) This chapter is subject to § 15-2-22.

Section 8. That a NEW SECTION be added:

21-67-8. Construction.

This chapter shall be construed to be consistent with the Communications Decency Act of 1996, 47 U.S.C. Section 230.

Section 9. That a NEW SECTION be added:

21-67-9. Uniformity of application and construction.

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

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

I certify that the attached Act originated in the:
House as Bill No. 1108

Chief Clerk

Speaker of the House

Attest:

Chief Clerk

President of the Senate

Attest:

Secretary of the Senate

House Bill No. 1108
File No. _____
Chapter No. _____

Received at this Executive Office
this ____ day of _____,
2020 at _____ M.

By _____
for the Governor

The attached Act is hereby
approved this _____ day of
_____, A.D., 2020

Governor

STATE OF SOUTH DAKOTA,

ss.

Office of the Secretary of State

Filed _____, 2020
at _____ o'clock __ M.

Secretary of State

By _____
Asst. Secretary of State