

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

SB 1210 (Cortese)
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Fiscal: No
Urgency: No
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SUBJECT

Personal rights: obscene materials: attorney's fees

DIGEST

This bill requires a court to award attorneys' fees and costs to a prevailing plaintiff in an action against any person or entity that distributes, benefits from, promotes, or induces another person to distribute unauthorized obscene materials.

EXECUTIVE SUMMARY

Numerous state and federal laws, both civil and criminal, establish penalties for the creation, distribution, and possession of certain sexually explicit or obscene material. For instance, in California, recently enacted laws specifically provide private causes of action against those creating and/or distributing sexually explicit material without the consent, as provided, of the depicted individuals. This includes actions involving explicit "deep fake" material and so called "revenge porn."

These statutes, and others, provide causes of action for relief, but do not guarantee the award of attorneys' fees. This lack of certainty can be a barrier to full enforcement of these laws.

This bill makes attorneys' fees and costs mandatory for prevailing plaintiffs in any civil cause of action against any person or entity that distributes, benefits from, promotes, or induces another person to distribute unauthorized obscene materials, as those terms are defined.

This 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, or where they should have reasonably known, 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) 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, except where the person has received notice from the depicted individual to cease distribution, as specified. (Civ. Code § 1708.85(c).)
- 4) Authorizes the court to order, in addition to any other relief available at law, equitable relief against the person in violation, including a temporary restraining order, or a preliminary injunction or a permanent injunction ordering the defendant to cease distribution of material. The court may also grant, after holding a properly noticed hearing, reasonable attorney's fees and costs to the prevailing plaintiff. (Civ. Code § 1708.85(d), (e).)

- 5) Provides 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 (“depicted individual”) a cause of action against a person who does either of the following:
 - a) 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
 - b) 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.)
- 6) Defines “sexually explicit material,” for the purposes of the above action, to mean 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, as those terms are defined. (Civ. Code § 1708.86(a).)
- 7) Exempts a person from liability in the above action if the person discloses the sexually explicit material in the course of reporting unlawful activity; exercising the person’s law enforcement duties; or in hearings, trials, or other legal proceedings. The person is also exempt if the material is any of the following:
 - a) a matter of legitimate public concern;
 - b) a work of political or newsworthy value or similar work; or
 - c) a commentary, criticism, or disclosure that is otherwise protected by the California Constitution or the United States Constitution. (Civ. Code § 1708.86(c).)
- 8) Provides that a court may award the following relief to a prevailing plaintiff that suffers harm:
 - a) an amount equal to the monetary gain made by the defendant from the creation, development, or disclosure of the sexually explicit material;
 - b) economic and noneconomic damages proximately caused by the disclosure of the sexually explicit material, including damages for emotional distress, or in the alternative, statutory damages as provided;
 - c) punitive damages;
 - d) reasonable attorney’s fees and costs; and
 - e) any other available relief, including injunctive relief. (Civ. Code § 1708.86(e).)
- 9) Authorizes a victim of human trafficking, as defined, to bring a civil action for actual damages, compensatory damages, punitive damages, injunctive relief, any combination of those, or any other appropriate relief. A prevailing plaintiff may also be awarded attorney’s fees and costs. (Civ. Code § 52.5.)

- 10) Prohibits a person who uses a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another identifiable person who may be in a state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, in the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which that other person has a reasonable expectation of privacy, with the intent to invade the privacy of that other person. For the purposes of this paragraph, "identifiable" means capable of identification, or capable of being recognized, meaning that someone, including the victim, could identify or recognize the victim. (Pen. Code § 647(j).)

- 11) Prohibits a person who intentionally distributes 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(j).)

This bill:

- 1) Requires a court to award a prevailing plaintiff attorney's fees and costs in a civil action seeking damages or equitable relief against any person or entity that distributes, benefits from, promotes, or induces another person to distribute unauthorized obscene materials, including through electronic distribution.

- 2) Defines "obscene material" as material, 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.

- 3) Defines "unauthorized" to mean either of the following:
 - a) the obscene material was coerced, made, or obtained by trickery or subterfuge, or stolen, made, obtained, or distributed without the knowledge or without or beyond the express permission, freely given, of the person in the photograph, or the person whose identifiable likeness appears in the photograph; or
 - b) the obscene material is of a person who was less than 18 years of age at the time the obscene material was created.

COMMENTS

1. Existing laws combatting “unauthorized,” “obscene” material

In response to concerns about nonconsensual sexual content being made, coerced, or distributed, a number of existing laws impose both civil and criminal liability for those responsible. In California, the Penal Code prohibits surreptitiously recording others in various states of undress as well as the distribution of images of intimate body parts or sexually explicit content where the person depicted intended such material to remain private. (Pen. Code § 647(j).)

In recent years, the Legislature has established civil causes of action for similar content. For instance, California’s so-called “revenge porn” statute provides a cause of action against a person that intentionally distributes a sexually explicit photograph, film, videotape, or recording of another, without the other’s consent, where the person knew, or reasonably should have known, that the other person had a reasonable expectation that the material would remain private and the other person suffers harm. (Civ. Code § 1708.85.)

In response to the rise of so-called “deep fakes,” California law also provides a cause of action against persons that create or intentionally disclose sexually explicit material of another where the other person appears, as a result of digitization, to be giving a performance they did not actually perform or to be performing in an altered depiction. (Civ. Code § 1708.86.) The claim only lies where the person creating and intentionally disclosing the material knows or reasonably should know the depicted individual did not consent to its creation or disclosure, or where a person simply disclosing the material knows the depicted individual did not consent.

The law also provides a specific cause of action for victims of human trafficking, as defined. (Civ. Code § 52.5.) They are authorized to bring a civil action for actual damages, compensatory damages, punitive damages, injunctive relief, any combination of those, or any other appropriate relief. Such a plaintiff may be awarded up to three times their actual damages or \$10,000, whichever is greater. A prevailing plaintiff *may* also be awarded attorney’s fees and costs.

Federal laws also work to combat such material, especially where children are involved:

Federal law prohibits the production, distribution, reception, and possession of an image of child pornography using or affecting any means or facility of interstate or foreign commerce (*See* 18 U.S.C. § 2251; 18 U.S.C. § 2252; 18 U.S.C. § 2252A). Specifically, Section 2251 makes it illegal to persuade, induce, entice, or coerce a minor to engage in sexually explicit conduct for purposes of producing visual depictions of that conduct. Any

individual who attempts or conspires to commit a child pornography offense is also subject to prosecution under federal law.¹

2. Enhancing existing causes of action

The author states a motivation similar to those of the above laws:

Online sexual exploitation and abuse disproportionately affects our women and girls and is only exacerbated by our culture of gender-based violence that silences victims and provides them inadequate avenues for recourse. Gender and systemic inequality has thrived in our digital age, allowing gender-based violence and sexual exploitation to take on countless new forms online.

This bill combats this exploitation by enhancing existing causes of action. It mandates that a court award a prevailing plaintiff attorney's fees and costs in a civil action where the plaintiff seeks damages, or equitable relief, against a person or entity that distributes, benefits from, promotes, or induces another person to distribute obscene materials, including through electronic distribution.

The bill defines "obscene material" as "material, 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." This definition tracks with United States Supreme Court precedent tracing the boundaries of what obscene material falls outside the ambit of First Amendment protections:

This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. "The First and Fourteenth Amendments have never been treated as absolutes [footnote omitted]." We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently

¹ *Citizen's Guide to U.S. Federal Law on Child Pornography* (May 28, 2020) United States Department of Justice, <https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-child-pornography>. All internet citations are current as of December 30, 2021.

offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

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 . . . ; (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. . . . If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary.

We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts.²

The clear goal is to ensure that the specific conduct qualifying an action for guaranteed fees and costs is not protected speech. While the type of sexual conduct included within the definition of obscene is not "specifically defined," the obscene material must be unauthorized. "Unauthorized" means either of the following:

- the obscene material was coerced, made, or obtained by trickery or subterfuge, or stolen, made, obtained, or distributed without the knowledge or without or beyond the express permission, freely given, of the person in the photograph, or the person whose identifiable likeness appears in the photograph; or
- the obscene material is of a person who was less than 18 years of age at the time the obscene material was created.

Therefore, the material at issue must be obscene and include either a minor or be nonconsensual in the specified ways.

The author states the case:

SB 1210 bolsters existing efforts to hold individuals accountable for the circulation of unauthorized obscene material and provides victims an avenue for relief, recourse and recovery. Online sexual exploitation and abuse disproportionately affects women and girls and is only exacerbated by our culture of gender-based violence that silences victims and provides them inadequate avenues for recourse. Moreover, COVID-19 has exacerbated the circulation of obscene material; since the pandemic began,

² *Miller v. California* (1973) 413 U.S. 15, 23-25 (citations and footnotes omitted).

the number of complaints of obscene images related to trafficking has increased by over 120%.

SB 1210 requires any attorney fees and costs be paid to the prevailing plaintiff by the defendant in a civil action arising from the intentional, unauthorized distribution of obscene material making it easier for victims to secure counsel and obtain justice.

Writing in support, the Consumer Attorneys of California argue:

SB 1210 will help combat online sexual exploitation by making it easier for victims to secure counsel and obtain justice, and prevent online sexual exploitation and trafficking. The bill will also codify the Supreme Court's definition of obscenity in *Miller v. California*. The Miller test, also called the three-prong obscenity test, is the United States Supreme Court's test for determining whether speech or expression can be labeled obscene, and, therefore is not protected by the First Amendment of the United States Constitution.

SUPPORT

Consumer Attorneys of California

OPPOSITION

None known

RELATED LEGISLATION

Prior Legislation:

AB 602 (Berman, Ch. 491, Stats. 2019) provides a cause of action for the nonconsensual disclosure of sexually explicit material depicting individuals in realistic digitized performances. The bill provides specified remedies and allows for the plaintiff in such cases to proceed using a pseudonym.

AB 2643 (Wieckowski, Ch. 859, Stats. 2014) 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, knowing that the other person had a reasonable expectation that the material would remain private, if specified conditions are met.
