Appendix A

Proposed Text for Model Legislation

**A Bill**

*To protect the consensual creation and sharing of intimate media.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. Short Title; Definitions.

(a) This Act may be cited as the “Strengthening Healthy and Responsible Exchange of Intimate Media Act,” or the “SHARE IT Media Act.”

(b) Section 101 of title 17, United States Code, is amended by inserting the following:

“A ‘work of intimate media’ is either a photograph (as defined herein under ‘pictorial, graphic, and sculptural works’) or an audiovisual work that:

1) Contains an image that captures the body of one or more living humans;
2) Captures intimate information; and
3) Enables one or more of the living humans captured in it to be reasonably identified, such as by capturing identifiable features or markings, by accurately labeling the human or humans, or by providing other identifying information in or accompanying the work.

‘Intimate information’ is one or more of the following:

1) Sexually explicit conduct, as defined in 18 U.S.C. 2256(2)(B)(i) & (ii);
2) Depiction of a living human’s genitals or pubic area, as defined by the term “graphic” in 18 U.S.C. 1466A(f)(3); or
3) The exposed nipple or areola of a living human female.”

Section 2. Rights in Intimate Media.

Title 17 of U.S. Code is amended by inserting after section 106A the following:

“Section 106B. Rights in Intimate Media.

(a) A living human captured in a work of intimate media, where that work includes intimate information pertaining to that person, shall have the rights

1) To authorize the distribution of that work, or of any copies of it, and
2) To authorize the display or performance of that work, or of any copies of it.

(b) The rights in subsection (a) are independent of, and in addition to, the rights conferred by Section 106.

(c) Section 109(c) of this title does not apply to the rights in subsection (a) above.

(d) The rights conferred by subsection (a) may not be transferred. These rights may be waived if the owner of the rights in subsection (a) expressly agrees to such waiver in a written instrument signed by the owner. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified.

(e) Notwithstanding the provisions of subsection (a), a person shall not be liable for infringement of that provision for the display, distribution, or performance of a work of intimate media if:
1) That person received the work, or a copy of it, from a living human captured in the work whose intimate information is captured in the work, and
2) Only that person views the performance or display of the work, or a copy of it.

This subsection shall operate as an affirmative defensive to liability for infringement.

(f) Anyone who violates the rights in subsection (a) is an infringer of the owner of the rights. For purposes of Section 106B, a plaintiff must establish the following elements to establish liability for infringement:
   1) The work in suit is a work of intimate media;
   2) The plaintiff was captured in that work;
   3) That work contains intimate information pertaining to the plaintiff;
   4) A reasonable person could identify the plaintiff based on the work, and information accompanying it; and
   5) The defendant displayed, distributed, or performed the work.

For purposes of this subsection, ‘distribution’ includes making the work, or a copy of it, available, and does not require proof that anyone actually obtained access to that work, or a copy of it.

(g) For purposes of this subsection, an infringer who is a service provider, as defined in 17 U.S.C. 512(k)(1)(B), infringes by distributing the work, or a copy of it, by hosting it (as defined in 17 U.S.C. 512(c)), linking to it (as defined in 17 U.S.C. 512(d)), or caching it (as defined in 17 U.S.C. 512(b)), among other modes of distribution.

(h) This Section shall apply only to works of intimate media created on or after the effective date of the legislation enacting the SHARE IT Media Act.

(i) A plaintiff who proves infringement, as defined in subsection (f), shall be entitled to the remedies in Sections 502-506, except as otherwise provided in this Section.

(j) A plaintiff who proves infringement, as defined in subsection (f), shall be entitled to recovery of costs and reasonable attorney’s fees as defined in Section 505, unless the district court finds, and supports with specific findings, that such an award is not in the interests of justice.

(k) A plaintiff who proves infringement, as defined in subsection (f), and who obtains an injunction as provided in Section 502(a), shall be entitled to removal and deletion of all digital copies of infringing works under the defendant’s control, and to destruction of all physical copies of infringing works under the defendant’s control, as provided in Section 503(a)(1), unless the district court finds, and supports with specific findings, that such relief is not in the interests of justice.

(l) The first clause of Section 411 is edited to read as follows:

   “Except for an action brought for violation of the rights of the author under sections 106A(a) and 106B(a),”

(m) It is not an infringement of the rights in subsection (a) to perform, distribute, or display a work of intimate media if
   1) Such performance, distribution, or display is newsworthy, or
2) The defendant has obtained express written consent from the plaintiff to the performance, distribution, or display at issue.

A newsworthy performance, distribution, or display must be one where the work of intimate media at issue is a matter of public concern. To evaluate whether the work is a matter of public concern, a district court may consider the Restatement (Second) of Torts, section 652D (1977), and related precedent.

(n) Section 107 is not a defense to infringement of the rights in subsection (a). In a suit for infringement of the rights in subsection (a), a district court shall not consider Section 107.

(o) Safe harbor -

1) A service provider, as defined in 17 U.S.C. 512(k)(1)(B), shall not be liable for monetary relief, or, except as provided herein, for injunctive or other equitable relief, for infringement of the rights in subsection (a) by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider
   A. does not have actual knowledge that the material or an activity using the material on the system or network infringes the rights in subsection (a), and
   B. upon notification of claimed infringement as described in paragraph (2) herein, removes or disables access to the material that is claimed to be infringing within five business days of receipt of the notification.

2) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:
   A. A statement that the complaining party is a person captured in the allegedly infringing work of intimate media, or is authorized to act on behalf of such person;
   B. The complaining party can reasonably be identified based on the infringing work or information accompanying it;
   C. The work of intimate media contains intimate information pertaining to the complaining party;
   D. The complaining party did not consent in writing to the performance, distribution, or display of the allegedly infringing work of intimate media; or, the performance, distribution, or display at issue exceeded the scope of the consent provided;
   E. The complaining party’s name and contact information, including e-mail address; or, if proceeding pseudonymously as provided in subsection (p), the complaining party’s unique identifier and court information;
   F. The uniform resource locators (URLs) or locations under the service provider’s control where the infringing media can be located; and
   G. A statement that the information in the notification is accurate, under penalty of perjury.

3) The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive
notifications of claimed infringement described in paragraph (2), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:

A. The name, address, phone number, and electronic mail address of the agent.

B. Other contact information which the Register of Copyrights may deem appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, and may require payment of a fee by service providers to cover the costs of maintaining the directory.

4) A service provider receiving a notification of claimed infringement under this subsection must maintain the confidentiality of the notification, including by minimizing the number of people who can obtain access to the notification, and by redacting identifying information before sharing it with anyone who is not employed by the service provider or who is not an attorney retained by the service provider.

5) The following rule shall apply in the case of any application for an injunction under section 502 against a service provider that is not subject to monetary remedies under this subsection. A court may grant injunctive relief with respect to a service provider only in one or more of the following forms:

A. An order restraining the service provider from providing access to infringing material or activity residing at a particular online site on the provider’s system or network.

B. An order restraining the service provider from providing access to a subscriber or account holder of the service provider’s system or network who is engaging in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

C. Such other injunctive relief as the court may consider necessary to prevent or restrain infringement of copyrighted material specified in the order of the court at a particular online location, if such relief is the least burdensome to the service provider among the forms of relief comparably effective for that purpose.

6) Subject to paragraph (A), a service provider shall not be liable to any person for any claim based on the service provider’s good faith disabling of access to, or removal of, material or activity claimed to be infringing rights in subsection (a), or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.

A. The limitation on liability described above in subsection (o)(6) shall not apply with respect to material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider that is removed, or to which access is disabled by the service provider, pursuant to a notice provided under subsection (o)(2), unless the service provider
I. takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material;  
II. upon receipt of a counter notification described in paragraph (B), promptly provides the person who provided the notification under subsection (o)(2) with a copy of the counter notification, and informs that person that it will replace the removed material or cease disabling access to it in 5 business days; and  
III. replaces the removed material and ceases disabling access to it not less than 5, nor more than 7, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification under subsection (o)(2) that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider’s system or network.  

B. To be effective under this subsection, a counter notification must be a written communication provided to the service provider’s designated agent that includes substantially the following:  
   I. A physical or electronic signature of the subscriber;  
   II. Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled;  
   III. The material that was removed or disabled was newsworthy, as defined in subsection (m)(1); or that the subscriber obtained express written consent to the performance, distribution, or display of the work of intimate media at issue, as defined in subsection (m)(2);  
   IV. The subscriber’s name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the subscriber’s address is outside of the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided notification under subsection (o)(2) or an agent of such person; and  
   V. A statement that the information in the notification is accurate, under penalty of perjury.  

7) Any person who knowingly misrepresents material information in a notification of claimed infringement, as defined in subsection (o)(2), or in a counter notification, as defined in subsection (o)(6)(B), shall be liable as follows:  
   A. To a service provider who received such a notification of claimed infringement, or counter notification, for the service provider’s actual damages, or for statutory damages of $750 per allegedly infringing work, at the service provider’s election; and  
   B. To any person who uploaded, transmitted, or submitted the allegedly infringing work at issue, in the case of knowing misrepresentation of a notification of claimed infringement; or, to any person who submitted the relevant notification of claimed infringement, in the case of knowing misrepresentation of a counter notification; for that person’s actual damages.
A service provider who receives a notification of claimed infringement or a counter notification containing material false information shall not be liable for infringement based on that notification or counter notification.