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Using Copyright to Combat Revenge Porn

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USING COPYRIGHT TO COMBAT REVENGE PORN

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Over the past several years, the phenomenon of "revenge porn" – defined as sexually explicit images that are publicly shared online, without the consent of the pictured individual – has attracted national attention. Victims of revenge porn often suffer devastating consequences, including losing their jobs, but have had limited success using tort laws to prevent the spread of their images. Victims need a remedy that provides takedown procedures, civil liability for uploaders and websites, and the threat of money damages. Copyright law provides all of these remedies. Because an estimated 80 percent of revenge porn images are "selfies," meaning that the subject and the photographer are one in the same, the vast majority of victims can use copyright law to protect themselves. Although copyright is not a perfect solution, it provides a powerful tool to combat revenge porn.

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"Revenge is a kind of wild justice, which the more a man's nature runs to, the more ought law to weed it out."

- *Sir Francis Bacon, from* Essays Civil and Moral

INTRODUCTION

At twenty-five, Hunter Moore started the website IsAnyoneUp, where Moore posted sexually explicit photographs of the young women he met at parties.[1] But after a few months, Moore dramatically changed his business model: he began allowing *anyone* to submit sexually explicit images to the website.[2] Soon after, IsAnyoneUp hit more than 500 million page views and Moore netted more than $13,000 a month in advertising revenue and hired a lawyer, public relations consultant, server administrator, and two security specialists.[3] By twenty-seven, Moore—the "most hated person on the Internet"[4]—was indicted for identity theft and conspiring to hack into e-mail accounts to obtain nude photographs to feature on his website.[5]

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[1] Danny Gold, *The Man Who Makes Money Publishing Your Nude Pics*, THE AWL (Nov. 10, 2011), http://www.theawl.com/2011/11/the-man-who-makes-money-publishing-your-nude-pics [hereinafter Gold].

[2] Kashmir Hill, *Revenge Porn with a Facebook Twist*, FORBES (Jul. 6, 2011), http://www.forbes.com/sites/kashmirhill/2011/07/06/revenge-porn-with-a-facebook-twist/

[3] Camille Dodero, *Bullyville Has Taken Over Hunter Moore's IsAnyoneUp: Open Letter from Hunter Moore*, THE VILLAGE VOICE (Apr. 19, 2012), *available at* http://blogs.villagevoice.com/runninscared/2012/04/bullyville_isanyoneup.php; Gold *supra* note 1.

[4] *See* Charlotte Laws, *I've Been Called the Erin Brockovitch of Revenge Porn, and For the First Time Ever, Here Is My Entire Uncensored Story of Death Threats, Anonymous and the FBI*, JANEXO (Nov. 21, 2013), http://www.xojane.com/it-happened-to-me/charlotte-laws-hunter-moore-erin-brockovich-revenge-porn.

[5] Moore, along with alleged hacker Charles "Gary Jones" Evens, was indicted for conspiracy, identity theft, and unauthorized access of a protected computer to obtain information in violation

IsAnyoneUp featured more than nude images: Moore often included information about the individuals whose images were posted on the site, including full names, social media accounts, and other personal, identifying information.[6] Any person who shares intimate images with a partner is Schrödinger's victim: according to one survey, one in ten former partners threaten to post sexually explicit images of their exes online and an estimated sixty percent of those follow through.[7] The victims featured on revenge porn websites frequently receive solicitations over social media, lose their jobs, or live in fear that friends, lovers or employers will discover the images.[8]

The images hosted by websites like IsAnyoneUp are often referred to as "revenge porn." Defining revenge porn, however, is difficult – journalists and activists, lawyers and pundits have used the term revenge porn to refer to all manner of non-consensual pornography, including images captured without a victim's knowledge,[9] images of a victim's face transposed on a sexually explicit body,[10] hacked images,[11] and images uploaded by jaded ex-lovers.[12] This paper

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of the Computer Fraud and Abuse Act. Indictment at 1, United States v. Moore, No. CR13-0917 (C.D. Cal. Dec. 30, 2013).

[6] Camille Dodero, *Hunter Moore Makes a Living Screwing You*, THE VILLAGE VOICE (Apr. 4, 2012), *available at* http://www.villagevoice.com/2012-04-04/news/revenge-porn-hunter-moore-is-anyone-up/full.

[7] The survey included 1,182 online interviews amongst American adults ages 18-54. Kim Eichorn, *Lovers Beware: Scorned Exes May Share Intimate Data and Images Online*, MCAFEE (Feb. 4 2013), http://www.mcafee.com/us/about/news/2013/q1/20130204-01.aspx.

[8] Lorelei Laird, *Victims Are Taking On 'Revenge Porn' Websites For Posting Pictures They Didn't Consent To*, A.B.A. J. (Nov. 1, 2013, 4:30 AM CDT), http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c. According to a Cyber Civil Rights Initiative study, the vast majority of revenge porn victims are female. Danielle K. Citron, *Revenge Porn: A Pernicious Form of Cyber Gender Harassment*, THE BALT. SUN (Dec. 15, 2013), *available at* http://articles.baltimoresun.com/2013-12-15/news/bs-ed-cyber-gender-harassment-20131214_1_cyber-civil-rights-initiative-nude-images-harassment.

[9] Victims who were videotaped without their knowledge represent an estimated ten percent of victims, though these victims were not expressly discussed in the non-consensual pornography statistics. *Why One Mom's Investigation Might Actually Stop Revenge Porn*, ON THE MEDIA (Dec. 6, 2013), http://www.onthemedia.org/story/why-one-moms-investigation-might-actually-stop-revenge-porn/transcript [hereinafter *One Mom's Investigation*]. Those victims may be able to use state video voyeurism or Peeping Tom laws. *See Voyeurism Statutes 2009*, NATIONAL DEFENSE ATTORNEYS ASSOCIATION (Mar. 2009), http://www.ndaa.org/pdf/voyeurism_statutes_mar_09.pdf.

[10] An estimated twelve percent of non-consensual pornography was Photoshopped, or otherwise edited and manipulated. *One Mom's Investigation*, *supra* note 9.

defines revenge porn in terms of its content, not distribution: Revenge porn refers to sexually explicit images that are publicly shared online without the consent of the pictured individual.[13]

Victims' attempts to use harassment, stalking and privacy laws to punish uploaders and remove images are often met with apathy from local police.[14] Additionally, tort law is ill equipped to address the problem of revenge porn. Because websites are afforded a great deal of legal protection under Section 230 of the Communications Decency Act, which protects interactive service providers ("ISPs") from liability for user-generated content, tort actions against the websites that traffic in revenge porn are unlikely to succeed.[15] To further complicate matters, victims are not looking solely for injunctive relief, civil penalties, or monetary damages, which are the remedies available under tort law. Instead, victims' primary goal is to have the images removed as quickly as possible, with the tort remedies coming into play as threats for non-compliance with an order to remove the images in question. Of the states with legislation expressly applicable to revenge porn, none provide such a radical remedy. [16] Some activists argue that there are only two possible solutions: amend Section 230 to create liability for

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[11] Roughly forty percent of non-consensual pornography was hacked. *Id.* These victims may be able to use the Computer Fraud and Abuse Act. *See* 18 U.S.C. § 1030(a)(2) (2012).

[12] The remaining 36 percent constitutes the subset of revenge porn analyzed by this Note.

[13] The author developed this definition of revenge porn for Wikipedia. *Revenge Porn*, WIKIPEDIA (Version Oct. 8, 2013, Amphiggins) *available at* https://en.wikipedia.org/w/index.php?title=Revenge_porn&oldid=593224773. This definition was adopted by the Criminal Court of the City of New York. People v. Barber, 2014 NY Slip. Op. 50193(U) (Feb. 18, 2014), *available at* http://www.courts.state.ny.us/reporter/3dseries/2014/2014_50193.htm.

[14] *See* Maureen O'Connor, *The Crusading Sisterhood of Revenge Porn Victims*, N.Y. MAG. (Aug. 29, 2013), *available at* http://nymag.com/thecut/2013/08/crusading-sisterhood-of-revenge-porn-victims.html.

[15] 47 U.S.C. § 230(c) (1998).

[16] *See infra* Part II. Israel, France, the Phillipines, and the Australian state of Victoria also have laws applicable to revenge porn. *See*, *e.g.,* C. PÉN. 226-1 (Fr.); An Act Defining and Penalizing the Crime of Photo and Video Voyeurism, Prescribing Penalties Therefor, and for Other Purposes, Rep. Act No. 9995, § 4 (2009) (Phil.); *see also* '*Revenge Porn' Outlawed: Israel and Australia Ban Spurned Lovers from Posting Compromising Photos of Their Exes*, DAILY MAIL (Jan. 8, 2014)

http://www.dailymail.co.uk/femail/article-2535968/Revenge-porn-outlawed-Israel-state-Australia-ban-spurned-lovers-posting-compromising-photos-exes.html.

ISPs or pass new laws with hefty penalties for revenge porn uploaders and traffickers.[17]

However, there is already a federal law that provides *all* of these remedies: copyright law. Copyright establishes a uniform method for revenge porn victims to remove their images, target websites that refuse to comply with takedown notices and, in some cases, receive monetary damages. A survey of 864 revenge porn victims revealed that more than eighty percent of revenge porn images are "selfies," meaning that the author and the subject are the same.[18] For this portion of victims, copyright law can be used to combat revenge porn. While not a perfect solution, copyright requires no amendments to Section 230, no reinterpretation of settled doctrine, no abridgment of free speech rights and no new criminal laws.[19] Thus, it is the most efficient and predictable means of protecting victims of revenge porn.

In Part I, I examine how Section 230 protects revenge porn traffickers, like IsAnyoneUp, from liability. Part II discusses why harassment, stalking and privacy laws are often inadequate means of fighting revenge porn. In Part III, I explain why existing and proposed legislation presents problems for both victims and free speech. Finally, Part IV outlines why copyright functions as a solution to the revenge porn problem.

I
LEGAL PROTECTION FOR REVENGE PORN: THE COMMUNICATIONS DECENCY ACT SECTION 230

The damage caused by revenge porn is inextricably tied to the nature of the Internet. Once a single, sexually explicit image is posted, the uploader loses control

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[17] Danielle K. Citron and Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. (forthcoming 2014). Amending existing law, or creating new criminal ones, to tackle revenge porn creates additional problems for free speech and pornography, and poses a threat to websites, aggregators, and other Internet-based businesses. *See* Sarah Jeong, *Revenge Porn Is Bad. Criminalizing It Is Worse*, WIRED (Oct. 28, 2013), http://www.wired.com/opinion/2013/10/why-criminalizing-revenge-porn-is-a-bad-idea.

[18] *Proposed CA Bill Would Fail to Protect up to 80% of Revenge Porn Victims,* CYBER CIVIL RIGHTS INITIATIVE (Sept. 10, 2013), http://www.cybercivilrights.org/press_releases[hereinafter *CCRI Survey*]. The remaining twenty percent of non-selfie revenge porn often falls into other categories of non-consensual pornography in which other federal laws are applicable.

[19] New revenge porn-specific legislation poses a threat to free speech by imprecise or overbroad drafting of new laws or amendments to old ones. For an in-depth discussion about the clash between free speech and revenge porn, *see infra* Part III.

of the image. Victims are often able to identify the original uploader based on whom the original image was shared with,[20] but hiring a lawyer and obtaining an injunction against the uploader does not protect the victim from posted, cached or linked versions of the image on websites.[21] Although uploaders may be subject to tort law for posting the images, Section 230 of the Communications Decency Act ("CDA") makes it nearly impossible for victims to go after traffickers of revenge porn using the same laws.

In the early 1990s, lawyers and young companies were still questioning how to classify online services like message boards and forums, chat rooms and listservs. Were ISPs like digital stores that sold newspapers or like the media companies that published them?[22] If ISPs were more analogous to one than the other, what would that mean for liability? In 1995, the New York Supreme Court answered both questions: ISP Prodigy was more like a publisher because Prodigy exercised some "editorial control" over user-generated content and thus could be held liable for the defamatory statements made by one of its users.[23]

To combat the perverse incentive of *rewarding* ISPs that did not monitor content – and to protect the "vibrant and competitive free market" of the Internet – Congress enacted Section 230,[24] which immunizes ISPs from being held liable for content generated by third parties.[25] ISPs may even engage in some amount of reviewing, editing, withdrawing, postponing or altering content – like Prodigy did,

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[20] *See, e.g.,* Erica Goode, *Victims Push Laws to End Online Revenge Posts*, N.Y. TIMES (Sept. 23, 2013), *available at* http://www.nytimes.com/2013/09/24/us/victims-push-laws-to-end-online-revenge-posts.html?_r=0.

[21] Hunter Moore encouraged users to repost the images he shared on IsAnyoneUp. *One Mom's Investigation*, *supra* note 9.

[22] *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *3 (Sup. Ct., Nassau County1995) ("In short, the critical issue to be determined by this Court is whether … PRODIGY exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper."); *see also* Conor Clarke, *How the Wolf of Wall Street Helped Write the Rules for The Internet*, SLATE (Jan. 7, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/01/the_wolf_of_wall_street_and_the_stratton_oakmont_ruling_that_helped_write.html.

[23] *Stratton Oakmont, Inc.,* 1995 WL 323719 at *2.

[24] *See* 47 U.S.C. § 230(b)(1)-(2) (1998).

[25] *Id.* § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

before Section 230 was passed – without sacrificing immunity.[26] The solution to revenge porn is not upsetting the broad protection afforded by Section 230, but rather understanding the limitations that Section 230 places on revenge porn victims' remedies.

A. Section 230 Shields Revenge Porn Sites From Tort Liability

Although Section 230 broadly protects websites from liability, it does not give ISPs carte blanche to allow any and all content without concern for liability. ISPs are not required to monitor or proactively remove user-generated content, but Section 230 immunity does not extend to violations of child pornography, obscenity,[27] or copyright laws.[28] Similarly, Section 230 immunity does not apply if the ISP is also an "*information* content provider."[29] Immunity does not extend to original information or content that an ISP creates or develops.

Websites that traffic in revenge porn do not create the content they post – victims or uploaders create the images.[30] When revenge porn websites post user-submitted images, that content is, in the language of Section 230, "information provided by another information content provider."[31] Because revenge porn websites are not taking on the role of information content providers, Section 230 protection will apply and render nearly any lawsuit against the ISPs for stalking, harassment, defamation, or invasion of privacy dead on arrival. Revenge porn websites may even exercise some discretion over posted images without losing Section 230 protection.[32]

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[26] Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997). ("[L]awsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions-such as deciding whether to publish, withdraw, postpone or alter content-are barred.").

[27] 47 U.S.C. § 230(e)(1) (1998). Explaining why categorizing revenge porn as "obscenity" could open a Pandora's box of problems goes beyond the scope of this paper. For a sense of why using obscenity law might be problematic, *see* Amy M. Adler, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359, 1362 (1990).

[28] It also does not apply to harassing telephone calls made in Washington, D.C., among other limited carve-outs. 47 U.S.C. § 230(e)(2) (1998).

[29] *Id*. § 230(f)(3).

[30] *CCRI Survey*, *supra* note 18.

[31] 47 U.S.C. §230(c)(1) (1998).

[32] The content-related exceptions to Section 230 protection for posting obscenity, child pornography and copyright infringement still apply. For that reason, the two "security experts" who worked for Moore were tasked with ensuring that he did not post images of under-aged victims. Gold, *supra* note 1.

In 1997, the Fourth Circuit set the tone for courts' broad approach to interpreting Section 230.[33] Kenneth Zeran sued America Online ("AOL") for statements posted by third parties to an AOL bulletin that stated he was selling shirts with tasteless slogans about the Oklahoma City bombings and included his personal telephone number.[34] The court refused to hold AOL held liable as an *information* service provider, echoing Congress' findings:

> [the] specter of tort liability in an area of such prolific speech would have an obvious chilling effect … Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.[35]

Courts continue to interpret Section 230 to comport with Congress' policy decision not to chill harmful online speech by immunizing interactive service providers that "serve as intermediaries for other parties' potentially injurious messages" from tort liability."[36]

B. Recent Court Decisions Narrowing the Scope of Section 230 Are Anomalous

In *Sarah Jones v. Dirty World Entertainment*, a Kentucky district court held that Section 230 immunity "may be forfeited if the site owner invites the posting of illegal materials or makes actionable postings itself."[37] The defendant managed TheDirty.com, a website which invites users to submit images – many of which are sexually explicit – and share gossip about individuals featured on the website.

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[33] *Zeran*, 129 F.3d at 330.

[34] *Id.* at 329.

[35] *Id.* at 331.

[36] *Id.*; *see also* Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 669 (7th Cir. 2008) ("[Section] 230(c)(1) provides broad immunity from liability for unlawful third-party content. That view has support in other circuits.") (internal quotations omitted) (citing Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997); Ben Ezra, Weinstein & Co. v. America Online, Inc., 206 F.3d 980 (10th Cir. 2000); Green v. America Online, 318 F.3d 465 (3d Cir.2003); Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003); Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413 (1st Cir. 2007)).

[37] Jones v. Dirty World Entm't Recordings, LLC, 766 F. Supp. 2d 828, 836 (E.D. Ky. 2011), *aff'd*, Jones v. Dirty World Entertainment Recordings, LLC, 840 F. Supp. 1008 (E.D. Ky. 2012) (citing Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157 (9th Cir. 2008)).

Even though TheDirty.com did not create the images, the court determined that the website could not use Section 230 as a shield against liability because it "invited and accepted postings" that were alleged to be either libelous per se or invasions of the individuals' right of privacy."[38] The court ignored the plain text and history of Section 230 when it later asserted that ISPs lost immunity if they "invite invidious postings, elaborate on them with comments of their own, and call upon others to respond in kind."[39]

In nearly identical pending tort claims against TheDirty.com, district courts in Arizona and Missouri *declined* to hold TheDirty.com and its corporate parent liable for comments on the site.[40] *Sarah Jones* and the *en banc* Ninth Circuit decision it relied upon, (*Fair Housing Council of San Fernando Valley v. Roomates.com*) remain outliers among Section 230 cases.[41]

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[38] *Id*. at 832. The court denied defendants' for judgment as a matter of law. Jones v. Dirty World Entm't Recordings, LLC, 840 F. Supp. 2d 1008, 1013 (E.D. Ky. 2012). TheDirty.com is appealing to the Sixth Circuit. Kashmir Hill, *Big Deal For Internet Law: Ex-Bengals Cheerleader Sarah Jones Wins Suit Against The Dirty Over 'Reputation-Ruining' Comments*, FORBES (July 11, 2013), http://www.forbes.com/sites/kashmirhill/2013/07/11/big-deal-for-internet-law-ex-bengals-cheerleader-wins-suit-against-the-dirty-over-reputation-ruining-comments.

[39] Jones v. Dirty World Entm't Recordings, LLC, No. 09-219-WOB, 2013 WL 4068780 (E.D. Ky. Aug. 12, 2013); *Cf.* Doe v. MySpace, Inc., 528 F.3d 413, 419 (5th Cir.2008) ("[S]o long as a third party willingly provides the essential published content, the interactive service provider receives full immunity [under Section 230] regardless of the specific editing or selection process.") (citations omitted) (internal quotation marks omitted).

[40] *See* Dyer v. Dirty World, LLC, No. CV-11-0074-PHX-SMM, 2011 WL 2173900 (D. Ariz. June 2, 2011); S.C. v. Dirty World, LLC, No. 11-CV-00392-DW, 2012 WL 3335284 (W.D. Mo. Mar. 12, 2012) ("[M]erely encouraging defamatory posts is not sufficient to defeat CDA immunity."). Although the Arizona district court claimed not to be addressing Section 230 liability expressly, its analysis of provider versus publisher indicates otherwise. As Eric Goldman noted, "[I]t appears that this is a 47 USC 230 case where the court denies it's relying on 47 USC 230." *TheDirty Defeats Privacy Invasion Lawsuit–Dyer v. Dirty World*, TECH. AND MKTG. L. BLOG (June 4, 2011), http://blog.ericgoldman.org/archives/2011/06/thedirty_defeat.htm.

[41] *See* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008) (holding that Roommates.com, which provided dropdown menus users could select to reflect housing-mate and apartment-mate preferences, was not protected by Section 230).

Some advocates have suggested that Section 230 ought to be amended to better protect victims of revenge porn,[42] whereas others have heralded the interpretation adopted by *Sarah Jones* as a much-needed limitation on Section 230 protection.[43] But as the Ninth Circuit recognized in perhaps the earliest digital revenge porn case, "the language of the statute that defines and enacts the concerns and aims of Congress; a particular concern does not rewrite the language."[44] Relying on courts to misinterpret Section 230 to create liability for revenge porn websites is a dangerous way to empower victims. By narrowing the protection of Section 230 to target revenge porn websites, courts and advocates are necessarily narrowing the protection afforded to websites that depend on user-generated content, like Wikipedia, Yelp, and Wordpress.[45]

II
EXISTING TORT LAW IS ILL EQUIPPED TO HANDLE REVENGE PORN

The experiences of victims of revenge porn – living in fear that their identities will be discovered, concerned with repercussions in both their professional and personal lives, and worrying that the images will reappear – are similar to those of victims of harassment, stalking, and invasion of privacy.[46] Despite this similarity, the remedies that accompany the torts of harassment, stalking, and invasion of privacy are unlikely to provide a meaningful remedy for revenge porn victims. Even if victims are successful in bringing a civil lawsuit against the uploader, Section 230 prevents them from going after the websites that continue to distribute their images.

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[42] "By writing Section 230 into law, Congress left . . . Internet harassment victims vulnerable and helpless." Ann Bartow, *Internet Defamation As Profit Center: The Monetization of Online Harassment*, 32 HARV. J. L. & GENDER 383, 417-18 (2009).

[43] Mary Anne Franks, *The Lawless Internet? Myths and Misconceptions About CDA Section 230*, HUFFINGTON POST (Dec. 18, 2013), http://www.huffingtonpost.com/mary-anne-franks/section-230-the-lawless-internet_b_4455090.html (discussing the merits of a *Sarah Jones*-type interpretation of Section 230).

[44] Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1097 (9th Cir. 2009) (refusing to hold Yahoo! liable for false accounts featuring Cecilia Barnes' name and nude pictures created by her ex-boyfriend, pursuant to Section 230).

[45] *See CDA 230 Success Cases Series*, EFF (2013), https://www.eff.org/issues/cda230/successes (featuring interviews with legal counsel about the importance of broad Section 230 protections).

[46] Victims' descriptions of feeling victimized when images reappear or strangers approach them in public because of the images is eerily reminiscent of the "haunting harm" described by child pornography victims. *See* New York v. Ferber, 458 U.S. 747 (1982).

A. Harassment and Stalking

Harassment laws typically require the aggressor to communicate (or cause communication) with the victim in a way that is likely to cause annoyance or alarm.[47] A single communication can constitute harassment.[48] Although revenge porn websites often frame victims' images with uploaders' demeaning or humiliating commentary, those comments are not direct communication with victims any more than a Letter to the Editor about Hillary Clinton is conversing with Ms. Clinton herself.

To be found guilty of stalking, an aggressor must intentionally engage in a "course of conduct" that is likely to cause fear of some material harm.[49] Nearly all states interpret "course of conduct" to mean that the behavior is repetitive or ongoing.[50] The harm caused by revenge porn, however, is accomplished through the one-off act of uploading a sexually explicit image.[51] An image's viral spread only mirrors an ongoing act or repetitive actions –any harm that results (such as the fear of losing one's job or destroying personal relationships) is caused by the Internet's magnification of a *single act*, rather than a course of conduct by the website.[52]

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[47] Though many states have online-specific harassment and stalking statutes, some continue to apply existing civil laws to digital torts. *See generally State Cyberstalking and Cyberharassment Laws*, NAT'L CONFERENCE OF STATE LEGIS. (Dec. 5, 2013), http://www.ncsl.org/research/telecommunications-and-information-technology/cyberstalking-and-cyberharassment-laws.aspx.

[48] *Id.*

[49] Many statutes do not define "material harm." The specific standards vary amongst the states. *Compare* N.Y. PENAL LAW § 120.45 *with* CAL. PENAL CODE § 646.9. All 50 states and Washington, D.C. have anti-stalking laws. *State and Federal Stalking Laws*, BERKMAN CENTER FOR INTERNET AND SOC'Y (Nov. 6, 2013), http://cyber.law.harvard.edu/vaw00/cyberstalking_laws.html.

[50] *See generally* Naomi Harlin Goodno, *Cyberstalking, A New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72 MO. L. REV. 125, 134 (2007).

[51] *See* Somini Sengupta, '*Revenge Porn' Could Be Criminalized in California*, N.Y. TIMES (Aug. 27, 2013), http://bits.blogs.nytimes.com/2013/08/27/revenge-porn-could-be-criminal-offense-in-california.

[52] It is unclear whether uploading the same image to different sites, several images to the same site or repeatedly re-uploading images in response to removals would sufficiently establish a "course of conduct."

More than one third of states' stalking statutes also require the aggressor to make a "credible threat,"[53] which can almost never be shown without direct contact between the aggressor and the victim.[54] The federal cyberstalking statute takes the "credible threat" requirement one step further, criminalizing only communications that contain a "threat to injure the person of another."[55]

Revenge porn websites often employ aggressive, hyper-sexualized language, including frequent references to rape and assault, to discuss featured individuals.[56] However, courts have interpreted what constitutes a "threat to injure" quite narrowly so as not to encroach on the free speech protections afforded by the First Amendment.[57] In *United States v. Baker*, a federal district court judge dismissed the government's claim against a man who corresponded via e-mail with an unidentified Internet acquaintance about brutally raping a female classmate because his conversations were shared fantasies that could not "possibly amount to a true threat."[58]

B. Privacy Torts

The right to privacy is not rigidly defined, and thus may be more capable of responding to changing technology than codified harassment and stalking laws. The "right to privacy" is covered by four privacy torts, which often overlap: false light, misappropriation, invasion of privacy, and public disclosure of private fact.[59]

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[53] States' approaches to assessing what constitutes a "credible threat" differ. For deeper analysis, *see Goodno supra* note 50, at 196.

[54] *Id.*

[55] 18 U.S.C. § 875(c) (2012).

[56] Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 64 (2009); *see also* Azy Barak*, Sexual Harassment on the Internet*, 23 SOC. SCI. COMPUTER REV. 77, 80 (2005) (discussing the frequency of rape-related comments and threats directed at women on the Internet).

[57] *See* Bonnie D. Lucks, *Electronic Crime, Stalkers, and Stalking: Relentless Pursuit, Harassment and Terror in Cyberspace*, *in* STALKING CRIMES AND VICTIM PROTECTION: PREVENTION, INTERVENTION, THREAT ASSESSMENT AND CASE MANAGEMENT 179 (Joseph A. Davis ed., 2001).

[58] United States v. Baker, 890 F. Supp. 1375, 1388-90 (E.D. Mich. 1995), *aff'd sub nom*. United States v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997).

[59] Although many states have additional privacy laws, Dean Prosser formulated the distinctions among the privacy torts that was adopted by the Restatement of Torts. *See* William L. Prosser, *Privacy,* 48 CALIF. L. REV. 383 (1960). Revenge porn lawsuits tend to focus on one or more privacy torts.

Frequently, one or more of these privacy torts are alleged in the complaints of lawsuits against revenge porn uploaders and websites.[60]

1. False Light

False light requires that the "publicized matter" is false, in the sense that the publicity attributes false beliefs, characteristics, or conduct to the victim.[61] Non-consensual pornography created through digitally manipulated images of victims is entirely false because the victim never posed for the image. Non-consensual pornography obtained through hacking, may be similarly false if the victim never shared the images with anyone else. False light claims present an interesting riddle for victims of revenge porn who both posed for and consented to sharing the images with at least one other person: is revenge porn "false?"

The earliest non-consensual pornography lawsuit[62] involved a *Hustler Magazine* spread featuring sexual photographs that had been stolen and submitted to the magazine.[63] The Fifth Circuit determined that *Hustler* falsely represented that the subject of the photographs "consented to the submission and publication [of her photographs] in a coarse and sex-centered magazine."[64] When presented with a nearly identical case two years later, the Sixth Circuit granted summary

[60] *See, e.g.*, Compl. at 5-6, Jacobs v. Seay, No. 2013-013626-CA-01 (Fla. Miami-Dade County Ct. Apr. 18, 2013) (alleging invasion of privacy and public disclosure of private facts); Compl. at 3-4, Wells v. Avedisian, No. 112013CA0014570001XX (Fla. Collier County May 13, 2013) (alleging invasion of privacy and publication of private facts); Compl. at 4, Toups v. GoDaddy, No. D130018-C (Tex. Orange County Ct. Jan. 18, 2013) (alleging intrusion upon the right to seclusion, public disclosure of private facts, wrongful appropriation of name or likeness and false light).

[61] RESTATEMENT (SECOND) OF TORTS § 652E cmt. a (1977).

[62] Alexa Tsoulis-Reay, *A Brief History of Revenge Porn*, N.Y. MAG. (Jul. 21, 2013), http://nymag.com/news/features/sex/revenge-porn-2013-7.

[63] Wood v. Hustler Magazine, Inc., 736 F.2d 1084 (5th Cir. 1984), *cert. denied*, 469 U.S. 1107 (1985); *see also* Douglass v. Hustler Magazine, Inc., 769 F.2d 1128 (7th Cir. 1985) (refusing to dismiss plaintiff's false light claim because the re-publication of her provocative photos, which appeared in another publication, falsely "insinuate[d] that she is the kind of person willing to be shown naked in Hustler.").

[64] Judge Reavely also noted that the publication falsely attributed a "lewd fantasy" to the victim, which is mirrored in the explicit, demeaning comments that frequently accompany revenge porn. *Id.* at 1089.

judgment in favor of *Hustler* because the victim was unable to show that the magazine acted with actual malice by deciding to publish the images.[65]

It is easy to analogize between the "false light" of indicating that a woman consented to pose for *Hustler* and the "false light" that she consented to appear on a pornographic website. Because revenge porn derives its appeal from being non-consensual and "false," victims may be able to convince a court that any website trafficking in revenge porn is *per se* acting with reckless disregard for the images' truth. Yet, few courts have grappled with how false light operates in the context of non-consensual pornography and each state's statutes and governing case law regarding revenge porn differ; thus, facts that may protect a victim in California may fail completely in New York. For victims of revenge porn, false light is a capable fix for the few, not the many.

2. Misappropriation

Misappropriation is the appropriation of a person's name or likeness by another.[66] Despite the exploitative character of revenge porn, misappropriation only applies when the name or likeness has been used to benefit the appropriator, reputationally, socially, or commercially. [67] Revenge porn serves as a way to humiliate victims, rather than to benefit uploaders, which pushes most victims beyond the bounds of misappropriation protection.[68]

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[65] Ashby v. Hustler Magazine, Inc., 802 F.2d 856, 860 (6th Cir. 1986). The Supreme Court decision in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 259 (1986), requiring plaintiffs in actions governed by an actual malice standard—including defamation and false light plaintiffs—to demonstrate actual malice with "convincing clarity" to survive summary judgment, was decided just before *Ashby*. The *Liberty Lobby* decision perhaps explains the Sixth Circuit dismissal, and the Fifth Circuit's change of course shortly thereafter. *See* Faloona by Fredrickson v. Hustler Magazine, Inc., 799 F.2d 1000 (5th Cir. 1986).

[66] RESTATEMENT (SECOND) OF TORTS § 652C (1977); *see also* Digital Media Law Project, *Using the Name or Likeness of Another*, BERKMAN CTR. FOR INTERNET AND SOC'Y (July 30, 2008), http://www.dmlp.org/legal-guide/using-name-or-likeness-another.

[67] If no value has been appropriated, there is no tort. RESTATEMENT (SECOND) OF TORTS § 652C cmt. c (1977). New York, Oklahoma, Utah and Virginia require that the misappropriation be for "advertising, or for purposes of trade." *Id*.

[68] State-specific misappropriation laws often define "benefit" in more stringent terms. *See, e.g.* N.Y. CIV. RIGHTS LAW § 50 (limiting to advertising or purposes of trade). It is not clear how courts might evaluate page views or advertising revenues in misappropriation claims against revenge porn websites.

3. Invasion of Privacy and Public Disclosure of Private Fact

To prevail under either an invasion of privacy or public disclosure of private fact theory, victims must show a "reasonable expectation of privacy" in the images.[69] Social norms determine whether the same sexually explicit image is perceived as a courtship ritual or as revenge porn. Despite identical content, the *context* in which the image is shared differs,[70] a phenomenon that privacy theorist Helen Nissenbaum has termed "contextual integrity." Nissenbaum has written extensively about contextual integrity, which explains why an employee may feel comfortable sharing details about her personal life with Facebook friends, but outraged if those details were shared with her co-workers;[71] why that same person may readily share her age with her doctor, but feel uneasy if her prospective employer were to ask the same question; and why she may share a sexually explicit selfie with a lover, but feel as if her privacy has been violated if that image were shared with thousands of strangers on the Internet.[72] Contextual integrity emphasizes *how* information is shared, rather than what it reveals.

No courts have yet addressed the issue of whether revenge porn victims have a reasonable expectation of privacy in the images they have shared. As the District of Puerto Rico stated, "[a] reasonable person does not protect his private pictures by placing them on an Internet site," even if those images are unavailable to the general public or protected by passwords.[73] Other courts have

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[69] Kristin M. Beasley, *Up-Skirt and Other Dirt: Why Cell Phone Cameras and Other Technologies Require A New Approach to Protecting Personal Privacy in Public Places*, 31 S. ILL. U. L. J. 69, 93 (2006) ("A plaintiff's ability to recover on an invasion of privacy tort is premised on her having had a reasonable expectation of privacy."); *see also* RESTATEMENT (SECOND) OF TORTS §§ 652D & 652B (1977).

[70] "[F]inely calibrated systems of social norms, or rules, govern the flow of personal information in distinct social contexts (e.g. education, health care, and politics)." Helen Nissenbaum, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY AND THE INTEGRITY OF SOCIAL LIFE 2-3 (2010). *See generally* Jaime A. Madell, Note, *The Poster's Plight: Bringing the Public Disclosure Tort Online*, 66 N.Y.U. ANN. SURV. AM. L. 895 (2011).

[71] *Id.*

[72] As one victim put it after a sexually explicit image she shared with her boyfriend went viral, "I didn't ever think he'd ever use this to try to ruin my life." Gilma Avalos, *Miami Woman Fighting to Outlaw Revenge Porn*, NBC MIAMI (Oct. 31, 2013), http://www.nbcmiami.com/news/local/Miami-Woman-Fighting-To-Outlaw-Revenge-Porn-229983581.html?akmobile=o.

[73] United States v. Gines-Perez, 214 F. Supp. 2d 205, 225 (D.P.R. 2002) (declining to find that a criminal defendant had a reasonable expectation of privacy in images posted to a password-protected, non-public Internet site under the Fourth Amendment).

followed suit.[74] Victims of revenge porn may find themselves subject to a similarly flawed analysis: a reasonable person does not protect private pictures by sharing them with others via text message, e-mail or other means. Courts may not be prepared to rejigger the privacy torts to reflect that *context* determines the extent to which an expectation of privacy is reasonable.

III
OVERBROAD REVENGE PORN LEGISLATION THREATENS FREE SPEECH

Although many civil and criminal laws apply to revenge porn,[75] some scholars argue that using those laws is often hindered by disinterested law enforcement, and suggest that new criminal legislation is necessary to protect victims.[76] If police and prosecutors are reluctant to acknowledge that the activities of revenge porn uploaders and traffickers may violate the law, however, additional legislation may have no affect on victims' remedies.[77] Yet, the arrests of Moore and another revenge porn website operator, Kevin Bollaert, indicate that law enforcement's attitude toward investigating revenge porn using existing laws is changing.[78]

Generally, the First Amendment prevents the government from restricting expression based on "its message, its ideas, its subject matter, or its content."[79] As the Supreme Court explained in *United States v. Stevens*, the First Amendment has only accommodated restrictions on the content of speech in a handful of limited areas (including obscenity, defamation, fraud, incitement) and has never interpreted the First Amendment to include a "freedom to disregard these

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[74] *See* Woodrow Hartzog and Frederic Stutzman, *The Case for Online Obscurity*, 101 CALIF. L. REV. 1, 26 (2013) ("[T]he type of analysis employed in Gines-Perez persists.").

[75] *See* Citron, *supra* note 17 at 3.

[76] *Id.*

[77] *See* Derek Bambauer, *Exposed*, 98 MINN. L. REV. (forthcoming 2014).

[78] Both men were indicted under existing criminal laws. Neither was charged under the California revenge porn law because the alleged crimes occurred before the law was enacted. *See* United States v. Moore, No. CR13-0917 (C.D. Cal. Dec. 30. 2013). Bollaert was arrested and charged with 31 felony counts, in part because his website, UGotPosted, accepted money in exchange for removing victims' images from the site. *Attorney General Kamala D. Harris Announces Arrest of Revenge Porn Website Operator,* CALIF. OFFICE OF THE ATTORNEY GEN. (Dec. 10, 2013), https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-arrest-revenge-porn-website-operator.

[79] Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 573 (2002) (internal quotation marks omitted).

traditional limitations." [80] The Court has held that offensive,[81] embarrassing,[82] and disgusting[83] speech warrants protection, even when it causes tangible harm.[84] Even so, nine states – Alaska, Arizona, California, Georgia, New Jersey, Idaho, Utah, Virginia, and Wisconsin – have enacted targeted revenge porn that criminalizes the distribution of intimate images of another person without that person's consent.[85]

From a First Amendment perspective, targeted revenge porn legislation occupies a tricky space: imprecisely drafted revenge porn legislation protects many victims but risks criminalizing protected expression,[86] but whittling down legislation to avoid trammeling free speech excludes many of the victims the law intended to protect.[87] Although broad legislation makes it easier to prosecute revenge porn uploaders and traffickers, it could also have unintended consequences on protected speech by criminalizing distributions made in the public interest,[88]

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[80] United States v. Stevens, No. 08–769, slip op. at 5 (3rd Cir. Apr. 20, 2010) (internal citations omitted).

[81] Carey v. Population Servs., Int'l, 431 U.S. 678, 701 (1977) ("At least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.").

[82] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982) ("Speech does not lose its protected character, however, simply because it may embarrass others . . . . ").

[83] United States v. Stevens, 559 U.S. 460 (2010) (striking down an overbroad statute criminalizing crush videos, "which feature the torture and killing of helpless animals and are said to appeal to persons with a specific sexual fetish," on First Amendment grounds).

[84] *See* Bambauer, *supra* note 77, at 54.

[85] For an up-to-date digest of states' proposed and enacted revenge porn legislation, see STATE REVENGE PORN LEGISLATION, NAT'L CONF. STATE LEG. (Apr. 16, 2014), http://www.ncsl.org/research/telecommunications-and-information-technology/state-revenge-porn-legislation.aspx.

[86] The American Civil Liberties Union, Electronic Frontier Foundation and Digital Media Law Project at Harvard opposed broader drafts of the California legislation out of concern that the law would "clamp down" on free speech. Laura Sydell, *Calif. Bans Jilted Lovers From Posting 'Revenge Porn' Online*, NPR'S ALL TECH CONSIDERED (Oct. 2, 2013), *available at* http://www.npr.org/blogs/alltechconsidered/2013/10/02/228551353/calif-bans-jilted-lovers-from-posting-revenge-porn-online.

[87] As California Senator Anthony Cannella, who authored the revenge porn bill that was ultimately enacted, put it, "My bill would have died if we didn't [limit the scope of the law]." *Id.*

[88] The Arizona law, for example, would apply to journalists' coverage of New York mayoral candidate Anthony Weiner's second sexting scandal. H.B. 2515, 51st Leg., 2d Reg. Sess. (Ariz. 2014), *available at* http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/51leg/2r/bills/hb2515p.htm&Session_ID=112.

linking to revenge porn websites for purposes of critique,[89] or disclosures made to document the harassment itself.

IV
COPYRIGHT CAN COMBAT REVENGE PORN

Even if revenge porn victims were able to successfully state claims for harassment, stalking or invasion of privacy, they may still be unable to remove their images from the Internet. An injunction could force uploaders to remove the images and pay monetary damages, but subsequent postings and re-postings would remain untouched because Section 230 protects the websites/ISPs hosting the content.

Copyright is not a perfect solution but, unlike the aforementioned alternatives, victims' invocation of copyright law does not threaten to erode the protections of free speech or Section 230, nor does it shoehorn revenge porn liability into existing tort schemes or create new criminal liability. The works protected, rights afforded, and remedies provided by copyright law empower the vast majority of victims to protect themselves.[90]

A. Authoring and Owning the Selfie

When Hunter Moore was asked whether the images he posted on IsAnyoneUp violated copyright laws, he offered this fascinatingly misguided explanation:

> [B]ut when you take a picture of yourself in the mirror, it was intended for somebody else so, actually, the person you sent the picture to actually owns that picture, because it was intended as a gift. So whatever the - that person does with the picture, you don't even

[89] An early draft of the California law would have applied to linking to revenge porn websites for purposes of critique. S.B. 255, 2013-2014 Sess. (Feb. 13, 2013), *available at* http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0251-0300/sb_255_bill_20130507_amended_sen_v98.htm.

[90] *See* Amanda Levendowski, *Our Best Weapon Against Revenge Porn: Copyright Law?*, THE ATLANTIC (Feb. 4, 2014), *available at* http://www.theatlantic.com/technology/archive/2014/02/our-best-weapon-against-revenge-porn-copyright-law/283564.

> own the nude picture of yourself anymore … So that's how I'm protected.[91]

The majority of revenge porn images are "selfies," like the ones described by Moore.[92] Copyright law protects any original work of authorship fixed in a tangible medium of expression, including photographs.[93] As the authors of their selfies, the vast majority of victims thereby own the copyright in their images.[94]

Revenge porn features sexually explicit imagery, and neither Congress nor the Supreme Court have addressed the copyrightability of pornography. However, as the Fifth Circuit decision in *Mitchell Brothers Film Group v. Cinema Adult Theater* explained, "the protection of all writings, without regard to their content, is a constitutionally permissible means of promoting science and the useful arts."[95] Subsequent decisions and treatises have recognized that the author of a sexually explicit work is afforded the full panoply of copyright protections.[96] Hence, the authors of a sexy selfie and a *New York Times* bestseller both retain the exclusive rights to their respective works, including the rights of reproduction and display.

B. Positive and Negative Rights of Copyright Owners

The reproduction and display of revenge porn victims' copyrighted images without their permission constitutes copyright infringement. Section 104 of the Copyright Act grants the authors of unpublished and published works the same

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[91] *Revenge Porn's Latest Frontier*, ON THE MEDIA (Dec. 6, 2013), http://www.onthemedia.org/story/revenge-porns-latest-frontier/transcript.

[92] *Press Releases,* CYBER CIVIL RIGHTS INITIATIVE, *available at* http://www.cybercivilrights.org/press_releases (last visited Apr. 27, 2014).

[93] 17 U.S.C. § 102 (2012); 17 U.S.C. §101 defines "pictorial, graphic, and sculptural works," the language used in §102(a)(5), to include "photographs."

[94] 17 U.S.C. § 201 (2012).

[95] Mitchell Bros. Film Grp. v. Cinema Adult Theater, 604 F.2d 852, 860 (5th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980).

[96] The Fifth Circuit decision has been described as the "most thoughtful and comprehensive analysis of the issue." 1 NIMMER ON COPYRIGHT, § 2.17 (2013). Both the Ninth Circuit and the S.D.N.Y. have adopted the Fifth Circuit standard for copyrightability of obscenity. *See* Jartech, Inc. v. Clancy, 666 F.2d 403, 406 (9th Cir. 1982) ("Acceptance of an obscenity defense [to copyright infringement] would fragment copyright enforcement, protecting registered materials in a certain community, while, in effect, authorizing pirating in another locale."); Nova Products, Inc. v. Kisma Video, Inc., 02 CIV. 3850 (HB), 2004 WL 2754685, at *3 (S.D.N.Y. Dec. 1, 2004) ("In short, even if the videos were ultimately proven to be obscene, following the Fifth and Ninth Circuits' holdings [in Mitchell Bros. and Jartech], this would not be a defense to copyright infringement.").

rights and protections. [97] Limited distribution of a copyrighted work – to a prospective publisher or a love interest –has no effect on the exclusive rights granted to an author.[98] The author of an unpublished work retains the exclusive right to decide whether to publish a work, and exercise or authorize any reproduction or display of the copyrighted work.[99]

By definition, revenge porn victims did not authorize the reproduction or display of their copyrighted images, thus revenge porn uploaders and traffickers infringe upon the exclusive right to make and show copies in several ways. Uploaders reproduce victims' copyrighted images when submitting them to a website,[100] traffickers reproduce the images when creating copies to store on webservers, and display copies of the original images when users direct their browsers to these websites.[101] Although these actions often occur simultaneously or concurrently, this doesn't pose a problem to victims asserting their rights as the Copyright Act allows the rights protected by Section 106 to overlap.[102]

The Supreme Court takes seriously the idea that the limited monopoly provided by copyright law incentivizes creativity and innovation.[103] Implicit in the positive rights enumerated in Section 106 is an equally powerful "negative right" *not* to exercise those exclusive rights.[104] The Supreme Court has acknowledged this negative right, explaining that

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[97] 17 U.S.C. § 104(a) (2012).

[98] *See* Harper & Roe Publishers, Inc. v. Nation Enterprises, 471 U.S 539, 555 (1985). The distinction between unpublished and published works also factors into the fair use inquiry: an "author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use" because "the scope of fair use is narrower with respect to unpublished works," *Id.* at 554, 564.

[99] *See* 17 U.S.C. §§ 106(1), (3), (5)..

[100] *See, e.g.*, Sega Enters. v. MAPHIA, 852 F. Supp. 679, 686 (N.D. Cal. 1994) ("[U]nauthorized copies . . . are made when such games are uploaded . . ."; Ohio v. Perry, 697 N.E.2d 624, 628 (Ohio 1998) ("Uploading is copying").

[101] *See* 4 PATRY ON COPYRIGHT §13:11.

[102] Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1161 (9th Cir. 2007).

[103] *See* Eldred v. Ashcroft, 537 U.S. 186, 247 (2003) (copyright gives "authors an incentive to create") (quoting H. R. Rep. No. 100-609, p. 17 (1988)); Golan v. Holder, 132 S. Ct. 873, 889 (2012) (copyright "supplies the economic incentive to create and disseminate ideas") (quoting Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S.C. 539, 558 (1985)) (emphasis omitted).

[104] This negative right is contemplated by the Copyright Act itself, which protects unpublished works. 17 U.S.C. §104(a) ("Unpublished Works.— The works specified by sections 102 and 103, while unpublished, are subject to protection under this title . . . . ").

> [T]he limited monopoly conferred by the Copyright Act is intended to motivate creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired. But nothing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright.[105]

Consider the treasure trove of J.D. Salinger stories, which he chose never to publish, that are only available for limited viewing at Princeton's Firestone Library. [106] In some way, that rareness, manufactured by Salinger's decision *not* to fully exercise his exclusive rights, enhances the stories' value.[107] Revenge porn victims are a perfect example of the ways in which negative copyrights incentivize creation: those images would never have been shared if victims did not believe they could control who saw them.

C. What Goes Up Must Come Down: The Digital Millennium Copyright Act

The same threat that drove Congress to pass Section 230, primarily crushing liability, pushed Congress to enact the Digital Millennium Copyright Act in 1998.[108] As part of its amendments and updates to the Copyright Act, Congress codified the Online Copyright Infringement Liability Limitation Act ("Section 512").[109] In passing Section 512, Congress sought to provide "greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities."[110]

1. Using DMCA Notices to Takedown Revenge Porn

Qualified ISPs[111] that comply with Section 512's "notice and takedown" procedures are protected from liability for copyright infringement.[112] A procedure

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[105] Stewart v. Abend, 495 U.S. 207, 228-29 (1990) (internal citations and quotations omitted).

[106] The stories were leaked online in December 2013. For a discussion of the stories, see *The Ocean Full of Bowling Balls*, ON THE MEDIA (Feb. 5, 2010), *available at* http://www.onthemedia.org/story/132669-the-ocean-full-of-bowling-balls/transcript.

[107] As Salinger obsessive PJ Vogt explained, "I don't know if there's an aura around something that, that you can't possess, and if maybe, if you were to possess that, that loses something." *Id.*

[108] *See* 3 NIMMER ON COPYRIGHT § 12A.02[A].

[109] 144 CONG. REC. S11,889 (daily ed. Oct. 2, 1998) (statement of Sen. Hatch).

[110] S. REP. No. 105–190, at 20 (1998); H.R. REP. No. 105–551, pt. 2, at 49 (1998).

[111] As defined by 17 U.S.C. § 512(k)(1)(A) or (B) (2012).

[112] *Id*. § 512(c)(3), (f) and (g) (2012).

that is deemed complying is one in which the ISP creates and maintains a system for copyright owners to report infringement and allows the ISP to promptly respond to takedown requests.[113]

Revenge porn victims do not need to register their copyrights or hire a lawyer to file a takedown notice.[114] Victims need only submit their name and signature; identify the image; and provide links to the infringing material, contact information and written verification that they believes the use is unauthorized.[115] Victims who discover their images re-posted to commercial porn websites, rather than revenge porn sites, are more likely to have success with takedown notification: commercial porn sites are hotbeds of pirated and infringing content and many link to DMCA notice and takedown procedures directly from their homepages and quickly comply with verified requests.[116] Victims can also issue de-indexing requests to search engines, like Google or Yahoo, to remove infringing links from search results.[117]

2. The Trouble With Takedowns

Websites that traffic exclusively in revenge porn present a problem for victims, as they may run into the problem that mainstream content creators encounter during takedown procedures [118] often called the "Whac-a-Mole" problem. The dynamic nature of the Internet means that as soon as infringing content is removed from one source, it "pops up" elsewhere, reminiscent of the whac-a-mole arcade game. In the case of revenge porn, this phenomenon is magnified.

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[113] 17 U.S.C. § 512(c)(3).

[114] Cory Brittain, who managed the revenge porn site IsAnybodyDown, encouraged victims to pay $250 to a "takedown lawyer." Brittain is suspected of posing at the lawyer, David Blade III, and using takedown requests to extort victims. *Is Anybody Down?*, ON THE MEDIA (Nov. 16, 2012), http://www.onthemedia.org/story/251306-is-anybody-down/transcript.

[115] 17 U.S.C. § 512(c)(3).

[116] *See* Jim Edwards, *The Porn Industry Is Being Ripped Apart by Piracy-Fueled 'Tube' Websites*, BUSINESS INSIDER (Jul. 19, 2012), http://www.businessinsider.com/the-porn-industry-is-being-ripped-apart-by-tube-site-litigation-2012-7.

[117] *Removing Content From Google*, GOOGLE (Dec. 2013), https://support.google.com/legal/troubleshooter/1114905?hl=en; *Copyright and Intellectual Property Policy*, YAHOO (Dec. 2013), http://info.yahoo.com/copyright/us/yahoo/en-us/details.html?pir=7HthGQlibUlfPalRk9tbOEXwzlWdqV6ynVEdNQ--.

[118] Ben Sisario and Tanzina Vega, *Playing Whac-A-Mole With Piracy Sites*, N.Y. TIMES (Jan. 28, 2013), *available at* http://www.nytimes.com/2013/01/29/business/media/playing-whac-a-mole-with-piracy-sites.html?ref=technology&_r=1&.

Revenge porn websites are meant to damage reputations and ruin lives.[119] By issuing a takedown notice – which requires the disclosure of personal information – victims may inadvertently draw *more* attention to the image as the websites might create additional posts about victims who request takedowns or encourage users to re-post victims' images onto other websites.[120]

Reposting is not the only problem that victims encounter. Identifying the location of revenge porn websites' servers may require a subpoena. For victims who are able to afford a lawyer, filing a subpoena seeking the disclosure of servers' locations could potentially attract attention to the images at issue.[121] Websites with servers in countries that do not have intellectual property agreements with the United States may refuse to comply with US law and ignore takedown requests entirely.[122] While additional investigation may buoy the success of revenge porn victims' takedown notices, hiring a lawyer is not an option for most victims. Despite the shortcomings of takedown notices, revenge porn sites that choose to ignore takedown requests sacrifice the immunity afforded by Section 512, thereby risking exposure to tremendous legal liability.[123]

D. Monetary Damages and Criminal Penalties

The rare victim who is willing to register a copyright and file a lawsuit can seek up to $150,000 in statutory damages for each instance of willful infringement.[124] If a revenge porn site successfully rebuts the presumption of

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[119] Marlow Stern, *Hunter Moore, Creator of 'Revenge Porn' Website Is Anyone Up?, Is the Internet's Public Enemy No. 1*, THE DAILY BEAST (Mar. 13, 2012), http://www.thedailybeast.com/articles/2012/03/13/hunter-moore-creator-of-revenge-porn-website-is-anyone-up-is-the-internet-s-public-enemy-no-1.html.

[120] Increasing publicity for information by trying to suppress it is called the "Streisand Effect." The term was coined after Barbara Streisand issued a request to remove a photograph of her home from the Internet. The image was subsequently re-posted across dozens of websites. *What is the Streisand Effect*?, THE ECONOMIST (Apr. 15, 2013), http://www.economist.com/blogs/economist-explains/2013/04/economist-explains-what-streisand-effect (hereinafter *Streisand Effect*).

[121] *See Streisand Effect*, *supra* note 131.

[122] Susanna Lichter, Comment, *Unwanted Exposure: Civil and Criminal Liability for Revenge Porn Hosts and Posters*, HARV. J.L. & TECH. DIGEST (May 28, 2013), *available at* http://jolt.law.harvard.edu/digest/privacy/unwanted-exposure-civil-and-criminal-liability-for-revenge-porn-hosts-and-posters.

[123] Hunter Moore bluntly explained why he was undeterred by the threat of legal action for managing IsAnyoneUp: "It takes you $50,000 to get me into court, and people who work at Starbucks don't make that kind of money." Stern, *supra* note 130.

[124] 17 U.S.C. §504(c)(2) (West).

willfulness, victims are still entitled to have their images removed.[125] Although high criminal penalties for copyright infringement are meant to deter would-be infringers, website operators who know they are "judgment proof," meaning they do not have the assets to sustain a judgment, may not be deterred by the threat of monetary damages.[126]

In 1997, Congress enacted the No Electronic Theft (NET) Act to target infringers whose behavior could not be deterred by monetary damages alone.[127] The NET Act criminalizes willful copyright infringement when the total retail value of the infringed work exceeds $1,000.[128] Violations are punishable by up to ten years in prison.[129]

The NET Act is frequently and justifiably critiqued for its harsh penalties, and it is unlikely that a revenge porn site operator could be charged with criminal infringement. Courts have expressed a willingness to use the highest dollar value possible to calculate the "retail value" of infringed works.[130] Revenge porn websites can fetch anywhere from $3,000[131] to $13,000[132] per month in advertising revenue, but it remains unclear whether advertising revenue is a satisfactory metric for "retail value." While the arrests of Hunter Moore and Kevin Bollaert indicate that prosecutors *are* willing to test the waters using existing laws,[133] courts should

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[125] *Id.* Courts also retain the discretion to award anywhere from $750 to $30,000 in damages. 17 U.S.C. § 504(c)(1).

[126] The Digital Theft Deterrence and Copyright Damages Improvement Act of 1999 amended section 504(c) and raised the statutory damages available under the Copyright Act. Pub. L. No. 106-160, 113 Stat. 1774.

[127] Pub. L. No. 105-147, 111 Stat. 2678.

[128] *Id.*

[129] See 18 U.S.C. § 2319 (providing scaled penalties based on a number of aggravating factors, including whether the infringement was a first offense and the size of the infringement operation).

[130] *See, e.g.*, United States v. Armstead, 524 F.3d 442, 443 (4th Cir. 2008) (holding that retail value is determined by taking the "highest of the face value, par value, or market value of copies of the copyrighted material in retail context" (internal quotations excluded).

[131] Cory Brittain's self-reported revenue during the height of IsAnybodyDown. *'Revenge Porn' Website Has Colorado Women Outraged*, CBS4 (Feb. 3, 2013, 10:13 PM), http://denver.cbslocal.com/2013/02/03/revenge-porn-website-has-colorado-woman-outraged/ -at_pco=cfd-1.0.

[132] Hunter Moore's self-reported revenue for IsAnyoneUp. David Kluft, *Revenge Porn: "IsAnyoneUp" on Copyright Law?*, FOLEY HOAG TRADEMARK AND COPYRIGHT LAW BLOG (Dec. 20, 2011), http://www.trademarkandcopyrightlawblog.com/2011/12/revenge-porn-is-anyone-up-on-copyright-law.

[133] Harris, *supra* note 78.

be wary of permitting prosecutors to use criminal copyright infringement laws to prosecute revenge porn traffickers.

CONCLUSION

Existing tort laws, like harassment, stalking and privacy laws, are poorly equipped to handle the problem of revenge porn. Even if victims succeed in their cases against uploaders, those same claims will most likely be unable to pierce revenge porn websites' Section 230 immunity or force operators to remove victims' images.

Working backward from the remedy victims most want – takedown procedures – copyright law stands out as the most efficient and predictable way to achieve those goals. Copyright is not a panacea for revenge porn. Victims must be willing to invest time to submit takedown notices and, if that fails, money into hiring an attorney to proceed with litigation. Copyright laws are also imperfect: the protections may well be too broad and the penalties too draconian. Still: for the vast majority of revenge porn victims, copyright presents an efficient means of self-help.