

RESEARCH ARTICLE

Using IP rights to protect human rights: copyright for ‘revenge porn’ removal

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Abstract

‘Revenge pornography’ is a concept which embraces a broad spectrum of the non-consensual distribution of private sexual images. Acknowledging the harms that arise from this practice and the human rights implications of ‘revenge pornography’, this paper focuses on the difficulty of removing those images from the Internet. It considers the legal vehicles which can be employed to force websites and third-party operators to remove private sexual images, including privacy law and copyright notice and takedown systems. It concludes that the piecemeal approach to image removal is insufficient, and that a more cohesive and appropriate approach to image removal is required to ensure that victim-survivors’ rights to private and family life are properly protected.

Keywords: human rights law; intellectual property law; revenge porn; image-based sexual abuse; privacy

Introduction

‘Revenge porn’ typically occurs when an ex-partner shares private sexual images (PSI) of their former partner in order to seek retribution for the ending of a relationship.¹ Additionally, ‘revenge pornography’ can involve distribution of PSI which were obtained through hacking of a storage device or software, recordings of sexual assault, images obtained through voyeurism, and even explicit images which have been manipulated (photoshops and deepfakes). The practice also encompasses the re-posting of these images once they have been made available online.² What all of these situations have in common is that – irrespective of how the PSI or videos are obtained – they are publicly shared without the consent of the person depicted.³

Non-consensual distribution of PSI can frequently result in harmful consequences for victims, as they are often identified by the perpetrator, while the distributors remain anonymous. According to the Cyber Civil Rights Initiative, in 59% of cases the full name of the individual was provided.⁴ Further, 49% gave links to social networking pages, 26% provided an email address, 20% gave the

¹A Koppelman ‘Revenge pornography and first amendment exceptions’ (2016) 65 Emory Law Journal 661; S Desai ‘Smile for the camera: the revenge pornography dilemma, California’s approach and its constitutionality’ (2016) 42 Hastings Constitutional Law Quarterly 443; Cyber Civil Rights Initiative ‘Infographic’ available at <https://www.cybercivilrights.org/anatomy-effective-revenge-porn-law/> (accessed 19 May 2020).

²JK Stokes ‘The indecent internet: resisting unwarranted internet exceptionalism in combating revenge porn’ (2014) 29 Berkeley Technology Law Journal 929; C Calvert ‘Revenge porn and freedom of expression: legislative pushback to an online weapon of emotional and reputational destruction’ (2015) 24 Fordham Intellectual Property, Media & Entertainment Law Journal 673.

³C McGlynn and E Rackley ‘Image-based sexual abuse’ (2017) 37(3) Oxford Journal of Legal Studies 534. The spectrum of IBSA is wider than discussed here, encompassing also threats to take, make, or share private sexual images. This paper is concerned only with mechanisms for removing images and videos after they have already been shared.

⁴Cyber Civil Rights Initiative, above n 1.

individual's phone number, 16% gave the individual's home address and in 14% of cases the work address was provided. As a result, victims are often threatened with physical violence and experience psychological abuse. Additionally, 93% of victims experienced significant stress and anxiety and 49% have reported being stalked or harassed as a result.⁵ 'Revenge pornography' can also lead to professional costs. It is not uncommon for future employers to research candidates on the Internet and sexual images online can diminish one's chances of securing employment.

Publication of PSI can occur on specific 'revenge pornography' websites, adult entertainment websites, messaging boards, social media platforms or by emailing numerous recipients. All of this can be achieved with a phone, anywhere, using 3–4 G technology.⁶ It is estimated that currently, there are almost 3000 'revenge pornography' websites.⁷ Online distribution of images through communication platforms is simple, involving only a few clicks. Furthermore, images can be collated and disseminated in bulk with ease, as was the case for Lauren Evans, whose images were circulated as part of a larger document that was shared at her former school.⁸ Due to the nature of online communication, images shared online can be seen by broad audiences and reproduced multiple times.⁹ The difficulty in removing PSI from the Internet, once they are uploaded online, often means that harms stemming from this practice are significant and long-lasting.¹⁰

If the website hosting the image agrees to take a specific image down, it can still be re-uploaded. Many websites do not have the technology to match and remove re-posted images. Facebook, in 2018, announced that it would implement PhotoDNA technology to tackle 'revenge pornography'. This technology takes an uploaded photo and converts it to a numerical value – a hash. That hash can then be stored and compared to uploads of images to prevent that image from being uploaded again. However, the image can still be published on other websites and a link to the depicted person's Facebook profile can also be provided. This will not be prevented by the PhotoDNA technology since the image itself will not appear on Facebook.¹¹

Many websites have reporting mechanisms to request the takedown of private sexual images, but this reliance on website terms of service can be limiting. To report an image on Facebook, for example, one must have a Facebook account. More worryingly, websites dedicated to 'revenge porn' are not usually willing to remove content from their websites. In order to effectively tackle 'revenge porn', websites disseminating such images ought to be held legally accountable, since they are deriving revenue from this practice. Further, by creating specific platforms dedicated to this purpose, they are making the practice of 'revenge porn' easier and promoting social acceptance of abusive behaviours. However, the legal methods to force websites to take down images from online are largely ineffective.

This paper considers the mechanisms available to victims of 'revenge porn' to require the takedown of their images from the internet. It considers first the criminal offence introduced in 2015, and concludes that its limited scope,¹² combined with the requirement of 'actual

⁵Ibid.

⁶SR Stroud and J Henson 'Social media, online sharing, and the ethical complexity of consent in revenge porn' in A Close Scheinbaum (ed) *The Dark Side of Social Media: A Consumer Psychology Perspective* (Routledge, 2017).

⁷W DeKeseredy and MD Schwartz 'Thinking sociologically about image-based sexual abuse: the contribution of male peer support theory' (2016) *Sexualisation, Media, & Society* 1 at 2.

⁸S Gallagher "'Revenge porn' is not the right term to describe our experiences, say victims' (*Huffington Post*, 3 August 2019) www.huffingtonpost.co.uk/entry/why-are-we-still-calling-it-revenge-porn-victims-explain-change-in-the-laws-needed_uk_5d3594c2e4b020cd99465a99 accessed 15 February 2020.

⁹D Keats Citron and MA Franks 'Criminalizing revenge porn' (2014) 49 *Wake Forest Law Review* 345 at 350; DE Bambauer 'Exposed' (2014) 98 *Minnesota Law Review* 2025 at 2026.

¹⁰AL Cecil 'Taking back the internet: imposing civil liability on interactive computer services in an attempt to provide an adequate remedy to victims of non-consensual pornography' (2014) 71 *Wash & Lee Law Review* 2513.

¹¹A Binns 'Facebook wants your nude photos to prevent "revenge porn" – here's why you should be sceptical' (*The Conversation*, 14 November 2017) theconversation.com/facebook-wants-your-nude-photos-to-prevent-revenge-porn-heres-why-you-should-be-sceptical-87390 (accessed 19 May 2020).

¹²A Dymock and C van der Westhuizen 'A dish served cold: targeting revenge in revenge pornography' (2019) 39(3) *Legal Studies* 361: this paper outlines the weaknesses of the intention requirement embedded within the 2015 offence.

knowledge¹³ to make website providers liable, makes this an insufficient remedy for takedown of 'revenge porn' images and videos. Moving on, then, to human rights and privacy laws, the paper discusses the applicability of Article 8 of the European Convention on Human Rights (ECHR) to 'revenge porn', and how this intertwines with requests for its removal. The paper addresses historical 'breach of confidence' cases, then considers the post-1998 Human Rights Act (HRA 1998) cases which established 'misuse of private information' as a separate category of action.¹⁴ In considering these, it highlights the weaknesses of each cause of action, notably its ability to scale, as well as the difficulty of identifying perpetrators.

After identifying the weaknesses of both the criminal and tort law remedies for image takedown, the paper moves on to consider a remedy which is applicable in some 80% of cases. The paper suggests that copyright is an efficient and appropriate mechanism for demanding the removal of images from cyberspace in a majority of 'revenge porn' situations. An automatic, non-registrable right which arises at creation, it also provides the holder with the right to prevent distribution or reproduction of their work.

The role of copyright law in dealing with 'revenge pornography' can be seen as problematic. This is because it focuses on providing copyright owners with a bundle of property rights to their images and films. McGlynn and Rackley argued that this may be disadvantageous for 'revenge porn' victims as it misrepresents the harm involved in this practice and shifts the issue from sexual abuse to property rights.¹⁵ As a result, copyright law cannot effectively address the attitudes that underpin 'revenge pornography' and the sexual shame that victims feel after the online exposure. However, as Levendowski highlights, copyright law remains a cost-effective solution which can offer a stronger protection to 'revenge porn' victims than tort laws.¹⁶ Victims do not need to hire a lawyer or to have an official registration document to submit a takedown notice.¹⁷ Also, websites hosting PSI are not immune from copyright infringement, unlike the position with tortious claims.¹⁸

This paper adopts a doctrinal analysis and outlines the requirements for copyright protection, as well as the availability and effectiveness of notice and takedown as a removal mechanism for PSI. The qualitative analysis of legal doctrine acknowledges that there are still weaknesses and areas which lack coverage in using copyright law for takedown. The paper proposes a copyright-style notice and takedown regime that would provide an appropriate and efficient remedy for victims of 'revenge porn' to achieve removal of their PSI from the Internet.

1. Terminology

'Revenge porn' is a well-used term in contemporary media, discourse and society. The UK Safer Internet Centre defines 'revenge porn' as 'sexually explicit media that is publicly shared online without consent of the pictured individual'.¹⁹ Hall and Hearn define 'revenge pornography' as the 'online and offline non-consensual distribution, or sharing, of genuine or fake explicit images of someone else by ex-partners, others in order to seek revenge, for entertainment or for political motives'.²⁰ Further, they point out that whilst the term 'revenge pornography' is problematic, it remains the most well-used term to describe this phenomenon. As a result, they use the term 'revenge pornography' in inverted commas, as the cultural reference it has become, not as a distinct analytical or political category.

¹³Criminal Justice and Courts Act 2015; Sched 8, para 5: 'A service provider is not capable of being guilty of an offence under section 33 in respect of anything done in the course of providing so much of an information society service as consists in the storage of information provided by a recipient of the service...'

¹⁴Beginning with *Campbell v Mirror Group News Ltd* [2004] UKHL 22.

¹⁵McGlynn and Rackley, above n 3.

¹⁶A Levendowski 'Using copyright to combat revenge porn' (2014) 3 NYU Journal of Intellectual Property & Entertainment Law 441.

¹⁷Ibid, at 422.

¹⁸Ibid.

¹⁹UK Safer Internet Centre (undated) 'Revenge porn helpline' <https://www.saferinternet.org.uk/blog/revenge-porn-helpline> (accessed 19 May 2020).

²⁰M Hall and J Hearn *Revenge Pornography: Gender Sexualities and Motivations* (Routledge, 2018) p 18. Ibid, p 75.

This paper adopts a similar approach to Hall and Hearn and uses the term ‘revenge pornography’ in inverted commas as a cultural reference. This is particularly the case since the paper is not only concerned with perpetrators disseminating ‘revenge pornography’, but additionally with related actors, including the websites hosting such images. Similar to Hall and Hearn, ‘revenge pornography’ is defined broadly, to encompass the non-consensual distribution of real and digitally altered PSI.²¹ The term ‘images’ encompasses both photographs and videos for the purposes of this paper. This definition includes images distributed by ex-partners, people known to the victim, hackers and others who came across PSI on lost/stolen phones. It is also concerned with primary distributors of PSI who initially share the images with the wider public, and secondary distributors who later disseminate them further.²² It is necessary to include secondary distributors, as they often assist in the images being shared more broadly.²³ This would cover online platforms which facilitate the spread of ‘revenge pornography’ and the harassment that this practice entails. Without secondary distributors or hosting online platforms this practice would not be so widespread, nor the impact so devastating.²⁴ As such, a legislative regime to require image removal must be broad enough to cover both primary and secondary distribution.

2. Criminal law addressing ‘revenge porn’

Section 33 of the Criminal Justice and Courts Act (CJCA) 2015 was enacted specifically to deal with ‘revenge pornography’. The statute provides that it is a crime to disclose a private sexual photograph or film if the disclosure is made without consent and with the intention of causing the depicted person distress.²⁵ However, section 33 cannot adequately address online distribution of PSI. Section 33(8) of the Act provides that the mens rea element will not be satisfied merely because distress to the victim was a natural and probable consequence of the disclosure.²⁶ This leaves it open for perpetrators to argue that they did not mean to cause any emotional harm to the victim but simply did it for financial or entertainment purposes.²⁷ This high standard can inadvertently exclude hackers and other online distributors.²⁸ It could be argued that it is only ex-partners who will seek to cause any emotional anxiety. Further, Schedule 8 to the CJCA 2015 provides immunities from criminal liability for providers of information services and hosting platforms. The online intermediaries hosting content provided by users will not be liable, provided they had no actual knowledge of the offending content and they act expeditiously to remove such content once they learn of its existence.²⁹ The CPS Guidelines on ‘revenge pornography’ clearly state that the removal of images would be the responsibility of the website or social media provider.³⁰ The CJCA 2015 does not force website operators to take action in relation to the uploaded material and does not provide victim-survivors a remedy to remove their PSI.

3. Human rights aspects of ‘revenge porn’

‘Revenge pornography’ can have an adverse impact on an individual’s fundamental rights to dignity and privacy, as well as their freedom of sexual expression and autonomy.³¹ This practice violates

²¹Ibid.

²²McGlynn and Rackley, above n 3.

²³Ibid.

²⁴Ibid, at 539.

²⁵Criminal Justice and Courts Act 2015, s 33(1).

²⁶Ibid, s 33(8).

²⁷McGlynn and Rackley, above n 3, at 555.

²⁸Ibid.

²⁹Criminal Justice and Courts Act 2015, Sched 8, para 5.

³⁰Revenge pornography: guidelines on prosecuting the offence of disclosing private sexual photographs and films’ (Crown Prosecution Service, 2015) <https://www.cps.gov.uk/legal-guidance/revenge-pornography-guidelines-prosecuting-offence-disclosing-private-sexual> (accessed 19 May 2020).

³¹McGlynn and Rackley, above n 3, at 546.

individuals' self-worth and involves degrading and disrespectful treatment of victims.³² Article 8 of the ECHR safeguards the right to family and private life.³³ However, it is expressed in a way that only protects interference from a public authority, and thus has a vertical effect between the state and the citizen.³⁴ In *Douglas v Hello! Ltd*³⁵ Lord LJ discussed the dilemma that, on the one hand, Article 8(1) of the ECHR appears to create a right exercisable against the world. On the other hand, the general philosophy of the HRA 1998 and the ECHR is that these rights are enforceable only against a public authority.

The court noted that the HRA 1998, giving effect to the ECHR, and common law are running in the same channel by virtue of the HRA 1998, sections 2 and 6. Section 2 of the HRA 1998 requires domestic courts to give effect to Convention rights and consider the relevant case law of the Convention when determining disputes that raise such rights and their application.³⁶ Section 6 of the HRA 1998 makes it unlawful for a public authority to act in a way which is incompatible with a Convention right.³⁷ The definition of a 'public authority' includes a court or a tribunal.³⁸ As a result, the courts will have a responsibility to carry out the functions imposed on them under the Act, and to develop the law, including private law, in a manner which is consistent with Convention rights.³⁹

In *Douglas v Hello! Ltd* the court recognised the combined effect of these provisions.⁴⁰ It concluded that the HRA 1998 can have an impact on resolution of purely private disputes between citizens, as it would require the courts to have regard to Article 8 when interpreting and developing the common law.⁴¹ In addition to this, there may be positive obligations inherent in an effective respect for family life.⁴² These obligations can involve the adoption of measures designed to secure respect for private life even in disputes between individuals.⁴³ Therefore, when deciding any disputes relating to publication of non-consensual sexual images, the courts will need to consider the effect of Article 8 of the ECHR.

The courts have consistently held that information about sexual life falls within the scope of Article 8 of the ECHR.⁴⁴ Personal sexuality is seen as an extremely intimate aspect which can include gender identification and sexual orientation.⁴⁵ In *Mosley* the courts held that clandestine recording of sexual activity on private property must be taken to engage Article 8.⁴⁶ Therefore, 'revenge pornography' will similarly engage Article 8 of the ECHR and will attract particular scrutiny, since sexual photographs and videos are much more intrusive in their nature than words.⁴⁷ In *Douglas v Hello! Ltd*, the court

³²Ibid, at 545.

³³ECHR, Art 8. Article 8(1) states that 'everyone has the right to respect for his private and family life, his home and his correspondence'. Article 8(2) provides that 'there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

³⁴N Moreham and M Warby (eds) *Tugendhat and Christie The Law of Privacy and the Media* (Oxford: Oxford University Press, 3rd edn, 2016) p 212.

³⁵*Douglas v Hello! Ltd* [2007] UKHL 21 paras 80–137.

³⁶Human Rights Act 1998, s 2 provides that when a court or a tribunal is determining a question which has arisen in connection with a Convention right, it must take into account any judgement, decision, declaratory or advisory opinion of the European Court of Human Rights, any opinion of the European Commission given in a report, decision of the European Commission and any decision of the Committee of Ministers.

³⁷Human Rights Act 1998, s 6.

³⁸Ibid, s 6(3).

³⁹S Foster *Human Rights and Civil Liberties* (Pearson, 3rd edn, 2011) p 162; R Buxton 'The Human Rights Act and private law' (2000) 116 *Law Quarterly Review* 48; M Hunt 'The "horizontal effect" of the Human Rights Act' (1998) *Public Law* 423.

⁴⁰*Douglas v Hello! Ltd*, above n 35.

⁴¹*Douglas v Hello! Ltd*, above n 35; Moreham and Warby, above n 34, pp 212–213.

⁴²*Douglas v Hello! Ltd*, above n 35, para 85 referring to *X and Y v The Netherlands*, para 23.

⁴³Ibid.

⁴⁴*Argyll v Argyll* [1967] Ch 302; *Stephens v Avery* [1988] 1 Ch 449; *Barrymore v News Group Newspapers* [1997] FSR 600.

⁴⁵*Douglas v Hello!*, above n 35; *PG v UK* (2006) 46 EHRR 51.

⁴⁶*Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB).

⁴⁷*Tulisa Contostavlos v Michael Mendahan* [2012] EWHC 850 (QB).

stated that photographs enable the viewer to act as a spectator of scenes that the photo is depicting and they can even be described as a voyeur.⁴⁸ Pursuant to this reasoning it can be concluded that Article 8 of the ECHR will apply to ‘revenge pornography’ because it concerns distribution of private images and videos of a sexual nature.

In *KU v Finland*, the European Court of Human Rights (ECtHR) considered the case of a 12-year-old boy whose information was uploaded to a dating website, suggesting that he was seeking an intimate relationship with an adult. The person who uploaded his information could not be identified as there was no existing legal provision permitting the police to order the service provider to disclose identifying information. The ECtHR confirmed that the state does not just have the negative obligation to abstain from interference with Article 8 of the ECHR, but also positive obligations which may involve the adoption of legal measures to protect private life.⁴⁹ The Court ruled in favour of the 12-year old boy and stated that whilst Internet users have a guarantee to privacy and freedom of expression, it must yield on occasion to other legitimate interests, such as the prevention of crime and protection of rights and freedoms of others.⁵⁰

In *Dudgeon v UK* the ECtHR held that the more intimate the nature of the information in question, the closer it lies to the ‘core’ values protected by Article 8. Thus, greater weight will be accorded to such information when conducting the balancing exercise between ECHR, Article 8 and Article 10.⁵¹ There are different kinds of speech which are protected under Article 10 of the Convention, some of which will have higher value of protection than others. For example, political speech will have a very high value.⁵² So will speech about paternity, familial relationships, intellectual and educational speech and artistic speech and expression.⁵³ Speech concerning ‘vapid tittle-tattle’ about celebrities and blackmailing speech will deserve a low level of protection.⁵⁴ Pursuant to this reasoning, the privacy rights involved in unauthorised distribution of private sexual images and videos will outweigh the freedom of expression rights attached to the dissemination and viewing of such images by Internet users.

4. Privacy law and ‘revenge porn’

Breach of confidence is an equitable doctrine which allows the court to prevent publication of confidential information, or grant damages for its unauthorised distribution. The requirements for breach of confidence are set out in *CoCo v AN Clark*⁵⁵ and consist of three elements. First, the information itself must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.

In *Stephens v Avery*,⁵⁶ the necessary quality of confidence was confirmed to apply to personal relationships between married and unmarried partners. Browne-Wilkinson VC stated that there was no reason why the most private sector of everybody’s life, sexual conduct, could not be subject to the legally enforceable duty of confidentiality.⁵⁷ In *Mosley v News Group Newspapers Ltd* it was also held that those who participate in sexual relationships may be expected not to reveal private

⁴⁸*Douglas v Hello! Ltd*, above n 35, paras 138, 165.

⁴⁹*KU v Finland* App No 2872/02 (ECtHR 2 December 2008) para 42.

⁵⁰*Ibid*, para 49.

⁵¹*Dudgeon v UK* App No 7525/76 (ECtHR 22 October 1981).

⁵²*Sunday Times v UK* (1979) 2 EHRR 245; *Jersild v Denmark* (1994) 19 EHRR 1; *Lingens v Austria* (1986) 8 EHRR 1; *Thorgeirson v Iceland* (1992) 14 EHRR 843.

⁵³Moreham and Warby, above n 34, p 265.

⁵⁴*CC v AB* [2006] EWHC 3083 (QB).

⁵⁵*CoCo v AN Clark (Engineers) Ltd* [1968] FSR 415.

⁵⁶*Stephens v Avery*, above n 44.

⁵⁷*Ibid*.

conversations or activities.⁵⁸ Pursuant to this reasoning, victims of 'revenge pornography' would be able to establish that their PSI possess the relevant quality of confidence.⁵⁹

A duty of confidence will arise if the information has been communicated in circumstances imparting an obligation of confidence.⁶⁰ Information arising in the context of a marriage will be afforded a high degree of protection. If the relationship is outside of marriage, the general approach is likely to be that the more permanent the relationship, the greater the protection afforded to it.⁶¹ However, in *Barrymore v NGN Ltd* it was held that when people 'kiss and later one of them tells, that second person is almost certainly breaking a confidential arrangement'.⁶² As a result, the recipient of private sexual images or videos ought to know that they are to be regarded as a confidential matter. This is due to the sexual nature of these images, because they are not usually available in the public domain and are unlikely to be seen by anybody else.⁶³ Similarly, somebody who obtained PSI from a lost or stolen device, such as a phone or a laptop, should also be aware that sexually explicit media is to be considered as private and confidential.⁶⁴

Finally, it must be demonstrated that there has been an unauthorised use of the relevant information or a threat of misuse. To determine this, it is necessary to establish whether the defendant's conscience should be troubled by the disclosure at issue.⁶⁵ The ultimate test is what the reasonable man's conscience would dictate.⁶⁶ In *Barrymore v News Group Newspapers Ltd*,⁶⁷ Jacob J stated that the information about the relationship ought not to be used for a wider purpose. Hence, if sexual images or videos are exchanged during a relationship, their purpose will be limited to the duration of that relationship and the use of images for another purpose is likely to be a breach of duty. As a result, distribution of 'revenge pornography' can be covered by a breach of confidence action because PSI will be considered as confidential information. The images and videos will engage the protection of Article 8 of the ECHR and carry an obligation of confidence. When revenge pornography is distributed online, unauthorised use of the material occurs and thus all requirements of the breach of confidence action are satisfied.

The splitting point of misuse of private information from breach of confidence is visible in *Campbell v MGN Ltd*.⁶⁸ The crucial difference between the misuse of private information and breach of confidence claims (besides the distinction of tort from equity) is that misuse of private information does not require an 'initial confidential relationship'.⁶⁹ The implementation of the HRA 1998 has reinforced the strength of this tort. Since the decision in *Campbell*, it has also been expanded from actions in which the plaintiff had a reasonable expectation of privacy to include bare invasions of privacy. This distinction is, however, unimportant to 'revenge porn' cases, as private sexual images taken for personal distribution would almost invariably bring with them a reasonable expectation of privacy and the protection of Article 8 of the ECHR.

'Revenge porn' has been the subject of misuse of private information actions already. YouTube star Chrissy Chambers sought redress from her former boyfriend, who uploaded intimate videos of Chambers. Although the videos were uploaded in 2013, her misuse of private information case ended in settlement in 2018. However, the case was only taken against her former partner, and did not take into consideration the websites which were still hosting the video. Rather, as a part of the

⁵⁸ *Mosley v News Group Newspapers Ltd*, above n 46, para 105.

⁵⁹ *AMP v Persons Unknown* [2011] EWHC 3454 (TCC); *Contostavlos v Mendahun*, above n 47.

⁶⁰ *CoCo v AN Clark (Engineers) Ltd*, above n 55, at 47.

⁶¹ *Moreham and Warby*, above n 34, pp 195–196.

⁶² *Barrymore v News Group Newspapers Ltd* [1997] FSR 600.

⁶³ *Campbell v Mirror Group News Ltd*, above n 14, para 14.

⁶⁴ *AMP v Persons Unknown*, above n 59.

⁶⁵ *R v Department of Health, ex p Source Informatics Ltd* [2001] QB 424 (CA).

⁶⁶ *Ibid.*

⁶⁷ *Barrymore v News Group Newspapers Ltd*, above n 62.

⁶⁸ *Campbell v Mirror Group News Ltd*, above n 14.

⁶⁹ *Ibid.*, para 14.

settlement, the former boyfriend transferred his copyright interest in the videos to Chambers, so that she could use it to remove the videos from online platforms.⁷⁰ In a similar case, *Contostavlos v Mendahun*,⁷¹ the High Court made an order preventing publication or distribution of an intimate video or stills therefrom. The order was made against multiple persons who had access to the film, preventing them from distributing it further. What both *Contostavlos* and *Chambers* have in common is that they are both publicly-known figures, with public interest in their activities.

Misuse of private information cases involve the balancing of rights under Articles 8 and 10 of the ECHR, meriting individual assessments of the relative weights of the individual's right to a private and family life against the right to freedom of expression and information. Per Lord Steyn in *re S*:

[N]either article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.⁷²

Most victims of 'revenge porn' are private individuals, meaning that the ultimate balancing test will almost inevitably come down on the side of Article 8, rather than Article 10. However, the equal weight of both rights merits a full assessment in court, which adds an additional burden of time, legal representation, and cost. In *ABK v KDT and FGH*,⁷³ Tugendhat J granted an order preventing publication of private photos of the claimant after the end of an affair. The order in this case was made and continued against the affair partner and their spouse, preventing further distribution of the images, but not removing the images from the Internet. The images in this circumstance were emailed, and thus cannot be retracted by the original distributor.

However, although privacy law can be used as a remedy for 'revenge porn', it will be most effective against websites and distributors located within the English jurisdiction. If website operators are located elsewhere, substantial efforts and expense may be incurred to secure compliance with privacy injunctions issued in England. This will be particularly troublesome if websites are located in countries which do not offer equivalent protection of privacy rights and permit greater interferences.⁷⁴ Thus, privacy remedies are a potential, but not ideal, avenue for removing images from the Internet. The cost implications, the timescales involved, and the lack of scalability for multiple websites mean that it is unreasonably burdensome for the person whose PSI have been shared. Therefore, this paper moves on to discuss the legal difficulties associated with the removal of PSI and copyright protection mechanisms. The sections that follow explain why copyright law is a suitable protection method for many victims of 'revenge porn'.

5. Legal measures preventing accountability of online platforms

For victims of 'revenge porn', a primary desire is often to remove the images from cyberspace as soon as possible. While the harms done by the images being uploaded exist from the moment of first distribution, the continuing harms of the images remaining available online can be minimised or reduced by preventing further distribution. The easiest way to do this is to require the person who uploaded the image to remove it from their account. However, there are many 'revenge porn' situations where this is

⁷⁰J Kleeman 'YouTube star wins damages in landmark UK 'revenge porn' case' (*Guardian*, 17 January 2018) www.theguardian.com/technology/2018/jan/17/youtube-star-chrissy-chambers-wins-damages-in-landmark-uk-revenge-porn-case (accessed 19 May 2020).

⁷¹*Contostavlos v Mendahun*, above n 47.

⁷²*In re S (FC) (a child)* [2004] UKHL 47 at para 17.

⁷³*ABK v KDT and FGH* [2013] EWHC 1192 (QB).

⁷⁴YH Lee 'Delivering (up) a copyright-based remedy for revenge porn' (2019) 14(2) *Journal of Intellectual Property Law & Practice* 99 at 101.

not feasible, where the perpetrator is not willing to comply with victims' requests. Equally, where PSI were obtained as a result of a hacking, the victim will not know where to address the takedown request. Similarly, where images have been downloaded from one website and uploaded to another, the victim again may not have knowledge of who the uploader is, and therefore be unable to request removal of the image by the user. Rather, the victim may seek to request that the website provider remove the image. However, despite the obvious privacy violations of online 'revenge pornography' and the human rights implications which accompany this, websites can be reluctant to comply with image removal requests without legal accountability attached.

Articles 12–14 of the E-Commerce Directive 2000/31/EC⁷⁵ allow for immunity of information society services (ISSs). Where an ISS (such as a website operator, Internet provider, etc) stores, transmits, or hosts information on its server at the request of the customer (such as storing the user's website, storing images uploaded by the user or comments in a newsgroup) the ISS will not be liable for illegal materials stored on its servers if:

- (i) the service provider did not actually know that the material was illegal; and
- (ii) once the service provider becomes aware of illegal material it acts expeditiously to remove or disable such material from its server.

Arguably, this could leave some categories of websites (such as those dedicated to 'revenge porn') open to liability for the illegal content they host, as they should have actual knowledge that the material they are providing is illegal. Unlike various social media platforms, 'revenge porn' websites operate for one purpose – to provide a platform for non-consensual posting of PSI. It could be argued that they have actual knowledge of the illegal content and fail to expeditiously remove it. However, as discussed above, the criminal offence dealing with 'revenge pornography' in the UK requires an intentional element to cause distress to the victim. This means that 'revenge porn' websites can escape accountability under the CJCA 2015.⁷⁶

In the case of *CG v Facebook*, the Northern Ireland Court of Appeal ruled that actual knowledge of the illegal content was sufficient, however it was acquired.⁷⁷ In this case a Facebook page was set up providing details of individuals convicted of sexual offences with children, which included photographs, names and addresses of these individuals. Facebook argued that it could not be held liable for that content as it could not be deemed to have actual knowledge of the existence of this page. It argued that as the claimant had not used Facebook's online submission process, he had not given proper notice. The court rejected this argument and stated that as Facebook was made aware of the existence of this page by other means, it should have acted expeditiously to remove the content. Further, in *L'Oreal v eBay*, the Court of Justice of the European Union stated that Article 14 of the E-Commerce Directive does not protect internet service providers from injunctions or the costs associated with them.⁷⁸ Although these cases demonstrate that online service providers may be held liable for illegal content, the process required to achieve results is both time-consuming and expensive. It requires both the knowledge and determination to see the litigation through.

In *AY v Facebook*⁷⁹ the court considered the liability of social media platforms for distribution of 'revenge pornography' under the E-Commerce Directive. The claimant argued that Facebook had not done enough to prevent her PSI being distributed online. She maintained that Facebook should have used PhotoDNA technology to ensure that a sexual image of her taken when she was 14 years old had not been re-uploaded to Facebook. Facebook, for its part, argued that the case should be struck out because on each occasion that the image was posted it acted expeditiously to remove it. As such,

⁷⁵Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (the E-Commerce Directive), Art 14.

⁷⁶Dymock and van der Westhuizen, above n 12.

⁷⁷*CG v Facebook Ireland Ltd and Joseph McCloskey* [2016] NIQB 76.

⁷⁸Case C-324/09 *L'Oreal v Ebay* [2011] ECR I-06011.

⁷⁹*AY v Facebook Ireland Ltd* [2016] NIQB 76.

Facebook claimed that it complied with its responsibilities and should be immune from liability on the basis of the E-Commerce Directive. The Court, however, rejected Facebook's application that the case be struck out. It held that the issue of whether Facebook acted expeditiously in removal of the images remained a question of fact that will need to be decided at full trial, upon presentation of all the necessary evidence. However, the case settled in January 2018. As a result, it is not entirely clear whether Facebook could have relied on the E-Commerce Directive to prevent liability arising from the tort of misuse of private information for its failure to track an image with PhotoDNA technology.⁸⁰ As Lee points out, intellectual property rights are accorded stronger protection than privacy rights in almost all jurisdictions and it is to these rights that this paper will now turn.⁸¹

6. Copyright as a solution to revenge porn removal

Copyright is an intellectual property right which subsists in creative works. In the UK, copyright is governed by the Copyright, Designs and Patents Act 1988 (CDPA 1988).⁸² The Act has been amended numerous times to implement the EU Directives and international treaties dealing with intellectual property rights. The CDPA 1988 provides the copyright owner with property rights and the ability to authorise or prohibit certain uses of their works by others. Therefore, it is not a positive right but a negative right, providing the ability to prevent others from doing what only the copyright owner is authorised to do.⁸³

Section 1 of the CDPA 1988 identifies the categories of works which copyright law protects and includes within this original literary, dramatic, musical or artistic works and films.⁸⁴ Section 4 of the CDPA 1988 defines artistic works as a graphic work, a photograph, sculpture or collage, irrespective of artistic quality.⁸⁵ In the case of *Interlego Ag v Tyco Industries*,⁸⁶ Lord Oliver stated that the essence of the artistic copyright is that which is visually significant.⁸⁷ Considering that photographs and films are included within the ambit of the CDPA 1988, distribution of 'revenge pornography' images is prima facie covered by the Act.

Copyright arises automatically at the point of creation of a work, does not require registration, and gives the author of a work an exclusive right to control, among other things, the distribution, reproduction, and making available of the work to the public.⁸⁸ The holder of copyright in an image can use that right to request that a website refrain from distributing or reproducing the image. This is an ideal situation for victims of 'revenge porn'. If they hold the copyright in an image, they do not need to obtain the assistance of the uploader of the image. Instead, their copyright in the image means that they have the exclusive right to control the distribution and reproduction thereof, and can exercise that right to prevent a website from further distributing an image.

At this point, it is useful to examine how one becomes the holder of copyright in a work. Copyright is an automatic right, which arises at the creation of a work without the need for registration. There is no necessity for a copyright holder to register their work with a central database in order to be able to claim copyright protection and prevent distribution. However, for copyright to exist in a creation, the work must be original and possess a certain level of creativity.⁸⁹ In *Infopaq International A/S* the

⁸⁰It did, however, introduce a pilot provision which provided similar facilities in 2017: Binns, above n 11.

⁸¹Lee, above n 74, at 110.

⁸²Copyright, Designs and Patents Act 1988.

⁸³N Caddick et al *Copinger and Skone James on Copyright* (Sweet and Maxwell, 17th edn, 2016) para 1–35.

⁸⁴Copyright Design and Patents Act 1988, s 1.

⁸⁵Ibid, s 4.

⁸⁶*Interlego AG v Tyco Industries Inc & Others (Hong Kong)* [1988] UKPC 3.

⁸⁷Ibid.

⁸⁸Copyright, Designs and Patents Act 1988, s 16.

⁸⁹The Berne Convention, Art 2(5); WIPO – Guide to the Berne Convention, para 2.8.

CJEU, applying the Infosoc Directive, held that the term ‘intellectual creation’ means that the author has exercised expressive and creative choices in producing the work.⁹⁰ Further, in *Painer v Standard Verlags GmbH*, the CJEU stated that in cases concerning photographs, an intellectual creation is the author’s own if it reflects the author’s personality.⁹¹ This will be the case if the author was able to exercise his creative abilities in the production of the work by making free and creative choices.⁹²

Pursuant to this reasoning, it is not clear whether taking a snapshot or a selfie will meet the required standard of originality. If sufficient creativity is exercised in the pose, the facial expression, the lighting and other expressive choices, then PSI will attract protection of copyright. However, if it is just a snapshot of a body part or a selfie taken without much thought being given as to the details of the photograph, it may not reach the *Painer* threshold.⁹³ Whilst there has been some debate regarding what should qualify for the originality threshold,⁹⁴ in the UK the standard for this criteria has been relatively low.⁹⁵ It required that the work originated from its author and the author expended sufficient skill, labour and judgement to justify copyright protection.⁹⁶ As a result, in order to attract copyright protection, the provisions require a *de minimis* level of creative effort to be made.⁹⁷ By posing for a ‘selfie’ and attempting to present their best angle, victims of ‘revenge pornography’ would satisfy this requirement.⁹⁸

The first owner of copyright in a work is the author – the person who creates the work.⁹⁹ A 2013 survey of ‘revenge porn’ victims indicated that 80% of the images which were uploaded without consent were ‘selfies’, ie pictures taken by the victims themselves.¹⁰⁰ In these circumstances, the author of the photo is also the subject, and therefore automatically the copyright owner. However, if the photograph is taken by somebody else, that person will be deemed to be the copyright owner. Similarly, in instances where PSI have been digitally manipulated, for example superimposing faces, it will be the creator of that work who will own the copyright, not the person depicted.

If the subject of the photograph is not the person who took the photo, but was involved in the artistic direction of the photography (ie had some say in pose, lighting, angle, etc), then they would arguably also have a claim to joint authorship in copyright.¹⁰¹ This has been the argument made by, for example, Gigi Hadid,¹⁰² in response to a suit taken against her for posting a press photo on her Instagram.¹⁰³ However, the case was filed in the US, and subsequently dismissed for other reasons, so the argument remains as yet untested.¹⁰⁴ A recent Court of Appeal decision¹⁰⁵ set out the criteria for joint authorship, stating ‘the person who wields the pen is not necessarily the sole author of the

⁹⁰Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECDR 16 paras 33–37.

⁹¹Case C-145/10 *Painer v Standard Verlags GmbH* [2012] ECDR 6 paras 120–124.

⁹²*Ibid.*

⁹³*Ibid.*

⁹⁴E Rosati ‘Why originality in copyright is not and should not be a meaningless requirement’ (2018) 13 *Journal of Intellectual Property Law & Practice* 597.

⁹⁵Caddick et al, above n 83, para 2–04.

⁹⁶*Kelly v Morris* (1865–66) LR 1 697; *Karo Step* [1977] RP 255 para 273.

⁹⁷LTC Harms ‘Originality and “reproduction” in copyright law with special reference to photographs’ (2013) 16(5) *Potchefstroom Electronic Law Journal* 1.

⁹⁸*Ibid.*

⁹⁹Copyright, Designs and Patents Act 1988, s 9(1).

¹⁰⁰Cyber Civil Rights Initiative ‘Proposed CA Bill would fail to protect up to 80% of revenge porn victims’ (Press Release, 10 September 2013).

¹⁰¹A Guadamuz ‘The monkey selfie: copyright lessons for originality in photographs and internet jurisdiction’ (2016) 5(1) *Internet Policy Review*.

¹⁰²H Boshier ‘Gigi Hadid, smile for the copyright’ (*The IPKat*, 1 July 2019) <http://ipkitten.blogspot.com/2019/07/gigi-hadid-smile-for-copyright.html> (accessed 19 May 2020).

¹⁰³*Xclusive-Lee, Inc v Hadid* (1:19-cv-00520) (2019 District Court, EDNY).

¹⁰⁴Gigi Hadid victorious in paparazzi photo copyright case as court cites fourth estate decision’ (*The Fashion Law*, 18 July 2019) available at www.thefashionlaw.com/home/gigi-hadid-victorious-in-paparazzi-photo-copyright-case-as-court-cites-fourth-estate-decision (accessed 19 May 2020).

¹⁰⁵*Kogan v Martin and Others* [2019] EWCA Civ 1645.

work'. Applying this to photography or videography, the person who presses the shutter button is not necessarily the sole author, and thus the subject could have a right to prevent distribution of the work.¹⁰⁶

It is also possible for copyright interests to be transferred – as was the case with Chrissy Chambers, who obtained the copyright in the videos of her from her former partner.¹⁰⁷ However, this was not easy as her ex-boyfriend who allegedly made the sexual recording whilst she was unconscious, initially refused to assign the copyright to her. Chambers' legal battle came to an end in April 2017 when her ex agreed to a settlement, paid damages for the distribution of the sex tapes online and transferred his copyright to her, so that she may pursue websites that host these videos.¹⁰⁸

If the subject of the image or video was not aware that they were being recorded or photographed, or had no say in the recording or photography (which would be the case for most videos of rape or assault, or covert videos or images), however, they will have no claim in copyright. They cannot make use of the copyright protection to exercise control over their image. Lee argued that privacy claims should include the remedy to transfer copyright in the images to revenge pornography victims even if they are not authors of such images.¹⁰⁹ This is to ensure that in the instances where the person depicted in the images was not the author, they could still benefit from the protection accorded by copyright law. For the 80% of 'revenge porn' victims who can claim they are the author of the work and those who gain copyright by transfer, copyright protections can then allow them to control the reproduction and distribution of that PSI.

Sections 16–27 of the CDPA 1988 cover the rights of copyright owners and actions that would constitute an infringement of those rights. Section 16 of the CDPA 1988 prescribes that primary infringement of copyright will include copying the work, issuing copies of the work to the public, communicating the work to the public and making an adaptation of the work.¹¹⁰ Section 17(2) of the CDPA 1988 provides that copying the work in relation to literary, dramatic and musical or artistic works means reproducing the work in any material form, including storing the work in any medium by electronic means.¹¹¹ As such, even storing a sexual photograph or film in a computer memory, when the copyright does not belong to that person, can infringe the owner's copyright. Section 18(1) of the CDPA 1988 prohibits issuing works to the public. This includes the act of putting into circulation copies of the work which have not been distributed with the consent of the copyright owner.¹¹²

Copyright provides a method of controlling the distribution and reproduction of their images, and using copyright mechanisms – such as notice and takedown – gives victims of 'revenge pornography' an appropriate method of requesting removal of their image from websites. As a result, many victims would have a claim of copyright infringement against individual perpetrators distributing their PSI and online platforms hosting these images. Further, the copyright infringement would occur irrespective of how the images were distributed. Hence it could apply to PSI disseminated online, by text messages or even in hard copy. A claim in copyright would also capture a broad range of perpetrators, from ex-partners to hackers and others who may come across the images on lost or stolen devices.

7. Notice and take down

One of the most helpful and effective mechanisms for speedy removal of content which is infringing copyright online is known as notice and takedown. While similar notice and takedown systems exist in both the US and the UK, the UK's is far less structured. This paper will first discuss the US notice and takedown system, to promote a better understanding of what this entails, and to demonstrate what

¹⁰⁶For a fuller discussion see D Simone *Copyright and Collective Authorship: Locating the Authors of Collaborative Work* (Oxford: Oxford University Press, 2019).

¹⁰⁷Kleeman, above n 70.

¹⁰⁸*Ibid.*

¹⁰⁹Lee, above n 74, at 110.

¹¹⁰Copyright Designs and Patents Act 1988, s 16.

¹¹¹*Ibid.*, s 17(2).

¹¹²*Ibid.*, s 18(2).

information might be needed to create and issue a takedown notice. The discussion will then move on to the relative strengths and weaknesses of notice and takedown systems as a whole, focusing on how this can impact on victims of 'revenge porn' specifically.

In the US, copyright protection provides an alternative avenue of removal for victims of 'revenge porn'. Copyright protection for a creative work arises automatically upon creation and does not have to be registered. Further, copyright protection provides authors of creative works with the exclusive right to distribute (or prevent distribution of) their protected works.¹¹³ Thus, where an image is distributed or reproduced without the permission of the rights holder, this infringement of copyright is actionable. That is to say, where a work which is subject to copyright (as most private sexual images are) has been distributed, the holder of the copyright may sue the person distributing the image for copyright infringement. However, the thought of suing every website which hosts an image may seem daunting. Luckily, that difficulty is mitigated somewhat by notice and takedown.

The Online Copyright Infringement Liability Limitation Act (OCILLA),¹¹⁴ enacted in 1998 as part of the Digital Millennium Copyright Act (DMCA), grants websites immunity from suit provided they do not have actual knowledge of infringing content,¹¹⁵ and once they are made aware of infringing content, act expeditiously to remove it. Effectively, this means that where a website is hosting an infringing image, but is not aware of it, it cannot be sued. However, to maintain its immunity from suit for infringement of copyright, once the website has received notification that the image is infringing and should be taken down, it is required to comply. Thus, a content owner may send a notification to a website which is hosting a non-consensual or abusive image (notice), and the website should remove it within a relatively short space of time (takedown). There is no specific time limit on takedown, but the Act provides that the service provider (ie the website owner) must respond 'expeditiously to remove, or disable access, to the material'.¹¹⁶

Section 512(c) of OCILLA provides guidelines for the details which must be included in a takedown notice, as follows:

- (i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
- (ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.
- (iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.
- (iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.
- (iv) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.
- (v) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.¹¹⁷

On receiving a notice which conforms to the protocols set out above, to maintain immunity from monetary, injunctive, or other relief, the website must remove or disable access to the offending

¹¹³Berne Convention for the Protection of Literary and Artistic Works (as amended), Art 9.

¹¹⁴Online Copyright Infringement Liability Limitation Act 1998, 17 US Code §512(c).

¹¹⁵*Ibid.*

¹¹⁶This phrase, as well as the term expeditiously, is used multiple times within the section as a whole, notably in §512(c)(1)(A)(iii), and §512 (c)(1)(C), which refer to user-uploaded material.

¹¹⁷Online Copyright Infringement Liability Limitation Act 1998 17 US Code §512(c)(3).

material,¹¹⁸ which will achieve the aim of the victim-survivor of ‘revenge porn’ in removing their PSI from public access or view.

This solution seems ideal for victims of ‘revenge porn’ because it is relatively simple, cheap (it does not require a lawyer), and can be repeated for multiple websites or image hosts. The DMCA is clear and precise about what information is required, who can send notices, and procedures for responding to or challenging takedown notices.¹¹⁹ The clarity contained within section 512 also means that where multiple requests are being sent for the same image, a lot of the information can be pre-filled into a template, reducing the quantity of work required for each notice. The DMCA further requires that websites identify an agent who will deal with such takedown requests. This means that victims should, in theory, always have a nominated point of contact available on the website to whom they can address their notice.¹²⁰ Thus, with a dedicated contact person, a clear legal authority to rely on, and effectively a template of what information to include, a notice of copyright infringement seems for copyright holders the ideal action to require the removal of PSI from public access.

A similar system exists in the EU. As already discussed, websites have immunity from liability under Article 14 of the E-Commerce Directive. However, that immunity is reliant on similar knowledge and expeditious action boundaries. Thus, the E-Commerce Directive also requires websites to act expeditiously to remove or disable access to materials which they know to be illegal.¹²¹ Copyright infringement would fall within the bounds of illegality in a way in which ‘revenge porn’ alone might not. However, the E-Commerce Directive is less prescriptive than the DMCA, in that it does not contain the same clarity regarding how notification of illegal content can be made. In practice, copyright infringement notifications in the EU still take the form of notice and takedown, but the lack of clear structure for sending a notice presents extra obstacles to those seeking to make use of the system. Those who wish to remove their copyright content from European-hosted websites face barriers greater than those who are dealing with US websites. There is a lack of a requirement for a designated agent,¹²² and no clear structure for what should be included for a notice to be valid.¹²³ Victims-survivors of ‘revenge porn’ who wish to send notices to websites under the E-Commerce Directive are burdened with the extra step of finding the correct contact details to which they may send their notice. Although domain registrars keep records of the registered owners of websites,¹²⁴ and these are often publicly searchable, the registered owner of a domain is not necessarily the proprietor of the website. Further, the General Data Protection Regulation¹²⁵ has resulted in extra protections for personal data, including redacting contact information for website owners.¹²⁶

There are further issues with establishing which is the applicable system of notice and takedown. Websites which are hosted outside the jurisdiction of the EU or the US may not be subject to the provisions of either system. Where a notice is not complied with, the next step is to sue, which presents the same difficulties as those mentioned above in section 4 of this paper. Finally, many dedicated revenge porn websites are deliberately hosted outside of these jurisdictions, which limits the availability of remedies for victim-survivors.

¹¹⁸Ibid, §512(c)(1)(A)(iii).

¹¹⁹Ibid, §512(g)(3).

¹²⁰Ibid, §512(c)(2).

¹²¹E-Commerce Directive, above n 75, Art 14.

¹²²Online Copyright Infringement Liability Limitation Act 1998 17 US Code §512(c)(3).

¹²³Ibid, §512(c)(3)(A).

¹²⁴See for example Whois.net, a domain lookup service which provides contact details for registered owners of domains.

¹²⁵Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJL 119/1

¹²⁶See for example ICANN Whois, which has redacted nearly all information about domain host Blacknight.com, in an information request submitted in November 2018: whois.icann.org/en/lookup?name=blacknight.com.

Once notices have been correctly sent, the difficulties do not necessarily end. Notice and takedown is still not a perfect system. Although millions of notices are sent every year,¹²⁷ it is not a single, permanent solution. A takedown notice sent to a website does not prevent the image from being uploaded to another website, which would then require a further takedown notice. The 2013 paper Clickonomics identified this issue with notice and takedown, naming it a cat and mouse scenario, requiring the content owner to monitor the web for ever-reappearing versions of their material.¹²⁸ Similarly, the *New York Times* commented on the same effect, this time likening it to 'whac-a-mole'.¹²⁹ Levendowski highlights that in some situations sending a takedown notice can even have a negative impact, encouraging further online abuse of the victim, resulting in a 'Streisand effect'¹³⁰ increase of difficulties.¹³¹

Finally, notice and takedown provides little relief against a website which does not comply with a takedown notice. Although they would no longer enjoy immunity from suit, in order to achieve removal of the image, the victim would be required to file suit against the website in a court, and obtain injunctive relief ordering takedown of the image. The costs of this are substantial, and not scalable for multiple takedown requests. Thus, a victim of 'revenge porn' whose images have been uploaded to multiple websites may find themselves in a situation where the financial burdens of legal action to remove their images are too great for them to take action. Bearing in mind that victims of 'revenge porn' are private individuals, this presents a serious problem with access to justice and the protection of Article 8 ECHR rights to private and family life.

Although notice and takedown is not a perfect solution, in a large proportion of 'revenge porn' cases, especially where larger websites such as social media sites and 'legitimate' pornography sites are concerned, it can be an effective tool for removal of private, sexually suggestive or explicit images, rapidly and relatively easily.

8. Remaining problems

There are still significant issues with utilising copyright protection mechanisms for removing image-based sexual abuse. As Levendowski discusses, problems remain with the takedown procedures of 'revenge porn websites'.¹³² She maintains that as revenge porn websites are specifically aimed at shaming individuals and ruining their reputation, issuing a takedown notice may have the opposite effect. It can instead draw more attention to these images and encourage their reuploading to alternative sites, resulting in the need for multiple takedown notices. It can also encourage further online abuse such as doxing.¹³³ Refusal to take down images which are the subject of a copyright infringement notice then opens the ISS to liability for copyright infringement, but this would require the copyright holder to file suit and pursue legal redress through the courts. Furthermore, for those whose images were created without their consent or knowledge, these protections are unavailable as they will not be the copyright holder. Even those who do eventually obtain the copyright to those works through a settlement may struggle to remove their content. As Chrissy Chambers has stated, even after she acquired the copyright to the videos created by her then-boyfriend without her knowledge, removing the images entirely

¹²⁷Lumen Database, which collects and analyses takedown notices, registered almost 2.2 million notices from 27 November 2017–27 November 2018: lumendatabase.org/notices/search?utf8=%E2%9C%93&date_received_facet=1511845200000..1543381200000.0 (accessed 19 May 2020).

¹²⁸T Lauinger et al 'Clickonomics: determining the effect of anti-piracy measures for one-click hosting' (2013) Presented at 20th Annual Network and Distributed System Security Symposium (NDSS 2013).

¹²⁹B Sisario and T Vega 'Playing whac-a-mole with piracy sites' (*New York Times*, 28 January 2013).

¹³⁰S Jansen and B Martin 'The Streisand effect and censorship backfire' (2015) 9 *International Journal of Communication* 656.

¹³¹Levendowski, above n 16.

¹³²Ibid, at 443.

¹³³Doxxing is the process of sharing real-life information such as addresses, workplaces, contact numbers, etc.

has still been a daunting task.¹³⁴ She stated that she still receives messages from strangers because the videos can be reposted as soon as they are taken down.

Conclusion

There is a need for a more robust system of removal of private sexual images from the Internet. Victim-survivors of ‘revenge porn’ who find their images distributed online face a variety of legal avenues through which they can seek removal of their images, but none of these systems cover all victims. There are also serious issues with access to justice, scalability, accessibility, and appropriateness of such avenues of redress. For a victim of ‘revenge porn’ who has already been through a traumatic experience to be subject to criminal and civil systems of justice in order to remove their images is an insufficient protection of their right to a private and family life. Further, financial burdens of access to the civil courts infringe on the rule of law and present serious difficulties in access to justice. Although copyright protection provides an affordable route to image removal for some, its disconnection from ‘revenge porn’ means that it is not an accessible system, and victim-survivors are unlikely to be aware that it could provide a remedy. Non-compliance with notices, and its consequent requirement to file suit then places victim-survivors in the same position discussed above. Finally, due to the requirement that the copyright holder sends the notice requesting takedown, it is not a viable alternative for all victims of ‘revenge porn’ and non-consensual image sharing. The most egregious violations of privacy, where the taking and making of images and videos was done without the knowledge or consent of the person depicted, create a situation where the person depicted is not able to use copyright protection, as they are not the author or the copyright holder. In sum, although an appropriate interim solution, notice and takedown is not a viable long-term avenue for protection of victim-survivors’ Article 8 rights.

However, there is some hope to be taken from the above discussion. While inappropriate as a single system for protection of the right to a private and family life, there are distinct strengths to notice and takedown as a system for image removal in general. Thus, notice and takedown as a system can be altered to adapt to image-based abuse. A system which operates in a similar fashion to notice and takedown, specifically focused on privacy infringement and video and image takedown, could be introduced in the UK, supported by legislation which imposes liability on websites which do not comply with the regime. This, backed up by a state body which assumes responsibility for pursuing non-compliance with takedown requests, would remove the burden from victim-survivors and improve access to justice. In the interim, following the example of the Australian Office of the eSafety Commissioner,¹³⁵ a system which provides contact details for websites on which images are frequently uploaded, sample wording for takedown notices, and authoritative support for complainants who face non-compliance with their removal requests, would be a crucial step in providing support for victims in removing their image from the Internet.

¹³⁴J Kleeman, ‘The YouTube star who fought back against revenge porn – and won’ (*Guardian*, 18 January 2018) www.theguardian.com/news/2018/jan/18/chrissey-chambers-youtube-revenge-porn-legal-victory (accessed 19 May 2020).

¹³⁵Office of the eSafety Commissioner ‘Image-based abuse’ available at www.esafety.gov.au/image-based-abuse/ (accessed 19 May 2020).