

AMENDED IN SENATE JUNE 9, 2014
AMENDED IN ASSEMBLY APRIL 24, 2014
AMENDED IN ASSEMBLY APRIL 9, 2014
CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

ASSEMBLY BILL

No. 2643

Introduced by Assembly Member Wieckowski

February 21, 2014

An act to add Section ~~48.95~~ 1708.9 to the Civil Code, relating to privacy.

LEGISLATIVE COUNSEL'S DIGEST

AB 2643, as amended, Wieckowski. Invasion of privacy: distribution of sexually explicit materials.

Existing law makes it a crime for a person to distribute, with the intent to cause serious emotional distress, a photograph or recorded image of the intimate body part or parts of another identifiable person, under circumstances where the parties agree or understand that the image shall remain private, if the depicted person subsequently suffers serious emotional distress.

This bill would create a private right of action against a person who intentionally ~~or recklessly~~ distributes a photograph or recorded image of another that exposes the intimate body parts, as defined, of that person or him or her engaged in specified sexual acts, without his or her consent, *and knew that the other person had a reasonable expectation that the material would remain private*, if specified conditions are met. The bill would establish affirmative defenses to that cause of action, including waiver or consent of the person appearing in the material. In a civil proceeding pursuant to these provisions, the bill would also

authorize equitable relief, as specified, and a plaintiff to proceed using a pseudonym instead of his or her true name. The bill would require a plaintiff using a pseudonym in a civil proceeding under these provisions to file a confidential information form, as specified. The bill would make these provisions operative July 1, 2015.

This bill would further require the Judicial Council to develop that confidential information form by July 1, 2015.

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

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

1 SECTION 1. ~~Section 48.95 is added to the Civil Code, to read:~~
2 48.95. ~~(a) A private cause of action lies against a person who~~
3 ~~intentionally or recklessly distributes by any means a photograph,~~
4 ~~film, videotape, recording, or any other reproduction of another,~~
5 ~~without his or her consent, if the distributed material exposes an~~
6 ~~intimate body part of the other person, or shows the other person~~
7 ~~engaging in an act of intercourse, oral copulation, sodomy, or other~~
8 ~~act of sexual penetration.~~
9 ~~(b) As used in this section, “intimate body part” means any~~
10 ~~portion of the genitals, and, in the case of a female, also includes~~
11 ~~any portion of the breast below the top of the areola, that is~~
12 ~~uncovered or visible through less than fully opaque clothing.~~
13 ~~(c) There shall be no liability on the part of the person~~
14 ~~distributing material under subdivision (a) under any of the~~
15 ~~following circumstances:~~
16 ~~(1) The distributed material was created under an agreement by~~
17 ~~the person appearing in the material for its public use and~~
18 ~~distribution or otherwise intended by that person for public use~~
19 ~~and distribution.~~
20 ~~(2) The person possessing or viewing the distributed material~~
21 ~~has permission from the person appearing in the material to publish~~
22 ~~or post the material.~~
23 ~~(3) The person appearing in the material waived any expectation~~
24 ~~of privacy in the distributed material by making it accessible to~~
25 ~~the general public.~~
26 ~~(4) The distributed material constitutes a matter of public~~
27 ~~concern.~~

1 ~~(5) The distributed material was photographed, filmed,~~
2 ~~videotaped, recorded, or otherwise reproduced in a public place~~
3 ~~and under circumstances in which the person depicted had no~~
4 ~~reasonable expectation of privacy.~~

5 ~~(d) In addition to any other relief, the court may order equitable~~
6 ~~relief against the person violating subdivision (a), including a~~
7 ~~temporary restraining order, or a preliminary injunction or a~~
8 ~~permanent injunction ordering the defendant to remove the~~
9 ~~distributed material. The court may grant injunctive relief~~
10 ~~substituting a pseudonym for the true name of the plaintiff pursuant~~
11 ~~to subdivision (d). The court may also grant, after holding a~~
12 ~~properly noticed hearing, reasonable attorney's fees and costs to~~
13 ~~the prevailing party.~~

14 ~~(e) (1) A plaintiff in a civil proceeding pursuant to subdivision~~
15 ~~(a), may proceed using a pseudonym, either John Doe, Jane Doe,~~
16 ~~or Doe, for the true name of the plaintiff and may exclude or redact~~
17 ~~from all pleadings and documents filed in the action other~~
18 ~~identifying characteristics of the plaintiff. A plaintiff who proceeds~~
19 ~~using a pseudonym and excluding or redacting identifying~~
20 ~~characteristics as provided in this section shall file a confidential~~
21 ~~information form for this purpose that includes the plaintiff's name~~
22 ~~and other identifying characteristics excluded or redacted. The~~
23 ~~court shall keep the plaintiff's name and excluded or redacted~~
24 ~~characteristics confidential. Nothing in this section restricts the~~
25 ~~defendant's right to discovery from the plaintiff of information~~
26 ~~contained in the confidential information form.~~

27 ~~(2) All court decisions, orders, petitions, and other documents,~~
28 ~~including motions and papers filed by the parties, shall be worded~~
29 ~~so as to protect the name or other identifying characteristics of the~~
30 ~~plaintiff from public revelation.~~

31 ~~(3) Unless the plaintiff requests otherwise and the court so~~
32 ~~orders, the parties, their counsel and other agents, and all other~~
33 ~~persons subject to the jurisdiction of the court shall make no public~~
34 ~~revelation of the name or any other identifying characteristics of~~
35 ~~the plaintiff.~~

36 ~~(4) As used in this subdivision, "identifying characteristics"~~
37 ~~includes, but is not limited to, name or any part thereof, address~~
38 ~~or any part thereof, city or unincorporated area of residence, age,~~
39 ~~marital status, relationship to defendant, and race or ethnic~~
40 ~~background.~~

1 ~~(5) The responsibility for excluding or redacting the name or~~
2 ~~identifying characteristics of the plaintiff from all documents filed~~
3 ~~with the court rests solely with the parties and their attorneys.~~
4 ~~Nothing in this section requires the court to review pleadings or~~
5 ~~other papers for compliance with this provision.~~

6 ~~(f) In an action pursuant to this section, the plaintiff shall state~~
7 ~~in the caption of the complaint “ACTION BASED ON CIVIL~~
8 ~~CODE SECTION 48.95.”~~

9 ~~(g) Nothing in this section shall be construed to alter or negate~~
10 ~~any rights, obligations, or immunities of an interactive service~~
11 ~~provider under Section 230 of Title 47 of the United States Code.~~
12 ~~Nothing in this section shall be construed to limit or preclude a~~
13 ~~plaintiff from securing or recovering any other available remedy.~~

14 ~~(h) The provisions of this section are severable. If any provision~~
15 ~~of this section or its application is held invalid, that invalidity shall~~
16 ~~not affect other provisions or applications that can be given effect~~
17 ~~without the invalid provision or application.~~

18 ~~(i) This section shall become operative on July 1, 2015.~~

19 *SECTION 1. Section 1708.9 is added to the Civil Code, to read:*

20 *1708.9. (a) A private cause of action lies against a person*
21 *who intentionally distributes by any means a photograph, film,*
22 *videotape, recording, or any other reproduction of another, without*
23 *the other’s consent, if (1) the person knew that the other person*
24 *had a reasonable expectation that the material would remain*
25 *private, (2) the distributed material exposes an intimate body part*
26 *of the other person, or shows the other person engaging in an act*
27 *of intercourse, oral copulation, sodomy, or other act of sexual*
28 *penetration, and (3) the other person suffers general or special*
29 *damages as described in Section 48a.*

30 *(b) As used in this section, “intimate body part” means any*
31 *portion of the genitals, and, in the case of a female, also includes*
32 *any portion of the breast below the top of the areola, that is*
33 *uncovered or visible through less than fully opaque clothing.*

34 *(c) There shall be no liability on the part of the person*
35 *distributing material under subdivision (a) under any of the*
36 *following circumstances:*

37 *(1) The distributed material was created under an agreement*
38 *by the person appearing in the material for its public use and*
39 *distribution or otherwise intended by that person for public use*
40 *and distribution.*

1 (2) *The person possessing or viewing the distributed material*
2 *has permission from the person appearing in the material to*
3 *publish by any means or post the material on an Internet Web site.*

4 (3) *The person appearing in the material waived any reasonable*
5 *expectation of privacy in the distributed material by making it*
6 *accessible to the general public.*

7 (4) *The distributed material constitutes a matter of public*
8 *concern.*

9 (5) *The distributed material was photographed, filmed,*
10 *videotaped, recorded, or otherwise reproduced in a public place*
11 *and under circumstances in which the person depicted had no*
12 *reasonable expectation of privacy.*

13 (6) *The distributed material was previously distributed by*
14 *another person.*

15 (d) *In addition to any other relief available at law, the court*
16 *may order equitable relief against the person violating subdivision*
17 *(a), including a temporary restraining order, or a preliminary*
18 *injunction or a permanent injunction ordering the defendant to*
19 *cease distribution of material. The court may grant injunctive relief*
20 *substituting a pseudonym for the true name of the plaintiff pursuant*
21 *to subdivision (e).*

22 (e) *The court may also grant, after holding a properly noticed*
23 *hearing, reasonable attorney's fees and costs to the prevailing*
24 *party.*

25 (f) (1) *A plaintiff in a civil proceeding pursuant to subdivision*
26 *(a), may proceed using a pseudonym, either John Doe, Jane Doe,*
27 *or Doe, for the true name of the plaintiff and may exclude or redact*
28 *from all pleadings and documents filed in the action other*
29 *identifying characteristics of the plaintiff. A plaintiff who proceeds*
30 *using a pseudonym and excluding or redacting identifying*
31 *characteristics as provided in this section shall file with the court*
32 *and serve upon the defendant a confidential information form for*
33 *this purpose that includes the plaintiff's name and other identifying*
34 *characteristics excluded or redacted. The court shall keep the*
35 *plaintiff's name and excluded or redacted characteristics*
36 *confidential.*

37 (2) *All court decisions, orders, petitions, and other documents,*
38 *including motions and papers filed by the parties, shall be worded*
39 *so as to protect the name or other identifying characteristics of*
40 *the plaintiff from public revelation.*

1 (3) Counsel for all parties shall comport their conduct with
2 Rule 5-120 of the California State Bar Rule of Professional
3 Conduct and counsel and all parties shall comply with any lawful
4 order of the court.

5 (4) As used in this subdivision, “identifying characteristics”
6 includes, but is not limited to, name or any part thereof, address
7 or any part thereof, city or unincorporated area of residence, age,
8 marital status, relationship to defendant, and race or ethnic
9 background.

10 (5) The responsibility for excluding or redacting the name or
11 identifying characteristics of the plaintiff from all documents filed
12 with the court rests solely with the parties and their attorneys.
13 Nothing in this section requires the court to review pleadings or
14 other papers for compliance with this provision.

15 (g) In an action pursuant to this section, the plaintiff shall state
16 in the caption of the complaint “ACTION BASED ON CIVIL CODE
17 SECTION 1708.9.”

18 (h) Nothing in this section shall be construed to alter or negate
19 any rights, obligations, or immunities of an interactive service
20 provider under Section 230 of Title 47 of the United States Code.
21 Nothing in this section shall be construed to limit or preclude a
22 plaintiff from securing or recovering any other available remedy.

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

27 (j) This section shall become operative on July 1, 2015.

28 SEC. 2. The Judicial Council shall, by July 1, 2015, develop
29 the confidential information form specified in subdivision-(e) (f)
30 of Section-48.95 1708.9 of the Civil Code.