



Cyber torts and “revenge porn” claims

A LOOK AT THE REMEDIES AVAILABLE TO VICTIMS OF THIS ONLINE HARASSMENT

*“Heaven hath no rage like love
to hatred turned.”*

~*William Congreve*

At times, consenting adults choose to record sexually intimate moments with their trusted partners. The pervasiveness of smartphones, equipped with high-quality cameras, has made this practice more prevalent in recent times. Occasionally, when the relationship ends, one party may disseminate the sexually explicit content, without

consent, to embarrass their former partner. This form of sexually-based digital harassment is frequently referred to as “revenge porn.”

Revenge porn was first made illegal in California in 2013, at the time making it the second state in the country to pass such a law (New Jersey was the first). Over half the states now have laws that expressly address revenge porn. As discussed below, victims may also utilize various tort, privacy, copyright and family laws to seek justice.

While revenge porn has existed for as long as the internet itself, its prevalence and potential for massive exposure and harm permeate our everyday lives more than ever before. The catalyst for this shift can be attributed, in large part, to the recent hacking and publication of nude celebrity photographs and videos.

One such hacking and publication occurred on August 31, 2014, when hundreds of private nude photographs of

See Liberty, Next Page

various celebrities (mostly women) were posted online, quickly spreading to other websites and social networks. The photographs were obtained under false pretenses via targeted “phishing” attacks in which the wrongdoer poses as a reputable third party to trick the victim into providing information.

Referred to as “The Fapping” and “Celebgate,” the incident was met with varied reaction from the media and internet users. The leak sparked outrage and raised serious concerns regarding invasion of privacy. The incident also called into question the privacy and security of digital content stored in the cloud. These types of mainstream incidents helped propel revenge porn subculture into the mainstream.

While celebrities are typically regarded as the victims of revenge porn, they can also be the perpetrators. By way of illustration, in July 2017, reality star Rob Kardashian posted sexually explicit photographs of his celebrity ex-fiancé Blac Chyna on social media, in what appeared to be retaliation based on accusations of cheating.

While cases involving celebrities may garner the most media attention, revenge porn is by no means limited to celebrities. Revenge porn has also become an increasingly prevalent problem for ordinary Americans. A recent report indicates that of Americans who use the internet, three percent have been threatened by revenge porn and two percent are its victims. (Lenhart, Amanda, Michele Ybarra, And Myeshia Price-Feene. *Nonconsensual Image Sharing: One In 25 Americans Has Been A Victim Of “Revenge Porn”* Rep. Data & Society Research Institute and Center for Innovative Public Health Research, 13 Dec. 2016.)

In sum, approximately 10.4 million Americans have been a victim of revenge porn through threats or actual posting of sensitive photographs. (*Ibid.*)

Clearly, the emotional and unpredictable nature of revenge porn means that almost anyone can become a victim, making revenge porn particularly challenging. This article discusses some of the steps taken by tech companies to implement new policies addressing

revenge porn, as well as some of the laws available to its victims.

Response from tech companies

In 2015, California’s Attorney General, Kamala Harris, assembled a task force including law enforcement officials, tech companies, and advocates, to help form new policies concerning revenge porn. Recently, tech companies have begun implementing such new policies. For example, many have started providing online forms that allow revenge porn victims to request the removal of online content without having to assert a copyright first.

Furthermore, social media giants such as Reddit, Twitter, Instagram, and Facebook have adopted policies against revenge porn. These new policies, although not perfect, have started to have an impact. In January 2017 alone, Facebook users reported almost 54,000 incidents of sexual extortion and revenge porn, which resulted in the disabling of over 14,000 Facebook accounts.

Google and Bing also agreed to “de-index” revenge porn so that it no longer comes up under searches for the victim’s name. Google’s statement regarding this new policy reflects the growing public sentiment towards revenge porn: “Our philosophy has always been that Search should reflect the whole web. But revenge porn photographs are intensely personal and emotionally damaging, and serve only to degrade the victims... This is a narrow and limited policy, similar to how we treat removal requests for other highly sensitive personal information, such as bank account numbers and signatures.”

Even adult pornography sites have joined the fight with major sites such as PornHub announcing that they would honor requests to remove revenge porn. Additionally, Deep Web sites like Texxxan, Pink Meth, IsAnyBodyDown.com have been shut down and prosecuted.

While not perfect, the implementation of these new policies pertaining to revenge porn is a step in the right direction.

Criminal Laws

• Criminal Revenge Porn Law (California Penal Code § 647(j) (4))

In 2013, in response to this growing problem, the California Legislature enacted Penal Code section 647(j)(4) which makes it a crime to disseminate revenge porn. Penal Code section 647(j)(4) states that “[a] person who intentionally distributes the photograph of the intimate body part or parts of another identifiable person, or a photograph of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or a photograph of masturbation by the person depicted or in which the person depicted participates, under circumstances in which the persons agree or understand that the photograph shall remain private, the person distributing the photograph knows or should know that distribution of the photograph will cause serious emotional distress, and the person depicted suffers that distress” is guilty of a crime under the statute.

While Penal Code section 647(j) (4) does address some concerns, it does not apply to every scenario. The law does not cover “selfies” (where the victim makes the recording of himself or herself). The law also does not apply to those who do not make the actual recording, those who distribute the recording once it has already been distributed, or websites which post user-submitted content. The law also does not apply to those who obtain the content by hacking into someone else’s electronic device (such as computer or phone). However, hackers can be charged with unauthorized computer access under Penal Code section 502(c) or other computer crimes.

One of the difficulties of charging an individual under this law is that the law only applies to situations where those depicted in the photograph or video agreed or understood that it was to be kept private. Where the victim knew s/he was being recorded, it is hard to prove that the parties agreed or understood that it was meant to be kept

See Liberty, Next Page

private. The prosecution must also demonstrate that the defendant *intended* to cause the victim serious emotional distress, which can be extremely difficult to prove.

Minors

If the victim of revenge porn is a minor, this can lead to legal action for child pornography as has happened in non-revenge porn cases involving sexting.

Civil Actions

• Civil Revenge Porn Law (*California Civil Code § 1708.85*)

Under California Civil Code section 1708.85 “[a] private cause of action lies against a person who intentionally distributes by any means a photograph, film, videotape, recording, or any other reproduction of another, without the other’s consent, if (1) the person knew that the other person had a reasonable expectation that the material would remain private, (2) the distributed material exposes an intimate body part of the other person, or shows the other person engaging in an act of intercourse, oral copulation, sodomy, or other act of sexual penetration, and (3) the other person suffers general or special damages as described in Section 48a.”

The statute also allows the victim to seek injunctive relief, and the action may be filed using a pseudonym for the victim.

• Eavesdropping (*California Penal Code §§ 630, 632, 637.2*)

Under the California Penal Code, anyone who is recorded without permission may bring an action for eavesdropping. However, there is some uncertainty regarding whether the recording of sexual activity, without conversation, constitutes a “communication” under the statute.

• Extortion (*California Penal Code § 523*)

One who receives a threat that their private photograph or video will be published unless the victim takes some action, or unless the victim avoids taking some action, may bring a civil claim for

extortion. This sort of conduct may also lead to criminal charges.

• Identity theft (*California Penal Code §§ 528.5, 530.5*)

California Penal Code sections 528.5 and 530.5 provide civil causes of action to individuals whose online identities have been stolen and used to post sexually explicit messages or photographs without their knowledge or consent. The law also provides imprisonment as a possible punishment.

• Computer crime (*California Penal Code § 502(e)(1)*)

Applying California Penal Code section 502(e)(1), a perpetrator who takes private photographs from someone’s computer or uses someone’s computer to distribute private photographs is guilty of a crime and can also be liable in a civil action. Civil remedies include compensatory damages, injunctive relief or other equitable relief.

• Appropriation (*California Civil Code § 3344*)

California Civil Code section 3344 allows a person to sue someone who is using their photograph for a commercial purpose without consent. Therefore, a victim of revenge porn may sue the user of the material if it can be contended that the user is obtaining a commercial benefit from the revenge porn’s publication without their consent.

• Deceit (*California Civil Code § 1709*)

California Civil Code section 1709 allows a victim to sue for damages if the culprit’s acts were deceptive. This claim may be useful where the pornographic material was created consensually with the promise that it would be kept private. However, it is tough to prove that a culprit had a specific intent to break the promise at the time it was made.

• Defamation – Libel (*California Civil Code § 45*)

California Civil Code section 45 permits an individual to sue for libel. Where the revenge porn is accompanied by libelous statements about the victim (e.g., the victim has HIV), the victim may have a claim for libel.

• Defamation – Slander (*California Civil Code § 46*)

California Civil Code section 46 permits an individual to sue for slander.

Where the revenge porn is accompanied by slanderous statements about the victim (e.g., the victim has HIV), the victim may have a claim for slander.

• Invasion of Privacy to Capture Physical Impression (AKA “Anti-Paparazzi Act”) (*California Civil Code § 1708.8*)

California Civil Code section 1708.8 provides a victim the right to bring a civil action against anyone, not just paparazzi, who trespasses onto one’s property to capture a photograph of the victim involved in private activity. The victim can be an ordinary person and does not have to be a celebrity. This section applies as well to “Peeping Toms.”

• The Unruh Civil Rights Act (*California Civil Code § 51*)

The Unruh Civil Rights Act provides a cause of action to those who have been targeted by violence, or threat of violence, because of their sex, marital status, or sexual orientation. If the revenge porn is published along with violent threats, this may be a viable cause of action.

• Stalking (*California Civil Code § 1708.7*)

Where revenge porn has been posted to harass the victim, and the perpetrator either threatened the victim or was under a restraining order, the victim may have a cause of action for stalking.

• Bullying and Title IX

If any of the revenge porn occurs on a school campus, a victim may also have a claim for bullying and Title IX violations.

• Other torts

One should be creative and look at the various traditional torts that may be applicable in any given situation involving revenge porn. Some additional causes of action to consider include invasion of privacy, public disclosure of private fact and intentional infliction of emotional distress.

For example, in February 2014, a Texas woman received a \$500,000 settlement after she brought a civil action

See Liberty, Next Page

against her ex-boyfriend for posting revenge porn. At the time, Texas did not have a particular “revenge porn” law.

• Copyright

Over 80 percent of revenge porn photographs are “selfies” taken by the victims themselves. Consequently, most of these victims own the copyright in their photographs. Such victims may file Digital Millennium Copyright Act take-down notices with service providers. Websites have an incentive to comply with DMCA takedown notices because if they do not, they cannot take advantage of the safe harbor provisions of the DMCA which shields them from liability.

• Federal Trade Commission

The Federal Trade Commission is also fighting revenge porn as “unfair or deceptive acts or practices in or affecting commerce” in violation of section 5(a) of the Federal Trade Commission Act. The FTC has used this scheme to go after Craig Brittain, a man who used Craigslist to deceive women for revenge porn and an extortion site (IsAnybodyDown.com). Revenge porn victims can file a complaint online with the FTC.

Defenses

Defense: First Amendment and anti-SLAPP

While many applaud revenge-porn laws, some free-speech advocates object to these laws on First Amendment grounds, arguing that laws restricting expression have a history of being overturned. Revenge-porn defendants may also challenge civil lawsuits using anti-SLAPP laws, which allow defendants to counter lawsuits aimed at stifling free speech. Defendants may argue that the First Amendment’s Free Speech Clause allows them to display photographs they lawfully possess, regardless of the embarrassment that the photograph may cause a subject. The courts have yet to resolve those issues.

Defense: Communications Decency Act section 230

Section 230 of the Communications Decency Act of 1996 states that a website cannot be treated as “the publisher or

speaker” of contents posted online by other users. In essence, Section 230 grants websites immunity from damages and injunctive relief relating to revenge porn if the website posts it without editing/revising what is posted. Section 230 is one of the reasons many lawsuits against websites have been unsuccessful. The few lower court decisions allowing claims to go forward against ISPs involve odd fact patterns or are outliers. Congress initially enacted Section 230 to encourage websites to voluntarily monitor and delete obscene or offensive material, not to provide complete immunity. However, relying on the Free Speech Clause, the Supreme Court held unconstitutional provisions defining “offensive” speech.

The unintentional consequence of those decisions was to leave intact only those provisions of the Act which provides websites immunity for permitting others to post revenge porn.

Family Law

Restraining order and abuse (Family Code 6203(4))

Where there is a previous relationship with the wrongdoer, another option available to a victim is to pursue charges under Family Code 6203(4), also known as the Domestic Violence Prevention Act (“DVPA”). Under the DVPA, revenge porn would be considered “abuse” and a victim could file for a restraining order. If “abuse” is found, it can be used in custody hearings as well. The “abuser” cannot get sole or joint legal or physical custody of a child.

Prenuptial agreements

Prenuptial agreements are increasingly including provisions relating to revenge porn which express that the couple agrees not to share intimate photographs or videos. Victims who have entered into such agreements should refer to the agreement for potential remedies provided therein.

Conclusion

Online content can live on the internet forever. Therefore, the damage that revenge porn can cause, both

professionally and emotional, cannot be overstated. Invasion of one’s privacy and the embarrassment and humiliation that follows can be devastating. Thankfully, tech companies and the legislature recognize this reality and have begun fighting revenge porn. As these types of cases are litigated in the courts, one message seems to be clear: those involved in the publication of revenge porn stand to potentially pay a high price.

That was the message the court sent to Gawker media in *Bollea v. Gawker*. In *Bollea*, Terry Bollea (aka Hulk Hogan) sued Gawker Media for posting excerpts of a sex tape involving Hogan and a friend’s wife. Hogan’s claims included invasion of privacy, infringement of personality rights, and intentional infliction of emotional distress. Leading up to trial, Hogan’s lawyers claimed that the privacy rights of Americans was at stake while Gawker’s lawyers asserted that the case threatened freedom of the press.

In March 2016, a Florida jury found Gawker Media liable and awarded Hogan \$115 million in compensatory damages and \$25 million in punitive damages. Three months after the verdict, Gawker filed for Chapter 11 bankruptcy protection and put itself up for sale. The parties subsequently reached a \$31 million settlement. This case, and others like it, serves as a reminder that revenge porn victims are not entirely helpless in fighting back against perpetrators.

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