



2020 South Dakota Legislature

House Bill 1108

Introduced by: **Representative Johns**

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

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

4 **Section 1.** That a NEW SECTION be added:

5 **21-67-1. Short title.**

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

8 **Section 2.** That a NEW SECTION be added:

9 **21-67-2. Definitions.**

10 Terms used in this chapter mean:

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

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

13 **Section 3.** That a NEW SECTION be added:

14 **21-67-3. Intentional disclosure of intimate images--Civil action.**

- 15 (a) In this section:
 16 (1) "Harm" includes physical harm, economic harm, and emotional distress whether or
 17 not accompanied by physical or economic harm.
 18 (2) "Private" means:
 19 (A) Created or obtained under circumstances in which a depicted individual had
 20 a reasonable expectation of privacy; or
 21 (B) Made accessible through robbery, theft, bribery, extortion, fraud, false
 22 pretenses, voyeurism, or exceeding authorized access to an account,
 23 message, file, device, resource, or property.
 24 (b) Except as otherwise provided in § 10-67-4, a depicted individual who is
 25 identifiable and who suffers harm from a person's intentional disclosure or threatened
 26 disclosure of an intimate image that was private without the depicted individual's consent
 27 has a cause of action against the person if the person knew, or acted with reckless
 28 disregard for whether:
 29 (1) The depicted individual did not consent to the disclosure;
 30 (2) The intimate image was private; and
 31 (3) The depicted individual was identifiable.
 32 (c) The following conduct by a depicted individual does not establish by itself that
 33 the individual consented to the disclosure of the intimate image which is the subject of an
 34 action under this chapter or that the individual lacked a reasonable expectation of privacy:

- 1 (1) Consent to creation of the image; or
2 (2) Previous consensual disclosure of the image.
3 (d) A depicted individual who does not consent to the sexual conduct or uncovering
4 of the part of the body depicted in an intimate image of the individual retains a reasonable
5 expectation of privacy even if the image was created when the individual was in a public
6 place.

7 **Section 4.** That a NEW SECTION be added:

8 **21-67-4. Exceptions to liability.**

9 (a) In this section:

10 (1) "Child" means an unemancipated individual who is less than eighteen years of age;

11 (2) "Parent" means an individual recognized as a parent under law of this state other
12 than this chapter.

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

15 (1) Made in good faith in:

16 (A) Law enforcement;

17 (B) A legal proceeding; or

18 (C) Medical education or treatment;

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

20 (A) Unlawful conduct; or

21 (B) Unsolicited and unwelcome conduct;

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

23 (4) Reasonably intended to assist the depicted individual.

24 (c) Subject to subsection (d), a defendant who is a parent, legal guardian, or
25 custodian of a child is not liable under this chapter for a disclosure or threatened disclosure
26 of an intimate image, as defined in § 21-67-2, of the child.

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

29 (1) Prohibited by law other than this chapter; or

30 (2) Made for the purpose of sexual arousal, sexual gratification, humiliation,
31 degradation, or monetary or commercial gain.

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

1 **Section 5.** That a NEW SECTION be added:

2 **21-67-5. Plaintiff privacy.**

3 In an action under this chapter:

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

11 **Section 6.** That a NEW SECTION be added:

12 **21-67-6. Remedies.**

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

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

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

3 **Section 7.** That a NEW SECTION be added:

4 **21-67-7. Statute of limitations.**

5 (a) An action under § 21-67-3 for:

6 (1) An unauthorized disclosure may not be brought later than six years from the date
7 the disclosure was discovered or should have been discovered with the exercise of
8 reasonable diligence; and

9 (2) A threat to disclose may not be brought later than six years from the date of the
10 threat to disclose.

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

12 **Section 8.** That a NEW SECTION be added:

13 **21-67-8. Construction.**

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

16 **Section 9.** That a NEW SECTION be added:

17 **21-67-9. Uniformity of application and construction.**

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