

A cousin to identity theft, 'doxxing' is on the rise

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You may not be familiar with “doxxing,” but if you heard of the recent hacking and release of private celebrity photographs, you understand the concept. Doxxing (sometimes spelled “doxing”) is the practice of gathering and releasing an individual’s personal information, such as name, address, photographs, or financial information, on the Internet, typically in a public forum. The term is an abbreviation for “dropping dox” or “dropping documents,” which arose out of the 90s hacker culture as a means of revealing the true identity of fellow hackers, usually for the purpose of revenge or harassment.

Since then, doxxing has evolved to include various forms of harassment with consequences ranging from irritating, to distressing, to potentially lethal. Yet, the recourse available for doxxing victims remains a legal gray area.

Overview of doxxing

The most common and fastest growing form of doxxing involves identifying an individual online by posting his or her name, address, or telephone number. While this might seem innocuous, the harm comes not from the information itself but from the forum in which the information is posted. As always, the power and danger of the Internet comes from the exponential exposure it provides.

Some have used doxxing as a means of inciting violence against an individual by posting that person’s information in an openly violent and hostile forum. For example, one form of doxxing involves posting a person’s photograph (usually a young woman) along with her real name, address, and phone number to a website soliciting



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sexual feedback or violent sexual encounters. This can lead to a slew of harassment and threats, both online and in person, in some cases lasting for years.

Another particularly dangerous form of doxxing, known as “swatting,” involves submitting an individual’s information to local authorities along with a false report so that a SWAT team will raid the person’s home. Swatting is

so common in some online communities that there are now YouTube videos compiling clips of swatting footage.

Doxxing as “revenge porn”

While existing civil and criminal laws can address many harmful forms of doxxing, a fast-growing and particularly destructive incarnation of doxxing, commonly (and controversially) referred to as “revenge porn,” provides particular difficulties for victims seeking recourse. Revenge porn involves the online publishing of private, sexually explicit images without the consent of the persons pictured. According to Mary Anne Franks, associate professor of law at University of Miami School of Law:

A vengeful ex-partner, opportunistic hacker, or rapist can upload an explicit image of a victim to a website where thousands of people can view it and hundreds of other websites can share it. In a matter of days, that image can dominate the first several pages of search engine results for the victim’s name, as well as being emailed or otherwise exhibited to the victim’s family, employers, co-workers, and peers. Victims are frequently threatened with sexual assault,

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stalked, harassed, fired from jobs, and forced to change schools. Some victims have committed suicide.¹

Frank points out that the moniker “revenge porn” can be misleading because some perpetrators act out of a desire for profit, notoriety, or entertainment.² Recognizing the potential for profit, websites have been created for the sole purpose of displaying such non-consensual illicit images. One of the first popular versions of such sites, *IsAnyoneUp*, averaged nearly thirty million page views per month and earned \$10,000 in monthly advertising revenue.³

In addition to ad revenue, a similar site, *UGotPosted*, made money by creating a second site, *ChangeMyReputation*, which contacted the individual whose images were posted on *UGotPosted*, and offered to have the images removed if the victims paid a substantial fee.

A survey conducted by Cyber Civil Rights Initiative (CCRI) outlined the scope of the growing trend.⁴ Out of 1,606 total respondents, 23 percent (361 people) had been victims of non-consensual pornography. Out of those victims, the survey found that:

- 90 percent (325 respondents) were women.
- 17 percent (61 respondents) had not voluntarily taken the nude photos themselves.
- 68 percent (245 respondents) were between the ages of 18 and 30.
- 27 percent (97 respondents) were between the ages of 18 and 22.

The today’s teens document a dizzying amount of their personal lives on such social media sites as Facebook, Twitter, and Instagram. As they enter adulthood, these issues will become even more prevalent. More likely than not, you will eventually have a client, friend, or even a family member ask you what recourse he or she has to such behavior.

Criminal law may be ill suited to address the problem.

As of the writing of this article, sixteen states have criminal laws directly applicable to revenge porn. Louisiana is not one of

them. One problem holding states back from adopting such criminal laws is that it is difficult to avoid running afoul of the First Amendment.

In 2014, the ACLU successfully fought to have Arizona's revenge porn statute overturned on the grounds that it was overly broad, criminalizing even the display or sale of artistic, historical, and newsworthy images. For example, someone who sells a history book containing an iconic image such as the Pulitzer Prize-winning photograph "Napalm Girl" — the unclothed Vietnamese girl running from a napalm attack — could have been prosecuted under the law.

Occasionally, cases involving revenge porn may coincidentally fall under such related criminal statutes as child pornography, unlawful surveillance, sexual assault, aggravated harassment, domestic violence, cyber-stalking, stalking, extortion, unlawful use of an access card, hacking, etc. But there remains a need for a direct legal approach to advocating for these victims.

Limited solutions under copyright law

As a partial solution, some victims of revenge porn have been able to utilize provisions of the 1998 Digital Millennium Copyright Act (DMCA) to attempt to remove particular postings of their images online. In such cases, the victim must send a DMCA "takedown notice" to the website's host requesting removal of the images.

One site, *Undox.Me*, provides step-by-step information for submitting such requests. Some sites, such as *DMCA.com*, will submit the takedown requests for you for a fee. However, this remedy is only available

to victims who took the photograph themselves, and there are practical difficulties with enforcement.

The victim must issue a takedown request to each site posting the material. Since there could be hundreds of different sites, the victim must send out hundreds of individual notices and then constantly police the Web for reappearance of the images.

Even then, takedown requests fail to address the underlying problem. In most instances, the damage has already been done, especially since, absent a cultural and legal shift in the United States akin to the European Union's "Right to be Forgotten," completely and permanently removing personal content from the Internet is all but impossible. Further, takedown requests fail to adequately compensate victims or to deter wrongdoers.

Attorneys in other states are addressing the issue using tort law.

Attorneys in other states have been turning to civil law, particularly intentional infliction of emotional distress (IIED) claims, as a recourse for victims of revenge porn. In Texas, a class action lawsuit was filed in 2013 against a revenge porn site, *Texxxan.com*, as well as against *Texxxan.com*'s uploaders, subscribers, and Web-hosting giant *GoDaddy.com* for invasion of privacy and IIED.

In California, a civil lawsuit in a revenge porn case ended with a \$250,000 jury award. In February 2014, a Texas jury awarded a woman \$500,000 for her emotional distress after her ex-boyfriend posted private photos, messages, and Skype conversations

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of her on the Internet and then emailed her regularly to update her on how many people had viewed her private images.⁵ At the time, the Texas verdict was the largest revenge porn verdict in U.S. history, and some have touted it as a turning point in the statewide discussion of how best to advocate revenge porn victims.

Why IIED is a good fit for such cases

One of the reasons that claims based on intentional infliction of emotional distress or “the tort of outrage” are a good fit for the emerging issues of Internet culture is that the cause of action is designed to reflect society’s existing social norms.⁶ As the Louisiana Supreme Court stated in *Nicholas v. Allstate*: “Generally, liability will be found where the facts are such that, if they were recited to an average member of the community, they would arouse his resentment against the actor, and leave him to exclaim, ‘Outrageous!’”^{7,8} Obviously, not all instances of revenge porn would rise to the level of “outrageous.”

While “outrage” is an imprecise term, this lack of precision is also a virtue allowing the tort to evolve with changing times, social circumstances, and geographic locations. This built-in contextual analysis makes IIED claims uniquely adept at addressing bad Internet behavior.

IIED claims in Louisiana; three-part test

For an IIED claim to succeed in Louisiana as it has in Texas, a plaintiff must meet the three-part test set forth by the Louisiana Supreme Court of Louisiana in *White v. Monsanto*:

In order to recover a plaintiff must establish (1) that the conduct of the defendant was extreme and outrageous; (2) that the emotional distress suffered by the plaintiff was severe; and (3) that the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to

result from his conduct. The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests.⁹

Under this standard, an IIED claim based on a revenge porn case would face several specific challenges.

Challenge 1: Proving intent

In *Monsanto*, the court clarified that intent means that the actor either “(1) consciously desires the physical result of his act, regardless of the likelihood of that result happening; or (2) knows that that result is substantially certain to follow from his conduct, regardless of his desire as to that result.”¹⁰

In many cases, a “conscious desire” will be apparent from the choice of the posting forum given that such sites are known for hosting images for the purpose of “revenge.” Occasionally an individual will even state his or her desired result with the images. However, even when profit, notoriety, or factors unrelated to causing distress motivate the poster, the nature of the forum and its publicity may make it clear that a particular result is substantially certain to follow.

Challenge 2: Proving “severe” emotional distress

Proving damages is a significant hurdle in any IIED case, as plaintiffs rarely suffer such extreme emotional distress that they are motivated to seek medical treatment that could document their distress and its effects. However, the CCRI survey suggests that the victims of revenge porn might be particularly likely to suffer damages that would meet this burden. For example, the survey found that, of the 361 victims:

- 93 percent (336 people) said they have suffered significant emotional distress due to being a victim.
- 42 percent (152 people) sought out psychological services due to being a victim.
- 51 percent (184 people) had suicidal thoughts due to being a victim.
- 26 percent (94 people) had to take time off from work or school due to being a victim.
- 8 percent (29 people) quit their job or dropped out of school due to being a victim.
- 6 percent (22 people) were fired from their job or kicked out of school due to being a victim.
- 3 percent (11 people) legally changed their name due to being a victim.

Challenge 3: Proving outrage

Whether an act can be called “outrageous” is a context-specific determination. More important than what a defendant does is when and where he or she did the act and the relationship between the parties involved, particularly whether



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the defendant's relation with the plaintiff gave him power to affect the plaintiff's interests.¹¹ The courts also look at the duration of the activity and its resulting harm. Courts around the nation have frequently found that a series of harassment can rise to the level of "outrageous" conduct.¹²

The CCRI survey showed that about half of victims were subjected to continued harassment or stalking after their images were posted. This harassment and stalking wasn't just online. Thirty percent had been harassed or stalked in person, over the phone, or otherwise offline. Given the breadth of exposure and the permanence of images on the Internet, the harassment in some of these cases lasts for years and sometimes decades.

Challenge 4: Succeeding against particular defendants


Another hurdle plaintiffs face is identifying the individual who posted the illicit material. Often, the user will identify himself in the post or to the victim. However, absent such evidence, proving the user's identity may be difficult. A computer's Internet protocol (IP) address can provide the location of the user, but a moderately sophisticated user can obscure his or her IP address by routing Internet traffic through a proxy server, virtual private network, or by simply using publically available Wi-Fi.

The websites hosting the illicit content often have information that could identify abusive posters but may refuse to reveal their users' identities to protect their financial interest in hosting such content. Other websites make a conscious effort not to obtain or retain their users' identifying information. Finally, even if the individual can be identified, he or she may be judgment-proof.

A plaintiff may also sue the website itself or a related Internet service provider (ISP), such as a website hosting company. When suing a website or ISP, an attorney must contend with the broad defenses afforded by Section 230 of the Communications Decency Act of 1996. Section 230 shields website owners and ISPs from liability whenever they act as a "service provider" and only passively display "user-generated content" (*i.e.*, content uploaded/created by a website's users).

However, in the past decade, limits have been placed on that immunity. In 2008, the 9th Circuit held that the Section 230 defenses do not apply when the website solicits or interacts with the content in a way that augments or materially contributes to the content's alleged unlawfulness.¹³ The court stated that when a website engages in such activities, it is acting as a "content provider" in addition to being a service provider and thus should be held liable for the content posted.


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Until more civil claims based on revenge porn are litigated or until a workable approach to criminalizing revenge porn is found, these issues may remain in a legal gray area. The problems raised in this article extend beyond the scope of this particular issue. More of our interactions are taking place online, and this means that more potentially tortious conduct is happening on the Internet rather than in person.

To what extent are victims of Internet harms entitled to compensation? Should individuals be held accountable for the consequences of their Internet activities? Should website providers or ISPs? What constitutes "outrageous" behavior on the Internet? A jury may best answer these questions.

Endnotes

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