SENATE JUDICIARY COMMITTEE
Senator Hannah-Beth Jackson, Chair
2019-2020 Regular Session

SB 890 (Pan)
Version: March 11, 2020
Hearing Date: May 22, 2020
Fiscal: Yes
Urgency: No
AWM

SUBJECT

Privacy: video recording of a crime: social media

DIGEST

This bill requires social media websites, and other websites that allow users to create and share content (collectively "social media platforms"), to remove photos or videos depicting crimes upon request of a victim of the crime or, if the victim is deceased, the family of the victim, when the photo or video was posted by the perpetrator of the crime and the take-down request includes a police report number relating to the alleged crime; and imposes a $1,000-per-day civil penalty if a social media platform does not comply with the take-down request within two hours of receipt.

EXECUTIVE SUMMARY

The rise in popularity of social media platforms has unfortunately lead to an increase in perpetrators of crimes posting photos and videos of those crimes, in an attempt to increase their popularity, notoriety, or monetary gain. For the victims of crimes, seeing images of the crime circulated on social media can be traumatizing, as can seeing their perpetrator gain fame and acclaim for their criminal acts. This bill would make social media platforms responsible for removing photos or videos depicting alleged crimes posted by the perpetrator when the victim of a crime—or, if the victim has died, the family of the victim—requests that the photo or video be removed, and accompanies the request with a police report number relating to the crime allegedly depicted. If the social media platform failed to remove a qualifying photo or video within two hours of the request, the bill would impose a $1,000 civil penalty for each day the photo or video remained available on the social media platform.

This bill is supported by Crime Victims United of California. It is opposed by the California Broadcasters Association, the California Chamber of Commerce, the California News Publishers Association, CompTIA, the Internet Association, Oakland Privacy, and TechNet.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Makes it a misdemeanor to intentionally distribute images depicting intimate body parts or sexual acts, where there was an agreement that the images remain private, and where the person distributing the image knows or should know that the distribution will cause serious emotional distress, and the person depicted suffers that distress. (Penal Code, § 647(j)(4).)

2) Provides for a private right of action against a person who intentionally distributes intimate images (including photos or videos) of another without the other's consent, where the person knew the images were intended to remain private and the person depicted suffers general or special damages. (Civ. Code, § 1708.85.)
    a) The distributor of the material shall not be liable if certain conditions are met, including:
        i. When the distributed material constitutes a matter of public concern (Civ. Code, § 1708.85(c)(4));
        ii. When the distributed material was photographed or filmed in a public place and under circumstances where the person depicted had no legitimate expectation of privacy (Civ. Code, § 1708.85(c)(5)); or
        iii. The distributed material was previously distributed by another person. (Civ. Code, § 1708.85(c)(6).)

This bill:

1) Requires a social media internet website to remove a photo or video posted to the site by a third-party user of the site, when certain conditions are met:
    a) The social media website receives a request for the photo or video to be removed;
    b) The photo or video depicts the commission of a crime;
    c) The request comes from a victim of that crime or, if the victim is dead, from the family of the victim;
    d) The request is accompanied by a police report number; and
    e) The photo or video was posted by the perpetrator of that crime.

2) Gives the social media internet website a two-hour window in which to respond to a take-down request.

3) Imposes a $1,000-per-day civil penalty against a social media internet website that fails to remove a photo or video in response to a legitimate request within two hours.

4) Defines "social media internet website," for purposes of which sites are subject to the removal requirement, as "a website or application that enables users to create and share content and find and connect with other users of common interests."

5) Does not impose any penalty on the perpetrator of the crime for posting the photo or video, or impose any obligation on the perpetrator to remove the photo or video.

COMMENTS

1. Author's comment

According to the author:

> Perpetrators of violence know that the more shocking and violent their crime is, the more likely they are to go viral. We cannot allow the perpetrators of violence to use social media platforms to personally benefit from the violence and criminal activity they committed.
>
> SB 890 is intended to shield victims of crime, and their families after the victim dies, from further injury by protecting their privacy and discouraging incitement of future harm via social media websites.

2. The law proposed in this bill is very likely an overbroad restraint on speech and therefore unconstitutional.

   a. The First Amendment requires restrictions on speech to be narrowly tailored, under either intermediate or strict scrutiny.

The United States Supreme Court has held that posting on social networking and/or social media sites constitutes communicative activity protected by the First Amendment.[1] As a general rule, the government "may not suppress lawful speech as the means to suppress unlawful speech."[2] A constitutional challenge to a restriction on speech is generally analyzed under one of two frameworks, depending on whether the courts deem it to be "content neutral" or "content based," i.e., targeting a particular type of speech. A law is content neutral when it "serves purposes unrelated to the content of the expression."[3] On the other hand, a law is content based when the

[1] *E.g.*, *Packingham v. North Carolina* (2017) 137 S.Ct. 1730, 1735-1736 (*Packingham*).
[2] *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 255; see also *United States v. Alvarez* (2012) 567 U.S. 709, 717 (Supreme Court "has rejected as 'startling and dangerous' a 'free-floating test for First Amendment coverage…[based on] an ad hoc balancing of relative social costs and benefits' " [alterations in original]).
[3] *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791.

proscribed speech is "defined solely on the basis of the content of the suppressed speech."[4]

If a law is determined to be content neutral, it will be subject to intermediate scrutiny, which requires that the law "be 'narrowly tailored to serve a significant government interest.' "[5] In other words, the law " 'need not be the least restrictive or least intrusive means of' serving the government's interests," but " 'may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.' "[6]

If a restriction on speech is determined to be content based, it will be subject to strict scrutiny.[7] A restriction is content based "if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred."[8] Content-based restrictions subject to strict scrutiny are "presumptively unconstitutional."[9] A restriction can survive strict scrutiny only if it uses the least-restrictive means available to achieve a compelling government purpose.[10]

b. This bill is likely overbroad and unconstitutional.

As an initial matter, it is important to recognize that the problem highlighted by the author of the bill is very real. The popularity of social media has led to an increase in persons willing to post photos and/or videos of *themselves committing crimes*, and all too often, they are rewarded with "likes" and a greater audience for their agendas. As bill opponent Oakland Privacy puts it, such postings are "disgusting and abusive to the victims and the survivors of victims," "emotionally distressing, invasive, and cause indescribable suffering to families left behind."

There are currently no laws specifically targeted at preventing a person found guilty of a crime from posting photos or videos of that crime, and while many social media platforms purport to police such content, some victims' complaints fall on deaf ears. Victims, therefore, often have no protection against being re-victimized when images of traumatic events are circulated on social media. The phenomenon of criminals posting their own crimes is also a concern given the recent increase in hate crimes: "followers" who see criminals gain notoriety and fame from posting photos or videos of their crimes might be inspired to do the same.

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[4] *FCC v. League of Women Voters* (1984) 468 U.S. 364, 383.
[5] *Packingham*, *supra*, 137 S.Ct. at p. 1736.
[6] *McCullen v. Coakley* (2014) 573 U.S. 464, 486 (*McCullen*).
[7] *Id.* at p. 478.
[8] *Id.* at p. 479.
[9] *Reed v. Town of Gilbert* (2015) 135 S.Ct. 2218, 2226 (*Reed*).
[10] *United States v. Playboy Entertainment Group* (2000) 529 U.S. 803, 813.

But while the problem this bill aims to solve is real, the approach taken by the bill almost certainly does not pass constitutional muster. As explained below, the bill is likely unconstitutional under either intermediate or strict scrutiny because it will result in the restriction of far more speech than necessary to accomplish its goal.

First, for purposes of the scrutiny analysis, this bill is likely a content-based restriction of speech because it bars a specific type of speech: videos or photos of a crime posted by the perpetrator (or an alleged perpetrator). A social media platform deciding whether to remove a photo or video in response to a request, and the state official deciding whether to bring an enforcement action against a social media platform that failed to remove a photo or video,[11] would have to examine the photo or video in question to determine whether the content of the photo/video makes it subject to removal: only photos and videos depicting crimes and posted by the perpetrator—or claimed to be photos and videos of crimes posted by the perpetrator—must be removed. The content of the photo or video thus determines whether it must be removed, and whether a social media platform can be liable for a civil penalty for failing to remove it, meaning it is likely that the bill would be subject to strict scrutiny and presumptively unconstitutional.[12] The question of intermediate vs. strict scrutiny is not essential to this analysis, however: it is likely that the bill would be deemed overbroad and unconstitutional under either approach because the bill would lead to the restriction of a significant amount of legitimate speech while only somewhat protecting victims from images of crimes in which they were harmed.

As noted by the Coalition Opponents of the bill,[13] it is unclear whether the bill requires social media platforms to remove every photo or video that is the subject of a take-down request accompanied by a police report number, or whether social media platforms are expected to perform independent verifications of the information alleged in take-down requests before removing the content. Either way, the bill would cause legitimate speech to be stifled.

If the bill is interpreted to require social media platforms to remove photos or videos whenever they receive a take-down request accompanied by a police report number, without verifying the details of the request, this bill will " 'burden substantially more speech than is necessary to further the government's legitimate interests.' "[14] If a social media platform were required to remove a user's post simply because some other user provided a police report number and alleged that the post contained evidence of a

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[11] Although the bill does not specify how the $1,000-per-day civil penalty would be imposed, the author has explained that the intention is to allow a public right of action brought by the State Attorney General against social media platforms that fail to timely remove qualified photos/videos. It would not change the analysis if the civil penalty were imposed via a different means, such as a private right of action.
[12] *Reed*, *supra* 135 S.Ct. at p. 2226.
[13] The "Coalition Opponents" are the California Broadcasters Association, California Chamber of Commerce, California News Publishers Association, CompTIA, Internet Association, and Technet.
[14] *Packingham*, *supra*, 137 S.Ct. at p. 1736.

crime committed by the user, there would be no limit to the platform's removal obligation—even photos or videos that had nothing to do with the commission of a crime would nevertheless have to be removed if they were the subject of a request with a police number attached. There can be little question that, if every take-down request accompanied by a police report number had to be honored, unscrupulous persons would use take-down requests to demand the removal of perfectly legitimate posts, for purposes of personal gain, retaliation, and so on. A statutory scheme requiring the restriction of speech on the mere say-so of a third party could not be deemed to be narrowly tailored to achieve the goal of victim protection.

Next, the bill could be interpreted to require the social media platform to remove a photo or video where the crime alleged in the police report matches the crime portrayed in the photo or video. First, it is unclear whether social media platforms can easily access police reports, particularly within the two-hour time frame granted by the bill. Second, even if a social media platform could obtain the police report and verify that the alleged crime depicted in the post matched the alleged crime reported, social media platforms would still end up removing a wide swath of legitimate speech. If a police report—rather than a conviction—were the test for removing a photo or video, social media platforms would be required to remove content posted by, e.g., people mistakenly identified as a perpetrator in a police report, people never charged with the crime allegedly depicted, people found not guilty of the crime allegedly depicted, and/or people who might have a legitimate interest in posting the video of the crime.[15] As a reference point, the Supreme Court has invalidated state restrictions on posting activity designed to prevent crimes by *already-convicted* criminals, because the restriction was overbroad.[16] If this bill were to restrict the speech of anyone simply named in a police report, it is likely that, even under intermediate scrutiny, the balancing of interests would be even more unfavorable.[17]

The third possibility is that the bill leaves it to social media companies to decide whether to engage in a complex factual and legal investigation before removing a photo or video in response to a request. While this is the only possible reading that would not *facially* result in an overbroad restriction of speech, it would nevertheless be overbroad because it would inevitably *chill* far too much legitimate speech. As the Coalition Opponents note, this interpretation of the bill would require a social media company to "verify the identity of the requestor, verify the validity of the request against a court or

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[15] *E.g.*, if a person shoved a police officer and the police officer reacted by shooting the person, a social platform would be required to remove the video of the shooting at the request of the officer even though the video clearly had independent import as a video of excessive use of police force.

[16] *Packingham*, *supra*, 137 S.Ct. at pp. 1736-1737.

[17] *See also United States v. Stevens* (2010) 559 U.S. 460, 473 (*Stevens*) (law may be facially invalid "as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep' "). Bill opponent Oakland Privacy additionally notes that the restriction of speech by individuals accused, but not convicted, of crimes could separately violate the constitutional guarantee of due process.

police record (which depends on the police or court system's turnaround time), determine whether the requestor is also the victim who is actually depicted in the photo or video, verify who the uploader is, determine whether the uploader is the perpetrator, and determine whether [it] depicts a crime under California law, any other state law, or federal law." The Coalition Opponents indicate this is a "nearly impossible task that leaves online services with no good options." There is little question that, in practice, the bill would lead social media platforms to default to granting take-down requests because of the cost and risks of declining them.

The bill gives a social media platform a mere two hours to respond to a take-down request before subjecting the social media platform to a civil penalty. This is clearly insufficient time to conduct a meaningful verification; as noted above, it might not even be enough time to get a police report. Furthermore, the cost of taking more than two hours to respond to a request, or of erroneously denying a request, is a civil penalty of $1,000 for each day the photo or video remains available. This means a social media company is subject to the penalty even if it *ultimately makes the correct decision to remove a photo or video*: if a social media platform takes two or three days to verify the matter set forth in the take-down request and then removes the photo or video in question, the platform would still be liable for a civil penalty of several thousand dollars. That cost is even higher for a social media platform that denies a take-down request, with or without an extensive verification. It could be weeks or months before the Attorney General institutes an action against the social media platform for declining the take-down request, and even longer before a judgment was entered in the case; a social media platform that lost at trial could easily be liable for hundreds of thousands of dollars. The risk of denials would be virtually impossible to manage, so a social media platform would have little incentive to ever decline a take-down request. This is compounded by the fact that the social media platform has no similar downside to incorrectly *granting* a take-down request—a person whose video was incorrectly taken down has no recourse against the platform.

Thus, it is virtually certain that, if faced with a two-hour time window and an incredibly complex set of facts to verify, social media platforms would simply default to granting take-down requests with little or no verification, thereby chilling more speech than necessary to achieve the bill's purpose.[18] The likelihood that social media platforms would consistently remove content that does not actually require removal—and which may have independent journalistic, political, or other import—is the kind of chilling effect that intermediate and strict scrutiny are loath to permit.[19]

This bill's likely curtailment of a significant amount of legitimate speech would be weighed against the government interest furthered by the bill and the existence of

[18] *Reno v. ACLU* (1997) 521 U.S. 844, 872 (statute that raised significant risk that speakers would "remain silent rather than communicate ever arguably unlawful words" posed particular First Amendment concerns).
[19] *Ibid.*; *see also Stevens*, *supra*, 559 U.S. at p. 473.

other, less-restrictive means for furthering that goal. To the extent the bill aims to protect victims of crimes from images of those crimes, that goal would be only somewhat achieved through this measure, because the bill requires the removal of photos or videos only when posted by the perpetrator (or person accused of) the crime in question.[20] A victim would still have no recourse when the content was posted by anyone other than the perpetrator, such as news outlets that determine the content was newsworthy. And to the extent that the bill aims to prevent criminals from gaining notoriety or personal benefit from posting photos or videos of their crimes, the bill would not halt all such conduct; instead, it would prevent criminals from undue gains only where a victim, or victim's family, decides to come forward with a take-down request. As such, the limitations on the interests protected by the bill are unlikely to outweigh the significant restriction on legitimate speech.[21] And with respect to more narrowly tailored alternatives, measures aimed directly at the criminals who post such photos or videos—rather than at the social media platforms hosting the photos or videos—would likely provide a more targeted set of restrictions that could be tied, e.g., to a criminal conviction to ensure that the person restricted from posting was actually convicted of the crime in question. In sum, this bill is almost certainly an unconstitutional restraint on speech.[22]

SUPPORT

Crime Victims United of California

OPPOSITION

California Broadcasters Association
California Chamber of Commerce
California News Publishers Association
CompTIA
Internet Association
Oakland Privacy
TechNet

RELATED LEGISLATION

Pending Legislation:

AB 3140 (Bauer-Kahn, 2020) makes it a misdemeanor to publish, including on social media, the personal information of any reproductive health care services patient,

[20] *McCutcheon v. FEC* (2014) 572 U.S. 185, 218 ("In the First Amendment context, fit matters. Even when the Court is not applying strict scrutiny, we still require 'a fit that is not necessarily perfect, but one whose scope is "in proportion to the interest served")
[21] *Ibid.* (statute invalid where it was poorly tailored to achieve the stated government interest).
[22] Additionally, this bill may be preempted by the federal Communications Decency Act. (*See* 47 U.S.C. § 230(c), (e).)

provider, or assistant with the intent to threaten the patient, provider or assistant or cause them imminent great bodily harm, and prohibits the posting of such information when the patient, provider, or assistant has requested that the information not be disclosed and provides a sworn statement describing a reasonable fear for their safety. AB 3140 is pending before the Assembly Committee on Public Safety.

AB 2931 (Gallagher, 2020) prohibits social media sites from removing user-posted content on the basis of the political affiliation or viewpoint of that content, except where the social media site is, by its terms and conditions, limited to the promotion of only certain viewpoints and values and the removed content conflicts with those viewpoints or values. AB 2931 is pending before the Assembly Committee on Arts, Entertainment, Sports, Tourism, and Media.

AB 2442 (Chau 2020) requires a social media platform to disclose whether or not the social media platform has a policy to address the spread of misinformation, and gives a social media platform 30 days to cure a violation of its provisions. AB 2442 is pending before the Assembly Judiciary Committee.

AB 2010 (Cunningham, 2020) prescribes requirements for an online dating service in connection with users who are banned from the service because the person may have used a false identity or may have posed a significant risk of attempting to obtain money from, or provide money to, another user through fraudulent means, i.e., requiring the service to send a specified notice to a California user known to have previously received and responded to an onsite message from a banned user, to be sent not later than 3 days after the ban. AB 2010 is pending before the Assembly Committee on Privacy and Consumer Protection.

Prior Legislation:

AB 1316 (Gallagher, 2019) would have prohibited social media sites from removing user-posted content on the basis of the political affiliation or viewpoint of that content, except where the social media site is, by its terms and conditions, limited to the promotion of only certain viewpoints and values and the removed content conflicts with those viewpoints or values. AB 1316 was held on the floor of the Assembly and was re-introduced as AB 2931 (2020).

SB 564 (Leyva, 2019) would have created a private cause of action a person who intentionally distributes a photograph or recorded image of another that exposes the intimate body parts of that person or of a person engaged in a sexual act without the person's consent if specified conditions are met. SB 564 was held in the Senate Rules Committee.

AB 1598 (Fong, 2019) would have made it a misdemeanor to, knowingly and without consent, credibly impersonate another actual person through or on an internet website

or by other electronic means for the purpose of soliciting a sexual relationship with another person. AB 1598 was held in the Assembly Committee on Public Safety.

AB 730 (Berman, Ch. 493, Stats. 2019) prohibits a person or specified entity from, with actual malice, producing, distributing, publishing, or broadcasting campaign material, as defined, that contains (1) a picture or photograph of a person or persons into which the image of a candidate for public office is superimposed or (2) a picture or photograph of a candidate for public office into which the image of another person or persons is superimposed, unless the campaign material contains a specified disclosure that the material was manipulated.

AB 288 (Cunningham, 2019) would have required a social networking service, at the request of a user, to permanently remove personally identifiable information and not sell the information to third parties, within a commercially reasonable time of the request. AB 288 was held in the Assembly Committee on Privacy and Consumer Protection.

SB 1424 (Pan, 2018) would have established a privately funded advisory group to study the problem of the spread of false information through Internet-based social media platforms, and draft a model strategic plan for Internet-based social media platforms to use to mitigate this problem. SB 1424 was vetoed by Governor Brown.

AB 3169 (Gallagher, 2018) would have prohibited social media sites from removing content on the basis of the political affiliation or viewpoint of the content, and prohibited internet search engines from removing or manipulating content from search results on the basis of the political affiliation or viewpoint of the content. AB 3169 was held in the Assembly Committee on Privacy and Protection.

SB 157 (Wieckowski, Ch. 233, Stats. 2017) established procedures for plaintiffs pursuing a private right of action against persons who intentionally distributed intimate media without consent to do so using a pseudonym.

SB 448 (Hueso, Ch. 772, Stats. 2016) required persons subject to the Sex Offender Registration Act to list any and all internet identifiers established or used by the person under specified circumstances, such as where the person used the internet to commit the crime requiring registration, and made it a misdemeanor for qualified persons to provide those internet identifiers.

AB 2068 (Holden, Ch. 245, Stats. 2016) expanded the prohibitions on talent agencies using without permission, or failing to remove on request, information about an artist on the internet to cover a wider range of internet and mobile applications and services.

AB 1291 (Lowenthal, 2013) would have repealed the existing restrictions on businesses sharing personal information, including information gathered over the internet, and

would have required businesses that retain personal information to make available to a customer all of the personal information retained upon verification of the requester's identity. AB 1291 was held in the Assembly Judiciary Committee.

SB 999 (La Malfa, 2012) would have created a private right of action seeking damages, injunctive relief, or both for the unauthorized commercial use of a person's name, signature, photograph, or likeness on a website. SB 999 was held in the Senate Judiciary Committee.

SB 242 (Corbett, 2011) would have required websites to create a default privacy setting for registered users of the site that prohibits the display, to the public or other registered users, of any information about a registered user, other than the user's name and city of residence, without the express agreement of the user, and to remove the personal identifying information of a registered user in a timely manner upon his or her request; a site that knowingly failed to comply would have been liable for a $10,000 civil penalty for each violation. SB 242 failed on the floor of the Senate.

SB 1361 (Corbett, 2010) would have prohibited social networking websites from displaying, to the public or other registered users, the home address or telephone number of a registered user of that site who is under 18 years of age, and imposed a civil penalty of up to $10,000 for each willful and knowing violation of this prohibition. SB 1361 was held in the Assembly Committee on Entertainment, Sports, Tourism, and Internet Media.

AB 632 (Davis, 2009) would have required a social networking website to provide a specified disclosure to a user of the site stating that an image which is uploaded onto the site is capable of being copied by persons who view the image without the consent of the user who initially uploads the image, or copied in violation of the privacy policy, terms of use, or other policy of the site. AB 632 was vetoed by Governor Schwarzenegger.

AB 2104 (Smyth, 2008) would have criminalized the preparing, posting, or publication of images of minors containing obscene matter, with an exception for providers of interactive web sites when the material was posted by a different user. AB 1204 was held in the Assembly Committee on Public Safety.

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