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Legal Sidebar

Federal Civil Action for Disclosure of Intimate Images: Free Speech Considerations

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On March 15, 2022, Congress authorized a federal civil claim relating to the disclosure of intimate images as part of the Consolidated Appropriations Act, 2022. The new cause of action, which takes effect on October 1, 2022, marks the first federal law targeting the unauthorized dissemination of private, intimate images of both adults and children—images commonly referred to as "nonconsensual pornography" or "revenge porn."

This Sidebar discusses the current legal landscape with respect to prohibitions on nonconsensual pornography. It first provides an overview of state and federal laws on the subject, including the new private right of action. It then discusses how courts have decided significant First Amendment challenges to nonconsensual pornography laws at the state level. The Sidebar concludes with a discussion of the relevance of these legal developments for legislative proposals to criminalize the distribution of nonconsensual pornography at the federal level or to expand liability for distributing other types of content online.

State of the Law

Nearly all 50 states (plus the District of Columbia, Puerto Rico, and Guam) have a nonconsensual pornography law in some form. The majority of states make dissemination of nonconsensual pornography a criminal offense if the defendant acted with a specific intent (e.g., to harass or intimidate) or with some level of knowledge—either actual or imputed through recklessness or negligence—that the depicted person had not consented to the disclosure.

Some states, including New York, Pennsylvania, and Washington, also authorize the depicted person to bring a civil action in state court against an individual who disseminated the material (also limited by the requisite mental state). Such actions may authorize the court to award injunctive relief or monetary damages. Most of these state laws were adopted within the past 10 years.

At the federal level, there is no criminal offense specifically aimed at the distribution of nonconsensual pornography. Distribution of such materials over the internet or in interstate commerce could, however, violate other federal laws, depending on the circumstances. For example, nonconsensual pornography depicting persons under the age of 18 could violate federal prohibitions on child sexual exploitation.

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Circumstances involving threats, extortion, or harassment could constitute other federal crimes. Federal law also prohibits the interstate distribution of obscene visual matter—a type of speech that is not protected by the First Amendment. However, as explained below, not all nonconsensual pornography rises to level of legally obscene.

Congress created a new, private right of action for victims of nonconsensual pornography in Section 1309 of the Violence Against Women Act Reauthorization Act of 2022, passed as part of the Consolidated Appropriations Act, 2022. Effective October 1, 2022, Section 1309 will authorize an individual whose intimate image was disclosed without the individual's consent to bring a federal lawsuit against the person who made the disclosure. While a court has not yet interpreted Section 1309, the text of this section provides that, to prevail in the litigation, a plaintiff would have to prove that the defendant made the disclosure *knowing* that the plaintiff had not consented to the disclosure or with *reckless disregard* as to whether the plaintiff had consented to the disclosure, which usually means consciously disregarding a substantial risk. A cause of action could be available under Section 1309 for distribution of an intimate image without the plaintiff's consent even if the plaintiff had consented to the creation of the image or had shared it with someone else. In contrast, Section 1309 would not reach disclosures of commercial pornographic content (with some exceptions); disclosures made in good faith to law enforcement or as part of a legal, medical, or investigatory process; disclosures on matters of public concern; and disclosures "reasonably intended to assist" the depicted person. Under Section 1309, a court may award a prevailing plaintiff monetary damages and enjoin the defendant from further disclosing the image.

First Amendment Challenges

As of the date of this Sidebar, CRS has not identified any pre-enforcement legal challenges to the constitutionality of Section 1309. Litigation over similar laws continues to unfold at the state level, however. The highest state courts in five states—Illinois, Indiana, Minnesota, Texas, and Vermont—have adjudicated free speech challenges to their states' nonconsensual pornography laws. All five of these courts ultimately rejected the First Amendment arguments in those cases, though the Texas Court of Criminal Appeals did so in a nonprecedential opinion that is not controlling in the state's lower courts. The reviewing courts concluded that the statutes prohibited "more than obscenity," reaching protected speech in the form of non-obscene, sexually explicit images depicting adults. With one exception (IL), the courts also determined that the laws regulated or potentially regulated speech on the basis of its content (i.e., depictions of sexual conduct or nudity) and applied strict scrutiny, the most stringent First Amendment test. The laws passed strict scrutiny in these four jurisdictions (IN, MN, TX, and VT). In particular, the courts determined that the laws served compelling governmental interests in protecting privacy and preventing the psychological and reputational harms associated with public disclosure of intimate images. The courts also concluded that the laws were narrowly tailored and the least restrictive means of serving those interests.

Although the state statutes differed in their particulars, at least three features of the laws were important to the courts' strict scrutiny analysis. First, the laws expressly imposed or were construed to impose a mens rea requirement with respect to the depicted person's consent to disclosure—negligence (IN, MN), recklessness (TX), or actual knowledge (VT). Second, several of the statutes exempted disclosures made for law enforcement purposes (IN, MN) or regarding matters of public concern (VT). Third, several of the statutes were limited to circumstances where a depicted person would have a reasonable expectation of privacy (MN, TX, VT).

At least two of these courts (IN, TX) also considered whether their states' laws were substantially "overbroad" in relation to their "plainly legitimate sweep" (a type of facial challenge), rejecting this argument as well.

Considerations for Congress

These cases upholding state laws in the states' highest courts provide some insight into how Section 1309 might fare in a constitutional challenge in federal court. It appears that Section 1309 shares some attributes of the statutes that survived free speech challenges in Indiana, Minnesota, Texas, and Vermont, such as a knowing or reckless mens rea requirement for the lack-of-consent element and exceptions for disclosures in the public interest. It remains to be seen, however, whether other state or federal courts will adopt reasoning similar to the four state courts discussed above in future legal challenges to nonconsensual pornography laws.

In terms of First Amendment case law, these state court cases are significant because they reflect the "rare" circumstance in which a government restriction of speech based on its content survived strict scrutiny. If a challenge to a nonconsensual pornography law were to reach the Supreme Court, the Court could consider whether to recognize a new category of unprotected speech for nonconsensual pornography—something it has been reluctant to do with respect to other depictions that legislatures have sought to restrict. Even assuming that nonconsensual intimate images enjoy First Amendment protection, however, the surviving state laws could signal a path forward for legislatures seeking to expand criminal or civil liability for nonconsensual pornography. They could also provide lawmakers with some options for regulating online content such as deepfakes, which, like nonconsensual pornography, may implicate protected speech while posing distinct harms that Congress may have an interest in addressing.

One issue that the particular state cases discussed above did not decide is the interaction between the restrictions under review and other federal statutes. In particular, could a defendant seek to dismiss a Section 1309 claim on the ground of immunity from liability under Section 230 of the Communications Act? Section 230(c) precludes courts from holding a defendant liable for distributing content "provided by another information content provider" through an interactive computer service (e.g., a website or social media platform). Although Section 230 does not bar enforcement of federal *criminal* laws, the statute contains no similarly broad exemption for federal *civil* claims or state law claims. In practice, therefore, Section 230 generally bars a private plaintiff from proceeding with a claim against a provider or a user of an interactive computer service if that claim is based on content that the defendant posted, hosted, or otherwise disseminated but did not create or develop. This limitation often results in dismissal of such claims in the early stages of litigation—before the court has reached the merits of the legal dispute.

Section 1309 does not specify how it interacts with Section 230(c). In these circumstances, a court reviewing a Section 1309 claim may have to decide whether the two provisions can be "harmonized" or whether Section 1309 implicitly repeals Section 230(c) for claims concerning nonconsensual pornography. The Supreme Court has discouraged courts from finding "repeals by implication" unless the statutes pose an "irreconcilable conflict." The U.S. Court of Appeals for the Second Circuit found no such conflict in a case involving a different civil remedies provision enacted after Section 230, reasoning that "Section 230 provide[d] an affirmative defense to liability" to the civil claim "for only the narrow set of defendants and conduct to which Section 230 applies." If a reviewing court were to adopt similar reasoning, it could conclude that Section 1309 and Section 230 can co-exist, with Section 1309 allowing claims against defendants who distributed nonconsensual pornography that they either created or developed, and Section 230(c) barring claims against providers and users of interactive computer services based on third-party content.

In practice, the circumstances in which a plaintiff could show that a provider or user created or developed the nonconsensual pornography at issue could be fairly narrow. By some estimates, a large percentage of nonconsensual pornography images are "selfies"—that is, images captured by the depicted person—and thus may not have been "created" by the defendant. Additionally, in some jurisdictions, a court may not consider a provider or user to have "developed" the content at issue unless the provider or user "directly

and materially contributed to what made the content itself unlawful." Websites that actively encourage the posting of nonconsensual pornography might be content creators under this test. In 2021 and 2022, some federal district courts have allowed certain claims to proceed against pornographic websites based on allegations that the providers of those sites "curate[d] video playlists" of illegal content or engaged in other actions directly promoting that content. Assuming that a plaintiff could clear these initial hurdles, the plaintiff would still have to allege and prove that the defendant acted knowingly or recklessly with regard to the plaintiff's lack of consent, which is a requirement under Section 1309 itself.

Alternatively, although less likely, a court could decide that Section 1309 displaces Section 230(c)'s liability shield because it is the later-enacted and more specific law. Under that scenario, a court might allow a claim against a non-developer distributor of nonconsensual pornography if the plaintiff adequately alleges that the defendant acted with the requisite intent under Section 1309—that is, that the defendant knew that the plaintiff had not consented to the disclosure or acted with reckless disregard as to whether the plaintiff consented.

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