

Date of Hearing: July 2, 2024

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Rebecca Bauer-Kahan, Chair

SB 926 (Wahab) – As Amended May 16, 2024

SENATE VOTE: 38-0

SUBJECT: Crimes: distribution of intimate images

SYNOPSIS

As generative artificial intelligence (GenAI) becomes more accessible it is increasingly being adopted for a variety of nefarious purposes, including scamming, the propagation of political disinformation, and the generation of nonconsensual deepfake pornography. Nonconsensual deepfake pornography is incredibly damaging to individuals and to society. Teenage males in California’s middle and high schools can now use cheap, phone-based “nudification” applications to digitally undress their underage female classmates, and the likenesses of female celebrities and public figures are regularly being adapted into high-resolution, fake pornographic scenarios.

Existing law makes it a misdemeanor to intentionally distribute intimate imagery of another identifiable person without that person’s consent. This crime is also commonly known as “revenge porn.” This bill would expand California’s revenge porn laws to include fake digital imagery.

This bill is sponsored by the Crime Victims Alliance and supported by a number of public safety associations, as well as the Los Angeles County District Attorney’s office. It has no opposition. If this bill passes out of this Committee it will next be heard by the Assembly Appropriations Committee.

SUMMARY: Expands California’s “revenge porn” laws to include nonconsensual deepfake pornography. Specifically, **this bill:**

- 1) Creates a new crime punishable as a misdemeanor for a person who intentionally creates and distributes or causes to be distributed any photo realistic image, digital image, electronic image, computer image, computer-generated image, or other pictorial representation of an 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, that was created in a manner that would cause a reasonable person to believe the image is an authentic image of the person depicted, under circumstances 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.
- 2) Applies the existing exceptions in the existing revenge porn statute to the provisions of this bill, including the prohibition against applying this law to issues pertaining to public concern or public interest.

EXISTING LAW:

- 1) Makes it a misdemeanor for a person to intentionally distribute an image of the intimate body parts of another identifiable person, or of the person depicted engaged in a sex act, under circumstances in which the persons agreed or understood that the image would remain private, and the person distributing the image knows or should know that the distribution of the image will cause serious emotional distress, and the person depicted suffers that distress. This crime is also commonly known as “revenge porn.” (Pen. Code § 647.)
 - a) States that a person intentionally distributes an image when that person personally distributes the image, or arranges, specifically requests, or intentionally causes another person to distribute that image.
 - b) Provides that distribution of the image is not a violation of the law if:
 - i) The distribution is made in the course of reporting an unlawful activity;
 - ii) The distribution is made in compliance with a subpoena or other court order for use in a legal proceeding; or,
 - iii) The distribution is made in the course of a lawful public proceeding.
 - c) Defines “intimate body part” to mean “any portion of the genitals, the anus and, in the case of a female, also includes any portion of the breasts below the top of the areola that is either uncovered or clearly visible through clothing.”

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS:

1) Artificial Intelligence and Generative Artificial Intelligence. Artificial intelligence (AI) refers to the mimicking of human intelligence by artificial systems, such as computers. AI uses algorithms – sets of rules – to transform inputs into outputs. Inputs and outputs can be anything a computer can process: numbers, text, audio, video, or movement. AI that are trained on small, specific datasets in order to make recommendations and predictions are sometimes referred to as “predictive AI.” This differentiates them from GenAI, which are trained on massive datasets in order to produce detailed text and images. When Netflix suggests a TV show to a viewer, the recommendation is produced by predictive AI that has been trained on the viewing habits of Netflix users. When DALL-E generates high-resolution, lifelike images, it uses GenAI that has been trained on ~250 million text-image pairs.

2) Deepfake pornography. The creation of text, imagery, video, and audio by GenAI has the potential to change the world by automating repetitive tasks and fostering creativity. When employed by bad actors, however, these capabilities have the potential to invade privacy and disrupt the lives of Californians. Since its inception, GenAI has been used to create nonconsensual pornography, more accurately referred to by sexual assault experts as image-based sexual abuse. According to a recent New York Times article, phone-based apps allowing teenage boys to digitally “nudify” their classmates have become increasingly accessible and affordable:

Boys in several states have used widely available “nudification” apps to pervert real, identifiable photos of their clothed female classmates, shown attending events like school proms, into graphic, convincing-looking images of the girls with exposed A.I.-generated breasts and genitalia. In some cases, boys shared the faked images in the school lunchroom, on the school bus or through group chats on platforms like Snapchat and Instagram, according to school and police reports.¹

The harms of AI-powered image-based sexual abuse are already being felt in California:

A third school in Southern California has been hit with allegations of digitally manipulated images of students circulating around campus . . . “Sixteen eighth-grade students were identified as being victimized, as well as five egregiously involved eighth-grade students,” Superintendent Michael Bregy wrote. While Bregy acknowledged that children “are still learning and growing, and mistakes are part of the process,” he affirmed disciplinary measures had been taken and noted that the incident was swiftly contained. The district vowed to hold accountable any other students “found to be creating, disseminating, or in possession of AI-generated images of this nature.”²

Women are the primary targets of these efforts, and no one appears to be immune: in the run-up to the 2024 Super Bowl, a series of images involving Taylor Swift began to appear on the social media platform X (formerly Twitter). These images were removed over the following days, but the damage had been done:

“We are too little, too late at this point, but we can still try to mitigate the disaster that’s emerging,” says Mary Anne Franks, a professor at George Washington University Law School and president of the Cyber Civil Rights Initiative. Women are “canaries in the coal mine” when it comes to the abuse of artificial intelligence, she adds. “It’s not just going to be the 14-year-old girl or Taylor Swift. It’s going to be politicians. It’s going to be world leaders. It’s going to be elections.”³

The harm inflicted on women and girls by this technology cannot be understated. In a recent *Guardian* article by gender equity expert and journalist, Luba Kassova, she argues that “nonconsensual deepfake pornography has become a growing human rights crisis.” In her article she asks readers to:

Imagine finding that someone has taken a picture of you from the internet and superimposed it on a sexually explicit image available online. Or that a video appears showing you having sex with someone you have never met.

¹ Natasha Singer, “Teen Girls Confront an Epidemic of Deepfake Nudes in Schools,” *New York Times*, Apr. 8, 2024, <https://www.nytimes.com/2024/04/08/technology/deepfake-ai-nudes-westfield-high-school.html>.

² Mackenzie Tatananni, “Inappropriate images’ circulate at yet another California high school, as officials grapple with how to protect teens from AI porn created by classmates,” *Daily Mail*, Apr. 11, 2024, <https://www.dailymail.co.uk/news/article-13295475/Inappropriate-images-California-Fairfax-High-School-AI-deepfake.html>.

³ Brian Contreras, “Tougher AI Policies Could Protect Taylor Swift—And Everyone Else—From Deepfakes,” Feb. 8, 2024, www.scientificamerican.com/article/tougher-ai-policies-could-protect-taylor-swift-and-everyone-else-from-deepfakes/.

Imagine worrying that your children, partner, parents or colleagues might see this and believe it is really you. And that your frantic attempts to take it off social media keep failing, and the fake “you” keeps reappearing and multiplying. Imagine realising that these images could remain online for ever and discovering that no laws exist to prosecute the people who created it.⁴

The problem has become so pervasive that the United States Department of Justice recently launched the first national 24/7 helpline for survivors of image-based sexual abuse.⁵ According to RAINN, a non-profit anti-sexual assault organization, more than 100,000 deepfake images and videos are posted on the internet every day.⁶ The *2023 State of Deepfakes* report found in its survey of American men that 74 percent of deepfake pornography users did not feel guilty about their consumption. According to the report’s authors, this finding suggests that deepfake pornographic content is becoming normalized and accepted. Further, of those surveyed almost one-third of those surveyed stated that they did not think that deepfake pornography hurt anyone as long as it was only used for their personal interest.⁷

3) Legal considerations. According to the Assembly Public Safety Committee’s analysis of this bill:

First Amendment: The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” (U.S. Const, Amend. I, Section 1.) The California Constitution also protects free speech. “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.” (Cal. Const. Art. I, § 2.) “[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” (*Ashcroft v. American Civil Liberties Union* (2002) 535 U.S. 564, 573.) Legislation that regulates the content of protected speech is subject to strict scrutiny, sometimes referred to by the courts as “exacting scrutiny” in this context. (*Reed v. Town of Gilbert, Ariz.* (2015) 135 S.Ct. 2218, 2226.) To survive strict scrutiny, state action must be narrowly tailored to address a compelling government interest. (*Ibid.*)

Nevertheless, First Amendment protections are not absolute. Restrictions on the content of speech have long been permitted in a few limited areas including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. (*United States v. Stevens* (2010) 559 U.S. 460, 130 S.Ct. 1577, 1584 [citations omitted].) The First Amendment permits “restrictions upon the content of speech in a few limited areas which are ‘of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the societal interest in order and morality.’” (*R.A.V. v. City of St. Paul* (1992) 505 U.S. 377, 382-383.)

4 Kassova, Luba. “Tech bros need to realise deepfake porn ruins lives – and the law has to catch up,” *The Guardian* (Mar. 1, 2024) <https://www.theguardian.com/global-development/2024/mar/01/tech-bros-nonconsensual-sexual-deepfakes-videos-porn-law-taylor-swift>.

5 Travers, Karen and Emmanuelle Saliba. “Fake explicit Taylor Swift images: White House is ‘alarmed’,” *ABC News* (Jan. 26, 2024) <https://abcnews.go.com/US/white-house-calls-legislation-regulate-ai-amid-explicit/story?id=106718520>.

6 *Ibid.*

7 *2023 State of Deepfakes: Realities, Threats, and Impact*. Home Security Heroes. <https://www.homesecurityheroes.com/state-of-deepfakes/#deepfake-porn-survey>.

While some lower courts have grappled with First Amendment challenges to state “revenge porn” laws generally, the California Supreme Court has yet to weigh in. (Paul, *Is Revenge Porn Protected Speech? Lawyers Weigh in, and Hope for a Supreme Court Ruling*, The Washington Post (Dec. 26, 2019).⁸

A former version of California’s “revenge porn” law (Pen. Code, § 647, subd. (j)(4)(iii)) survived First Amendment scrutiny in *People v. Iniguez* (2016) 247 Cal.App.4th Supp. 1 (*Iniguez*). There, the defendant argued the statute was overbroad in violation of the First Amendment.

Overbreadth means a defendant “may challenge a statute not because their own rights of free expression are violated, but because the very existence of an overbroad statute may cause others not before the court to refrain from constitutionally protected expression. [Citations.]” (*In re M.S.* (1995) 10 Cal.4th 698, 709.) To avoid being overbroad, “statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.” (*Broadrick v. Oklahoma* (1973) 413 U.S. 601, 611–612 [citations omitted].)

Without deciding whether a person has a free speech right to distribute such images, the *Iniguez* court concluded former subdivision (j)(4)(iii) of Penal Code section 647.6⁹ was not constitutionally overbroad because it required specific intent to distribute sexually explicit material, with the intent to cause serious emotional distress. (*People v. Iniguez, supra*, 247 Cal.App.4th Supp. at pp. 7-8.) Accordingly, the statute would not apply if a person acted by mistake or accident. (*Id.* at pp. 7-8.)

The *Iniguez* court also explained that “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.” (*People v. Iniguez, supra*, 247 Cal.App.4th Supp. at p. 8 [citation omitted].) The court stated, “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.” (*Ibid.*)

This proposed statute simply tracks the existing revenge porn statute without the requirement that the victimized party knows about the intimate image. Additionally, the provision is still subject to the requirements of the revenge porn statute.

Torts and Federal Law: Code of Civil Procedure section 1708.85 allows a person to file a private right of action (i.e., lawsuit) against any person who intentionally distributes sexually explicit photographs or other images or recordings of another person, without the consent of that person. Under California law, intentional infliction of emotional distress requires “extreme and outrageous conduct by the defendant with the intention of causing, or reckless

⁸ Located at < <https://www.washingtonpost.com/nation/2019/12/26/is-revenge-porn-protected-speech-supreme-court-may-soon-weigh/> > [as of April 5, 2024].

⁹ Penal Code section 647, subdivision (j)(4)(A-D.)

disregard of the probability of causing, emotional distress.” (See *Hughes v. Pair* (2009) 46 Cal. 4th 1035, 1050.) “A defendant’s conduct is ‘outrageous’ when it is so extreme as to exceed all bounds of that usually tolerated in a civilized community.” (*Id.* at pp. 1050–51.)

A person may also sue a former spouse, domestic partner, or person with whom the plaintiff cohabited for infliction of emotional distress pursuant to Civil Code section 1714.01. A person may recover up to \$250,000 for non-economic injuries like pain or suffering. A plaintiff is also entitled to receive attorneys’ fees (which are often significantly more than the actual damages) and economic damages, including medical (i.e., mental health) bills, costs of removing the images from the internet, lost wages, etc. This bill, as it pertains to images that may have been taken surreptitiously and disseminated without someone’s consent, may be remedied at civil law pursuant to a private right of action or injunctive relief. In certain circumstances, prosecutors charge individuals posting revenge porn with cyberstalking. (Indictment, *United States v. Sayer* (1st Cir. 2014) 748 F.3d 425 (No. 2:11-cr-113-DBH) (indicting defendant Shawn Sayer with one count of cyberstalking and one count of identity theft).¹⁰

Cyberstalking occurs when an individual intentionally uses an interactive computer service or electronic communication system to act in a way that "causes, attempts to cause, or would reasonably be expected to cause substantial emotional distress" to another person, their immediate family, or their intimate partner. If an individual repeatedly posts revenge porn online with sufficient contact information to allow viewers to contact the person depicted and thereby causes the victim to suffer substantial emotional distress, prosecutors may charge the individual with cyberstalking. (See *United States v. Sayer* (1st Cir. 2014) 748 F.3d 425, 428-429 (recounting the defendant's stalking and harassment of the victim by placing intimate images of the victim online with her contact information). Finally, prosecution may be possible under the Video Voyeurism Prevention Act of 2004. (18 U.S.C. § 1801 (2012).) If an individual "has the intent to capture an image of a private area of an individual without their consent, and knowingly does so under circumstances in which the individual has a reasonable expectation of privacy," prosecutors can charge the individual capturing the image under the Act. (*Id.*)

If an individual, including an intimate partner, captures revenge porn images, the individual could face voyeurism charges. (*Id.*) However, the Video Voyeurism Act may not apply to situations where a couple produced the image consensually with an expectation of privacy.¹¹ In this case, the author and sponsors point out that the existing revenge porn statute requires the person whose image is being distributed to know about the image, but in an era of deepfakes and rising AI, the victim may not know anything about the image.

4) What this bill would do. This bill would expand California’s existing “revenge porn” statutes, which currently require a person to distribute a real image of another identifiable person, to additionally include the creation and distribution of fake images.

¹⁰ See 18 U.S.C. § 2261A, subd. (2) (2012) (requiring that an individual engaging in cyberstalking must also have an "intent to kill, injure, harass, intimidate, or place under surveillance with the intent to kill, injure, harass or intimidate . . .").

¹¹ CIVIL: Chapters 859 & 863: *Model Revenge Porn Legislation or Merely a Work in Progress?*, Code Sections Affected Civil Code § 1708.85 (new).AB 2643 (Wieckowski); 2014 STAT. Ch. 859.Penal Code § 647 (amended).SB 1255 (Cannella); 2014 STAT. Ch. 863., 46 McGeorge L. Rev. 297, 301-302

5) Author's statement:

SB 926 is a crucial step towards addressing the growing threat of artificially created sexually explicit images distributed without consent. By building on existing legislation, SB 926 serves as a critical tool in creating effective legal recourse 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 clear legal consequences that 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 artificially created 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 sexual 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.

6) Analysis. Nonconsensual deepfake pornography is incredibly damaging to individuals and to society. This bill represents a meaningful attempt to combat these issues by expanding California's "revenge porn" laws to include deepfake materials. The language introduced by the author mirrors existing law, with a few minor exceptions aimed at reflecting fundamental differences between the release of real images and the creation of false images:

- Existing law: "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."
- SB 926 language: "A person who intentionally *creates and* distributes or causes to be distributed *any photo realistic image, digital image, electronic image, computer image, computer-generated image, or other pictorial representation of an* 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 *that was created in a manner that would cause a reasonable person to believe the image is an authentic image of the person depicted*, under circumstances 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.”

7) Related legislation. AB 1831 (Berman, 2024) would expand laws against child pornography to include AI-generated matter. This bill is currently pending in Senate Appropriations Committee.

AB 1856 (Ta, 2024) would provide that an individual who intentionally distributes nonconsensual deepfake pornography is subject to a misdemeanor. This bill is currently pending in Senate Appropriations Committee.

SB 933 (Wahab, 2024) would expand laws against child pornography to include real minors being portrayed in AI-generated media. This bill is currently pending in this Committee.

ARGUMENTS IN SUPPORT:

The City of San Jose writes:

Over the past year, generative artificial intelligence tools have been made available for public use and have immediately transformed the ability to generate new types of imagery. These powerful computing programs can now generate realistic text and images often indistinguishable from human-authored content, with generative audio and video not far behind. Given these technological advances, bad actors have manipulated images to create deceitful and damaging imagery not covered as criminal activity under current law. This legislation is urgently needed to update our criminal standards to capture the latest technological advancements and close legal loopholes so that this activity is no longer allowed.

The Los Angeles County District Attorney’s Office writes:

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 it a crime under California’s revenge porn statute to distribute 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.

REGISTERED SUPPORT / OPPOSITION:

Support

Los Angeles County District Attorney's Office (sponsor)
City of San Jose
City of Santa Clara
Peace Officers Research Association of California (PORAC)

Opposition

None on file.

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