

# THE CRIMINALISATION OF “REVENGE PORN” IN SOUTH AFRICA

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## SUMMARY

This article aims to give an overview of the growing problem of non-consensual pornography in the digital age. The problem of non-consensual pornography grew exponentially when Hunter Moore created a website called IsAnyoneUp.com and started receiving nude images from scornful ex-lovers who posted them on his website.<sup>1</sup> The article discusses the shortcomings of the legal framework that is designed to address non-consensual pornography. In addition, it discusses the provisions in the Cybercrimes Bill 2017 as it relates to criminalisation of non-consensual pornography.

## 1 INTRODUCTION

The use of the Internet, social networking services and technology has led to great changes in how people interact and communicate with each other. There has been a gradual shift from traditional voice calling and the sending of short message services (SMSes) to live video calling and the exchange of photographs and videos. Sexting, a particular form of communication among those in love relationships, has become prevalent among both adolescent teens and adults. Sexting is the use of a mobile/cellphone camera to transmit a sexually suggestive or explicit photograph or video.<sup>2</sup> These images depict a nude or semi-nude body part and are sent via SMS, Internet and other digital delivery means.<sup>3</sup> The risk of sharing intimate images and videos becomes real when such data is released into the public domain. In many instances, when a relationship breaks down, the hurting party takes

<sup>1</sup> On average, the IsAnyoneUp.com website had between 150 000 to 240 000 web page views per day. In no time, Hunter Moore was earning monthly advertising revenues of between \$8 000 and \$13 000. The laws at the time did not criminalise such conduct, leaving the victims without proper recourse. See Stroud “The Dark Side of the Online Self: A Pragmatist Critique of the Growing Plague of Revenge Porn” 2014 *Journal of Mass Media Ethics* 168 168.

<sup>2</sup> Calvert “Revenge Porn and Freedom of Expression: Legislative Pushback to an Online Weapon of Emotional and Reputational Destruction” 2013–2014 24 *Fordham Intellectual Property Media and Entertainment LJ* 673 678.

<sup>3</sup> Calvert 2013–2014 *Fordham Intellectual Property Media and Entertainment LJ* 679.

vengeance on his/her lover by posting intimate images or videos as a way of shaming the lover. This is usually termed “revenge porn”.

## 2 WHAT IS REVENGE PORN?

The term “revenge porn”, also known as non-consensual pornography/involuntary pornography, involves the distribution of sexually graphic images of an individual where at least one of the individuals depicted did not consent to the dissemination.<sup>4</sup> It includes the use of images obtained without the consent of the victim, images of a victim’s face transposed onto a sexually explicit body (photoshopping)<sup>5</sup> and images originally obtained with consent, usually within the context of a private or confidential relationship.<sup>6</sup> “Revenge porn” is used loosely to refer to all forms of non-consensual pornography. Revenge porn is a form of cyber-harassment and cyber-stalking and is becoming more and more prevalent, although it remains understudied and downplayed as trivial<sup>7</sup> despite the irreparable harm it causes victims.<sup>8</sup>

Revenge porn is one of the breed of previously insignificant activities that has gained a new lease of life through the introduction of cyberspace. Prior to the digital environment, the number of people who could access a revenge-porn photograph was limited to a particular geographical location and time. But in the digital age, a video or photograph can be relayed to an unlimited audience at any time and in any location across the globe. Once relayed into cyberspace, intimate data cannot be erased and the victims will continue to suffer from privacy infringement and violation of their dignity each time someone accesses their intimate photograph or video. As with other conduct in cyberspace, lawmakers did not foresee the possibility of revenge porn, which meant that there were either inadequate or no criminal laws put in place to criminalise such conduct; the only legal recourse available to victims of revenge porn was to sue in delict against the perpetrator or the internet service provider (ISP). A lack of criminal measures to deter distasteful conduct such as revenge porn and the serious consequences it has for women and girls makes the problem of revenge porn more serious and pronounced.

<sup>4</sup> Bloom “No Vengeance for ‘Revenge Porn’ Victims. Unravelling Why This Latest Female Centric, Intimate Partner Offence is Still Legal and Why We Should Criminalise it” 2014–2015 42 *Fordham Urban LJ* 233 237.

<sup>5</sup> Levendowski “Using Copyright to Combat Revenge Porn” 2013–2014 3 *NYU Journal of Intellectual Property and Entertainment Law* 422 424.

<sup>6</sup> Citron and Franks “Criminalising Revenge Porn” 2014 49 *Wake Forest LR* 345 354.

<sup>7</sup> *Ibid.*

<sup>8</sup> Victims can be fired from work, expelled from school, suffer emotional and mental trauma and incur irreparable harm to their reputations; see Scheller “A Picture is Worth a Thousand Words. The Legal Implications of Revenge Porn” 2014–2015 93 *North Carolina LR* 551 553. Victims of revenge porn also suffer from post-traumatic stress disorder, anxiety, depression, suicidal thoughts and other mental health effects; see Bates “Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors” 2016 12 *Feminist Criminology* 22; Citron and Franks 2014 *Wake Forest LR* 352.

### 3 WHAT ARE THE EFFECTS OF REVENGE PORN?

The harm caused by revenge porn is far from trivial.<sup>9</sup> Revenge porn raises the risk of off-line and physical attack. Often, perpetrators of revenge porn post full names, addresses and telephone numbers of victims next to their nude photographs to encourage strangers physically to visit and confront victims off-line.<sup>10</sup> Greta Potgieter, a well-known victim of revenge porn in South Africa, underwent a terrifying experience and received a great deal of off-line harassment from men who obtained her contact details when her jaded ex-lover posted nude photographs of her online.<sup>11</sup>

By its nature, revenge porn is a form of domestic abuse and violence.<sup>12</sup> In a domestic relationship, an abusive partner in possession of intimate images holds the bargaining power over his or her partner; abusive partners often threaten to post intimate images, thus exercising control over their partners.<sup>13</sup> In fear of his or her intimate life being exposed, an abused partner is discouraged from leaving the abusive relationship,<sup>14</sup> resulting in a continuous circle of abuse.

When damaging information about a victim is found online, a victim usually immediately withdraws from any online activity to avoid further interactions with the online community. As a result, victims of revenge porn lose their online liberty and autonomy and are robbed of their freedom to construct their own identity.<sup>15</sup> To avoid further embarrassment and harassment, victims of revenge porn are forced to change email accounts, deactivate social media accounts and withdraw from online communities.<sup>16</sup> Withdrawing from online activities and deleting social media accounts also means that victims will have low social media influence, which can impair their ability to obtain employment in the future.<sup>17</sup>

In some cases, victims of revenge porn suffer from post-traumatic stress disorder and symptoms and they feel shame and embarrassment.<sup>18</sup> Owing to the high stress levels experienced by victims of revenge porn, there is an increased vulnerability to commit suicide.<sup>19</sup> According to a study by Cyber Civil Rights Initiative, 47 per cent of revenge porn victims contemplated suicide and the majority of the victims were teenage girls.

<sup>9</sup> The Cyber Civil Rights Initiative is contacted by an average of 20–30 victims of revenge porn each month; Franks “Drafting an Effective ‘Revenge Porn’ Law: A Guide for Legislators” 2015 1 <https://ssrn.com/abstract=2468823> 10 – 11 (accessed 2018-02-06).

<sup>10</sup> Citron and Franks 2014 *Wake Forest LR* 350.

<sup>11</sup> Essop “Snap of Shame: The Tough Road to Stamping Out ‘Revenge Porn’” (2017-08-18) *Mail & Guardian* <https://mg.co.za/article/2017-08-18-00-snap-of-shame-the-rough-road-to-stamping-out-revenge-porn#> (accessed 2018-01-13).

<sup>12</sup> Citron and Franks 2014 *Wake Forest LR* 351.

<sup>13</sup> Burris “Hell Hath no Fury like a Woman Pored: Revenge Porn and the Need for a Federal Nonconsensual Pornography Statute” 2014 66 *Florida LR* 2325 2338.

<sup>14</sup> Citron and Franks 2014 *Wake Forest LR* 351.

<sup>15</sup> Bloom 2014–2015 *Fordham Urban LJ* 244.

<sup>16</sup> *Ibid.*

<sup>17</sup> Citron and Franks 2014 *Wake Forest LR* 353.

<sup>18</sup> Bates 2016 *Feminist Criminology* 26.

<sup>19</sup> Bloom 2014–2015 *Fordham Urban LJ* 242.

Revenge porn victims are more likely to get their professional life affected if there are sexually explicit photographs of them on the Internet. Many victims of revenge porn end up either getting dismissed from work or quitting their jobs.<sup>20</sup> Ms World Kenya 2015 lost her crown after her boyfriend sent nude pictures of her to the organisers of the pageant.<sup>21</sup> Some victims of revenge porn suffer reputational damage at their workplaces as their nude photographs are shared among workmates. The prospects of future employment and career advancement are also thwarted as it is now common practice for prospective employers to check an applicant's reputation on social media.<sup>22</sup> Most employers are not willing to be associated with people who have a negative image online and will not employ victims of revenge porn.

There is general consensus that revenge porn is a gender-based form of cyber-rape and harassment with the majority of its victims being women and girls while those who run revenge porn websites are predominantly male.<sup>23</sup> Holly Jacobs<sup>24</sup> is a world-famous victim of revenge porn who was forced to change her name as a result of cyber-harassment. According to a study conducted by the Cyber Civil Rights Initiative, 90 per cent of those victimised by revenge porn were female.<sup>25</sup> It is submitted that revenge porn is "explicitly purposed to shame, humiliate and destroy the lives and reputations of young women and forms part of a widespread, deeply sexist online culture everywhere from blog comment sections to YouTube videos to message boards".<sup>26</sup> Viewers of revenge porn get sexual gratification without the consent of the subject of the nude images and videos. This denies women control over their own bodies and lives and constitutes a vicious form of sex discrimination.<sup>27</sup> Despite the general consensus that revenge-porn victims are predominantly women, there is an argument that the results from a survey conducted by the Cyber Civil Rights Initiative were biased as the majority of the participants were women.<sup>28</sup> It is my submission that this counter-argument does not change the position of the effects of revenge porn on women. When it comes to sexual autonomy, there are double standards for men and women, with men being praised for their sexual

<sup>20</sup> Bloom 2014–2015 *Fordham Urban LJ* 244.

<sup>21</sup> *Roshanara Ebrahim v Ashleys Kenya Limited* [2016] eKLR.

<sup>22</sup> A Microsoft study showed that nearly 80% of employers consult search engines to collect intelligence on job applicants and, about 70% of the time, they reject applicants on the basis of their findings; Citron and Franks 2014 *Wake Forest LR* 352.

<sup>23</sup> Bloom 2014–2015 *Fordham Urban LJ* 239.

<sup>24</sup> Holly Jacobs is not the name she was born with. She had to change her name after her boyfriend distributed nude photographs of her on over 200 websites. After the police officers told her that her ex-boyfriend had not broken the law, she approached law professors Mary Anne Franks and Danielle Citron and formed a non-profit organisation called the Cyber Civil Rights Initiative; Jacobs "Being a Victim of Revenge Porn Forced Me to Change My Name" <http://www.xojane.com/it-happened-to-me/revenge-porn-holly-jacobs>.

<sup>25</sup> Citron and Franks 2014 *Wake Forest LR* 353.

<sup>26</sup> Stroud 2014 *Journal of Mass Media Ethics* 178.

<sup>27</sup> Citron and Franks 2014 *Wake Forest LR* 353.

<sup>28</sup> Stroud 2014 *Journal of Mass Media Ethics* 179.

conquests while women are “slut-shamed”.<sup>29</sup> Whereas men can be victims of revenge porn, there is a high chance that they will be praised for their sexual adventures while female victims of revenge porn are publicly shamed and harassed.

#### **4 WHY WAS REVENGE PORN NOT CRIMINALISED?**

The lack of understanding about the gravity, scope and dynamics of the problem created by revenge porn has been one of the reasons that it was not previously criminalised.<sup>30</sup> The majority of victims were unwilling to come forward to describe the grave harms they suffered, which left lawmakers and law enforcement agencies ignorant of the severity of the severe consequences of revenge porn. There is a popular conviction among scholars that since revenge porn is chiefly a female-centric crime, lawmakers have been lacklustre about minimising the harm of revenge porn owing to the historical indifference and hostility to women’s autonomy.<sup>31</sup> Historically, society has disregarded harm suffered by women, especially when a crime has been committed by their romantic partners.<sup>32</sup> Victim blaming has been prevalent in crimes of sexual harassment, sexual abuse and rape against women by their partners, and in most cases, women have been considered to have motivated the harm. For instance, rape victims would be told that they provoked rape through their behaviour or the way they dressed.<sup>33</sup> So victims of revenge porn (who are mainly women) are the latest victims who are blamed for their unfortunate circumstances.<sup>34</sup>

When it comes to conduct on the Internet and in social media, law enforcement and the judiciary have struggled to understand the mechanics of the conduct and the devastation it can cause,<sup>35</sup> which has meant that there was less willingness to address revenge porn as criminal conduct. When it comes to nude photographs, there is a generally inconsistent conception of contextual privacy. Some argue that by sharing sexually explicit photographs with a trusted confidante, a woman is consenting to the sharing of the photographs with the public.<sup>36</sup> Such misinterpretation of privacy has permitted the increase of revenge porn without criminal sanction.

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<sup>29</sup> Patton “Taking the Sting out of Revenge Porn: Using Criminal Statutes to Safeguard Sexual Autonomy in the Digital Age” 2015 16 *The Georgetown Journal of Gender and the Law* 407 420.

<sup>30</sup> Citron and Franks 2014 *Wake Forest LR* 347.

<sup>31</sup> Citron and Franks 2014 *Wake Forest LR* 348.

<sup>32</sup> Citron “Law’s Expressive Value in Combating Cyber Gender Harassment” 2009 108 *Michigan LR* 373 376.

<sup>33</sup> Bloom 2014–2015 *Fordham Urban LJ* 250.

<sup>34</sup> *Ibid.*

<sup>35</sup> Citron and Franks 2014 *Wake Forest LR* 347.

<sup>36</sup> Citron and Franks 2014 *Wake Forest LR* 348.

## 5 INADEQUACY OF CIVIL LAW REMEDIES

Victims of revenge porn can bring civil litigation suits against their perpetrators. The problem with civil litigation is that it imposes a financial and emotional burden on the victim. Lawsuits are extremely costly and time-consuming, not to mention that it brings additional public attention to the intimate material.<sup>37</sup> Moreover, most lawyers are not willing to take up such cases. This could be because there are no guarantees that they will be able to determine the identity of a perpetrator who posts images anonymously; and should the perpetrator be identified, there is no guarantee that the perpetrator will have the financial means to pay legal costs if the victim is successful. Furthermore, a damages award on its own carries no assurance that intimate images of the victim will be taken off the Internet. Once photographs are posted online, it is notoriously difficult to ensure that they are deleted forever and not reposted by other internet users.<sup>38</sup>

Privacy infringement offers a civil law remedy to a victim of revenge porn. The term “privacy” is generally defined as “an individual condition of life characterised by exclusion from the public and publicity”. This condition comprises all those personal facts that a person considers should be kept private from the knowledge of outsiders.<sup>39</sup> Outsiders can come to know of a person’s private facts through intrusion (the outsider becomes acquainted with facts) or through disclosure (an outsider reveals someone’s personal information to third parties when it is clear that information should remain private to third parties).<sup>40</sup> In the digital environment, targeted recipients can determine if a communication was meant to be private or public. Most social media services let a person set up privacy settings to determine the recipients of messages.<sup>41</sup> Where a sexually-explicit photograph is shared with a confidant, there is a reasonable expectation that such information should remain private. Should the confidant share the explicit photograph with third parties that would amount to privacy infringement through disclosure. Also, should a perpetrator post an explicit photograph that has been collected by unlawfully accessing the victim’s computer system, that amounts to privacy infringement by both intrusion (hacking) and disclosure (publishing the photograph).

Copyright law has previously been relied upon to bring legal action against perpetrators of revenge porn. Copyright law protects any original work of authorship fixed in a tangible medium of expression, including photographs<sup>42</sup> and videos. Section 21(1)(a) of the Copyright Act<sup>43</sup> provides that ownership in any copyright vests in the author of the copyrighted

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<sup>37</sup> Burris 2014 *Florida LR* 2342.

<sup>38</sup> Stroud 2014 *Journal of Mass Media Ethics* 171.

<sup>39</sup> Neethling, Potgieter and Visser *Law of Personality* (2005) 31.

<sup>40</sup> Neethling *et al Law of Personality* 33.

<sup>41</sup> Roos “Privacy in the Facebook Era: A South African Legal Perspective” 2012 *South African LJ* 375 386.

<sup>42</sup> Levendowski 2013–2014 *NYU Journal of Intellectual Property and Entertainment Law* 422 440.

<sup>43</sup> The Copyright Act 98 of 1978.

material. The Copyright Act defines an author of a photograph as the person responsible for the composition of the photograph. Where a person takes a sexually explicit “selfie”<sup>44</sup> of themselves, they are both author and owner of the photograph. Should anyone else publish<sup>45</sup> the explicit image without the permission of the victim that would constitute infringement of copyright. Section 21(1)(c) of the Copyright Act further provides that where a person commissions the taking of a photograph and pays or agrees to pay for it in money or money’s worth, and the work is made pursuant to that commission, that person is the owner of the photograph. This means that if a victim of revenge porn had previously instructed a third party to take sexually explicit photographs of themselves, the victim remains the owner of the photograph despite not being the author of the photograph.

The Copyright Act also provides protection to a victim of revenge porn where a photograph of them is subsequently photoshopped. Photoshopping occurs when different images are put together to create one new image. In revenge porn cases, photoshopping occurs when the face of a victim is transposed onto a photograph of a naked body to create the effect that the new photograph is the nude image of the victim. A study has indicated that 12 per cent of non-consensual pornography was photoshopped.<sup>46</sup> The owner of the copyright in a sexually-explicit photograph enjoys the exclusive right to reproduce the work in any manner or form<sup>47</sup> and if a third party reproduces the (photoshopped) photograph without the consent of the owner, the third party will be infringing on the copyright of the owner.<sup>48</sup>

The victim of revenge porn (as the owner of the copyright) can seek relief in the form of damages, interdiction and the delivery of the infringing copies.<sup>49</sup> However, the remedies available to a victim of revenge porn are inadequate. Delivery of infringing copies does not mean that the sexually explicit content will be wiped off the Internet. The images might have migrated to another website, which means the victim constantly has to bring copyright infringement claims against every website that may publish the photograph; this is naturally exhausting, expensive and at times impossible to do. It has also been argued that seeing copyright law as an adequate response to non-consensual pornography characterises the harm as one affecting property rights,<sup>50</sup> thus downplaying the real effects of revenge porn as a crime that personally denigrates individuals.

Another legal avenue available to revenge porn victims is the law on sexual harassment. Commentators on harassment laws argue that for these to apply there should be a pattern indicative of the accused’s willingness to

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<sup>44</sup> The *Oxford Dictionary* defines a selfie as a photograph that one has taken of oneself, typically taken with a smartphone or webcam and shared via social media.

<sup>45</sup> S 7(b) of the Copyright Act provides that copyright in an artistic work vests the exclusive right to publish or to authorise the publishing of the work if it was hitherto unpublished.

<sup>46</sup> Levendowski 2013–2014 *NYU Journal of Intellectual Property and Entertainment Law* 424.

<sup>47</sup> S 7(a) of the Copyright Act 98 of 1978.

<sup>48</sup> S 23(1) of the Copyright Act 98 of 1978.

<sup>49</sup> S 24(1) of the Copyright Act 98 of 1978.

<sup>50</sup> Citron and Franks 2014 *Wake Forest LR* 360.

stalk or harass the victim<sup>51</sup> and the aggressor should communicate with the victim in a way that is likely to cause annoyance or alarm.<sup>52</sup> To be found guilty of stalking, an aggressor must be shown to have intentionally engaged in a course of conduct that is likely to cause fear of some material harm.<sup>53</sup> The framing of the harassment laws makes them inadequate to address revenge porn because usually the harm is accomplished through the once-off act of uploading a sexually explicit image. The repetitive sharing action of a viral image is as a result of other actors on the Internet and not the course of conduct of the uploader. It is further argued that the prosecution would be required to prove that the accused posted the photographs with the intent to harass, abuse or threaten the subject. An accused could easily argue that they were motivated by other desires such as fame, money or fulfilling their own sexual fantasies.<sup>54</sup> Although victims of revenge porn may experience sexual harassment and stalking by other people as a result of the posted image or video, they cannot bring harassment charges against the uploader of the image or video because the conduct is not repetitive in nature.

The South African harassment laws are somewhat different from those in other jurisdictions. The Protection from Harassment Act<sup>55</sup> (Harassment Act) has addressed the shortcomings of harassment laws discussed above. Part of the definition of harassment under the Harassment Act provides that the respondent must have engaged in conduct (directly/indirectly) that s/he “knows or ought to know causes harm or inspires the reasonable belief that harm may be caused to the complainant” by carrying out any one of the listed activities. The Harassment Act defines harm as any mental, psychological, physical and economic harm. The motive behind uploading sexually explicit content of another is usually to embarrass and shame the victim. Any reasonable person knows or should know that non-consensual pornography is likely to cause some form of harm to the victim. Where a perpetrator uploads personal details of the victim and their contact details, as in the case of Greta Potgieter and Hunter Moore, he/she has a reasonable belief that a third party is likely to contact the victim to seek sexual favours or to shame them. As such, anyone who posts revenge porn has a reasonable belief that the victim will suffer harm as a result.

One of the activities listed as harassment in the Harassment Act is “engaging in electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues” (author’s own emphasis). The other listed activity is “sending, delivering or causing the delivery of electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to or brought to the attention of, the complainant or a related person” (author’s own emphasis). Perpetrators of revenge porn usually post sexually explicit content on platforms that they know are likely to be accessible by the victim or people who know the victim. If a perpetrator uploads or sends a

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<sup>51</sup> Bloom 2014–2015 *Fordham Urban LJ* 259.

<sup>52</sup> Levendowski 2013–2014 *NYU Journal of Intellectual Property and Entertainment Law* 432.

<sup>53</sup> *Ibid.*

<sup>54</sup> Bloom 2014–2015 *Fordham Urban LJ* 259.

<sup>55</sup> Protection from Harassment Act 17 of 2011.



sexually explicit photograph or video of the victim on a social networking platform or website that is accessible by the complainant or by a person who is likely to know the victim, that amounts to harassment. It is irrelevant whether or not the perpetrator engaged in a conversation with the victim or with the people likely to know the victim.

The second part of the definition of harassment refers to engaging in conduct that the respondent knows, or ought to know, amounts to sexual harassment<sup>56</sup> of the complainant or a related person. By attaching personal information and contact details of the victim to an uploaded photograph, and advertising the victim as “available for sexual encounters”, the perpetrator knows or ought reasonably to expect that one of the recipients or viewers of the content is likely to respond to the sexual invitation. Even in the absence of contact details of the victim, the perpetrator knows, or ought to know, that people who view the sexually explicit content are likely to pass offending remarks about the victim, which has the effect of harming the victim.

The problem with the Harassment Act is that it focuses on the effect of revenge porn on the victim instead of addressing the conduct of publishing the non-consensual pornography. For conduct to amount to harassment, it must cause harm to the complainant or amount to sexual harassment. If a perpetrator uploads a sexually explicit video or photograph onto a website that is accessed by neither the victim nor anyone who knows the victim, and without any information to identify the victim, that conduct is not an offence under the Harassment Act, as there is no harm to or sexual harassment of the victim. In addition, if the victim of the act of revenge porn does not experience any emotional, mental, psychological or physical harm, he or she cannot use the Harassment Act for legal recourse. It is in light of the limitations of the Harassment Act that the need for effective criminal laws to address the act of revenge porn becomes clear.

Criminal laws are an effective solution to the problem posed by revenge porn as they do not share the financial concerns and privacy concerns of civil litigation.<sup>57</sup> Criminal laws send a clear message to potential perpetrators that non-consensual pornography inflicts grave privacy and autonomy harms that have real consequences and penalties.<sup>58</sup> A criminal law solution would send the message that individuals’ bodies are their own and that society recognises the grave harms that flow from turning individuals into objects of pornography without their consent.<sup>59</sup> Criminalisation of revenge porn is also appropriate and necessary to convey the proper level of social

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<sup>56</sup> The Harassment Act further defines sexual harassment as “unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome or unwelcome explicit or implicit behaviour, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or a related person in circumstances, which a reasonable person having regard to all the circumstances would have anticipated that the complainant or related person would be offended, humiliated or intimidated; implied or expressed promise of reward for complying with a sexually oriented request; or implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request”.

<sup>57</sup> Burris 2014 *Florida LR* 2342.

<sup>58</sup> Citron and Franks 2014 *Wake Forest LR* 361.

<sup>59</sup> Citron and Franks 2014 *Wake Forest LR* 362.

condemnation for such behaviour.<sup>60</sup> Criminal law can assist to conceptualising the non-consensual publication of someone's sexually explicit images as a form of sexual abuse. The fact that non-consensual pornography does not involve physical contact should not change the fact that it is a form of sexual abuse.<sup>61</sup> Revenge porn should be classified as a sexual offence because of its similarity to other types of sexual assault and sexual harassment. Criminal sanctions are less likely to be overlooked because criminal convictions stay on a person's record forever. In South Africa, new laws have been drafted to address and criminalise revenge porn. The advantage of targeted legislation is that it allows for tailored punishment and provides a heightened awareness of revenge porn as criminal behaviour.<sup>62</sup>

## 6 CRIMINALISATION OF REVENGE PORN

The new Cybercrimes Bill 2017<sup>63</sup> was introduced to deal with all criminal activity in cyberspace and it introduced provisions that specifically deal with non-consensual pornography. Section 16(1) of the Cybercrimes Bill provides:

"Any person ("A") who unlawfully and intentionally makes available, broadcasts or distributes, by means of a computer system, a data message of an intimate image of a person ("B") without the consent of B, is guilty of an offence."

The Cybercrimes Bill recognises and promotes the constitutional right to privacy as well as bodily privacy in the digital environment. By criminalising non-consensual pornography, the Cybercrimes Bill reiterates the importance of consent as one of the important data protection principles outlined in the Protection of Personal Information Act (POPI).<sup>64</sup> Consent is very significant in data protection as it distinguishes between revenge porn and traditional pornography. In the absence of consent, any processing of intimate data by a third party can be considered to be a section 16 offence.

The reason that revenge porn is prosecuted and not traditional pornography lies in the consent requirement. In traditional pornography, the subject of the sexually explicit video or photograph consents to having it published to the online community<sup>65</sup> but with revenge porn such consent is absent. Privacy law holds that where an individual voluntarily publishes his or her sexually explicit photographs or videos on an online platform that is

<sup>60</sup> Citron and Franks 2014 *Wake Forest LR* 348.

<sup>61</sup> Citron and Franks 2014 *Wake Forest LR* 362.

<sup>62</sup> Patton 2015 *The Georgetown Journal of Gender and the Law* 432.

<sup>63</sup> The Cybercrimes and Cybersecurity Bill 2017 (B6-2017), GG 40487 of 9 December 2016, which was subsequently renamed as the Cybercrimes Bill B6B-2017 on 12 November 2018.

<sup>64</sup> Act 4 of 2013; s 11(1)(a) of POPI provides that personal information may only be processed if the data subject consents to the processing.

<sup>65</sup> According to Hunter Moore, some people willingly submitted nude photographs of themselves as a way of seeking instant internet fame; Stroud 2014 *Journal of Mass Media Ethics* 170.

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accessible to anyone (either through registration or free sign-up), then there is no reasonable expectation of bodily privacy. However, where a person shares an intimate photograph or video with his or her partner, in the context of their private relationship, there is a reasonable expectation that the communication will remain private between the parties. Consent to share intimate photographs between individuals in a private relationship does not mean consent to have the intimate images publicly exhibited to the entire world.<sup>66</sup> Should the recipient publish or post the sexually explicit data to others, that will be an impingement on the privacy rights of the data subject in terms of POPI and also a section 16 crime under the Cybercrimes Bill. Under POPI, consent of the data subject is required if the personal data is to be processed further.<sup>67</sup> This means that if the initial recipient of a sexually explicit video or photograph wishes to publish the data or share it with other people, then they should get the consent of the data subject. Without the data subject’s consent, any further processing of the data will be considered an infringement of the right to privacy as well as an offence under the Cybercrimes Bill.

Although the Cybercrimes Bill criminalises revenge porn, there remain loopholes in the Cybercrimes Bill that make its mechanisms less effective than they could be and that will leave victims of the crime with no legal recourse. Under the Cybercrimes Bill, liability is limited to the person who originally had knowledge that the victim did not consent to have their sexually explicit photograph or video shared. The criminal sanctions are only imposed against the original uploader or perpetrator. The recipients of the sexually explicit content are not prohibited from further forwarding, sharing, republishing and reposting the content. This makes the victim of revenge porn repeatedly live and suffer the same distasteful experiences of revenge porn. It is the author’s suggestion that when convicting an offender in terms of section 16 of the Cybercrimes Bill, the court should make an order that the offender must provide the details of all recipients of the sexually explicit content and the same order of court should be served on the recipients. If the recipients then continue to publish and share the sexually explicit data, they would be in contempt of court as well as be committing the section 16 offence and could be prosecuted.

Notably, section 16 of the Cybercrimes Bill covers scenarios where a third party unlawfully (without consent) accesses a victim’s computer and remotely monitors and makes video recordings of the victim with the intention of posting any intimate data obtained, and where a third party unlawfully (without consent) accesses the private files of a victim (usually through hacking and cracking) and retrieves any intimate data in order to publish it. This shifts the focus from the usual blame that victims of revenge porn suffer for sharing intimate photographs and videos in the first place, as it covers situations where the victim did not share sexually explicit data with anyone.

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<sup>66</sup> Burris 2014 *Florida LR* 2334.

<sup>67</sup> S 15(3)(a) of POPI.

Section 16 of the Cybercrimes Bill only makes reference to “intimate images” instead of “intimate data”. It is not clear why the legislature specifically makes mention of “images”<sup>68</sup> and does not include “videos”. It is probably an oversight by the legislature that has failed to stay up-to-date with digital advancements and developments. However, the Cybercrimes Bill defines “data” as “electronic representations of information in any form” and defines “data messages” as “data generated, sent, received or stored by electronic means, where any output of the data is in an intelligible form”. Therefore, section 16 of the Cybercrimes Bill would in general include intimate data that is published or distributed in any form or shape.

A victim of revenge porn under section 16 of the Cybercrimes Bill can bring an application to court for an interim protection order. An order can be made against the perpetrator to stop the further posting of intimate data or against the electronic communications service provider (ECSP) to remove or disable access to the intimate data message.<sup>69</sup> Within 30 days of receipt of the interim order, the perpetrator or the ECSP may apply to court for an order setting aside the interim order.<sup>70</sup> Both the applicant and the respondent can make use of a witness to support their claims. Such a witness must provide any book, document or object that may afford evidence.<sup>71</sup> Expert witnesses who have in-depth experience in digital footprints could be called if needed. Failure of such a witness to attend the court proceedings is an offence.

## 7 POSTING ANONYMOUSLY

Most people enjoy the anonymity that is provided them by the Internet. Some people prefer inflicting hurt on others by hiding in the shadows of cyberspace, confident that they will never be found out. The bulk of cybercrimes are committed by people who act anonymously to avoid prosecution. The Cybercrimes Bill has put in place measures to unmask cybercriminals for purposes of criminal investigation and prosecution. Section 21(1)(b) of the Cybercrimes Bill provides that a court can order an ECSP to provide the court with the electronic communications identity number of the origin of a data message, the name, identity and address of the persons to whom the electronic communications identity number is assigned, and any information that indicates the dates when a message was or was not sent from an electronic communications identity number of a person to the electronic communications identity number of the complainant. An order against an ECSP is likely to be very effective as it will help victims of revenge porn to identify the persons who are responsible for sharing their sexually explicit data and bring such perpetrators to justice.

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<sup>68</sup> The images could also be in the form of GIFs. GIF is an abbreviation for “Graphic Interchange Format” (Collins English Dictionary). A GIF is a computer file that is used on the Internet for sending images, especially moving images.

<sup>69</sup> S 20(1)(a) and (b) of the Cybercrimes Bill B 6B–2017.

<sup>70</sup> S 20(6) of the Cybercrimes Bill B 6B–2017.

<sup>71</sup> S 20(10)(d) Cybercrimes Bill B 6B–2017.

## **8 CONVICTION**

For effective investigation and prosecution and conviction of cybercrimes, the Cybercrimes Bill creates a “Point of Contact” consisting of technical experts and legal professionals in order to provide technical and legal assistance. The technical experts will play a major role in identifying and locating perpetrators who post data anonymously.

Upon conviction of an accused person charged with distributing intimate data, a court may order<sup>72</sup>:

- a) the convicted to refrain from posting;
- b) the convicted person to destroy the intimate data; and/or
- c) the ECSP to disable or remove access to the posted intimate data.

As indicated above, the orders of court are not meaningful and effective measures once the intimate image has been uploaded online. Prosecuting the person who originally posted the sexually explicit content does not mean the content has been deleted from cyberspace. This problem cannot be solved unilaterally by lawmakers; there is a need for information technology experts and innovators to find ways to assist in automatic deletion of an image or document after a period of time regardless of where the document or image is stored.

The penalties that may be imposed by courts in terms of section 19(7) of the Cybercrimes Bill are:

- a) payment of a fine;
- b) imprisonment of up to three years; or
- c) both a fine and imprisonment.

The length of prison time is enough of a deterrent to stop a person from posting nude pictures of another without their consent.

## **9 WHAT HAPPENS WHEN THE PERPETRATOR IS NOT PHYSICALLY PRESENT IN SOUTH AFRICA?**

Communication technologies are proud of their borderless nature. Cyberspace has opened up a virtual world that is not subject to the confines of time or geographical locations. Cybercriminals also enjoy the borderless nature of the digital environment as it means they can carry out their activities remotely from anywhere on the planet. Cognisant of this predicament, the Cybercrimes Bill has been framed in such a way as to bring to book even individuals who commit cybercrimes from outside of South Africa.

South African courts are to enjoy jurisdiction over the offence of unlawful distribution of intimate images if the offence was committed against a person

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<sup>72</sup> S 22 (2) Cybercrimes Bill B 6B–2017.

who is a citizen of the Republic or ordinarily resident in the Republic.<sup>73</sup> This provision suggests that a person who commits revenge porn against a South Africa citizen or resident can be brought to justice in a South African court. To limit the territorial scope of South Africa's jurisdiction, section 24(2) of the Cybercrimes Bill further provides that South Africa will exercise jurisdiction over the crime of revenge porn committed outside South Africa if the person who committed the crime is a South African citizen, is ordinarily resident in South Africa or is arrested in the territory of South Africa or on board a ship or aircraft registered in South Africa. The position adopted under the Cybercrimes Bill is different from that under the previous Cybercrimes and Cybersecurity Bill, which provided that the Republic could exercise jurisdiction where an act was committed outside the Republic by a foreign national as long as the act affected any other person in the Republic.<sup>74</sup> The narrower jurisdictional scope adopted under the Cybercrimes Bill is in line with the principles of state sovereignty as South Africa cannot automatically prosecute, without proper safeguards in place, persons from other jurisdictions who commit the crime of revenge porn.

## 10 CONCLUSION

The criminalisation of revenge porn breathes fresh air into the development of the legal system, enabling it to catch up with technological advances. The majority of victims who could not afford to bring take-down notices against internet service providers, or sue third parties for copyright infringement and privacy infringement, can now find the most effective way to obtain justice. The possibility of arresting and imposing a fine on convicted criminals is likely to stop many people from publishing the intimate data of others for fear of the criminal sanctions surrounding revenge porn. The Cybercrimes Bill shifts the blame that is usually placed on the victims of such a crime for taking the video or pictures in the first place and places the blame on the person who decides to publish the intimate data without the consent of the data subject. Such a shift in blame recognises that everyone has the freedom to take intimate photographs or videos of themselves either for their own enjoyment or for sharing with their intimate partners and they should not feel guilty about expressing themselves in such a manner.

The major flaw with the Cybercrimes Bill is that it still leaves victims of revenge porn vulnerable as there are no criminal remedies to deal with the intimate data being further processed by parties other than the perpetrator. It is equally important to note that although people enjoy the right to express themselves and take nude pictures of themselves and share the data with anyone they choose, they should always tread with caution in the digital environment. There is a need to exercise vigilance in the online environment and online security should be a top priority to ensure that personal data is and remains secured. The use of online security features such as complicated passwords, decryption and encryption keys is essential in preventing possible hacking and cracking of one's computer system.

<sup>73</sup> S 24(1)(b) of the Cybercrimes Bill B 6B–2017.

<sup>74</sup> S 23(3)(a) of the Cybercrimes and Cybersecurity Bill B6–2017.