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AB-602 Depiction of individual using digital or electronic technology: sexually explicit material: cause of action. (2019-2020)

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Assembly Bill No. 602

CHAPTER 491

An act to add Section 1708.86 to the Civil Code, relating to privacy.

[Approved by Governor October 03, 2019. Filed with Secretary of State October 03, 2019.]

LEGISLATIVE COUNSEL'S DIGEST

AB 602, Berman. Depiction of individual using digital or electronic technology: sexually explicit material: cause of action.

Existing law creates a private right of action against a person who intentionally distributes a photograph or recorded image of another that exposes the intimate body parts of that person or of a person engaged in a sexual act without the person's consent if specified conditions are met.

This bill would provide that a depicted individual, as defined, has a cause of action against a person who either (1) creates and intentionally discloses sexually explicit material if the person knows or reasonably should have known the depicted individual did not consent to its creation or disclosure or (2) who intentionally discloses sexually explicit material that the person did not create if the person knows the depicted individual did not consent to its creation. The bill would specify exceptions to those provisions, including if the material is a matter of legitimate public concern or a work of political or newsworthy value. The bill would authorize a prevailing plaintiff who suffers harm to seek injunctive relief and recover reasonable attorney's fees and costs as well as specified monetary damages, including statutory and punitive damages.

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1708.86 is added to the Civil Code, to read:

1708.86. (a) For purposes of this section:

- (1) "Altered depiction" means a performance that was actually performed by the depicted individual but was subsequently altered to be in violation of this section.
- (2) "Authorized Representative" means an attorney, talent agent, or personal manager authorized to represent a depicted individual if the depicted individual is represented.
- (3) (A) "Consent" means an agreement written in plain language signed knowingly and voluntarily by the depicted individual that includes a general description of the sexually explicit material and the audiovisual work in which it will be incorporated.

(B) A depicted individual may rescind consent by delivering written notice within three business days from the date consent was given to the person in whose favor consent was made, unless one of the following requirements is satisfied:

- (i) The depicted individual is given at least 72 hours to review the terms of the agreement before signing it.
- (ii) The depicted individual's authorized representative provides written approval of the signed agreement.

(4) "Depicted individual" means an individual who appears, as a result of digitization, to be giving a performance they did not actually perform or to be performing in an altered depiction.

(5) "Despicable conduct" means conduct that is so vile, base, or contemptible that it would be looked down on and despised by a reasonable person.

(6) "Digitization" means to realistically depict any of the following:

- (A) The nude body parts of another human being as the nude body parts of the depicted individual.
- (B) Computer-generated nude body parts as the nude body parts of the depicted individual.
- (C) The depicted individual engaging in sexual conduct in which the depicted individual did not engage.

(7) "Disclose" means to publish, make available, or distribute to the public.

(8) "Individual" means a natural person.

(9) "Malice" means that the defendant acted with intent to cause harm to the plaintiff or despicable conduct that was done with a willful and knowing disregard of the rights of the plaintiff. A person acts with knowing disregard within the meaning of this paragraph when they are aware of the probable harmful consequences of their conduct and deliberately fail to avoid those consequences.

(10) "Nude" means visible genitals, pubic area, anus, or a female's postpubescent nipple or areola.

(11) "Person" means a human being or legal entity.

(12) "Plaintiff" includes cross-plaintiff.

(13) "Sexual conduct" means any of the following:

- (A) Masturbation.
- (B) Sexual intercourse, including genital, oral, or anal, whether between persons regardless of sex or gender or between humans and animals.
- (C) Sexual penetration of the vagina or rectum by, or with, an object.
- (D) The transfer of semen by means of sexual conduct from the penis directly onto the depicted individual as a result of ejaculation.
- (E) Sadoomasochistic abuse involving the depicted individual.

(14) "Sexually explicit material" means any portion of an audiovisual work that shows the depicted individual performing in the nude or appearing to engage in, or being subjected to, sexual conduct.

(b) A depicted individual has a cause of action against a person who does either of the following:

- (1) Creates and intentionally discloses sexually explicit material and the person knows or reasonably should have known the depicted individual in that material did not consent to its creation or disclosure.
- (2) Intentionally discloses sexually explicit material that the person did not create and the person knows the depicted individual in that material did not consent to the creation of the sexually explicit material.

(c) (1) A person is not liable under this section in either of the following circumstances:

- (A) The person discloses the sexually explicit material in the course of any of the following:
 - (i) Reporting unlawful activity.
 - (ii) Exercising the person's law enforcement duties.

(iii) Hearings, trials, or other legal proceedings.

(B) The material is any of the following:

(i) A matter of legitimate public concern.

(ii) A work of political or newsworthy value or similar work.

(iii) Commentary, criticism, or disclosure that is otherwise protected by the California Constitution or the United States Constitution.

(2) For purposes of this subdivision, sexually explicit material is not of newsworthy value solely because the depicted individual is a public figure.

(d) It shall not be a defense to an action under this section that there is a disclaimer included in the sexually explicit material that communicates that the inclusion of the depicted individual in the sexually explicit material was unauthorized or that the depicted individual did not participate in the creation or development of the material.

(e) (1) A prevailing plaintiff who suffers harm as a result of the violation of subdivision (b) may recover any of the following:

(A) An amount equal to the monetary gain made by the defendant from the creation, development, or disclosure of the sexually explicit material.

(B) One of the following:

(i) Economic and noneconomic damages proximately caused by the disclosure of the sexually explicit material, including damages for emotional distress.

(ii) Upon request of the plaintiff at any time before the final judgment is rendered, the plaintiff may instead recover an award of statutory damages for all unauthorized acts involved in the action, with respect to any one work, as follows:

(I) A sum of not less than one thousand five hundred dollars (\$1,500) but not more than thirty thousand dollars (\$30,000).

(II) If the unlawful act was committed with malice, the award of statutory damages may be increased to a maximum of one hundred fifty thousand dollars (\$150,000).

(C) Punitive damages.

(D) Reasonable attorney's fees and costs.

(E) Any other available relief, including injunctive relief.

(2) The remedies provided by this section are cumulative and shall not be construed as restricting a remedy that is available under any other law.

(f) An action under this section shall be commenced no later than three years from the date the unauthorized creation, development, or disclosure was discovered or should have been discovered with the exercise of reasonable diligence.

(g) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions.