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**Images of Harassment:
Copyright Law and Revenge Porn**

23 FEDERAL BAR COUNCIL QUARTERLY 15 (Sept./Oct./Nov. 2015)

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Nonconsensual pornography, commonly known as “revenge porn,” usually occurs when an individual (usually a man) publicly posts online sexually explicit images of his former partner (usually a woman). Although normally the stuff of tort law, revenge porn offers copyright attorneys opportunities to help victims, as well: the offending images are often selfies taken by the victim and thus covered by the victim’s copyright. There is, to date, no Second Circuit case law on the subject, making this area uniquely suited to creative social impact litigation. Until state legislatures or Congress pass well-drafted criminal revenge porn statutes, copyright law remains a necessary though inadequate weapon to combat revenge porn in the Second Circuit and elsewhere.

The Problem of Revenge Porn

Revenge porn is a particularly devastating invasion into a private, intimate sphere of life not merely because of the sexually explicit content of the images, but because those images are posted online for all to see. In her book, *Hate Crimes in Cyberspace*, Danielle Citron tells us about Holly Jacobs: In 2011, Holly, then a doctoral student living in Florida, clicked on a link sent to her by an anonymous tipster and found nude photographs of herself and video from a webcam session, which her ex-boyfriend had surreptitiously recorded. A Google search revealed that these images, along with her name, email address, screen shots of her Facebook page, her work address, and other personal information appeared on hundreds of websites, including one that arranged sexual encounters. She started receiving frightening emails, some of which threatened physical violence while others threatened to send the nude images to her boss unless she paid handsomely. Law enforcement offered no help, telling her that it was her own fault for sending nude pictures to her ex-boyfriend. She tried contacting every website she could find that hosted her images, demanding they take them down. Few complied. She changed her name to escape.

The digital dimension of Holly’s victimization is salient: the Internet offers perpetrators a free and permanent weapon to harass their victims. Even if images are eventually taken down, links, copies, downloads, and blog posts create an intricate web history that anyone—future employers, future love interests, parents—can find with a simple Google search. It creates, as Holly said, a sense of “terror.”

The Role of the Copyright Attorney

Current law puts up hurdles in front of victims like Holly. First, Communications Decency Act (CDA) Section 230 immunizes revenge porn sites from tort liability. As platforms for content provided by others, websites that host images of revenge porn can take advantage of the broad immunity Congress, as interpreted by the federal courts, have granted to all websites. The few cases to the contrary—*Fair Housing Council v. Roommates.com* and *Sarah Jones v. Dirty World Entertainment*—are of no help because they require that websites have a substantial role in creating content themselves. Second, tort law is often inadequate to seek redress from the perpetrators themselves. A successful public disclosure of private facts claim, for example, requires a plaintiff to show that the information at issue (the sexually explicit image) was indeed private. But courts too often confuse sending an image to one person, even a partner in a relationship, with general revelation that extinguishes expectations of privacy. What’s more, tort cases are expensive and pose particular problems of proof when anonymous actors are involved.

However, reproduction and display of an individual’s copyrighted images constitutes copyright infringement, so copyright law gives revenge porn victims the tools to taking down offending images. CDA §230 does not immunize websites from copyright claims, and if victims like Holly want above all else to remove the images from the Internet, the Online Copyright Infringement Liability Limitation Act’s notice-and-takedown procedure (Section 512) may offer a promising avenue for relief.

Authors of published and unpublished works retain the same exclusive rights under §106 of the Copyright Act. By definition, those participating in uploading, copying, and trafficking in revenge porn violate the §106 exclusive rights of victims: those who post images on websites create copies; websites make copies to store on servers and display copies of the original images on the web. And, as the Supreme Court stated in *Stewart v. Abend*, 495 U.S. 207 (1990), the Copyright Act necessarily includes a right not to publish: victims have chosen not to publish their own images, an exclusive right violated by their harassers in the revenge porn business. Victims can

also use Section 512 to pull down sexually explicit images for which they retain a copyright. They can also send de-indexing requests to search engines like Google and Yahoo.

Why Criminalization?

Still, copyright law is an inadequate response to revenge porn. Often, the sexually explicit images posted online are not selfies and the copyrights do not belong to the victims. Even if they do, registering the copyright requires individuals to expose their intimate photos to yet more strangers. And following a notice-and-takedown procedure is not easy, either, particularly if the website is hosted abroad and not willing to comply with victims' requests. Hiring a lawyer to help is prohibitively expensive to most victims. Some argue that using copyright law to combat revenge porn also lacks the necessary expressive effect of either a tort or criminal law response. Revenge porn is an abusive invasion of personal inviolability, a stain on the social fabric of modern digital society. As such, it merits a response strong enough to create and maintain the social norm that revenge porn is not simply wrong because it amounts to stealing. Rather, it is wrong because it devalues, demeans, and subjugates its victims as sexual objects. Copyright law, arguably, does not meet that standard.

That is why several scholars, advocates, and policy makers have proposed reasonable and narrowly tailored criminal revenge porn laws that will punish harassers and deter future conduct while protecting important free speech rights. Until then, however, copyright law must remain an important tool in what must be a multi-weapon arsenal.