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Revenge Porn

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Revenge Porn



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The Digital Millennium Copyright Act requires, among other provisions, that particular websites remove any unauthorized use of copyrighted material provided that the owner sends a signed (electronic or physical signature) notice with a link to the unauthorized posting along with a statement that the photos were published without authorization.

Introduction

Technology has brought us many benefits in our everyday lives. However, the dark side of this same technology is the ability to widely transmit and disseminate harmful and detrimental information on the internet in the blink of an eye, often times anonymously and without recrimination. Such harmful acts include “revenge porn” which is subject to a number of descriptions and legal definitions (for the record we are not enamored with the accepted and recognized term “revenge porn”). A nationwide study of Nonconsensual Porn Victimization and Perpetration of 3,044 participants from Facebook users was undertaken by the Cyber Civil Rights Initiative for the period of November 2016 through March 2017. When asked “Has anyone ever shared a sexually-explicit image or video of you without your consent?”— 8 percent answered in the affirmative. In an earlier study by the Cyber Civil Rights Initiative from 2015, 23 percent of 1,606 respondents between the ages of 18-30 indicated they were victims of revenge porn.

The newly enacted Rhode Island statute “Unauthorized Dissemination of Indecent Material” (effective 6/4/18), includes dissemination of sexually explicit images “by any means.” Due to the widespread use of the internet in revenge porn cases, for the purposes of this article, we will address revenge porn as compromising photos obtained by individuals who utilize the web to transmit compromising images. Nationwide, many

states attempt to hold offenders of these acts accountable by the passage of a revenge pornography law. In addition, most states also have laws against cyberharassment and cyberbullying that may also be useful. As noted above, Rhode Island recently passed its version of a revenge pornography law titled “Unauthorized Dissemination of Indecent Material,” under R.I. Gen. Laws § 11-64-3. The law criminalizes dissemination of sexually explicit photos of people without their permission. The law contains language that requires proof of the perpetrator’s intent and victim identification if over age 18. While the first act of dissemination is a misdemeanor, a

second offense is punishable as a felony. Also worth noting in section (e) the act of threatening to disclose to gain a “benefit” for non-disclosure and (f) demanding money, property, services or something else in return for removal of the unauthorized disclosed images are felonies. It is not clear what will constitute a “benefit” under section (e). At the time of this writing, authors are not aware of any police department charging under this statute. That said, in the case of Alex, this statute would be an important tool of law enforcement to hold Danny accountable if the required elements of intent, knowledge and the act of dissemination are established.

Not all revenge porn profiles deal with intimate relationships but may also be part of a third party hacking or other such unauthorized appropriation of the images of the victim. One such notorious case was that of *People v. Bollaert*. Here the defendant owned and hosted a website “Ugotposted.” The site was a web sharing site where he would approve postings, usually of sexually explicit images and usually from “former significant others or friends,” along with names, locations, Facebook links, etc. This can be characterized as a revenge porn hosting site. He also had a second website, ChangeMyReputation.com where he would offer to have the photos removed from Ugotposted for a fee. The defendant was convicted of extortion and identity theft.

The genesis of this article came about as a result of being approached by a former female student who was a victim of revenge porn that occurred some two years ago. In assessing legal and technological protocol options, we conferred with colleagues in the Cyber Security and Digital Forensics programs at Roger Williams University that included co-author of this article, Tom Lonardo, as well as Dr. Doug White. Dr. White is a preeminent expert and consultant in digital forensics and computer security. There are a number of legal, practical and emotional considerations in addressing these highly emotionally charged and embarrassing transgressions against a potential client. This article will attempt to walk through those steps and strategies in representing clients who have been the victim of revenge porn.

Hypothetical: A potential client, Alex, has just

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told you that a two-year romantic relationship with her “ex,” Danny, ended six weeks earlier at the end of June, and it ended badly. The relationship started in her sophomore year of college. About 12 months into their relationship, certain nude and semi-nude photos were shared with Danny via emails and text messages. These photos were “selfies” (taken by herself with her smartphone). Alex said they were madly in love and talked about marriage. Over time, however, Danny became possessive and verbally abusive. When the relationship ended Danny was infuriated. About three weeks after the breakup, she received an email from a close college friend indicating there were nude and semi-nude photos of Alex on certain websites. In fact, her friend received an email with those photos as attachments with a number of recipients listed on the email. The email was forwarded to Alex by her friend. To her horror, those were the photos she electronically sent to Danny. Alex is devastated, afraid, embarrassed and confused. She would like to know what she can do under these circumstances.

Initial Consultation

This can be the most challenging undertaking. Although the victim has had the courage to meet with you to discuss the matter, it becomes an entirely different dynamic when you explain to the victim the practical and legal steps and options available to him/her. He/she may decide to not pursue the matter due to embarrassment in disclosing the situation and, of course, disclosing the compromising photos to total strangers or to her family. The victim may decide not to pursue legal remedies against the ex or other third parties, such as a lawsuit or criminal action, but instead look to technical measures to effect “damage control.” In any event, this must be entirely the victim’s decision.

Consideration of Client Safety and Security

Under the circumstances, Alex’s safety may be compromised by Danny or others who have accessed the websites. This is of particular importance if the photos on the websites contain personal identifiers that can be linked to Alex.

- Alex should be advised to contact the appropriate law enforcement agency and in particular the computer crimes unit. Officers in these units usually have a particular level of expertise in addressing computer related issues. If possible, Alex should request a female officer in the crime unit or if there is not a female officer in the unit ask for one to be present. Of course, you can accompany Alex to the law enforcement agency as well to give moral support and to ensure proper attention to the matter.
- Alex should be advised to take protective measures similar to those where domestic abuse or stalking is alleged (i.e. using varying routes to and from school/work, stay with groups as much as possible, travel in well-lighted areas, have 911 on auto dial, change locks, etc.).
- A restraining order may be appropriate if Alex believes her ex poses a physical threat.

Emotional Support

- Inquire whether the victim has communicated the situation to her parents, trusted friends or relatives. This may provide insight into the level of support the victim can expect when and if the process proceeds and escalates into a public forum.
- Ask if she has sought professional counseling.

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Preservation of Evidence

Authentication of digital evidence is a matter that can present certain challenges. The newly enacted law, R.I. Gen. Laws § 11-64-3, requires showing that the perpetrator intentionally, and without authorization, disseminated a sexually explicit visual image of another person among other requirements. The challenge is to prove that the defendant was the one who actually posted such images. For example, an email may be tied to a particular IP address but not necessarily identify the actual sender, and once posted, it may be difficult to trace the travel of such posting, if possible at all. This is especially problematic where there are free anonymous routing network services such as Tor. RI Rules of Evidence 901, which deals with authentication of documents such as emails and web postings, requires a low threshold. The proponent of the evidence merely needs to show “it is ‘reasonably probable’ that the evidence is what its offeror [pro]claims it to be” ...and “that there is sufficient evidence that the jury ultimately might do so.” However, in light of what must be proven under the statute, one could rely on circumstantial evidence such as provided for in RI Rules of Evidence 901(b)(4) “Distinctive Characteristics and the Like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.” This makes preservation of emails and other electronic communications critical in identifying certain “markers” by the sender compared to other previously sent communications such as style, use of grammar, and selection of text, hopefully linking the sender to the communications in question.

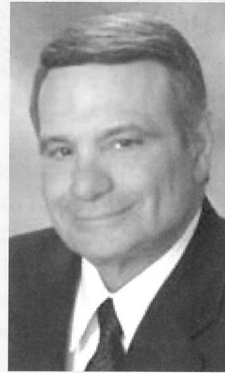
- Obtain electronic digital copies and hard copies of any electronic/digital files including emails, websites, and text messaging that relates to the photos. If the victim has provided hard copies, ask the victim, if possible, to note the precise time and date of the hard copy download. If you download the information include metadata including time and date. This is of particular importance where the digital evidence may have been destroyed, erased or removed from the digital source.
- Obtain all electronic digital copies of emails, text messages and website addresses where the photos appeared.
- Obtain hard and digital copies of all communications between the defendant and the victim.
- Print copies of the photos in PDF. Screenshots and actual photos of the screen are also an option. As with the other digital copies, note the precise time and date of the printout and the source. Another option is to utilize specialized software or hire a certified digital examiner. These options can, however, be costly.

Removal of Images from Websites

The Digital Millennium Copyright Act (DMCA) allows the owner of copyrighted material, or his/her authorized agents, a mechanism to require an unauthorized user of material to remove such materials. Since the photos were “selfies” it can be argued Alex, in essence, owned those photos. The DMCA provides for a “Take Down Notice.” The DMCA requires, among other provisions, that particular websites remove any unauthorized use of copyrighted material provided that the owner sends a signed (electronic or physical signature) notice with a link to the unauthorized posting along with a statement that the photos were published without authorization. Since many websites are Internet Service Providers (ISPs), they are not liable for copyright

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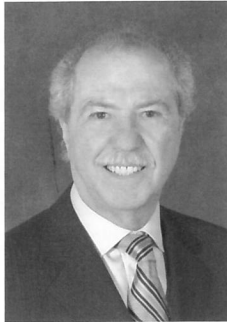
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violations as long as they comply with the DMCA "Take Down Notice" and they provide a mechanism to notify them of copyright violations.

Unfortunately, for many victims like Alex, removal of the photos from the websites is a short-lived sigh of relief. Although the photos may no longer be visible on the site, links to the photos remain on the internet and can be found using common search engines. To remove the active links, Alex must contact each individual search engine and request removal.

Complicating matters for Alex is the common "whack-a-mole" problem. Named for the childhood arcade game where a small animal sticks its head out of a hole and the player tries to hit it on the head with a mallet, only to have the animal's head reappear in another hole – the same problem occurs on the internet. In the case of Alex, users of a site with her photos may download the images and share them on other revenge type websites. Users on these sites often do this in return for site points. The amount of points given depends on the number of images shared. Users may "spend" their points by obtaining new images to download. It is not uncommon for a user to create a large collection of images to earn points in return. In addition, many sites have a practice of marking photos with a hash mark to protect against credit for already uploaded photos. Savvy users will sometimes make a slight modification to photos to avoid the hashtag. For victims like Alex, that means these photos may continue to be shared despite the DMCA. And while those sharing photos in this manner likely do not know the person in the images, the act of sharing continues the victimization for the person in the photo.



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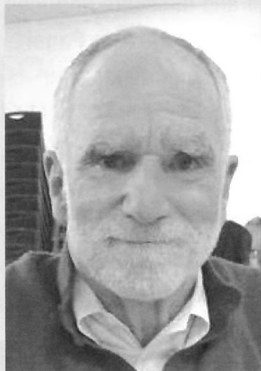
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Other legal remedies

One of the biggest challenges in these cases is that no one remedy seems to be a panacea.

While a revenge pornography criminal statute in Rhode Island is an enormous step in the right direction, there are often other issues for victims that remain unresolved. For example, many victims lose their jobs. Loss of employment may lead to anxiety and depression, as well as fear for one's own physical safety. While an order of protection in the District or Family Court may offer relief to a victim, there may be jurisdictional issues arising from the criminal nature of the act, as well as logistical challenges to serving an offender. The issuance of a protective order may be dependent on whether the court deems the mere posting of the image as creating a fear of imminent harm or whether something more is required, such as actual communication with the victim. Regardless of how the standard is applied by the courts, the potential inability to determine the true identity of the sender of an electronic communication with any degree of certainty could be problematic, making the issuance and serving a protective order difficult. Another legal remedy may include state privacy torts for invasion of privacy, and copyright law may be useful in cases where the victim (like Alex) is also the person who took the photograph or "selfie." But, these options assume that you are able to identify and find the perpetrator. And like the new revenge pornography statute, these legal options may mean that Alex, or another victim, has to take the witness stand and share very personal and detailed information about themselves – including identification of the photos. Victims are often concerned about the media attention

that cases like these may get and the negative impact it will have on their job prospects. Another issue for victims is the very real concern that jurors may hold victims partly or fully accountable for the photos ending up on the internet. The notion that these cases would never happen if the victim did not take or share the photo may be just the amount of victim shaming to excuse a defendant from criminal responsibility. On the upside, the arrest of an individual(s) using R.I. Gen. Laws § 11-64-3 sends the message to others in the online community that Rhode Island will hold offenders accountable for criminal behavior. As this article shares, the path to helping a client in this kind of case is not always clear or easy. For victims of unauthorized dissemination of indecent material, R.I. Gen. Laws § 11-64-3 offers a measure of accountability, criminal consequences, and protections to victims if they wish to come forward.

Self-Help

Acts of revenge pornography often leave victims feeling helpless and out of control. One way your client can help themselves is to take control of their online reputation. An online guide, such as one found on brandyourself.com, offers free advice to help users bury compromising material through search engine optimization. Recommendations help users to fill Google with positive content as a way to control what users see online and to minimize negative content. Following the steps provided will not only help your client to regain control of their online reputation but will also put them in the driver's seat to regaining control over their lives. ◇



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