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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

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**Bill No:** SB 926                      **Hearing Date:** April 23, 2024  
**Author:** Wahab  
**Version:** March 20, 2024  
**Urgency:** No                                      **Fiscal:** Yes  
**Consultant:** SC

**Subject:** *Crimes: distribution of intimate images*

## HISTORY

**Source:** Los Angeles District Attorney

**Prior Legislation:** SB 602 (Berman), Ch. 491, Stats. 2019  
SB 564 (Leyva), held in Sen. Approps. Comm., 2019  
AB 1260 (Grayson), failed Assem. Public Safety Comm., 2019  
SB 1255 (Cannella), Ch. 863, Stats. 2014  
SB 255 (Cannella), Ch. 466, Stats. 2013

**Support:** Unknown

**Opposition:** None known

## PURPOSE

*The purpose of this bill is to create a new crime for a person who intentionally distributes or causes to be distributed any image created or altered through digitation depicting the intimate body part or parts of another identifiable person, or depicting the person depicted engaged in or participating in a sexual act that the person distributing the image knows or should know that the person depicted did not consent to the distribution and the distribution of the image will cause serious emotional distress, and the person depicted suffers that distress.*

*Existing law* states that a depicted individual has a private cause of action against a person who does either of the following:

- 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; or,
- 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. (Civ. Code, § 1708.86, subd. (b).)

*Existing law* states for purposes of the above provision “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. (Civ. Code, § 1708.86, subd. (a)(14).)

*Existing law* states that a person is not liable under the above provision in either of the following circumstances:

- The person discloses the sexually explicit material in the course of any of the following: reporting unlawful activity, exercising the person’s law enforcement duties, during hearings, trials or other legal proceedings.
- The material is any of the following: a matter of legitimate public concern; a work of political or newsworthy value; commentary, criticism, or disclosure that is otherwise protected by the California Constitution or the United States Constitution. (Civ. Code, § 1708.86, subd. (c).)

*Existing law* establishes a right to seek damages against a person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person’s prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian. (Civ. Code, § 3344 subd. (a).)

*Existing law* makes it a crime for a person who intentionally distributes or causes to be distributed the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates, under circumstances in which the persons agree or understand that the image shall remain private, the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress. (Pen. Code, § 647, subd. (j)(4)(A).)

*Existing law* states that the above crime does not apply when:

- The distribution is made in the course of reporting an unlawful activity;
- The distribution is made in compliance with a subpoena or other court order for use in a legal proceeding;
- The distribution is made in the course of a lawful public proceeding;
- The distribution is related to a matter of public concern or public interest. Distribution is not a matter of public concern or public interest solely because the depicted individual is a public figure. (Pen. Code, § 647, subd. (j)(4)(D).)

*This bill* creates a new crime punishable as a misdemeanor for person who:

- Intentionally distributes or causes to be distributed an image created or altered through digitization depicting the intimate body part or parts of another identifiable person, or depicting the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or depicting masturbation by the person depicted or in which the person depicted participates;
- That the person distributing the image knows or should know that the person depicted did not consent to the distribution and that distribution of the image will cause serious emotional distress, and,
- The person depicted suffers that distress.

*This bill* applies the existing exceptions in Penal Code section 647(j)(4)(D) to the provisions of this bill.

*This bill* defines “digitation” to mean to alter an image in a realistic manner using an image or images of a person, other than the person depicted, or computer-generated image.

## COMMENTS

### 1. Need for This Bill

According to the author of this bill:

SB 926 is a crucial step towards addressing the growing threat of digitized sexually explicit images distributed without consent. By building on existing legislation, SB 926 serves as a critical tool in creating effective legal protections for victims and empowering law enforcement agencies to combat digital harassment and exploitation.

SB 926 strengthens current law by making it clear that unauthorized distribution of sexually explicit images will be considered a misdemeanor. The bill establishes a clear legal framework that creates safeguards to protect the rights and dignity of victims.

SB 926 provides law enforcement agencies with the necessary tools and authority to effectively prosecute cases involving the distribution of digitized sexually explicit images without consent. The bill empowers law enforcement to respond to digital harassment and exploitation by creating legal consequences for perpetrators.

SB 926 is needed to protect all victims of this type of crime, especially young women. Sensity AI, an organization that monitors the number of deepfakes online, found that 90-95% of all online deepfakes are non-consensual intimate media, and 90% of those feature women. These images are another form of gender-based violence meant to humiliate and harass women.

SB 926 represents an important step towards creating a safer digital landscape where individuals are protected from non-consensual dissemination of sexually explicit images. The bill reaffirms California's commitment to upholding the rights and well-being of its citizens in the face of evolving technology.

## 2. Artificial Intelligence-Generated or Manipulated Images

According to the Brookings Institution:

Over the last year, generative AI tools have made the jump from research prototype to commercial product. Generative AI models like OpenAI's ChatGPT and Google's Gemini can now generate realistic text and images that are often indistinguishable from human-authored content, with generative AI for audio and video not far behind. Given these advances, it's no longer surprising to see AI-generated images of public figures go viral or AI-generated reviews and comments on digital platforms. As such, generative AI models are raising concerns about the credibility of digital content and the ease of producing harmful content going forward.

Against the backdrop of such technological advances, civil society and policymakers have taken increasing interest in ways to distinguish AI-generated content from human-authored content.

(Siddarth Srinivasan, *Detecting AI fingerprints: A guide to watermarking and beyond* (January 4, 2024) Brookings Institution [as of Apr. 15, 2024].)

Highly publicized instances of celebrities who have had their faces overlaid on others' bodies in a way that are meant to make viewers think they are real have raised awareness around the issue of deepfake pornography. According to a study from cybersecurity company Deeptrace, some 96% of deepfakes posted online are sexually explicit, and 99% of those are of women who work in entertainment. (Mapping the Deepfake Landscape, Deeptrace (2019).) However, it is not uncommon for a private individual to have their real images manipulated to create deepfake pornography. Recently, a group of students from a Beverly Hills middle school who allegedly shared photos of classmates that had been doctored with an AI-powered app were investigated and expelled. The images used real faces of students atop AI-generated nude bodies. These types of images may be produced using an app on cell phones. (Healy, *Scandal over AI-generated nudes at Beverly Hills middle school exposes gaps in law*, Los Angeles Times (Mar. 3, 2024) <https://www.latimes.com/california/story/2024-03-03/scandal-over-ai-generated-nudes-at-beverly-hills-middle-school-highlights-gaps-in-law> [as of Apr. 15, 2024].)

## 3. First Amendment Considerations

The First Amendment to the United States Constitution states: "Congress shall make no law . . . abridging the freedom of speech . . ." This fundamental right is applicable to the states through the due process clause of the Fourteenth Amendment. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal. 4th 121, 133-134, citing *Gitlow v. People of New York* (1925) 268 U.S. 652, 666.) Article I, section 2, subdivision (a) of the California Constitution provides that: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for

the abuse of this right. A law may not restrain or abridge liberty of speech or press." It is a fundamental tenant of First Amendment law that speech cannot be prohibited merely because someone justifiably finds it offensive and objectionable. (See e.g. *Cohen v. California*, (1971) 403 U.S. 15, 22; *Virginia v Black* (2003) 538 U.S. 343, 358.)

In *Reno v. ACLU* (1997) 521 U.S. 844, the Supreme Court stated that "The Internet is an international network of interconnected computers . . . enab[ling] tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is a unique and wholly new medium of worldwide human communication." (*Id.* at 850.) Following its expansive discussion of the many benefits of the Internet, the Court turned its attention to First Amendment issues, finding that the "CDA [Communications Decency Act] is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech," citing *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1048-1051. The Court further stated that the CDA, as a criminal statute, "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images. As a practical matter, this increased deterrent effect, coupled with the risk of discriminatory enforcement of vague regulations, poses greater First Amendment concerns than those implicated by the civil regulations (internal citation omitted). Given the vague contours of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection. The CDA's burden on protected speech cannot be justified if it could be avoided by a more carefully drafted statute." (*Id.* at 874.)

A chilling effect on free speech may occur where a speaker is unclear if he or she is acting unlawfully and, as such, simply refrains from speaking. Statutes must precisely define the proscribed speech so as to give clear guidance as to what is permissible and what is not. "As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." (*Id.* at 885.)

Generally, laws that are content neutral face intermediate scrutiny, while laws that are content based are presumptively invalid and face strict scrutiny, a higher standard. (*Turner Broadcasting System v. Federal Communication Commission* (1994) 512 U.S. 622.) A content-based restriction means that the regulation restricts a specific subject matter, in this case sexually explicit speech. The standard by which the court would allow such a regulation to be upheld is strict scrutiny which requires a showing that the restriction is necessary to serve a compelling state interest. (*Sable Communications of California, supra*, at p. 126.) Thus, regardless of how important the state interest, the regulation of indecent speech must still be precise enough to achieve the purpose the regulation is intended to serve. (*Reno, supra*, 521 U.S. at p. 874.)

This bill creates a new crime for the nonconsensual distribution of any image created or altered through digitization depicting an individual engaging in, or participating in, a sexual act that the person distributing the image knows or should know that the person depicted did not consent to the distribution and that the distribution of the image will cause serious emotional distress, and the person suffers that distress. This bill defines "digitization" to mean altering an image in a realistic manner using an image or images of a person, other than the person depicted, or computer-generated images. The following circumstances would be exempted from criminal

liability: 1) the distribution is made in the course of reporting an unlawful activity; 2) the distribution is made in compliance with a subpoena or other court order for use in a legal proceeding; 3) The distribution is made in the course of a lawful public proceeding; and 4) the distribution is related to a matter of public concern or public interest. Distribution is not a matter of public concern or public interest solely because the depicted individual is a public figure.

This bill is modeled after the revenge porn statute. As to that particular statute, the California Appellate Court has found that the law was not overbroad or vague:

[B]arred a person who photographed or recorded the image from distributing it, when such a person had the intent to cause serious emotional distress. The requirement that a person *intend* to cause distress served to narrow the law (see [Stark v. Superior Court \(2011\) 52 Cal.4th 368, 391 \[128 Cal. Rptr. 3d 611, 257 P.3d 41\]](#)), rendering it inapplicable, for example, if the person acted under a mistake of fact or by accident (see [§ 26](#) classes Three & Five).

Furthermore, it is not just *any* images that are subject to the statute, but only those which were taken under circumstances where the parties agreed or understood the images were to remain private. “The government has an important interest in protecting the substantial privacy interests of individuals from being invaded in an intolerable manner. [Citation.]” ([People v. Astalis \(2014\) 226 Cal.App.4th Supp. 1, 8 \[172 Cal. Rptr. 3d 568\]](#).) It is evident that barring persons from intentionally causing others serious emotional distress through the distribution of photos of their intimate body parts is a compelling need of society.

([People v. Iniguez \(2016\) 247 Cal.App.4th Supp.1, 7-8.](#)) However, as will be discussed in more detail in note 4, there are some differences between the crime of revenge porn and the crime of distributing deepfake pornography.

The conduct punishable by this bill can also be compared to defamation which is a false, published statement that causes injury and was generally thought to be outside the scope of First Amendment protections. (Civil Code Section 46; [Beauharnais vs. Illinois \(1952\) 343 U.S. 250.](#)) However, in the landmark case of [New York Times vs. Sullivan \(1964\) 376 U.S. 254](#), the Court shifted course, finding some First Amendment protection in speech otherwise considered unprotected. “Libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.” The Court went on to state that a public official may not recover damages for defamation concerning his or her official conduct unless the statement was made with “*actual malice*,” meaning knowledge that it was false or with reckless disregard of the truth or falsity of the statement. In the case of [Hustler Magazine vs. Falwell \(1988\) 485 U.S. 46](#), Hustler Magazine parodied the Reverend Jerry Falwell by impersonating his likeness and insinuating he engaged in sexual activity with his mother. Falwell sued for defamation but lost because the Supreme Court ruled the obvious parody was not defamation. ([Hustler Magazine vs. Falwell \(1988\) 485 U.S. 46, 79.](#))

This bill would criminalize the distribution of images that have been digitized to realistically appear that the individual depicted is engaging in sexual conduct. There is not a requirement that the person who shared the image was also the one who created the image so people who share the image may be doing so while believing it to be an authentic image of the person depicted.

In some situations, it will be clear to the average person that the image created is not authentic even if the image was altered to look realistic. This bill does not require that a reasonable person would have believed that the image is an authentic image of the person depicted, thus it would criminalize the distribution of an image even if no one actually would believe the image to be real. Alternatively, a person who is merely sharing a deepfake image that they did not create or have reason to know is a deepfake and believes the image to be authentic could be criminalized under this bill. Because of the way the bill can be broadly applied, this bill may be challenged on First amendment grounds for overbreadth.

Additionally, as discussed in note 2, the majority of deepfake pornography is of women in the entertainment industry most of which are public figures and any criminalization of false statements regarding those individuals would likely have to comply with the actual malice standard in *Sullivan, supra*, meaning that the person has knowledge that it was false or with reckless disregard of the truth or falsity of the image.

#### 4. History of Revenge Porn Law

In 2013, California enacted a law to criminalize “revenge porn.” The law makes it a misdemeanor for a person to intentionally distribute an image that was intended to remain private of the intimate body parts of another or of the person depicted engaged in a sex act and the person distributing the image knows or should know that distribution of the image will cause serious emotional distress and the person depicted suffers that distress. (Pen. Code, § 647, subd. (j)(4).) When the law was originally enacted, the law did not include “selfies” however the following year the law was changed to include these types of images. (See SB 255 (Cannella), chapter 466, statutes of 2013 and SB 1255 (Cannella), chapter 863, statutes of 2014.) California and New Jersey were among the first to make revenge pornography a crime. Currently, 48 states and the District of Columbia have enacted laws to address this issue.

Following the passage of these laws, major leaders in technology changed their policies to better address nonconsensual images on their platforms:

Reddit, which was a major platform used by NCDII [nonconsensual distribution of intimate images] perpetrators, was the first to ban nonconsensual nude images in early 2015. Twitter and Facebook soon followed suit. Later that year, Google announced it would honor requests to remove intimate images that were posted without permission, marking a change from their previous commitment to wholly unregulated search results. The same year, the Federal Trade Commission took steps to remove major “revenge porn” sites such as IsAnybodyDown, IsAnyoneUp and UGotPosted by charging their owners with extortion, theft, hacking, and identity theft. This effectively upended the business model of “revenge porn” websites.

(Said and McNealey, *Nonconsensual Distribution of Intimate Images: Exploring the Role of Legal Attitudes in Victimization and Perpetration*, Journal of Interpersonal Violence Vol. 38, Iss. 7-8 (Sept. 9, 2022) <https://journals.sagepub.com/doi/full/10.1177/08862605221122834#body-ref-bibr8-08862605221122834> [as of Apr. 15, 2023].)

This bill is modeled after the existing “revenge porn” statutes however, unlike revenge porn where the parties are known to each other, the crime created by this bill may often be committed by someone unknown to the victim since it is not an image that the victim had purposely shared with the perpetrator. The purpose of the revenge porn law is to protect the privacy of an individual whose trust has been broken by a person who received a personal image with the understanding the image would not be shared with others. The images shared are real and in most instances would cause a person to suffer emotional distress and that is the intended result of the person unlawfully sharing the photo. The conduct this bill intends to cover, on the other hand, would involve an image of a real person that may be publicly accessible through social media or other means that has been altered in a way that makes the depicted person appear to engage in conduct they did not engage in, and by distributing such an image, an individual knowingly cause that person to suffer emotional distress. The emotional harm to the victim in both instances may be the same however the intent may be different for persons who share deepfake pornography. In particular when the deepfake images are of public figures, it is more likely that someone may have intent other than to humiliate or cause other emotional or reputational harm of the individual depicted, such as making a political commentary or parody.

## **5. Argument in Support**

According to the Los Angeles County District Attorney, the sponsor of this bill:

There has been an unfortunate increase in the proliferation of artificially created images distributed electronically across the internet and via email that but for the deficiency in existing law could be prosecuted under California’s existing revenge porn statute.

SB 926 would close this loophole in existing law by adding language to Penal Code Section 647(j)(4) that would make the distribution of any image created or altered through digitization of an intimate body part or parts of another identifiable person, or a digitized image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted, under circumstances which in which the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress.

SB 926 will protect victims from harm when a fake image of them is distributed in the same way that existing law protects victims from harm when an actual image of them is distributed. SB 926 will protect victims while still protecting any constitutional issues by retaining the requirement that the person distributing the image knew or should have known the distribution of the image would cause the victim serious emotional distress, and the victim suffered that distress.

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