

Date of Hearing: June 21, 2022

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Jesse Gabriel, Chair

SB 53 (Leyva) – As Amended June 9, 2022

SENATE VOTE: 36-0

SUBJECT: Unsolicited images

SUMMARY: This bill would provide a private cause of action against a person who knowingly sends an image that the person knows or reasonably should know is unsolicited, as defined, by electronic means, depicting obscene material. Specifically, **this bill would:**

- 1) Provides that a private cause of action lies against a person who knowingly sends an image, that the person knows or reasonably should know is unsolicited, by electronic means, depicting obscene material.
- 2) Provides that a prevailing plaintiff who suffers harm as a result of receiving an image in violation of 1), above, may recover economic and noneconomic damages proximately caused by the receipt of the image, including damages for emotional distress.
- 3) Provides that a prevailing plaintiff who suffers harm as a result of receiving an image, the receipt of which had been *expressly forbidden by the plaintiff*, in violation of 1), above, may recover the following:
 - Economic and noneconomic damages proximately caused by the sending of the image, including damages for emotional distress.
 - Upon request of the plaintiff at any time before the final judgment is rendered, the plaintiff may, in lieu of those damages specified in the previous bullet, recover an award of statutory damages of a sum of not less than \$1,500 but not more than \$30,000.
 - Punitive damages.
- 4) Provides that a prevailing plaintiff described and either 2) or 3), above, may recover the following:
 - Reasonable attorney's fees and costs.
 - Any other available relief, including injunctive relief.
- 5) Specify that the remedies provided by the provisions of the bill are cumulative and shall not be construed as restricting a remedy that is available under any other law.
- 6) Specify that the provisions of the bill do not apply to any of the following:
 - An internet service provider, mobile data provider, or operator of an online or mobile application, to the extent that the entity is transmitting, routing, or providing connections for electronic communications initiated by or at the direction of another person.

- Any service that transmits images or audiovisual works, including, without limitation, an on-demand subscription, or advertising-supported service.
 - A health care provider transmitting an image for a legitimate medical purpose.
 - An individual who has not expressly opted-out of receiving sexually explicit images on the service in which the image is transmitted, where such an option is available.
- 7) Defines “obscene material”, for the purposes of the bill, to mean material, including, but not limited to, images depicting a person engaging in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or masturbation, or depicting the exposed genitals or anus of any person, taken as a whole, that to the average person, applying contemporary statewide standards, appeals to the prurient interest, that, taken as a whole, depicts or describes sexual conduct in a patently offensive way, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value.
- 8) Specify that, for the purposes of the bill, an image is “unsolicited” if the recipient has not requested the image, has not consented to its receipt, or has expressly forbidden its receipt.
- 9) Specify that, for the purposes of the bill, “image” includes, but is not limited to, a moving visual image.

EXISTING LAW:

- 1) Provides, under the U.S. Constitution, that “Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” (U.S. Const., 1st Amend., as applied to the states through the 14th Amendment’s Due Process Clause; *see Gitlow v. New York* (1925) 268 U.S. 652.)
- 2) Holds that obscenity is not within the area of constitutionally protected speech or press. (*Roth v. United States* (1957) 364 U.S. 476, 485.)
- 3) Holds that the states have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. (*See, e.g., Miller v. California* (1973) 413 U.S. 15, 18-19.)
- 4) Holds that the appropriate test for evaluating whether material constitutes obscenity unprotected by the First Amendment weighs all of the following: (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. (*Id.* at p. 24.)
- 5) Provides that every person who willfully or lewdly does either of the following is guilty of a misdemeanor:

- Exposes their person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby.
 - Procures, counsels, or assists any person so to expose themselves or to take part in any model artist exhibition, or to make any other exhibition of themselves to public view, or the view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts. (Pen. Code Sec. 314.)
- 6) Provides that an individual who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view is guilty of misdemeanor disorderly conduct. (Pen. Code Sec. 647(a).)
- 7) Provides that every person who knowingly sends or causes to be sent any obscene matter is for a first offense guilty of a misdemeanor, and for subsequent offenses may be subject to a fine not exceeding \$50,000. (Pen. Code Sec. 311.2(a).)
- 8) Defines “obscene matter”, for purposes of 6), above, to mean matter, taken as a whole, that to the average person, applying contemporary statewide standards, appeals to the prurient interest, that, taken as a whole, depicts or describes sexual conduct in a patently offensive way, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value. (Pen. Code Sec. 311(a).)
- 9) Provides that a private cause of action lies against a person who intentionally distributes by any means of photograph, film, videotape, recording, or any other reproduction of another, without the other’s consent if all of the following are true, except as specified:
- The person knew, or reasonably should have known, that the other person had a reasonable expectation that the material would remain private.
 - The distributed material exposes an intimate body part of the other person, or shows the other person engaging in an act of intercourse, oral copulation, sodomy, or other act of sexual penetration.
 - The other person suffers general or special damages as specified. (Civ. Code Sec. 1708.85.)

FISCAL EFFECT: According to the Senate Appropriations Committee, “[u]nknown, potentially-significant workload cost pressures to the courts to adjudicate alleged violations of this measure. While the superior courts are not funded on a workload basis, an increase in workload could result in delayed court services and would put pressure on the General Fund to increase the amount appropriated to backfill for trial court operations.”

COMMENTS:

- 1) **Purpose of this bill:** This bill seeks to deter online sexual harassment and provide relief for victims of online sexual harassment by making available to recipients of unsolicited obscene materials transmitted through electronic means a cause of action to seek legal remedies. This bill is sponsored by Bumble, Inc.
- 2) **Author’s statement:** According to the author:

According to the Pew Research Center, 53 percent of young American women and 37 percent of young American men have been sent unsolicited explicit material while online. A 2017 national survey conducted by YouGovNY reports that 20 percent of male respondents believed that women would find lewd images distressing, and 17 percent believed that women would describe the material as threatening. This behavior occurs via social media, dating platforms, text messages, and email. In some cases, unsolicited sexually explicit material is ‘AirDropped’ in public spaces to unsuspecting recipients.

Technological advancements have allowed users to interact with one another through various social media platforms, dating applications, and private messaging. In modern online communications, perpetrators are easily and legally able to sexually harass users with lewd images and videos of themselves. With the growing accessibility and relevance of technology as a mode of communication, it has become easier for people to send unsolicited sexually explicit material of themselves.

By making the electronic transmission of unsolicited lewd material of the sender punishable subject to civil remedies, California can prevent technology users from experiencing digital forms of sexual harassment and can help foster a safe and healthy technology community.

- 3) Sexual harassment and indecent exposure in the digital age:** According to a 2018 survey by a nonprofit called Stop Street Harassment, 81% of women and 43% of men have experienced some form of sexual harassment during their lifetime, and 66% of those women said they’d been sexually harassed in public spaces.¹ The emergence of digital spaces as prominent venues for social interaction has brought with it many benefits for connection and communication, but has also facilitated certain types of sexual misconduct not generally contemplated by existing laws. A 2021 Pew Research Center Report examining “The State of Online Harassment” indicated that 33% of women under 35 and 11% of men under 35 say they have been sexually harassed online, and these statistics increase dramatically for those in the LGBTQIA+ community.² In many cases, this sexual harassment takes the form of unwanted exposure to explicit images. A 2017 Pew Research Center Report found that 52% of women and 36% of men ages 18-34 reported receiving an explicit image they did not request online.³ Receipt of these images can cause significant, lasting distress among recipients, and such images are generally viewed unfavorably. According to a 2017 YouGovNY survey, 41% of women characterize these types of explicit images as “gross,” 17% describe them as “distressing,” and 12% consider them “threatening.”⁴

Over the past decade, this Legislature has made several efforts to address issues pertaining to the ease with which explicit images can be transmitted through modern digital media. In

¹ Rhitu Chatterjee, “A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment,” *National Public Radio*, Feb. 21, 2018, <https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment> [as of Jun. 17, 2022].

² Emily A. Vogels, “The State of Online Harassment,” *Pew Research Center*, Jan. 13, 2021, https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2021/01/PI_2021.01.13_Online-Harassment_FINAL-1.pdf [as of Jun. 17, 2022].

³ Monica Anderson & Emily A. Vogels, “Young women often face sexual harassment online – including on dating sites and apps,” *Pew Research Center*, Mar. 6, 2020, <https://www.pewresearch.org/fact-tank/2020/03/06/young-women-often-face-sexual-harassment-online-including-on-dating-sites-and-apps/> [as of Jun. 17, 2022].

⁴ YouGovNY, “Dick Pics,” Oct. 2017, p. 13, <http://bit.ly/YouGovNYStudy> [as of Jun. 17, 2022].

2013, this Legislature passed its first so-called “revenge porn” statute, SB 255 (Canella, Ch. 466, Stats. 2013), which provides that any person who photographs or records the intimate body part or parts of another identifiable person under private circumstances, and subsequently distributes that image with the intent to cause serious emotional distress, is guilty of disorderly conduct, a misdemeanor, if the depicted person suffers serious emotional distress. AB 2643 (Wieckowski, Ch. 859, Stats. 2014) was enacted the following year, and provides that a private cause of action lies against a person who intentionally distributes by any means a photograph, film, videotape, recording, or any other reproduction of another, without the other’s intent, if there was a reasonable expectation that the material would remain private, the material exposes an intimate body part or shows the person engaging in an act of intercourse, oral copulation, sodomy, or other act of sexual penetration, and the person suffers general or special damages as specified. Recognizing the risks of manufactured and manipulated explicit content emerging from advances in digital technology, in 2019, the Legislature passed AB 602 (Berman, Ch. 491, Stats. 2019), which provides that a depicted individual, as defined, has a cause of action against a person who creates and/or intentionally discloses sexually explicit material that the person knows or should have known the depicted individual in that material did not consent to its creation or disclosure.

These laws have significantly improved the adequacy of the legal framework surrounding the distribution of explicit content intended to remain private, but the Legislature has yet to successfully address the inverse problem, in which recipients of digitally transmitted explicit content are exposed to that content without their consent. As the sponsors of this bill, Bumble, Inc., explain:

In a recent user safety survey, we found that close to four in five female Bumble users believe that the sending of unwanted lewd content is unacceptable. Close to two thirds of women using Bumble believe that sending lewd photos online is as offensive as flashing people in the street; this rises to just short of three quarters of women users belonging to the LGBTQIA+ community. The experience of receiving this content isn’t momentary or fleeting: users claim to have been left feeling violated, less trusting of others online, and more vulnerable when using the Internet.

This behavior is not just occurring on dating apps and social networks. These images and videos are sent via text, email, direct-message, and are even “AirDropped” in public places. [...] Tech companies can only do so much to curb this abhorrent behavior. We’re counting on our lawmakers to fill the gaps where our best efforts fall short.

Existing law provides that a person who knowingly sends any obscene matter is, for a first offense, guilty of a misdemeanor, and, for subsequent offenses, may be subject to a fine not exceeding \$50,000. (Pen. Code Sec. 311.2(a).) That law defines “obscene matter” in a nearly identical manner to this bill (*see* Comment #5), and further defines “matter” to mean “any book, magazine, newspaper, or other printed or written material, or any picture, drawing, photograph, motion picture, or other pictorial representation, or any statute or other figure, or any recording, transcription, or mechanical, chemical, or *electrical* reproduction, or any other article, equipment, machine, or material.” (Pen. Code Sec. 311(a) and (b).) Accordingly, a person who non-consensually electronically transmits obscene material could be prosecuted under this criminal statute. Additionally, existing law provides that a person who “willfully and lewdly [...] exposes his person, or the private parts thereof, in any public

place, or in any place where there are present other persons to be offended or annoyed thereby” is guilty of indecent exposure, a misdemeanor. (Pen. Code Sec. 314.) Jurisprudence with respect to whether an electronic communication platform constitutes a “place” for purposes of that law is presently unresolved, and it is thus unclear whether that law would apply in the circumstances contemplated by this bill.

Regardless, while both of these laws criminalize acts of exposing individuals who have not consented to obscene material, neither specifically provides relief to the victim, who can suffer substantial emotional harm as a result of the act. This bill provides for a cause of action to make such relief available, further deterring these heinous acts and facilitating the process of making victims whole subsequent to suffering this particular form of harassment.

- 4) **SB 53 would provide for a private cause of action against a person who knowingly sends an unsolicited image depicting obscene material by electronic means:** This bill would provide a private cause of action against a person who knowingly sends an image, that the person knows or reasonably should know is unsolicited, as defined, by electronic means, depicting obscene material. The bill defines image to include moving visual images, and specifies that “[a]n image is unsolicited if the recipient has not requested the image, has not consented to its receipt, or has expressly forbidden its receipt.”

The bill provides for two different sets of remedies, depending on whether the plaintiff had *expressly forbidden* the receipt the image. If a prevailing plaintiff had not expressly forbidden receipt of the image but does suffer harm as a result of receiving the image, the plaintiff may recover economic and noneconomic damages proximately caused by the receipt of the image, including damages for emotional distress, as well as reasonable attorney’s fees and costs, and any other available relief, including injunctive relief. If a prevailing plaintiff had expressly forbidden receipt of the image and the plaintiff suffers harm as a result of receiving the image, the plaintiff may recover punitive damages, reasonable attorney’s fees and costs, any other available relief, including injunctive relief, as well as one of the following:

- Economic and noneconomic damages proximately caused by the sending of the image, including damages for emotional distress; or
- Upon request of the plaintiff at any time before the final judgment is rendered, statutory damages of a sum not less than \$1,500 but not more than \$30,000.

In other words, in the event receipt of the image was expressly forbidden by the plaintiff, the plaintiff may also recover punitive damages, and has the option to recover statutory damages rather than economic and noneconomic damages proximately caused by the violation. This remedy structure appears to appropriately account for the particular seriousness of instances in which an obscene image is transmitted against the explicit wishes of the recipient.

In support of the bill, the California Police Chiefs Association argues:

“Cyber flashing” is becoming more prevalent in the internet age, and the distressed caused by electronic indecent exposure spans a multitude of different platforms. From social media and dating sites to text messages, emails and “air drops” the percentage of young adults experiencing the receipt of non-consensual sexually explicit material has

grown rapidly. However, current California law does not consider the role of technology as a facilitating means for a sender to distribute sexually explicit material.

This bill will establish consequences for sharing lewd material without express consent, and will help ensure that individuals of all ages are better protected from potentially damaging digital content.

- 5) **Definition of “obscene material” is crafted specifically to avoid suppressing constitutionally protected speech:** The First Amendment of the U.S. Constitution provides that “Congress shall make no law [...] abridging the freedom of speech [...]” (U.S. Const., 1st Amend.), and courts have consistently held that this prohibition on legislation abridging speech applies to state and local governments. (*See, e.g., Gitlow v. New York* (1925) 268 U.S. 652.) Courts have further established the contours of First Amendment protection of speech to include prohibitions against government compulsion of speech and against laws that serve the purpose of chilling speech on the basis of content, even if the law itself does not explicitly ban certain speech.

Generally speaking, a law that infringes on the freedom of individual speech based on the content of that speech must survive a so-called “strict scrutiny” analysis, which considers the law unconstitutional unless it meets three criteria: (1) the law must be justified by a compelling governmental interest; (2) the law must be narrowly tailored to achieve that goal or interest; and (3) it must be the least restrictive means for achieving that interest. However, the U.S. Supreme Court has held on several occasions that obscenity does not constitute protected speech. (*See, e.g., Roth v. United States* (1957) 354 U.S. 476, at p. 481: “The dispositive question is whether obscenity is utterance within the area of protected speech and press. Although this is the first time the question has been squarely presented to this Court, either under the First Amendment or under the Fourteenth Amendment, expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press.”)

The Supreme Court has further held that state statutes designed to regulate obscene materials must be carefully limited (*Miller v. California* (1973) 413 U.S. 15, at pp. 23-24) and that “the basic guidelines for the trier of fact must be: (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest, [citation]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” (*Id.* at p. 24.) Prudently, the author of this bill has defined “obscene material” for the purposes of this bill in direct reference to these guidelines. Specifically, “obscene material”, for purposes of this bill, is defined to mean “material, including, but not limited to, images depicting a person engaging in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or masturbation, or depicting the exposed genitals or anus of any person, taken as a whole, that to the average person, applying contemporary statewide standards, appeals to the prurient interest, that, taken as a whole, depicts or describes sexual conduct in a patently offensive way, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value.” By predicating the availability of the cause of action provided by the bill on this definition of “obscene material”, the bill in print appears unlikely to violate constitutional protections for free speech.

- 6) **Author’s amendments:** To resolve potential ambiguities in the bill, the author has offered two technical amendments:

Amendment #1: The bill in print includes what appears to be an inadvertent discrepancy between the bases for the economic and noneconomic damages available to those who have expressly forbidden receipt of the obscene material and those who have not. Specifically, while the bill in print predicates the damages for those who have *not* expressly forbidden receipt of the image on the harm “proximately caused by the *receipt* of the image,” for those who have expressly forbidden receipt, the bill predicates the damages on the harm “proximately caused by the *sending* of the image.”

In this case, while the distinction between harms caused by the sending of an image and harms caused by the receipt of an image may seem trivial, a court may interpret these harms to differ fundamentally. Per the canons of statutory construction, the Rule Against Surplusage specifies that courts interpreting different words in the same statute cannot assign the same meaning to those words. (*See, e.g., Mendoza v. Nordstrom, Inc.* (2017) 393 P.3d 375, 383.) As such, one could theoretically argue that there are no harms proximately caused by the *sending* of an obscene image, as if the image were never received, it would not have imposed emotional distress or other repercussions on the recipient, thereby foreclosing resulting damages.

The author has confirmed that it was not their intent for the bases for these damages to differ, and has offered the following amendment to resolve this oversight:

Author’s amendment:

On page 3, line 4, strike the word “sending” and insert: “*receipt*”.

Amendment #2: The bill in print specifies that “[a]n image is unsolicited if the recipient has not requested the image, has not consented to its receipt, *or* has expressly forbidden its receipt.” (Emphasis added.) The use of “or” here suggests that if any one of these conditions is met, the image is considered “unsolicited” and the cause of action provided by the bill is potentially available. In circumstances in which an individual did not *request* an image, however, they may have nonetheless provided enthusiastic consent to its receipt. Arguably, in such cases, the image should not be considered “unsolicited” to the extent that the author intends to capture only non-consensual circumstances. Because requesting an image can be construed as a form of consent, the author has offered the following amendment to clarify that the valid consent of the recipient, whether or not the recipient initiated the request for the image, is sufficient to disqualify the cause of action pursuant to this bill:

Author’s amendment:

On page 2, lines 20-21, strike “has not requested the image,”.

On page 2, line 21, strike “ its receipt”.

On page 2, line 22, strike “ its receipt” and insert: “, *the receipt of the image*”.

- 7) **Related legislation:** SB 435 (Cortese, 2021) would provide a cause of action against any person that engages in online sex trafficking by making, obtaining, or distributing, including

through electronic distribution, any moving or still photograph of a person, or their identifiable likeness, that is sexual in nature or in which the person is naked, under specified circumstances.

- 8) **Prior legislation:** SB 1182 (Leyva, 2020) would have provided a cause of action for knowingly sending an unsolicited, sexually explicit image, and would have imposed civil penalties for such an act. This bill died in the Senate Judiciary Committee.

SB 798 (Chang, 2020) would have created a private cause of action against a person who knowingly transmits or shares a lewd image by electronic means if the transmission was not at the request of, or expressly consented to by, the plaintiff, provided the plaintiff can demonstrate that the image was lewd, there was clear intent, and there was no relationship or a limited relationship between the plaintiff and the defendant. This bill died in the Senate Judiciary Committee.

AB 602 (Berman, Ch. 491, Stats. 2019) *See Comment #3.*

AB 2643 (Wieckowski, Ch. 859, Stats. 2014) *See Comment #3.*

AB 255 (Cannella, Ch. 466, Stats. 2013) *See Comment #3.*

- 9) **Double referral:** This bill was double-referred to the Assembly Judiciary Committee, where it was heard on June 8, 2022 and passed out 10-0.

REGISTERED SUPPORT / OPPOSITION:

Support

Bumble Trading, Inc. (sponsor)
Alameda County District Attorney's Office
California Coalition of School Safety Professionals
California Police Chiefs Association
California State Sheriffs' Association
California Statewide Law Enforcement Association
California Women's Law Center
Consumer Attorneys of California
Feminist Majority Foundation
Internet Association
Leda Health
National Organization for Women
National Women's Political Caucus of California
Peace Officers Research Association of California (PORAC)
Riverside Sheriffs' Association
Santa Ana Police Officers Association
Santa Barbara Women's Political Committee
Students Against Sexual Assault
TechNet
The Purple Campaign

Opposition

None on file

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