

# Fighting for Online Privacy with Digital Weaponry: Combating Revenge Pornography

By Elisa D'Amico and Luke Steinberger

*The Cyber Civil Rights Legal Project offers pro bono help to victims whose sexually explicit images have been disseminated online without consent. The speed at which information spreads is unfathomably rapid, and in just moments, a person's most intimate moments can be exposed—displayed online for more than three billion Internet users around the globe to view, download, and share.*

## I. Introduction and Background on Revenge Porn

"This has undoubtedly been the darkest chapter of my life." Those words were spoken by one individual whose private, intimate photographs were distributed online without her consent for countless strangers to see. Yet they might as well be the motto for all those who fall prey to abusers who use the Internet as their playground, sharing the most intimate details of their victims' bodies and lives online at high speeds and at low costs,<sup>1</sup> enabling what so many perpetrators and perpetuators crave: Instant gratification.

Revenge porn, also known as nonconsensual pornography, refers to the distribution of sexually explicit images without the consent of the pictured individual.<sup>2</sup> Thousands of victims struggle every day with the reality that, against their wishes, their private, intimate photographs and videos are available for viewing online and download.

These images surface online on many websites that exist solely for the purpose of allowing individuals to share nonconsensual pornography. For example, one site touts itself as a "moral free file host where anything legal is hosted forever!"<sup>3</sup> Another allows individuals to upload photographs of ex-lovers for the purpose of humiliating and shaming, boasting the tagline "Get Revenge! Naked Pics of Your Ex."<sup>4</sup> Other websites that are not solely dedicated to revenge porn have subsections dedicated to hosting revenge porn material.<sup>5</sup> Revenge porn also has permeated social media platforms, where individuals may fall victim to public shaming by way of "imposter profiles" that utilize their name and likeness, and display their intimate media.<sup>6</sup> This intimate material also is transmitted regularly via e-mail and text message.

While men can and do find themselves as targets of revenge porn, the overwhelming majority of victims are women.<sup>7</sup> The explicit images tend to target the victims' gender in ways that are sexually threatening and degrading,<sup>8</sup> and the comments that accompany the images can be as degrading—if not more—than the images themselves.<sup>9</sup> The images are not simply posted and forgotten, but they are often downloaded, traded, and collected, much like baseball cards.<sup>10</sup> As Professor Danielle Citron notes, the accompanying comments shame victims for their sexual-

ity; commentary often falsely suggest victims' availability for sex.

As if the unauthorized distribution of intimate images online with degrading and defamatory comments was not bad enough, revenge porn victims are also "doxed": their full names and other identifying information—such as their addresses, phone numbers, and links to social media accounts—are posted online along with their nude images.<sup>11</sup> This harassment and abuse typically extends beyond the initial posting of intimate and personal information. Certain individuals and groups make it their mission to terrorize revenge porn victims further, repeatedly publishing lies about them, doctoring photographs online, and even threatening rape or physical violence.<sup>12</sup>

The harm suffered by revenge porn victims is not limited to cyberspace. What begins as cyber exploitation increases victims' risk of exposure to offline stalking and physical attack. For starters, threats of sexual and physical violence cause profound fear, anxiety, and even panic attacks in revenge porn victims. According to a study conducted by the Cyber Civil Rights Initiative, more than 80% of victims of revenge porn suffer from severe emotional distress and anxiety.<sup>13</sup> In rare cases, revenge porn can result in physical harm. According to Citron, such posts and comments "raise victims' risk of physical attack, instill in them the fear of being harassed offline, damage their online reputations, and instill a deep sense of embarrassment."

Revenge porn also causes victims to suffer economic harm. For example, victims often see their careers suffer. If a victim is seeking employment, the interview process alone is an enormous challenge. Revenge porn perpetrators often manipulate search engines to increase the likelihood that employers and clients will see the defamatory statements.<sup>14</sup> Since most employers conduct online searches before hiring new employees, if the first page of search results for the potential employee is packed with nude images and videos of the candidate, there is a good chance the employer will move on to the next interviewee.<sup>15</sup>

*For the first several years of my non-consensual exposure online, all I wanted was for my name to no longer render humiliating and shocking search results so that I could secure a job that would allow me to become finan-*

*cially secure enough to hire lawyers, SEO professionals, a bodyguard...whatever would allow me to protect myself and my loved ones from any further injury or harm at the hand of my perpetrator.*

—Nikki Rettelle, victim

Revenge porn may threaten victims' existing jobs if their bosses discover their employees' intimate media on the Internet. If they do, employers often blame the victim for the appearance of the explicit images and/or video online, sometimes even going so far as terminating the victim-employee.<sup>16</sup>

What begins as online harassment sometimes—thankfully this tends to be a rarer occasion—manifests as physical harassment. The horror of revenge porn is exacerbated exponentially when victims are physically assaulted as a result of online postings.

*Think about finding your nude images on over 300 websites. My ex-boyfriend attempted to humiliate me publicly but to me, the worst part was how he impersonated me. He talked to literally thousands of men and tricked them into believing they were talking to me. He would explicitly describe to them the different sexual favors that "I" was going to provide them with if they came to my house, and he would give them my actual address. I remembered thinking "are these people crazy, do they actually think they're talking to me?"*

*My nightmare came true when men started showing up at my door thinking that the person on the other side (me) was interested in having sex with them. I even had someone leave pictures on my door step with a note that said "I'll find you." I had to explain to these men, repeatedly, that they had not been talking to me but instead to someone else pretending to be me and harassing me.*

*I was so full of fear. My phone constantly buzzed with text and social media messages containing photographs of the private parts of strange men that I had never met and that I did not care to meet. I wound up deleting my social media profiles and changed my phone number, in order to try and make these unwanted communications stop. I even remember turning my read receipts on for my text messages and telling my friends "if you text me and you see that I read it and don't respond, something is wrong; call the cops."*

*What my ex-boyfriend did to me was not just harassment on the web, but he actually placed me in harm's way, again and again. I would*

*never wish something like this upon my worst enemy.*

—Anisha Vora, victim

While this is—thankfully—not a common end result, Anisha's story should demonstrate to perpetrators and consumers of revenge porn that the consequences of these nonconsensual online postings may extend well beyond the initial goals and expectations of the original bad actors.

Revenge porn should have everyone's attention, not because it can impact anyone but because it already impacts everyone.

Originally, the kneejerk reaction was to denounce the victim for assuming the risk by engaging in purportedly sexually provocative and dicey conduct. While that attitude still exists, in this post-Snowden time, the conversation has evolved into tsk tsk-ing the victim for being so naïve as to think she is owed any right to privacy at all. No matter whether we perceive it to be our government or our fellow citizens encroaching upon our communications, we express ourselves differently because of it. We censor and restrain. Private speech—the funny, raunchy, sad intimacies we share behind closed doors and through password-protected email accounts and devices—is without a doubt valuable and creative speech. And we lose that speech if we declare that "privacy is dead" and that all communications belong to the public.<sup>17</sup>

Historically, revenge porn victims have faced an uphill and often impossible battle, both in removing explicit images that have been posted online and in pursuing justice against the perpetrators.<sup>18</sup> As the revenge porn epidemic spreads, the fight to cure it is becoming more manageable, due in large part to increased attention to the issue, the formation of advocacy groups, an increased number of attorneys being willing to take cases on a pro bono basis, and the passage of state laws criminalizing revenge porn. More importantly for present purposes, attorneys are finding creative ways to use existing laws, including copyright law and state tort law to combat the revenge porn epidemic. This article focuses on those creative efforts and identifies some obvious challenges that remain.

Part II introduces the Cyber Civil Rights Legal Project, a global pro bono project, which provides victims with free legal help and a chance to protect their online privacy and their "cyber civil rights."<sup>19</sup> Part III outlines the legal processes that attorneys are using to protect those rights,

and Part IV identifies the obstacles that do, and will continue to, impede the full protection of “cyber civil rights.”

## II. The Birth of the Cyber Civil Rights Legal Project

On Thursday, June 12, 2014, the Miami-Dade Chapter of the Florida Association for Women Lawyers (Miami-Dade FAWL) held its annual installation luncheon. The incoming President, Deborah Baker-Egozi, spoke about her goals for the organization including her plan to make “revenge porn” one of the organization’s main focuses during her term. Elisa D’Amico—at that time an associate in the Miami office of K&L Gates and a Director of Miami-Dade FAWL—was sitting next to Michael Grieco, Commissioner of Miami Beach, listening to Ms. Baker-Egozi. It was Commissioner Grieco’s idea to work on getting the Miami Beach Commission to pass a Resolution (Item RTW) urging the Florida legislature to pass a law criminalizing revenge porn.

On July 23, 2014, Ms. D’Amico, Ms. Baker-Egozi, and Mary Anne Franks, Associate Professor of Law, University of Miami Law School, attended the Miami Beach Commission meeting. Professor Franks addressed the Commission regarding Item R7W and urged the Commission to pass the proposed Resolution, which aimed to convince the Florida legislature to criminalize the nonconsensual disclosure of explicit images.<sup>20</sup> On July 30, 2014, the Resolution passed unanimously.<sup>21</sup> As Commissioner Grieco notes, that resolution had one lasting effect: momentum:

I could not be prouder that Miami Beach was able to move the needle on this issue. From the moment I listened to Miami-Dade FAWL leadership talk about the organization’s mission I wanted to do something to help. By making revenge porn a topic in a formal public forum I believe we gave those advocating criminalization a proper platform to gain momentum.<sup>22</sup>

Fueled by this energy, Ms. D’Amico teamed up with David Bateman, a partner in the K&L Gates Seattle office with 20 years of experience in Internet and technology law, to found the Cyber Civil Rights Legal Project (CCRLP). The pair recognized that no large law firm had yet stepped up to offer a large-scale program where victims of online cyber harassment and nonconsensual pornography could seek free legal advice. As K&L Gates has extensive cyber forensic resources, including a cyber forensic lab and forensic investigators, the firm is able to offer sophisticated legal help, which includes the collection and preservation of electronically stored information, and tracing the origin of certain postings of information online. The CCRLP leverages those resources to the benefit of victims of revenge porn who desperately need help reclaiming their online presence.

The CCRLP is not limited to any particular state or to the United States; in fact the project is a worldwide effort. K&L Gates has 48 offices on five continents. The firm’s global platform allows for the seamless transfer of information and permits the CCRLP to help clients located in many different jurisdictions. For example, the CCRLP’s roster of victims includes:

- A victim in Switzerland whose ex-boyfriend moved out of the country and posted explicit images online after their relationship ended;
- a Canadian victim whose intimate photographs were distributed after an online relationship ended;
- a UK resident whose nude photographs were posted on U.S. social media sites;
- a UK citizen whose ex-boyfriend posted explicit videos taken during their relationship online; and
- a U.S. citizen whose explicit images along with defamatory comments were posted on a Canadian dating site.

In just seven months, more than 60 K&L Gates lawyers in the United States, the European Union, and Australia have volunteered their time to the CCRLP, which has been contacted by well over 200 victims. The CCRLP receives referrals from well-known advocacy groups, including the Cyber Civil Rights Initiative and Women Against Revenge Porn,<sup>23</sup> and collaborates with lawyers, academics, advocates, law enforcement, and technology industry leaders, to examine ways to fight the online cyber harassment epidemic.

The CCRLP has been praised for its work by national and international TV, radio, online, and print media outlets, including *The New York Times*, *CNN*, *MSNBC*, *International Business Times*, *The National Law Journal*, *The Meredith Vieira Show*, and *La Repubblica*. Since its inception in September 2014, the project has become recognized, globally, as a leader in the fight to combat cyber exploitation.

## III. Legal Process—A Band-Aid® or a Cure?

The legal tools that exist to help revenge porn victims are undoubtedly imperfect. However, that imperfection does not mean that victims remain helpless or that the legal system is off limits. What it does mean is that lawyers who step up to help need to think outside the proverbial box, must be outspoken and unwavering, and cannot be afraid of taking three steps forward and two steps back. It also means that lawyers must be prepared for many unanswered phone calls, scowls, and dead-end IP addresses.

In representing revenge porn victims, lawyers must ask many awkward and uncomfortable questions. One of the first and most important questions to ask a victim is, “what do you want?” Just as not all victims suffer from the same thing, not all victims want or need the same

kind of help. Some want to stay in hiding and are unwilling to put their names and stories on public filings. Others are too embarrassed to even do a search for their own names online. However, most victims share at least the initial goal of removing the offensive material from the Internet or wherever it is residing.

Yet removal of postings often is not the only goal of revenge porn victims. Many victims wish to prevent the perpetrator from engaging in abusive behavior in the future by involving law enforcement, and some have the strong desire to force the perpetrator to answer for his actions in civil court.<sup>24</sup>

Each case requires analyzing the particular facts along with the wants and needs of the victim. Not every victim can get total satisfaction, but the hope is that the leak can be plugged, damage control can be implemented, and the victim can begin rebuilding an online reputation and reclaiming her online privacy.<sup>25</sup> More basically, the goal is for victims to feel that they can take ownership of their online identities and their lives.

To effectively represent a revenge porn victim, attorneys need not wait for the perfect law to be written.<sup>26</sup> There are numerous legal processes that may help, but no one method is appropriate for all cases. Outside of changing the current law, the key to success is crafting the concoction of various remedies based on the victim and the facts of the case. Thus far, the following existing tools have proven to be generally effective at combatting revenge porn.

#### **A. Take It Off! Offline, That Is: Using the Digital Millennium Copyright Act to Combat Revenge Porn**

Although copyright law is neither designed nor fully equipped to eradicate the global revenge porn epidemic, it has proven to be a rather effective notch in the revenge porn tool belt. In addition to providing protection, under federal law, against individuals who wrongfully distribute or display a victim's intimate images, copyright law often provides victims with a powerful tool to pull offensive material offline. While copyright law is not a silver bullet that can strike a death blow to revenge porn, it is an easily accessible—and often extremely powerful—weapon in the crusade.

#### **1. The Digital Millennium Copyright Act and Its Safe Harbor for Internet Service Providers**

Toward the end of the 20th century, Internet service providers (ISPs)<sup>27</sup> increasingly allowed and hosted user-generated content, a common practice in today's online world.<sup>28</sup> For example, many ISPs permit users to post videos online. Those ISPs may, but often do not, exercise discretion as to whether to permit certain categories of videos (such as erotica) on their systems. If an ISP permits user-generated content that infringes on copyright, is the

ISP liable for copyright infringement? The answer is not always clear.

In 1998, Congress enacted the Digital Millennium Copyright Act (DMCA).<sup>29</sup> The DMCA provides ISPs a safe harbor from monetary copyright liability so long as they comply with certain "notice and takedown procedures."<sup>30</sup> These particular procedures require ISPs to both 1) create and maintain a system for copyright owners to report infringement; and 2) promptly respond to takedown requests.<sup>31</sup> The rules are simple and binary: If a website takes down infringing material upon receiving a proper DMCA notice, then it will enjoy the safe harbor from monetary liability for hosting copyrighted materials. However, if a website either refuses or fails to take down infringing material following receipt of a proper DMCA notice, it will lose the protection of the safe harbor from monetary liability afforded to it by the DMCA.<sup>32</sup>

#### **2. Your Selfie Stick Holds the Power**

Copyright protection applies to pictures and videos with no consideration for why those "works of art" were created. Amateur films are given just as much protection under the law as big-budget Hollywood films. That means that copyright law applies to videos taken on a camera phone as much as it does to a Steven Spielberg film. Rather than considering why a film or photograph was taken, copyright law grants a copyright in a work of art in its creator; in the case of a film or photograph, that grants special protection in federal law to the photographer. The only caveats are that the works must be both original and fixed in a tangible medium.

In the context of using copyright law to battle the spread of the revenge porn virus, because most images distributed as revenge porn are "selfies," or pictures taken by the individual featured in the image,<sup>33</sup> most victims own the copyrighted images. These victims, many of whom believe they are powerless, are actually empowered by the DMCA. As copyright holders, they can send DMCA notices to websites that, in turn, are required to comply in order to avoid liability under federal law.<sup>34</sup>

A law degree is not required to send a DMCA takedown notice, so a victim need not engage counsel before beginning to send notices to websites containing infringing material.<sup>35</sup> While having an attorney send a notice on a victim's behalf certainly has its benefits, resources do exist for those victims without access to attorneys. For example, CopyByte, a service provided by nonlawyers, provides DMCA takedown services at no cost to revenge porn victims.<sup>36</sup> DMCA Defender, another nonlegal, paid service, also provides takedown services while offering various plans that provide victims with different levels of monitoring services. Under each of these plans, the company monitors the Internet for any new postings of the victim's copyrighted works, and if an infringing post appears, DMCA Defender will send a takedown notice.<sup>37</sup>

The sender of a DMCA notice must be careful to identify and send the notice to the correct recipient. If the notice is sent to an improper recipient, or if the notice does not identify the proper offending web address, or if the individual that posted the material disagrees with the claims contained in the notice, the victim may receive a counter-DMCA notice. A counter-DMCA notice is sent by the poster of the material to the website (to transmit to the DMCA notice sender) objecting to the DMCA notice; a victim has 10 to 14 days from receipt of the counter-DMCA notice to file a lawsuit.<sup>38</sup>

Properly complying with DMCA procedure and identifying the correct recipient is tedious but auspicious. If a takedown notice is proper, both in form and recipient, and the ISP fails to respond and remove the materials, it can be held liable for the infringing material found on its system. This legal structure incentivizes most ISPs to immediately take down material upon receipt of a proper DMCA notice. On the other hand, if the form is improper, if the notice is sent to an improper recipient, or if the notice does not identify the proper offending web address, the victim may instead find that the DMCA notice is met with a counter-DMCA notice, or no response at all. More importantly, if an improper DMCA notice is sent, even if there is a valid copyright infringement, the website may leave the offending images online without facing liability.

### 3. Limitations on DMCA Use to Battle Revenge Porn

Two main obstacles prevent the DMCA from being a one-fix solution to revenge porn. First, not all images used in revenge porn are selfies, meaning that not all victims own the copyright in the images that are improperly posted online. Second, many ISPs are hosted outside the United States, making the threat of copyright infringement toothless and enforcement nearly impossible.

The DMCA takedown process becomes complicated where the victim is the pictured individual but not the photographer. In that situation, despite being pictured in the image, the victim does not own the copyright. She therefore has no standing to send a DMCA notice.

When a victim learns that sexually explicit images of her that someone else took have been uploaded to the Internet without her permission, one option is to seek an assignment of copyright *from* the photographer *to* the victim.<sup>39</sup> Where a friend or professional photographer took the photograph, obtaining an executed assignment often is not a huge challenge. Where the photographer is also the perpetrator, however, obtaining a signature usually becomes conflated with denials and requests for agreements not to sue. The nastiest perpetrators sometimes even escalate the abuse in response to requests for an assignment. On the other hand, many perpetrators wish to cooperate and execute the assignment without the need for any discussion or pleading, perhaps due to feeling remorseful, or more likely because they wish to avoid any future litigation.

If, for whatever reason, the photographer refuses to assign copyright to the victim, the victim can instead request that the photographer submit the DMCA notice directly to the ISP. This is less desirable than an assignment because, in the event of any additional postings, the victim would have to reach out to the photographer again. More fundamentally, not receiving an assignment of copyright prevents the victim from experiencing a sense of finality and an ability to begin putting the nightmare in the past.

As a final option, the victim can try to reach out to the ISP and request voluntary removal of the material. Many social media platforms, for example, have created online reporting tools where victims can report what the platforms consider to be violations of their terms of service, and which include revenge porn and in some cases online harassment. However, if the ISP is not cooperative and ignores the victim's request, it faces no liability, under the DMCA or otherwise, for failing to respond to the request.<sup>40</sup>

The second obstacle, where website operators deliberately avoid the DMCA's reach by hosting their websites outside the United States, is perhaps even more frustrating.<sup>41</sup> These operators ignore DMCA takedown notices and refuse to comply with federal copyright law, particularly when they are based in countries without intellectual property agreements with the United States.<sup>42</sup> It is often irrelevant whether the ISP is correct that it is beyond the reach of the U.S. court system, because the expense and complexity of filing a copyright lawsuit in federal court is a deterrent to fighting back. Having to further overcome the additional hurdle of proving jurisdiction almost always eliminates litigation as an option. Copyright law is best understood as a "situation specific way to try and mitigate the damage that revenge porn can cause."<sup>43</sup>

### 4. What About Good Ol' Fashion Copyright Actions?

We know that the DMCA does not provide ISPs with a safe harbor from monetary copyright liability if they neither institute nor comply with notice and takedown procedures. So, if the victim owns the copyright, but the DMCA is no help, why not skip the DMCA notice procedure and use traditional copyright actions?

Federal copyright law provides victims with a method of recovering damages for infringement for the posting of their intimate images online.<sup>44</sup> However, to file a federal lawsuit based on infringement under the Copyright Act, victims must register their images or videos with the U.S. Copyright Office, which is often the last thing a revenge porn victim wants to do.<sup>45</sup>

*As a result of being a victim of this heinous crime, I am shy and unwilling to call attention to myself in part because of the dead links still available to anyone who runs an internet search of my name. At the core, I do not want*

*anyone else to find out about my images. I am afraid for my safety, and afraid of making new connections with people because my ability to trust, and recognize the inherent goodness in people has been destroyed.*

—anonymous victim

For those victims willing to register the copyright, the path remains a difficult and uncertain one. Yet, many victims affirmatively choose to traverse this path because, depending on the timing of the infringement and the registration, the statutory damages provided by the U.S. Copyright Act can be large sums of money.

Generally, victims of revenge porn are trying to seek relief from being unwillingly exposed. Unless they file a “Petition for Special Relief from the Deposit Requirements of the Copyright Office,”<sup>46</sup> victims—like all registrants—are required to submit copies of the materials they are seeking to register to the U.S. Copyright Office. Victims are not permitted to submit redacted versions of images, nor are they permitted to submit screenshots of videos. The end result is a public list of registered works that is searchable by the victim’s name and image title; and in some cases, the works may be uploaded into the Library of Congress where they will remain on display to the public. For a victim to choose this route, she must not only have the funds to pay for registration, but she must also have the funds to pay for an attorney to file a petition seeking to exempt her from the requirement to publicly disclose her intimate media, or she must have skin that is thick enough to be able to withstand a registration process that involves further dissemination of these materials.<sup>47</sup>

## **B. Every iCloud has a “Civil” Lining**

While copyright law is a valuable tool in the heroic fight against revenge porn, it clearly is not and cannot be the only tool. Creative lawyers have begun to use state law effectively to build additional weapons.

Copyright law is a federal remedy and thus a potential tool available to all victims who own or can obtain the copyright in images in which they are pictured, and tort law is a state-specific remedy. When applying tort law, the remedies available for each victim vary depending on where they live, where the perpetrator lives, and where the “injury” took place.<sup>48</sup> Aside from tort law, an increasing number of states have passed or are considering penal laws that criminalize revenge porn—some of which also authorize victims to file civil lawsuits alleging “revenge porn” as a cause of action.<sup>49</sup> Proponents of the criminalization of revenge porn argue that civil laws, alone, are no match for the devastation that revenge porn causes to its victims:

As is the case with many preceding women’s rights issues, naysayers have railed against women seeking unique protections, often arguing that civil legal

remedies are already available. It is true that existing legal paradigms are being utilized more effectively. But, even in their totality, available civil laws are inadequate in their capacity to combat the speed, breadth and potency with which revenge porn exacts a toll on its victims. Denying victims and future victims criminal legal remedies unique to revenge porn would be to perpetuate its injustice.<sup>50</sup>

Notwithstanding whether a state has or has not enacted a revenge porn law and whether civil laws are adequate to combat the entirety of revenge porn as we know it, several civil tort and privacy laws can often be used to obtain relief for a victim.<sup>51</sup>

### **1. Defamation**

Defamation is defined as “malicious or groundless harm to the reputation of another by the making of a false statement to a third person.”<sup>52</sup> The unauthorized distribution of the images, alone, in many cases qualifies as defamatory. Moreover, the commentary and other personal information that usually accompany the nonconsensual posting of intimate media strengthen or help establish a defamation claim, and help make this cause of action quite powerful. Its strength and corresponding effectiveness varies from state to state, and because defamation laws were not drafted specifically to address revenge porn, some laws will effectively aid revenge porn victims and others will not. For example, New York law defines defamation as “the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him.”<sup>53</sup> Under New York law, defamation applies only to facts, so no matter how nasty comments that accompany a nude photograph may be, if they are presented as the opinion of the person posting them, they remain protected by law.<sup>54</sup> To successfully plead a claim for defamation, a victim must allege that the perpetrator made “a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se.”<sup>55</sup> What that means is that a victim must demonstrate that he or she suffered economic harm or pecuniary loss, which qualifies as “special harm.”<sup>56</sup> The exception to that need to prove special harm is if the statements amount to defamation per se.

A statement qualifies as defamation per se if it falls into any one of the following four categories: 1) a statement that charges someone with a serious crime; 2) a statement that tends to injure another in his or her business, trade, or profession; 3) a statement claiming that an individual has a “loathsome disease”; or 4) a statement “imputing unchastity to a woman.”<sup>57</sup> While this list sounds somewhat antiquated, it translates particularly well to the revenge porn context; many of the heinous

comments that accompany the nonconsensual postings of intimate media discuss a victim's purported promiscuity, sexually transmitted diseases, inability to do his or her job, and often the possession and/or use of illicit drugs, which falls into the category of criminal activity. As the circumstances in which photographs are posted and comments are made vary greatly, whether a statement will qualify as defamation per se truly depends on the particular facts of the case and, of course, the particular law being applied.

Filing a cause of action for defamation can be an incredibly powerful tool to hold the poster of intimate photographs and accompanying commentary liable in a civil court of law, particularly where a victim is able to make out a prima facie case of defamation per se, and damages are presumed.

## 2. Right of Publicity

The right of publicity is defined as the right to prevent the commercial use of one's own identity.<sup>58</sup> This right is one of the most extensive privacy laws available to revenge porn victims because the wrong it seeks to prevent—the unauthorized use of one's own image or likeness—aligns almost perfectly with the wrong perpetrated on the victims. There is no universal right to publicity but instead it is protected statutorily in 19 states<sup>59</sup> and it is a construction of common law in 21 states.<sup>60</sup> While the specifics of these laws vary, the overarching theme is the same.

In New York, for example, the unauthorized distribution of a person's image or likeness for economic gain is a misdemeanor under §50 of the New York Civil Rights Law. Section 51 of that statute provides a private cause of action for victims of such unauthorized use, which recovery is mutually exclusive from other statutory recovery, including a victim's federal rights under the Copyright Act.<sup>61</sup> Florida law also prohibits the nonconsensual distribution of images without the express written or oral consent of the subject if distribution is for a commercial purpose, and the law grants a nonexclusive cause of action to victims of nonconsensual distribution.<sup>62</sup> Unfortunately for revenge porn victims, the New York and Florida statutes only cover distribution for a business or commercial purpose. However, not all rights of publicity laws include the "business purpose" requirement. For example, the Washington statute covers infringements that occur "without regard to whether the use is for profit or not for profit."<sup>63</sup> Each law differs, meaning that lawyers must closely evaluate the facts and circumstances of each victim when analyzing whether and how to commence a lawsuit.

## 3. Invasion of Privacy

Other privacy laws may also prove useful. For example, many states recognize the tort of intrusion or invasion of privacy, pursuant to which "one who intentionally intrudes, physically or otherwise, upon the solitude or

seclusion or another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."<sup>64</sup> Intrusion cases are generally difficult to prove in situations where the victim took the photo and distributed it; this limitation means an "invasion of privacy" lawsuit will likely not be the best if the victim originally sent the nude images to the perpetrator for private consumption, even if the perpetrator later distributed the images more widely. Yet intrusion proves useful in scenarios where the images or videos were taken without the victim's consent and typically without the victim's knowledge. In most states, intrusion includes "unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying." Intrusion offers a potential weapon to those victims unable to utilize copyright law and the DMCA.

## 4. Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress (IIED) is a common-law tort that reflects how offensive the perpetrator's conduct truly is, and how much it has harmed the victim. To allege this tort, the victim must establish: 1) extreme and outrageous conduct on the part of the perpetrator; 2) intent to cause, or disregard a substantial probability of causing, severe emotional distress; 3) a causal connection between the conduct and injury; and 4) severe emotional distress.<sup>65</sup> A number of revenge porn victims have pled IIED and won.<sup>66</sup>

IIED is a cause of action that can be used to enhance other claims. For example, one woman sued her ex-boyfriend who had posted her sexually explicit images on more than 20 adult websites along with her contact information and directions to "visit or phone call."<sup>67</sup> The perpetrator also created an imposter profile online, noting that the victim wanted "no strings attached" masochistic sex, to which strange men responded and left the victim voicemails that terrified her. The victim suffered from anxiety, which manifested physically.<sup>68</sup> The court also upheld the victim's claims for defamation, public disclosure of private fact, and negligent infliction of emotional distress.<sup>69</sup>

## 5. Successful Civil Verdicts for Revenge Porn "Tort" Cases

Revenge porn victims have indeed been successful at civil lawsuits alleging various torts and enforcing publicity and privacy rights under state laws. For example, on Valentine's Day of last year, a Houston jury awarded a woman \$500,000 after her ex-boyfriend recorded a Skype conversation between them, without her knowledge, and then posted the improperly obtained material online. She alleged, among other things, a claim of intentional infliction of emotional distress.<sup>70</sup>

Again, in 2014, an Ohio judge entered a verdict against two men who posted sexually explicit images of a

woman without her consent in violation of her common-law right of publicity, and awarded the woman a default judgment of \$385,000.<sup>71</sup> Similarly, that year a California jury awarded a woman \$250,000 after an ex-boyfriend posted nude photographs of her on Facebook in violation of California's privacy laws.<sup>72</sup>

While these verdicts are major triumphs that will hopefully go a long way toward discouraging future bad actors from engaging in such heinous online harassment, it is important to remember that such verdicts are actually the exception, not the rule. No litigant should enter the legal system expecting a windfall verdict. It also is equally important to remember that not all victories are financial victories. For some victims, removal of images from the Internet is a life-changing and life-saving moment.

Upon learning that her intimate images had been uploaded to the Internet without her consent, one victim, "Daisy," spoke to a litany of attorneys seeking help removing the material. They all told her that nothing could be done. She also paid a "removal service" more than \$2,000 to remove the images and videos from the Internet, but after more than five months, nothing had been removed. Ultimately, she was connected to the CCRLP, who used the DMCA takedown procedure to pull the nonconsensual postings offline. After learning that her images had been removed from the Internet, Daisy's response was as follows:

*That has got to be the most amazing news I've heard in almost a year!!! I feel like I won the lottery!!! I was scared because one attorney I spoke with acted like it wouldn't do much good for me to try and reach out to the website because he thought the website would just retaliate against me and repost the material if I messed with them. So I was really afraid to make any moves.*

*I am unable to stay in my home because I don't feel safe and now I can't work so I cannot afford to maintain my home even if I did feel safe in it. I am just so blessed that my son did not find out.*

*You are amazing!!!!*

*Thank you!!!!*

*Tears of joy●●!*

Eventually, the "removal service" also returned Daisy's \$2,000.

#### **IV. Obstacles to Enforcing and Protecting Online Privacy and Reputation**

The CCRLP was founded to empower victims in retaking control of their online identities and ultimately their lives. We are proud of the progress that has been

made thus far in this effort, of which we are a small but passionate part. While we utilize a number of creative ways to use existing laws to fight revenge porn, the sad truth remains that victims still face an uphill battle.

*Today, victims feel less alone in their battle against revenge porn. There are sympathetic politicians, advocacy groups, caring pro bono lawyers, and some members of law enforcement who are willing to listen, and fight hard for victims. Notwithstanding the strong coalition that has developed, significant hurdles lie ahead. The internet is in some sense still a "men's only" club: a subculture of misogynists that seek joy in tearing apart women. Bullying, slut shaming, humiliation, and revenge porn are unfortunately topics that will be synonymous with cyberspace for some time to come.*

—Charlotte Laws  
*"The Erin Brocovich of Revenge Porn"*

What precisely are those obstacles? Only time will tell what will sit on that bulleted list. For now, however, these are the most common obstacles faced by victims seeking to enforce their rights.

##### **A. The Internet and the World Wide Web**

We all use the Internet, but how many of us really understand it? When we talk about information being "online," what do we mean?

When we log onto our computers and open our browsers, we are traversing the "World Wide Web," (WWW or web) which is "an information system of interlinked hypertext documents that are accessed via the Internet and built on top of the Domain Name System [DNS]."<sup>73</sup> The software application used to access individual document pages or web pages on the WWW is called a web browser; web pages contain content and hyperlinks, which function as a means to navigate the web.<sup>74</sup>

##### **B. What Is the Darknet?**

Not everything that is "online" is integrated and accessible by simply logging on. The "Deep Web" is a portion of the Internet that is not indexed by standard search engines. The "Dark Web" or "Darknet" is a subsection of the "Deep Web." It lends itself to perpetrators of online harassment and abuse, because operators of websites on the "dark net" do not have to fear the risk of exposure. The Darknet is actually a private network where "peers" or "friends" connect by way of nonstandard protocols and ports. Unlike some other peer-to-peer networks that exist, on the Darknet, sharing is anonymous and Internet protocol (IP) addresses are not shared publicly.<sup>75</sup> Although peer-to-peer networks were not originally launched for any malicious purpose, the environment is a petri dish for revenge porn perpetrators and copyright infringers.



### C. Peeling Back the Layers of an Onion Router

Onions are pungent bulb vegetables that contain certain chemical substances that irritate the eyes, which chemicals are released when onions are chopped or when their layers are peeled back. “Onion routing” is a term used to describe a method of anonymous communication over a computer network. In an onion network, messages are captured in numerous layers of encryption, much like the layers of an onion. Encrypted data is transmitted through onion routers, which are a series of network nodes. Each of these onion routers essentially peels away one layer, which then uncovers the next destination for the data. After the final layer is peeled back, the message arrives at its destination. Anonymity is preserved because each intermediary layer only knows the location of the nodes that immediately precede and follow, but the others are unknown.<sup>76</sup> Due to its anonymity, onion routers often are utilized by those engaging in online harassment, revenge porn, and cyber mob activity.

In 2002, computer scientists developed what became known as not only the largest but also the best known implementation of onion routing: The Onion Routing (TOR) project.<sup>77</sup> Run entirely by volunteers, there are approximately one thousand TOR proxy servers on the Internet that provide the necessary routing paths for TOR project to function. In an age when online privacy is threatened, TOR provides both a safety net and a sword: It protects identities, for better or worse. In the revenge porn context, because TOR does not maintain records the same way a domain registrar does, Pink Meth, anonib, and anon-ib (and other sites) function as hidden services and not like regular websites that we all have come to know, understand, and frequent.

### D. Communications Decency Act Section 230

Section 230 was added to the Communications Decency Act (CDA) in response to the concern of ISPs that they would be held liable for the acts of their users who were posting content online.<sup>78</sup> Section 230 states, in pertinent part, that “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>79</sup> Through this statutory provision, Congress created a doctrine of federal immunity against “any cause of action that would make service providers liable for information originating with a third-party user of the service.”<sup>80</sup> Section 230 has been held to immunize interactive service providers from both state and federal causes of action, affording immunity to intermediary, “interactive computer services,” where the actual content at issue is created and developed by another entity (an “information content provider”).<sup>81</sup>

Section 230 immunity is broad, applying to web hosts, e-mail providers, commercial websites, individual websites, dating services, social media platforms, chat rooms, Internet access points, ad networks, search engines, and

many more “interactive computer services.”<sup>82</sup> CDA immunity applies to protect these entities from claims of defamation, claims relating to child pornography, misappropriation, invasion of privacy, deceptive trade practices, and since no federal law yet exists, revenge porn.<sup>83</sup>

### E. The Limitations of Civil Litigation

While civil litigation certainly provides a variety of remedies for revenge porn victims, much like the other available methods, it does not offer a perfect answer to what has become a pervasive problem. For one, victims who choose to pursue civil litigation may not remain anonymous: unlike the protection that criminal prosecution affords, a victim who decides to pursue civil litigation will not—unless extraordinary circumstances are present—remain anonymous. Civil filings are public documents and so the victim may have to face again being thrust into the public eye when that is the very thing from which the victim is trying to recover. Filing a civil lawsuit can be expensive. Attorney fees and litigation costs can easily exceed what victims are able let alone willing to spend. In addition, lawsuits take time. Being involved in a civil lawsuit can be all-consuming and encroach on a victim’s personal and professional life. It can also prevent her from growing and moving forward with her life.

Even clients who succeed in litigation may find their victories hollow. Civil litigation can only result in an award for the victim if the defendant is able to pay damages. If a victim is unable to enforce a judgment, the money spent litigating is for naught. Even if a victim is successful in obtaining a judgment against a perpetrator *and* is able to enforce that judgment, that victory will not prevent individuals who have already downloaded the subject images from reposting them at a later date. While a legal victory may deter the defendant from engaging in that type of behavior in the future, it does little to discourage others from becoming or continuing to be bad actors in the revenge porn world.

### V. Conclusion

Revenge porn represents just a portion of the kind of online harassment that ensues each and every day. It presents a dangerous and escalating threat not only to victims’ online reputations, but to their physical well-beings. Victims suffer tremendously in the physical sense for the terror that is inflicted upon them, even if that terror is inflicted by a series of mouse-clicks. The agony is long-lasting and sometimes never subsides. Victims not only lose self-esteem, but they lose their friends, their jobs, and even their abilities to provide for themselves and their families.

While an increasing number of organizations, including the CCRLP, are working to help victims by counseling them—with both legal and nonlegal advice—so long as technology keeps advancing, “cyber civil rights” may be infringed. Being creative in the battle against revenge

porn is the smartest way to fight an ever-changing technological landscape where laws do not perfectly align with the capabilities of the cyber world.

Whether the answer lies in creating a new set of laws to address the ongoing infringement of “cyber civil rights” is not yet clear. Arming law enforcement and civil litigators brave enough to take on victims of revenge porn as clients with new tools to fight the perpetrators certainly seems like a step in the right direction. The New York Bar, and more specifically the Intellectual Property Bar, can certainly be instrumental in drafting and pushing balanced legislation. In the end it will take a bit of trial and error to determine the best way to win the war.

Whatever path we take, we must work as a society to eliminate this scourge. Perhaps part of the process is a re-adjustment of social norms, along with the development of law and technology.<sup>84</sup> For now, we are left with the laws that exist today, our current social norms, and technology as it stands. All we can do is pick up whatever is within our reach that might help us, and fight as hard as we can. By using our creativity, we can and will unearth more tools to help us emerge victorious in this battle. In the meantime, we have our passion, our dignity, and our battle cry:

*I sing sometimes for the war that I fight  
'cause every tool is a weapon—  
if you hold it right.*

—Ani DiFranco

## Endnotes

1. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 350 (2014) (“The Internet provides a staggering means of amplification, extending the reach of content in unimaginable ways.”).
2. *See id.* at 346.
3. www.Motherless.com.
4. www.myex.com.
5. *See* Samantha H. Scheller, *A Picture Is Worth A Thousand Words: The Legal Implications Of Revenge Porn*, 93 N.C. L. REV. 551, 558 (2015).
6. *See* Jenna K. Stokes, *The Indecent Internet: Resisting Unwarranted Internet Exceptionalism in Combating Revenge Porn*, 29 BERKELEY TECH. L.J. 929, 929 (2014), available at <http://scholarship.law.berkeley.edu/btlj/vol29/iss4/17> (citing Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. (forthcoming 2014) (manuscript at 29), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2315583](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2315583)). Stokes borrows the term “intimate media” from Bambauer, who uses it to refer to sexually explicit photos or videos depicting the victim who is either recognizable in the media or is recognizable due to the information that accompanies the media.
7. *See* Danielle Keats Citron, *Law’s Expressive Value In Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 379 (2009) (“From 2000 to 2008, 72.5% of the 2519 individuals reporting cyber harassment were female and 22% were male.”). In light of this, and for convenience, this article uses the pronouns “she” and “her.” The laws discussed, and the application thereof, are gender-neutral, and she should be read as “he or she,” and her should be read as “his or her” or “him or her” as appropriate.
8. *See id.* at 378.
9. *See* Laurie Segall, *Blackmailers Trade Nude Pics Like Baseball Cards On The ‘Dark Web,’* CNN MONEY (Apr. 27, 2015, 1:34 PM), available at <http://money.cnn.com/2015/04/26/technology/revenge-porn-blackmail/index.html?iid=EL>.
10. *Id.*
11. *See* DANIELLE KEATS CITRON, *Hate Crimes in Cyberspace* 53 (2014) (hereinafter “Hate Crimes”).
12. Citron & Franks, *supra* note 1, at 353.
13. *Id.* at 350-51.
14. *See id.* at 352-53.
15. MATT IVESTER, *Lol...OMG! What Every Student Needs to Know About Online Reputation Management, Digital Citizenship, and Cyberbullying* 95 (2012).
16. Citron & Franks, *supra* note 1, at 352.
17. E-mail from Carrie Goldberg, Cyber Civil Rights Initiative, Board Member and C.A. Goldberg, PLLC, Founding Member (May 18, 2015, 09:42 EST) (on file with author).
18. *See, e.g.*, Citron & Franks, *supra*, n. 1, at 348 (explaining that there is a dearth of laws criminalizing revenge pornography because of “a lack of understanding about the gravity, dynamics and scope of the problem; historical indifference and hostility to women’s autonomy; inconsistent conceptions of contextual privacy; and misunderstandings of First Amendment doctrine”).
19. *See generally* Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009) (arguing that online harassment should be understood as a civil rights violation and articulating a legal agenda to address it); Citron, *supra* note 7 Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435 (2011). These three articles gave life to the project, Hate Crimes in Cyberspace. As the name truly fit, Holly Jacobs asked permission to use the “Cyber Civil Rights” name as the name for her organization, the Cyber Civil Rights Initiative. Later, the Cyber Civil Rights Legal Project also asked to use the name for its pro bono project to help victims of “revenge porn.” Today, both organizations are named after Professor Citron’s original work.
20. Miami-Dade chapter of the Florida Association for Women Lawyers, *Miami Beach Commission Unanimously Votes to Pass Resolution Urging Florida Legislature to Criminalize “Revenge Porn,”* (July 30, 2013), available at <http://www.mdawfl.org/miami-beach-revenge-porn-resolution/>.
21. MIAMI BEACH, FLA. ITEM R7W, available at <http://www.miamibeachfl.gov/WorkArea/DownloadAsset.aspx?id=80464>.
22. E-mail from Michael Grieco, Vice Mayor & Commissioner of Miami Beach (May 19, 2015 at 07:26 EST) (on file with author).
23. THE CYBER CIVIL RIGHTS INITIATIVE ([www.cybercivilrights.org](http://www.cybercivilrights.org)) is an advocacy group that, among other things, operates a 24-hour hotline for victims of revenge porn (End Revenge Porn Crisis Line: (844) 878-CCRI). Women Against Revenge Porn (WARP) ([www.womenagainstrevengeporn.com](http://www.womenagainstrevengeporn.com)) was founded in November 2012 by Bekah Wells, a victim of revenge porn.
24. A growing number of states have criminalized revenge porn; as of this writing, 20 states have enacted laws that criminalize revenge porn (most recently, Florida), and several other states have pending legislation. New York has not yet enacted a revenge porn law. Some of these laws—such as the Pennsylvania law (42 PA. CONS. STAT. § 8316.1 (2014)), authorize a civil cause of action for “revenge porn.” *See* C.A. Goldberg, *States with Revenge Porn Criminal Laws*, available at <http://www.cagoldberglaw.com/states-with-revenge-porn-laws/>. This article and the Cyber Civil Rights Legal Project both focus on remedies obtained through civil litigation.
25. *See, e.g.*, BrandYourself ([www.brandyourself.com](http://www.brandyourself.com)), a CCRIP partner that helps victims (and anyone) rebuild and manage their online reputation.

26. See Stokes, *supra* note 6, at 946–52 (arguing that the tort of intentional infliction of emotional distress is well-equipped to handle lawsuits filed over revenge porn).
27. Those who wish to access the Internet typically connect by using an access device that is owned by an ISP, an entity that provides Internet service to its subscribers for a fee. See PRESTON GRALLA, *How the Internet Works* 49-55 (Millennium ed. 1999).
28. John Krumm et al., *User-Generated Content*, PERVERSIVE COMPUTING, 2008 at 10, available at <http://www.computer.org/csdl/mags/pc/2008/04/mpc2008040010.pdf> (“User-generated content comes from regular people who voluntarily contribute data, information, or media that then appears before others in a useful or entertaining way, usually on the Web—for example, restaurant ratings, wikis, and videos. The use of such content has seen rapid growth in recent years, in part because it’s fairly inexpensive to obtain (users normally supply it for no charge.)”).
29. 17 U.S.C. §§ 512, 1201-1332 (Supp. IV 1998).
30. 17 U.S.C. §§ 512(a)-(d).
31. *Id.*
32. *Id.*
33. See, e.g., Amanda Levendowski, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. INTEL. PROP. & ENT. L. 422, 439-40 (2014).
34. Pursuant to 17 U.S.C. § 512(c)(3), a DMCA notice must be a signed writing and must identify both the copyrighted work and where, online, the infringing material is located (for example by identifying the offending URL (Uniform Resource Locator)). The notice must contain confirmation, “under penalty of perjury,” that the copyright owner is complaining in good faith and also must contain the copyright owner’s contact information or information of whomever is sending the notice on behalf of the copyright owner. A proper DMCA notice may read as follows:
 

This email is official notification under Section 512(c) of the Digital Millennium Copyright Act, seeking the removal of the aforementioned infringing material from your servers. Please also be advised that law requires you, as a service provider, to remove or disable access to the infringing materials upon receiving this notice. Under U.S. law a service provider, such as yourself, enjoys immunity from a copyright lawsuit provided that you act with deliberate speed to investigate and rectify ongoing copyright infringement. If service providers do not investigate and remove or disable the infringing material this immunity is lost.

We provide this notice in good faith and with the reasonable belief our client’s rights are being infringed. Under penalty of perjury I certify that the information contained in the notification is both true and accurate, and I have the authority to act on behalf of the owner of the copyrights involved.
35. See Levendowski, *supra* note 33, at 443.
36. COPYBYTE, available at <https://copybyte.com/stop-revenge-pornography/>.
37. DMCA DEFENDER, available at <http://dmcadefender.com/>.
38. 17 U.S.C. § 512(g).
39. 17 U.S.C. § 205.
40. See 17 U.S.C. § 512(b)(2). The DMCA limits ISPs’ liability to those instances where they directly place the infringing content online or where they refuse to comply with a takedown notice from a copyright holder or the holder’s designated representative.
41. See, e.g., Susanna Lichter, *Unwanted Exposure: Civil and Criminal Liability for Revenge Porn Hosts and Posters*, HARV. L.J. & TECH. DIGEST (May 28, 2013), available at <http://jolt.law.harvard.edu/digest/privacy/unwanted-exposure-civil-and-criminal-liability-for-revenge-porn-hosts-and-posters>; Lorelei Laird, *Victims Are Taking on ‘Revenge Porn’ Websites for Posting Photos They Didn’t Consent To*, ABA JOURNAL (Nov. 1, 2013 9:30 AM), [http://www.abajournal.com/magazine/article/victims\\_are\\_taking\\_on\\_revenge\\_porn\\_websites\\_for\\_posting\\_photos\\_they\\_didnt\\_c/](http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c/) (“website operators overseas or those who believe they’re judgment-proof can and do ignore the [DMCA] notices.” Professor Eric Goldman has pointed out that “foreign websites don’t care about DMCA takedown notices. Indeed, several sites have reportedly moved to overseas hosts to avoid legal consequences in the U.S.”).
42. Levendowski, *supra* note 33, at 444.
43. Philippa Warr, *Using Copyright to Fight Revenge Porn*, INTERNET POLICY REVIEW (Mar. 31, 2015), available at <http://policyreview.info/articles/news/using-copyright-fight-revenge-porn/360>.
44. 17 U.S.C. § 512 *et seq.*
45. Erica Fink, *To Fight Revenge Porn, I Had to Copyright My Breasts*, CNN MONEY (Apr. 27, 2015), available at <http://money.cnn.com/2015/04/26/technology/copyright-boobs-revenge-porn/index.html>.
46. 37 C.F.R. 202.20.
47. Fink, *supra* note 45.
48. The choice of which state in which to file a tort-based lawsuit involves a strategic analysis, but typically these three choices are all fair game.
49. See States with Revenge Porn Laws, END REVENGE PORN, available at <http://www.endrevengeporn.org/revenge-porn-laws/> (providing a full summary of revenge porn laws). This article focuses on the indirect causes of action available to victims. See Mary Anne Franks, *Protecting Sexual Privacy: New York Needs a ‘Revenge Porn’ Law*, 27 N.Y. ST. ASS’N CRIM. DEF. LAW, 1 (2015) (discussing how New York needs a law that directly addresses revenge porn to protect sexual privacy on the Internet).
50. E-mail from confidential academic source (May 15, 2015, 11:31 EST) (on file with author).
51. For example, some causes of action include defamation, right of publicity, public disclosure of private facts, false light, appropriation, and intentional infliction of emotional distress.
52. BLACK’S LAW DICTIONARY (10th ed. 2014).
53. *Dillon v. City of New York*, 261 A.D.2d 34, 37-38 (1st Dept. 1999). See *Albert v. Loksen*, 239 F.3d 256, 265 n.6 (2d Cir. 2001) (“Modern courts in New York still use variations on arcane definitions of defamatory: that which exposes an individual to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or...induces an evil opinion of one in the minds of right-thinking persons, and...deprives one of...confidence and friendly intercourse in society.”) (citations and internal quotation marks omitted).
54. See, e.g., *600 West 115th St. Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 139 (1992) (“only statements alleging facts can properly be the subject of a defamation action”); *Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163, 178 (2d Cir. 2000) (holding that opinions are provided absolute protection under the New York Constitution).
55. *Dillon*, 261 A.D.2d at 38; accord *Peters v. Baldwin Union Free Sch. Dist.*, 320 F.3d 164, 169 (2d Cir. 2003).
56. See *Lieberman v. Gelstein*, 80 N.Y.2d 429, 434-35 (1992).
57. *Id.* at 435.
58. J. Thomas McCarthy, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2000).
59. The states with right of publicity statutes are: Arizona, California, Florida, Illinois, Indiana, Kentucky, Massachusetts, Nebraska, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. See <http://rightofpublicity.com/statutes>.

60. See McCarthy, *supra* note 58, at § 6:3 (the states that have recognized the common law right of publicity are: Alabama, Arizona, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Michigan, Minnesota, New Hampshire, New Jersey, Ohio, Pennsylvania, South Carolina, Texas, Utah, West Virginia, and Wisconsin.). Some states recognize a statutory and common law right of publicity. Thus, the right of publicity is recognized as law in 31 states.
61. N.Y. CIV. RIGHTS LAW §§ 50, 51.
62. FLA. STAT. § 540.08 (2012).
63. WA. REV. CODE § 63.60.050.
64. RESTATEMENT (SECOND) OF TORTS: INTRUSION UPON SECLUSION § 652B (1977).
65. *Howell v. N.Y. Post Co.*, 81 N.Y.2d 115, 121 (N.Y. 1993).
66. See, e.g., *Taylor v. Franko*, No. 09-00002 JMS/RLP, 2011 WL 2746714, at \*3 (D. Haw. July 12, 2011); *Doe v. Hofstetter*, No. 11-cv-02209-DME-MJW, 2012 WL 2319052, at \*8 (D. Colo. June 13, 2012); in addition, a Harris County, Texas jury awarded a woman \$500,000 as a result of the emotional distress revenge porn inflicted, though the case has been sealed. See Brian Rogers, *Jury Awards \$500,000 in 'revenge porn' lawsuit*, HOUSTON CHRONICLE (Feb. 21, 2014, 10:33 PM), available at <http://www.houstonchronicle.com/news/houston-texas/houston/article/Jury-awards-500-000-in-revenge-porn-lawsuit-5257436.php>.
67. *Franko*, No. 09-00002 JMS/RLP, 2011 WL 2746714, at \*3.
68. *Id.*
69. See, e.g., *id.*; *Hofstetter*, No. 11-cv-02209-DME-MJW, 2012 WL 2319052, at \*8 (plaintiff awarded damages for intentional infliction of emotional distress where the perpetrator displayed and disseminated victim's intimate photographs online, by e-mail and via an imposter Twitter account).
70. E.J. Dickson, *Texas woman wins largest settlement ever in revenge porn case*, THE DAILY DOT (Feb. 28, 2014), available at <http://www.dailydot.com/crime/porn-revenge-law-texas/> (court papers sealed, but victim identified as "Rosie" won \$500,000 for emotional damages suffered after her ex-boyfriend posted private photographs, messages, and video chat conversations online).
71. *Doe v. Bollaert*, No. 2:13-cv-486, 2014 WL 1091053 at \*1 (S.D. Ohio Mar. 18, 2014).
72. *Liamsithisack v. Bruce*, Case No. 1-12-CV-233490 (Santa Clara Super. Ct. 2014) (plaintiff sued for invasion of privacy).
73. WIKIPEDIA, [http://en.wikipedia.org/wiki/World\\_Wide\\_Web](http://en.wikipedia.org/wiki/World_Wide_Web).
74. *Id.*
75. Peter Biddle et al., *The Darknet and the Future of Content Distribution*, MICROSOFT CORPORATION (2002), at 2 available at <http://crypto.stanford.edu/DRM2002/darknet5.doc>.
76. WIKIPEDIA, available at [http://en.wikipedia.org/wiki/Onion\\_routing](http://en.wikipedia.org/wiki/Onion_routing). To protect online U.S. intelligence communications, three employees at the U.S. Naval Research Laboratory developed onion routing in the mid-1990s. The Defense Advanced Research Projects Agency further built on and patented onion routing, and the Navy patented it in 1998.
77. In 2006, after the Naval Research Laboratory released the code for TOR under a free license, the computer scientists who developed onion routing and a few others co-founded TOR project as a nonprofit organization with the financial support of the Electronic Frontier Foundation (EFF) and other organizations. For a deeper explanation of the background of TOR project and how it works: <https://www.torproject.org/about/overview.html.en>.
78. Following the court's ruling in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 031063/94, 1995 WL 323710, (N.Y. Sup. Ct. May 24, 1995), Congress enacted §230 of the CDA, which created the federal immunity for neutral ISPs.
79. Section 230 of the CDA defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer service, including specifically a service or system that provides access to the Internet." It also defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."
80. 47 U.S.C. § 230.
81. Earlier this year, the Second Circuit issued its first published opinion addressing §230. The case involved a dispute among some Teamster Union members who took their critiques about the plaintiffs online and posted critical remarks on a website hosted by GoDaddy. In holding that the web host was immune from liability pursuant to §230, the Court made several critical points, including: 1) a plaintiff can sue the original speaker but cannot sue the messenger; 2) the plaintiff could not sue GoDaddy because it had no "role in creating the allegedly defamatory newsletters." See *Ricci v. Teamsters Union Local 456*, 781 F.3d 25 (2d Cir. 2015). Rather, the plaintiffs' allegations were that GoDaddy "refused to remove" a newsletter, which was authored by a third party, from its servers. The Court found that "These allegations do not withstand the Communications Decency Act, which shields GoDaddy from publisher liability (with respect to web content provided by others) in its capacity as a provider of an interactive computer service." *Id.*
82. For a compilation of §230 cases, see <https://www.eff.org/issues/cda230/legal>.
83. See H. Brian Holland, *Section 230 of the CDA: Internet Exceptionalism as a Statutory Construct*, THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET, 2010, at 189, 192.
84. See Eric Goldman, *What should we do about revenge porn sites like Texxxan*, FORBES (Jan. 28, 2013, 1:13 PM), available at <http://www.forbes.com/sites/ericgoldman/2013/01/28/what-should-we-do-about-revenge-porn-sites-like-texxxan/>; Eric Goldman, *What should we do about revenge porn sites like Texxxan (Forbes cross-post)*, FORBES (Feb. 9, 2013), available at [http://blog.ericgoldman.org/archives/2013/02/what\\_should\\_we.htm](http://blog.ericgoldman.org/archives/2013/02/what_should_we.htm) (Feb. 9, 2013) ("We as a society will necessarily have to adjust our social norms about the dissemination of nude or sexual depictions to reflect their ubiquity."). See also Mary Anne Franks, *Adventures in Victim Blaming: Revenge Porn Edition, Concurring Opinions*, available at <http://concurringopinions.com/archives/2013/02/adventures-in-victim-blaming-revenge-porn-edition.html> (Feb. 1, 2013):

I have various theories about why so many people cannot see the flaws of logic (to say nothing of humanity) inherent in gendered victim blaming, but for the purposes of this post I'm simply going to suggest that looking at how victim-blaming logic plays out in more gender-neutral issues might be instructive. I'll offer one example here. Let us imagine that there are no laws against identity theft. To the rising number of identity theft victims, we say: We do not need to have any laws against identity theft. Those who would prefer not to have their identity stolen should not own a credit card. Even if you never use your credit card, someone could hack into your computer and use your number to run up a \$5000 bill on a fetish porn site. And really, most people are in fact very promiscuous with their credit card numbers, giving them to waiters and gas station attendants and all sorts of unsavory types. It would be ridiculous for them to expect that a waiter is only going to use their credit card for the limited purpose for which it was authorized; once they gave their consent for the card to be used in one context, they should expect that the waiter is going to use it anywhere he likes.

Elisa D'Amico is a partner in the Miami office of K&L Gates LLP. She is the co-founder of the firm's Cyber Civil Rights Legal Project and currently mentors and oversees more than 60 K&L Gates lawyers in the United States, the EU, and Australia who have volunteered their time to the project. Ms. D'Amico is a commercial litigator with a focus on internet privacy, online consumer deception and fraud, unfair and deceptive acts and practices, and affiliate marketing. She is a member of both the New York and the Florida Bars and earned her bachelor's degree from Cornell University, the Charles H. Dyson School of Applied Economics and Management, and her juris doctor from Fordham University School of Law.

Luke Steinberger is an associate in the firm's New York office and is a commercial litigator with a focus on intellectual property matters. Mr. Steinberger is a member of the Cyber Civil Rights Legal Project and, in

fact, was one of the project's first volunteers. Not only does he represent victims of cyber exploitation but he is also a member of the project's intake team, which has already processed upwards of 200 inquiries from prospective clients. A member of the New York Bar, Mr. Steinberger received his bachelor's degree from Duke University and his juris doctor from New York University.

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