



Report #80
Nonconsensual Distribution of
False Sexual Imagery
(Final Draft)

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DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
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This Report contains draft language for a newly proposed offense related to the nonconsensual distribution of nude or sexually explicit images, video, and audio created or altered through use of any digital technology, including artificial intelligence methods. These draft revisions and repeal recommendations are part of the D.C. Criminal Code Reform Commission's (CCRC) efforts to issue recommendations for comprehensive reform of District criminal statutes.

This Report has two main parts: (1) statutory text for inclusion in the Revised Criminal Code Act (RCCA) as submitted to the D.C. Council on October 1, 2021; and (2) commentary on the draft statutory text. The Report's commentary on the revisions explains the meaning of each provision, considers whether existing District law would be changed by the provision (and if so, why this change is being recommended).

§ 22A-2801. Nonconsensual Distribution of False Sexual Imagery

- (a) *Offense.* An actor commits nonconsensual distribution of a false sexual imagery when:
 - (1) The actor knowingly distributes or displays to a person other than the complainant, or makes accessible on an electronic platform to a user other than the complainant or actor any false imagery;
 - (2) The false imagery realistically depicts any of the following:
 - (A) The complainant's nude genitals or anus; or
 - (B) The complainant's nude or undergarment-clad pubic area, buttocks, or female breast below the top of the areola; or
 - (C) An image or an audio recording of the complainant engaging in or submitting to a sexual act, masturbation, or sadomasochistic abuse;
 - (3) Without the complainant's effective consent;
 - (4) With intent to:
 - (A) Alarm or sexually abuse, humiliate, harass, or degrade the complainant;
 - (B) Sexually arouse or gratify any person; or
 - (C) Receive financial gain as a result of the distribution or display; and
 - (5) In fact, the complainant is identifiable from the false imagery itself.
- (b) *Exclusions from Liability.* An actor does not commit an offense under subsection (a) of this section when, in fact:
 - (1) The false imagery involves parody, satire, commentary, criticism or involves works of political or newsworthy values;
 - (2) The actor is a licensee under the 47 U.S.C. § 151 et seq. engaged in activities regulated pursuant to 47 U.S.C. § 151 et seq.; or
 - (3) The actor is an interactive computer service, as that term is defined in 47 U.S.C. § 230(f)(2), for content provided by another person.
- (c) *Affirmative Defense.* It is an affirmative defense to liability under this section, that the actor:
 - (1) With intent, exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney;
 - (2) In fact, distributes the false imagery to a person whom the actor reasonably believes is:
 - (A) A law enforcement officer, prosecutor, or attorney; or
 - (B) A teacher, school counselor, school administrator, or a person with a responsibility under civil law for the health, welfare, or supervision of a person who is:
 - (i) Depicted in the false imagery; or
 - (ii) Involved in the creation of the false imagery.
- (d) *Penalty.*
 - (1) A person who violates subsection (a) of this section shall be sentenced to not more than 180 days in jail, fined not more than the amount set forth in § 22-3571.01, or both.

(2) *Penalty Enhancements.* The penalty for this offense shall be increased to 2 years in prison, a fine of not more than the amount set forth in § 22-3571.01, or both, when the actor knowingly:

(A) Commits the violation within five years of one or more prior convictions under this section; or

(B) Commits the violation with the intent to cause violence or bodily harm.

(C) Commits the violation and is:

(i) Reckless as to the fact that the complainant is under 16 years of age and, in fact, the actor is at least 4 years older than the complainant; or

(ii) Reckless as to the fact that the complainant is under 18 years of age and the actor is in a position of trust with or authority over the complainant, and, in fact, the actor is at least 4 years older than the complainant;

(e) *Definitions.* For the purposes of this section, the term:

(1) “False Imagery” means any artificial image or audio recording created or altered through use of any digital technology:

(A) That is so realistic that a reasonable person would believe it depicts speech or conduct of an individual; and

(B) The production of which was substantially dependent upon technical means, rather than the ability of another individual to physically or verbally impersonate such individual.

(2) “Licensee” shall have the same meaning as provided in 47 U.S.C. § 153(30).

Explanatory Note. *This section establishes a new offense, prohibiting the nonconsensual distribution of false sexual imagery. This offense will be included in Title 22, Chapter 30A, governing non-consensual pornography.*

Subsection (a) specifies the prohibited conduct for nonconsensual distribution of false sexual imagery. Paragraph (a)(1) specifies that a person commits nonconsensual distribution of false sexual imagery when the actor distributes or displays to a person other than the complainant, or makes accessible on an electronic platform to a user other than the complainant or actor any false imagery. The word “distribute” requires granting another person the ability to exercise dominion and control over the image. The phrase “make accessible on an electronic platform” does not require proof that the material was actually accessed or viewed.¹ Paragraph (a)(1) also specifies that the culpable mental state “knowingly” applies. “Knowingly” is a defined term in RCC § 22A-206, which here means that the actor must have been practically certain that they were distributing nonconsensual false sexual imagery or making it available on an electronic platform to someone other than the complainant. “False imagery” is a defined term in paragraph (e)(1) that means any artificial image or audio recording created or altered through use of any digital technology that is so realistic that a reasonable person would believe it depicts speech or conduct

¹ For example, a person may commit an offense by publishing the image on their own public website, on a peer-to-peer social networking platform, or on the dark web, even if no one else ever views the page.

of an individual; and the production of which was substantially dependent upon technical means, rather than the ability of another individual to physically or verbally impersonate such individual.

Paragraph (a)(2) states that the false imagery must realistically depict one or more of the body parts or types of conduct listed in subparagraphs (a)(2)(A)-(C): the complainant's nude genitals or anus; the complainant's nude or undergarment-clad pubic area, buttocks, or female breast below the top of the areola; or the complainant engaging in or submitting to a sexual act, masturbation, or sadomasochistic abuse. The depictions must be *realistic*; an animated video generated by artificial intelligence depicting a nude person would not satisfy the element under paragraph (a)(2). The term "false image" is defined in subsection (e), discussed in commentary below. Per the rule of interpretation under RCC § 22E-207, the "knowingly" mental state from paragraph (a)(1) also applies to this element. The actor must be practically certain that the false image realistically depicts one of the body parts or types of conduct listed in subparagraphs (a)(2)(A)-(C).

Paragraph (a)(3) specifies that the offense requires that the actor does not have the complainant's effective consent to distribute or display the false imagery. "Effective consent" is a defined term in RCC § 22A-101 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." The RCC definition of "effective consent" incorporates the RCC definition of "consent," which requires some indication (by word or action) of agreement given by a person generally competent to do so. Per the rule of interpretation under RCC § 22E-207, the "knowingly" mental state from paragraph (a)(1) also applies to this element. The actor must be practically certain that the actor lacked effective consent from the complainant to distribute or display the false imagery.

Paragraph (a)(4) specifies that the actor must have the intent either to alarm or sexually abuse, humiliate, harass, or degrade the complainant; sexually arouse or gratify any person; or receive financial gain as a result of the distribution or display. "Intent" is a defined term in RCC § 22A-206 that, applied here, means the actor was practically certain that their conduct would cause one of the specified harms to the complainant or result in sexual arousal or gratification of any person, or lead to a financial benefit for the actor. Per RCC § 22A-206, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such harm, arousal or gratification, or financial benefit occurred, just that the defendant believed to a practical certainty that it would result.

Paragraph (a)(5) specifies that the complainant must be identifiable from the imagery itself, not from other means such as a caption or other descriptions that are not part of the image itself. For example, an image of a person's backside that does not include any unique identifying marks would not satisfy this element, even if accompanied by text stating that the image depicts a named individual.

Subsection (b) codifies three exclusions from liability for the offense. Under the first exclusion in paragraph (b)(1), the actor does not commit an offense when the false imagery involves parody, satire, commentary, criticism or involves works of political or newsworthy values. Under the second exclusion in paragraph (b)(2) an actor does not commit an offense when

they are a licensee² under the 47 U.S.C. § 151 et seq. engaged in activities regulated pursuant to 47 U.S.C. § 151 et seq. Under the third exclusion in paragraph (b)(3) an actor does not commit an offense under the statute when they are an interactive computer service, as that term is defined in 47 U.S.C. § 230(f)(2), and the content is provided by another person.

Subsection (c) establishes an affirmative defense for the innocent display or distribution of nonconsensual false sexual imagery.³ Paragraph (c)(1) establishes an affirmative defense for a person who is voluntarily reporting possible illegal content under this section. The actor must have the intent “exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney.”⁴ Per RCC § 22A-205, the object of the phrase “with intent to” is not an objective element that requires separate proof—only the actor’s mental state must be proven regarding the object of this phrase. The recipient of the display or distribution must be someone that the actor reasonably believes⁵ to be a “law enforcement officer, prosecutor, or attorney, or a teacher, school counselor, school administrator,” or someone with a responsibility for the health, welfare, or supervision of one of the people depicted in or involved in the creation of the image or recording. “Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.”⁶

Subsection (d) specifies relevant penalties for the offense. Paragraph (d)(1) describes the penalty for the general offense. Paragraph (d)(2) provides for enhanced penalties for the offense. If the government proves at least one of the elements listed under subparagraphs (d)(2)(A)-(C), the maximum penalty for each offense may be increased from 180 days to 2 years imprisonment. Subparagraph (d)(2)(A) describes the enhancement element where the government proves that the actor committed the violation within five years of one or more prior convictions under this section. Subparagraph (d)(2)(B) describes the enhancement element where the government proves that the actor committed the violation with the intent to cause violence or bodily harm. Subparagraph (d)(2)(C) describes the enhancement element where the government proves that the actor committed the violation and the actor was reckless to the fact that either the complainant is under 16 years of age and, in fact, the actor is at least 4 years older than the complainant; or the actor was reckless to the fact that the complainant is under 18 years of age and the actor is in a position of trust with or authority over the complainant, and, in fact, the actor is at least 4 years older than the complainant.

² The term “licensee” is defined in paragraph (e)(2) to have the same meaning specified in 47 U.S.C. § 153(30).

³ Per RCC § 22A-201, the defendant has the burden of proving an affirmative defense by a preponderance of the evidence.

⁴ In addition to criminal defense advice, legal advice can include civil proceedings such as custody and abuse and neglect.

⁵ Any circumstance element or result element that is the object of the phrase “reasonably believes” need not be proven to actually exist.

⁶ *See, e.g.*, Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). “...these questions are asked not in terms of what the actor’s perceptions actually were, but in terms of an objective view of the situation as it actually existed. ... The standard for ultimate judgment invites consideration of the ‘care that a reasonable person would observe in the actor’s situation.’ There is an inevitable ambiguity in ‘situation.’ If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.”

Subsection (e) provides defined terms that apply to this section. They include definitions of “false imagery” and “licensee”. The definition of “false imagery” specifies the technical specifications of what distinguishes all other images, altered or otherwise, from those that are false yet realistic enough to be prohibited in certain circumstances. The definition of “licensee” has the same meaning as provided in 47 U.S.C. § 153(30).

Relation to Current District Law. *The nonconsensual distribution of false sexual imagery offense changes current District law in one main way.*

The nonconsensual distribution of false sexual imagery offense closes a gap in current District law. The conduct covered by this offense is at most, only partially accounted for by other criminal offenses in the D.C. Code. While several provisions cover distribution or publication of sexual imagery, they require either that the images be *real* or that the images qualify as obscenity. This offense closes this gap by criminalizing the nonconsensual distribution of false images, even if they do not qualify as obscenity.⁷

Under current District law it is unlawful for someone to publish or distribute a sexual image of another person without their consent. There are three separate statutes addressing this issue, D.C. Code § 22–3052, Unlawful disclosure; § 22–3053, First-degree unlawful publication; and § 22–3054, Second degree unlawful publication.⁸ All three statutes prohibit the unauthorized sharing of a sexual image. A “sexual image” is defined in the statute as a photograph, video, or other visual recording of an unclothed private area or of sexual conduct.⁹ Although this definition arguably includes false imagery, the plain text of the statute only appears to apply to *authentic* photographs, videos, and recordings. It is unclear if falsely created images, or images that were initially non-sexual but were edited to include nudity or sexual conduct would qualify under these statutes.

⁷ Several other jurisdictions have recently addressed similar gaps in law by proposing changes to their existing “revenge pornography” statutes to ensure that distribution of falsely generated images is covered by those offenses. *See New Hampshire, Tennessee, and Connecticut*: 2023 New Hampshire House Bill No. 1319, New Hampshire Second Year of the One Hundred Sixty-Eighth Session of the General Court, 2023 New Hampshire House Bill No. 1319, New Hampshire Second Year of the One Hundred Sixty-Eighth Session of the General Court; 2023 Tennessee Senate Bill No. 2003, Tennessee One Hundred Thirteenth General Assembly - Second Regular Session, 2023 Tennessee Senate Bill No. 2003, Tennessee One Hundred Thirteenth General Assembly - Second Regular Session; 2024 Connecticut House Bill No. 5421, Connecticut General Assembly - February Session, 2024, 2024 Connecticut House Bill No. 5421, Connecticut General Assembly - February Session, 2024.

⁸ The severity of the offense depends on the number of people the image was sent to as well as how close in the distribution chain the person distributing was to the person depicted. Unlawful disclosure and second degree unlawful publication are misdemeanors that carry 180 day maximum penalties while first degree unlawful publication carries a 3 year maximum penalty.

⁹ D.C. Code § 22–3051 (7). This statute also refers to the term “sexual conduct”, which is defined under D.C. Code § 22–3101(5) as:

- (A) Actual or simulated sexual intercourse:
 - (i) Between the penis and the vulva, anus, or mouth;
 - (ii) Between the mouth and the vulva or anus; or
 - (iii) Between an artificial sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva;
- (B) Masturbation;
- (C) Sexual bestiality;
- (D) Sadomasochistic sexual activity for the purpose of sexual stimulation; or
- (E) Lewd exhibition of the genitals.

In addition, D.C. Code § 22-2201 prohibits the distribution of obscene images or video. Distribution of false imagery could possibly constitute this offense, but only if the image is *obscene*. An image is only obscene if it appeals to a prurient interest in sex, under contemporary community standards¹⁰, and when considered as a whole, is patently offensive; and is lacking serious literary, artistic, political, or scientific value.¹¹ While some false images could satisfy this standard, many false images depicting nudity or sexually explicit conduct would not constitute obscenity.¹²

The nonconsensual distribution of false sexual imagery offense ensures that the distribution of false images or images that have been edited to include nudity or sexual conduct is criminalized under District law.

¹⁰ See, e.g., *4934, Inc. v. Washington*, 375 A.2d 20, 24 (D.C. 1977) (holding that the performance of a dancer, Miranda, in which she wore “sheer-type negligee with bikini-type panties” was not prohibited by the District’s obscenity statute and noting that, “in a jurisdiction where complete nudity in playhouses as well as in burlesque theatres seems to be accepted, the Miranda dance can scarcely be described as offensive to community standards”).

¹¹ See, *Miller v. California*, 413 U.S. 15 (1973).

¹² See, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975) (noting that “clearly all nudity cannot be deemed obscene even as to minors”).