

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 514 (Ward)
Version: March 18, 2021
Hearing Date: June 15, 2021
Fiscal: No
Urgency: No
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SUBJECT

Injunctions: undertakings: civil actions: distribution of sexually explicit materials

DIGEST

This bill amends the so-called “revenge porn” statute to lower the standard for culpability and to remove the requirement that a plaintiff file an undertaking upon the granting of an injunction in their favor.

EXECUTIVE SUMMARY

Current law creates a private right of action against a person who intentionally distributes a photograph or recorded image of another that exposes that person’s intimate body parts, or shows the other person engaged in specified sexual acts, without that person’s consent, knowing that the other person had a reasonable expectation that the material would remain private, if specified conditions are met.

The law provides certain exemptions from liability. One is where the defendant distributes such content but the material was previously distributed by another person. In order to narrow this exemption and to provide plaintiffs with the ability to cease such distribution, the bill provides that such exemption does not apply if the plaintiff serves the defendant a notice to cease distribution, and the defendant fails to within 20 days of receiving the notice.

If a plaintiff victim successfully seeks an injunction to stop distribution pursuant to the statute, the plaintiff currently must post a bond. This bill removes this hurdle. The bill also extends liability to where the defendant “should have known” that the depicted person had a reasonable expectation that the material would remain private, if all other elements are met.

The bill is author-sponsored. It is supported by the Consumer Attorneys of California. There is no known opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Creates a private right of action against a person who intentionally distributes a photograph or recorded image of another that exposes that person's intimate body parts, or shows the other person engaging in an act of intercourse, oral copulation, sodomy, or other act of sexual penetration, without that person's consent, knowing that the other person had a reasonable expectation that the material would remain private, and causes the other person to suffer damages. (Civ. Code § 1708.85(a).)
- 2) Defines "intimate body part" as any portion of the genitals, and, in the case of a female, also includes any portion of the breast below the top of the areola, that is uncovered or visible through less than fully opaque clothing. (Civ. Code § 1708.85(b).)
- 3) Allows a plaintiff in such an action to proceed using a pseudonym and provides for other confidentiality protections. (Civ. Code § 1708.85(f).)
- 4) Exempts the person distributing material from liability pursuant to the above under any of the following circumstances:
 - a) the distributed material was created under an agreement by the person appearing in the material for its public use and distribution or otherwise intended by that person for public use and distribution;
 - b) the person possessing or viewing the distributed material has permission from the person appearing in the material to publish by any means or post the material on an Internet Web site;
 - c) the person appearing in the material waived any reasonable expectation of privacy in the distributed material by making it accessible to the general public;
 - d) the distributed material constitutes a matter of public concern;
 - e) the distributed material was photographed, filmed, videotaped, recorded, or otherwise reproduced in a public place and under circumstances in which the person depicted had no reasonable expectation of privacy; or
 - f) the distributed material was previously distributed by another person. (Civ. Code § 1708.85(c).)
- 5) Authorizes the court to award specified remedies and to issue a temporary restraining order, or a preliminary injunction or a permanent injunction against the defendant, ordering the defendant to cease distribution of material. (Civ. Code § 1708.85(d), (e).)

- 6) Provides that, on granting an injunction, the court or judge must require an undertaking on the part of the applicant to the effect that the applicant will pay to the party enjoined any damages, not exceeding an amount to be specified, the party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction, except as provided. (Code Civ. Proc. § 529.)

This bill:

- 1) Extends liability to where a person who intentionally distributes actionable material should have known the other person had a reasonable expectation of privacy.
- 2) Provides that the exemption from liability in situations where the distributed material was previously distributed by another person does not apply if the plaintiff served on the defendant, by certified mail, a notice to cease distribution of the material, and the defendant failed to cease distribution within 20 days of receiving the notice.
- 3) Exempts an applicant requesting an injunction pursuant to Section 1708.85 of the Civil Code (Section 1708.85) from the undertaking requirement in Section 529 of the Code of Civil Procedure.

COMMENTS

1. Combatting nonconsensual distribution of explicit content

“Revenge porn” has received national attention with legislation being proposed and enacted throughout the country to address this problematic and traumatizing phenomenon. Revenge porn is generally considered the posting of nude or sexually explicit photographs or videos of people online without their consent, even if the photograph itself was taken with consent. It gets its colloquial name from the incidences where the distribution is intended to degrade or harass someone, usually a former partner. The distribution goes mainstream when videos or images are uploaded to internet websites, many of which are set up specifically for these kinds of photos or videos. It can also be as a result of the acts of a person who hacks into a personal computer and then releases the photographs or videos. The victim’s name, address, and links to social media profiles are often included with the images, and some Web sites charge a fee to have the materials removed.

California first addressed this problem directly in 2013. SB 255 (Cannella, Ch. 466, Stats. 2013) made it unlawful in California for any person who photographs or records by any means the image of the intimate body part or parts of another identifiable person, under circumstances where the parties agree or understand that the image shall remain

private, to subsequently distribute the image taken, if there was intent to cause serious emotional distress and the depicted person suffers serious emotional distress. A person who commits this crime is guilty of a disorderly conduct misdemeanor. (Pen. Code § 947(j)(4)(A).)

The following year, AB 2643 (Wieckowski, Ch. 859, Stats. 2014) was enacted into law, adding Section 1708.85 to the Civil Code. It created a private right of action against a person who intentionally distributes a photograph or recorded image of another that exposes that person's intimate body parts, as defined, or shows the other person engaged in specified sexual acts, without the other person's consent, if specified conditions are met. Section 1708.85 authorizes a plaintiff in such a civil proceeding to use a pseudonym, and SB 157 (Wieckowski, Ch. 233, Stats. 2017) built on these confidentiality provisions to further protect a plaintiff victim's identity.

2. Streamlining the path to redress

a. *Undertaking*

Section 1708.85 authorizes a court to issue a temporary restraining order, or a preliminary injunction or a permanent injunction ordering the defendant to cease distribution of the relevant material. Section 529 of the Code of Civil Procedure requires a court or judge to mandate an undertaking on the part of a successful applicant for an injunction. In effect, when an injunction is granted, a plaintiff in a Section 1708.85 action must post an undertaking sufficient to reimburse the enjoined defendant any damages the defendant sustains as a result of the injunction, if the court eventually decides that the plaintiff was not entitled to the injunction. Section 529 also allows the enjoined to object to the undertaking, and, if the court determines that the undertaking is insufficient, the injunction must be dissolved.

Section 529 currently exempts certain parties:

- either spouse against the other in a proceeding for legal separation or dissolution of marriage;
- the applicant for an order pursuant to the Domestic Violence Prevention Act; and
- a public entity or officer, as defined.

In order to remove this barrier to a plaintiff victim putting an expeditious, legal halt to the distribution of sensitive images and recordings, the bill adds an applicant requesting an injunction under Section 1708.85 to the list of exempted parties.

According to the author: "AB 514 adds to the list of persons to whom CCP 529 will not apply. Victims seeking an injunction under Civ. Code 1708.85(d) would not have to post the bond required in CCP 529. This is not the only exemption to CCP 529."

b. Standard for liability

In order to assert a cause of action pursuant to Section 1708.85 against a person intentionally distributing actionable material, a plaintiff must establish that the person *knew* that the other person had a reasonable expectation that the material would remain private. This knowing element creates a high bar for plaintiffs. The bill amends this requirement to provide that a defendant can also be held liable where they “should have known” the other person had a reasonable expectation of privacy. This ensures that wrongdoers are held to a higher standard when distributing this sensitive material without consent.

Many statutes provide for a similar basis of liability, but provide it is triggered when a defendant “knew or *reasonably* should have known” that their conduct was in violation of a certain statute or was otherwise improper. (*See, e.g.*, Civil Code §§ 1708.86, 3345.1, and Labor Code § 3702.9.) In order to harmonize this statute with others, the author has agreed to amend the bill to insert “reasonably” in front of the newly added language.

c. Narrowing an exemption

Section 1708.85 provides exemptions from liability under the following circumstances:

- the distributed material was created under an agreement by the person appearing in the material for its public use and distribution or otherwise intended by that person for public use and distribution;
- the person possessing or viewing the distributed material has permission from the person appearing in the material to publish by any means or post the material on an Internet Web site;
- the person appearing in the material waived any reasonable expectation of privacy in the distributed material by making it accessible to the general public;
- the distributed material constitutes a matter of public concern;
- the distributed material was photographed, filmed, videotaped, recorded, or otherwise reproduced in a public place and under circumstances in which the person depicted had no reasonable expectation of privacy; or
- the distributed material was previously distributed by another person.

This bill amends the last exemption. Currently, the exemption forecloses a victim from bringing an action to stop the distribution of the explicit material if the material was already distributed. In order to provide an avenue for a plaintiff to stop such further distribution and to seek damages if it does not stop, the bill eliminates the exemption when the plaintiff serves the defendant with a notice to cease distribution and the defendant fails to abide by such notice within 20 days of receipt. This provides a clear warning to those distributing such material before liability attaches.

3. Support

The Consumer Attorneys of California write in support:

The purpose of the 2013 statute (AB 2643) was to create a clear, focused civil remedy for victims of nonconsensual distribution of intimate images, including a temporary restraining order, injunctive relief, and a pseudonymous pleading provision. Unfortunately, since AB 2643 was enacted, courts must now force a victim to pay for a bond when seeking a preliminary injunction, even where a wrongdoer admits distributing the material without consent. Further, an exemption under the law is unclear as to when a separate person redistributes the material when that person knows, or should know, the victim has an expectation of privacy regarding the material.

AB 514 will address a victim being forced to post a bond and a wrongdoer potentially evading liability by amending current law related to revenge pornography.

Writing in support, a law firm representing plaintiffs in Section 1708.85 actions argues:

The proposed amendments are great steps to help victims of revenge pornography. First, a victim should not be forced to pay to post a bond in order to get a court order to stop the spread of the private and intimate material. That's not the intent of the statute. Having a carve out in CCP 529 ensures the victims have quick and easy access to protecting the private material. Second, the additions regarding where a defendant knew "or should have known" that sexually intimate materials are private takes away a huge stigma and mountain victims must climb in seeking justice. I've sat in court and seen how degrading it is for a victim to have to fight a wrongdoer who says that he "didn't know" she wanted the materials to be private. It's common sense and this amendment fixes this problem. Finally, it provides a mechanism to give notice to people distributing the materials who may not know the material is private.

SUPPORT

Consumer Attorneys of California
One individual

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation:

SB 435 (Cortese, 2021) allows a person to bring a civil action against any person or entity that makes, obtains, or distributes, including through electronic distribution, actionable material, defined as any moving or still photograph in any technological form, regardless of whether it has been altered, of a person or their identifiable likeness, in which they are naked or that is sexual in nature. The prohibition applies to any person or entity that, with notice of claimed infringement, uploads or reuploads actionable material, or that in any manner publishes or republishes actionable material. This bill is currently in the Senate Judiciary Committee.

SB 53 (Leyva, 2021) provides a cause of action against a person that knowingly sends a sexually explicit image that the person knows, or reasonably should know, is unsolicited; and provides for both civil and criminal penalties for violations. This bill is currently on the Senate Inactive File.

Prior Legislation:

SB 157 (Wieckowski, Ch. 233, Stats. 2017) *See Comment 1.*

AB 2643 (Wieckowski, Ch. 859, Stats. 2014) *See Comment 1.*

SB 255 (Cannella, Ch. 466, Stats. 2013) *See Comment 1.*

PRIOR VOTES:

Assembly Floor (Ayes 74, Noes 0)

Assembly Judiciary Committee (Ayes 11, Noes 0)
