

AMENDED IN SENATE AUGUST 22, 2014
AMENDED IN ASSEMBLY MARCH 28, 2014
CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

ASSEMBLY BILL

No. 2306

Introduced by Assembly Member Members Chau and Waldron
(Coauthor: Senator Jackson)

February 21, 2014

An act to amend Section 1708.8 of the Civil Code, relating to privacy.

LEGISLATIVE COUNSEL'S DIGEST

AB 2306, as amended, Chau. Constructive invasion of privacy: liability.

Under existing law, except as specified, a person is liable for constructive invasion of privacy when a person attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression, through the use of a visual or auditory enhancing device, of another person engaging in a personal or familial activity under circumstances in which the other person had a reasonable expectation of privacy. Existing law subjects a person who commits a constructive invasion of privacy to specified damages and civil fines.

This bill would expand a person's potential liability for constructive invasion of privacy, by removing the limitation that the person use a visual or auditory enhancing device, and would instead make the person liable when using any device to engage in the above-described unlawful activity.

This bill would incorporate additional changes to Section 1708.8 of the Civil Code proposed by AB 1256 that would become operative if this bill and AB 1256 are both enacted and this bill is enacted last.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1708.8 of the Civil Code is amended to
2 read:

3 1708.8. (a) A person is liable for physical invasion of privacy
4 when the defendant knowingly enters onto the land of another
5 person without permission or otherwise committed a trespass in
6 order to physically invade the privacy of the plaintiff with the
7 intent to capture any type of visual image, sound recording, or
8 other physical impression of the plaintiff engaging in a personal
9 or familial activity and the physical invasion occurs in a manner
10 that is offensive to a reasonable person.

11 (b) A person is liable for constructive invasion of privacy when
12 the defendant attempts to capture, in a manner that is offensive to
13 a reasonable person, any type of visual image, sound recording,
14 or other physical impression of the plaintiff engaging in a personal
15 or familial activity under circumstances in which the plaintiff had
16 a reasonable expectation of privacy, through the use of any device,
17 regardless of whether there is a physical trespass, if this image,
18 sound recording, or other physical impression could not have been
19 achieved without a trespass unless the device was used.

20 (c) An assault or false imprisonment committed with the intent
21 to capture any type of visual image, sound recording, or other
22 physical impression of the plaintiff is subject to subdivisions (d),
23 (e), and (h).

24 (d) A person who commits any act described in subdivision (a),
25 (b), or (c) is liable for up to three times the amount of any general
26 and special damages that are proximately caused by the violation
27 of this section. This person may also be liable for punitive damages,
28 subject to proof according to Section 3294. If the plaintiff proves
29 that the invasion of privacy was committed for a commercial
30 purpose, the defendant shall also be subject to disgorgement to the
31 plaintiff of any proceeds or other consideration obtained as a result
32 of the violation of this section. A person who comes within the

1 description of this subdivision is also subject to a civil fine of not
2 less than five thousand dollars (\$5,000) and not more than fifty
3 thousand dollars (\$50,000).

4 (e) A person who directs, solicits, actually induces, or actually
5 causes another person, regardless of whether there is an
6 employer-employee relationship, to violate any provision of
7 subdivision (a), (b), or (c) is liable for any general, special, and
8 consequential damages resulting from each said violation. In
9 addition, the person that directs, solicits, actually induces, or
10 actually causes another person, regardless of whether there is an
11 employer-employee relationship, to violate this section shall be
12 liable for punitive damages to the extent that an employer would
13 be subject to punitive damages pursuant to subdivision (b) of
14 Section 3294. A person who comes within the description of this
15 subdivision is also subject to a civil fine of not less than five
16 thousand dollars (\$5,000) and not more than fifty thousand dollars
17 (\$50,000).

18 (f) (1) The transmission, publication, broadcast, sale, offer for
19 sale, or other use of any visual image, sound recording, or other
20 physical impression that was taken or captured in violation of
21 subdivision (a), (b), or (c) shall not constitute a violation of this
22 section unless the person, in the first transaction following the
23 taking or capture of the visual image, sound recording, or other
24 physical impression, publicly transmitted, published, broadcast,
25 ~~sold~~ *sold*, or offered for ~~sale~~, *sale* the visual image, sound
26 recording, or other physical impression with actual knowledge that
27 it was taken or captured in violation of subdivision (a), (b), or (c),
28 and ~~provide~~ *provided* compensation, consideration, or
29 remuneration, monetary or otherwise, for the rights to the
30 unlawfully obtained visual image, sound recording, or other
31 physical impression.

32 (2) For the purposes of paragraph (1), “actual knowledge” means
33 actual awareness, understanding, and recognition, obtained prior
34 to the time at which the person purchased or acquired the visual
35 image, sound recording, or other physical impression, that the
36 visual image, sound recording, or other physical impression was
37 taken or captured in violation of subdivision (a), (b), or (c). The
38 plaintiff shall establish actual knowledge by clear and convincing
39 evidence.

1 (3) Any person that publicly transmits, publishes, broadcasts,
2 ~~sells~~ *sells*, or offers for sale, in any form, medium, ~~format~~ *format*,
3 or work, a visual image, sound recording, or other physical
4 impression that was previously publicly transmitted, published,
5 broadcast, ~~sold~~ *sold*, or offered for ~~sale~~, *sale* by another person, is
6 exempt from liability under this section.

7 (4) If a person's first public transmission, publication, broadcast,
8 or sale or offer for ~~sale~~, *sale* of a visual image, sound recording,
9 or other physical impression that was taken or captured in violation
10 of subdivision (a), (b), or ~~(e)~~, *(c)* does not constitute a violation of
11 this section, that person's subsequent public transmission,
12 publication, broadcast, ~~sale~~ *sale*, or offer for sale, in any form,
13 medium, ~~format~~ *format*, or work, of the visual image, sound
14 recording, or other physical impression, does not constitute a
15 violation of this section.

16 (5) This section applies only to a visual image, sound recording,
17 or other physical impression that is captured or taken in California
18 in violation of subdivision (a), (b), or (c) after January 1, 2010,
19 and shall not apply to any visual image, sound recording, or other
20 physical impression taken or captured outside of California.

21 (6) Nothing in this subdivision shall be construed to impair or
22 limit a special motion to strike pursuant to Section 425.16, 425.17,
23 or 425.18 of the Code of Civil Procedure.

24 (7) This section shall not be construed to limit all other rights
25 or remedies of the plaintiff in law or equity, including, but not
26 limited to, the publication of private facts.

27 (g) This section shall not be construed to impair or limit any
28 otherwise lawful activities of law enforcement personnel or
29 employees of governmental agencies or other entities, either public
30 or private who, in the course and scope of their employment, and
31 supported by an articulable suspicion, attempt to capture any type
32 of visual image, sound recording, or other physical impression of
33 a person during an investigation, surveillance, or monitoring of
34 any conduct to obtain evidence of suspected illegal activity or
35 other misconduct, the suspected violation of any administrative
36 rule or regulation, a suspected fraudulent conduct, or any activity
37 involving a violation of law or business practices or conduct of
38 public officials adversely affecting the public welfare, ~~health~~
39 *health*, or safety.

1 (h) In any action pursuant to this section, the court may grant
2 equitable relief, including, but not limited to, an injunction and
3 restraining order against further violations of subdivision (a), (b),
4 or (c).

5 (i) The rights and remedies provided in this section are
6 cumulative and in addition to any other rights and remedies
7 provided by law.

8 (j) It is not a defense to a violation of this section that no image,
9 recording, or physical impression was captured or sold.

10 (k) For the purposes of this section, “for a commercial purpose”
11 means any act done with the expectation of a sale, financial gain,
12 or other consideration. A visual image, sound recording, or other
13 physical impression shall not be found to have been, or intended
14 to have been *been*, captured for a commercial purpose unless it is
15 intended to be, or was in fact, sold, published, or transmitted.

16 (l) For the purposes of this section, “personal and familial
17 activity” includes, but is not limited to, intimate details of the
18 plaintiff’s personal life, interactions with the plaintiff’s family or
19 significant others, or other aspects of the plaintiff’s private affairs
20 or concerns. “Personal and familial activity” does not include
21 illegal or otherwise criminal activity as delineated in subdivision
22 (g). However, “personal and familial activity” shall include the
23 activities of victims of crime in circumstances under which
24 subdivision (a), (b), or (c) would apply.

25 (m) (1) A proceeding to recover the civil fines specified in
26 subdivision (d) or (e) may be brought in any court of competent
27 jurisdiction by a county counsel or city attorney.

28 (2) Fines collected pursuant to this subdivision shall be allocated,
29 as follows:

30 (A) One-half shall be allocated to the prosecuting agency.

31 (B) One-half shall be deposited in the Arts and Entertainment
32 Fund, which is hereby created in the State Treasury.

33 (3) Funds in the Arts and Entertainment Fund created pursuant
34 to paragraph (2) may be expended by the California Arts Council,
35 upon appropriation by the Legislature, to issue grants pursuant to
36 the Dixon-Zenovich-Maddy California Arts Act of 1975 (Chapter
37 9 (commencing with Section 8750) of Division 1 of Title 2 of the
38 Government Code).

1 (4) The rights and remedies provided in this subdivision are
2 cumulative and in addition to any other rights and remedies
3 provided by law.

4 (n) The provisions of this section are severable. If any provision
5 of this section or its application is held invalid, that invalidity shall
6 not affect other provisions or applications that can be given effect
7 without the invalid provision or application.

8 *SEC. 1.5. Section 1708.8 of the Civil Code is amended to read:*

9 1708.8. (a) A person is liable for physical invasion of privacy
10 when the defendant knowingly enters onto the land of another
11 person without permission or otherwise committed a trespass in
12 order to ~~physically invade the privacy of the plaintiff with the~~
13 ~~intent to~~ capture any type of visual image, sound recording, or
14 other physical impression of the plaintiff engaging in a ~~personal~~
15 *private, personal, or familial activity* and the ~~physical~~ invasion
16 occurs in a manner that is offensive to a reasonable person.

17 (b) A person is liable for constructive invasion of privacy when
18 the defendant attempts to capture, in a manner that is offensive to
19 a reasonable person, any type of visual image, sound recording,
20 or other physical impression of the plaintiff engaging in a ~~personal~~
21 ~~or familial activity under circumstances in which the plaintiff had~~
22 ~~a reasonable expectation of privacy, private, personal, or familial~~
23 *activity*, through the use of a ~~visual or auditory enhancing~~ any
24 device, regardless of whether there is a physical trespass, if this
25 image, sound recording, or other physical impression could not
26 have been achieved without a trespass unless the ~~visual or auditory~~
27 ~~enhancing~~ device was used.

28 (c) An assault or false imprisonment committed with the intent
29 to capture any type of visual image, sound recording, or other
30 physical impression of the plaintiff is subject to subdivisions (d),
31 (e), and (h).

32 (d) A person who commits any act described in subdivision (a),
33 (b), or (c) is liable for up to three times the amount of any general
34 and special damages that are proximately caused by the violation
35 of this section. This person may also be liable for punitive damages,
36 subject to proof according to Section 3294. If the plaintiff proves
37 that the invasion of privacy was committed for a commercial
38 purpose, the defendant shall also be subject to disgorgement to the
39 plaintiff of any proceeds or other consideration obtained as a result
40 of the violation of this section. A person who comes within the

1 description of this subdivision is also subject to a civil fine of not
2 less than five thousand dollars (\$5,000) and not more than fifty
3 thousand dollars (\$50,000).

4 (e) A person who directs, solicits, actually induces, or actually
5 causes another person, regardless of whether there is an
6 employer-employee relationship, to violate any provision of
7 subdivision (a), (b), or (c) is liable for any general, special, and
8 consequential damages resulting from each said violation. In
9 addition, the person that directs, solicits, actually induces, or
10 actually causes another person, regardless of whether there is an
11 employer-employee relationship, to violate this section shall be
12 liable for punitive damages to the extent that an employer would
13 be subject to punitive damages pursuant to subdivision (b) of
14 Section 3294. A person who comes within the description of this
15 subdivision is also subject to a civil fine of not less than five
16 thousand dollars (\$5,000) and not more than fifty thousand dollars
17 (\$50,000).

18 (f) (1) The transmission, publication, broadcast, sale, offer for
19 sale, or other use of any visual image, sound recording, or other
20 physical impression that was taken or captured in violation of
21 subdivision (a), (b), or (c) shall not constitute a violation of this
22 section unless the person, in the first transaction following the
23 taking or capture of the visual image, sound recording, or other
24 physical impression, publicly transmitted, published, broadcast,
25 ~~sold~~ *sold*, or offered for ~~sale~~, *sale* the visual image, sound
26 recording, or other physical impression with actual knowledge that
27 it was taken or captured in violation of subdivision (a), (b), or (c),
28 and ~~provide~~ *provided* compensation, consideration, or
29 remuneration, monetary or otherwise, for the rights to the
30 unlawfully obtained visual image, sound recording, or other
31 physical impression.

32 (2) For the purposes of paragraph (1), “actual knowledge” means
33 actual awareness, understanding, and recognition, obtained prior
34 to the time at which the person purchased or acquired the visual
35 image, sound recording, or other physical impression, that the
36 visual image, sound recording, or other physical impression was
37 taken or captured in violation of subdivision (a), (b), or (c). The
38 plaintiff shall establish actual knowledge by clear and convincing
39 evidence.

1 (3) Any person that publicly transmits, publishes, broadcasts,
2 ~~sells~~ *sells*, or offers for sale, in any form, medium, ~~format~~ *format*,
3 or work, a visual image, sound recording, or other physical
4 impression that was previously publicly transmitted, published,
5 broadcast, ~~sold~~ *sold*, or offered for ~~sale~~, *sale* by another person, is
6 exempt from liability under this section.

7 (4) If a person's first public transmission, publication, broadcast,
8 or sale or offer for ~~sale~~, *sale* of a visual image, sound recording,
9 or other physical impression that was taken or captured in violation
10 of subdivision (a), (b), or ~~(e)~~, *(c)* does not constitute a violation of
11 this section, that person's subsequent public transmission,
12 publication, broadcast, ~~sale~~ *sale*, or offer for sale, in any form,
13 medium, ~~format~~ *format*, or work, of the visual image, sound
14 recording, or other physical impression, does not constitute a
15 violation of this section.

16 (5) This section applies only to a visual image, sound recording,
17 or other physical impression that is captured or taken in California
18 in violation of subdivision (a), (b), or (c) after January 1, 2010,
19 and shall not apply to any visual image, sound recording, or other
20 physical impression taken or captured outside of California.

21 (6) Nothing in this subdivision shall be construed to impair or
22 limit a special motion to strike pursuant to Section 425.16, 425.17,
23 or 425.18 of the Code of Civil Procedure.

24 (7) This section shall not be construed to limit all other rights
25 or remedies of the plaintiff in law or equity, including, but not
26 limited to, the publication of private facts.

27 (g) This section shall not be construed to impair or limit any
28 otherwise lawful activities of law enforcement personnel or
29 employees of governmental agencies or other entities, either public
30 or private who, in the course and scope of their employment, and
31 supported by an articulable suspicion, attempt to capture any type
32 of visual image, sound recording, or other physical impression of
33 a person during an investigation, surveillance, or monitoring of
34 any conduct to obtain evidence of suspected illegal activity or
35 other misconduct, the suspected violation of any administrative
36 rule or regulation, a suspected fraudulent conduct, or any activity
37 involving a violation of law or business practices or conduct of
38 public officials adversely affecting the public welfare, ~~health~~
39 *health*, or safety.

1 (h) In any action pursuant to this section, the court may grant
2 equitable relief, including, but not limited to, an injunction and
3 restraining order against further violations of subdivision (a), (b),
4 or (c).

5 (i) The rights and remedies provided in this section are
6 cumulative and in addition to any other rights and remedies
7 provided by law.

8 (j) It is not a defense to a violation of this section that no image,
9 recording, or physical impression was captured or sold.

10 (k) For the purposes of this section, “for a commercial purpose”
11 means any act done with the expectation of a sale, financial gain,
12 or other consideration. A visual image, sound recording, or other
13 physical impression shall not be found to have been, or intended
14 to have been *been*, captured for a commercial purpose unless it is
15 intended to be, or was in fact, sold, published, or transmitted.

16 (l) (1) *For the purposes of this section, “private, personal, and*
17 *familial activity” includes, but is not limited to:*

18 (A) *Intimate details of the plaintiff’s personal life under*
19 *circumstances in which the plaintiff has a reasonable expectation*
20 *of privacy.*

21 (B) *Interaction with the plaintiff’s family or significant others*
22 *under circumstances in which the plaintiff has a reasonable*
23 *expectation of privacy.*

24 (C) *If and only after the defendant has been convicted of*
25 *violating Section 626.8 of the Penal Code, any activity that occurs*
26 *when minors are present at any location set forth in subdivision*
27 *(a) of Section 626.8 of the Penal Code.*

28 (D) *Any activity that occurs on a residential property under*
29 *circumstances in which the plaintiff has a reasonable expectation*
30 *of privacy.*

31 (E) *Other aspects of the plaintiff’s private affairs or concerns*
32 *under circumstances in which the plaintiff has a reasonable*
33 *expectation of privacy.*

34 ~~(f) For the purposes of this section, “personal~~
35 ~~(2) “Private, personal, and familial activity” includes, but is~~
36 ~~not limited to, intimate details of the plaintiff’s personal life,~~
37 ~~interactions with the plaintiff’s family or significant others, or~~
38 ~~other aspects of the plaintiff’s private affairs or concerns. “Personal~~
39 ~~and familial activity” does not include illegal or otherwise criminal~~
40 ~~activity as delineated in subdivision (g). However, “personal~~

1 “private, personal, and familial activity” shall include the activities
2 of victims of crime in circumstances under which subdivision (a),
3 (b), or (c) would apply.

4 (m) (1) A proceeding to recover the civil fines specified in
5 subdivision (d) or (e) may be brought in any court of competent
6 jurisdiction by a county counsel or city attorney.

7 (2) Fines collected pursuant to this subdivision shall be allocated,
8 as follows:

9 (A) One-half shall be allocated to the prosecuting agency.

10 (B) One-half shall be deposited in the Arts and Entertainment
11 Fund, which is hereby created in the State Treasury.

12 (3) Funds in the Arts and Entertainment Fund created pursuant
13 to paragraph (2) may be expended by the California Arts Council,
14 upon appropriation by the Legislature, to issue grants pursuant to
15 the Dixon-Zenovich-Maddy California Arts Act of 1975 (Chapter
16 9 (commencing with Section 8750) of Division 1 of Title 2 of the
17 Government Code).

18 (4) The rights and remedies provided in this subdivision are
19 cumulative and in addition to any other rights and remedies
20 provided by law.

21 (n) The provisions of this section are severable. If any provision
22 of this section or its application is held invalid, that invalidity shall
23 not affect other provisions or applications that can be given effect
24 without the invalid provision or application.

25 *SEC. 2. Section 1.5 of this bill incorporates amendments to*
26 *Section 1708.8 of the Civil Code proposed by both this bill and*
27 *AB 1256. It shall only become operative if (1) both bills are enacted*
28 *and become effective on or before January 1, 2015, (2) each bill*
29 *amends Section 1708.8 of the Civil Code, and (3) this bill is enacted*
30 *after AB 1256, in which case Section 1 of this bill shall not become*
31 *operative.*