

There is 'no sui generis law prohibiting publication of non-consensual pornography'

(Justine Mitchell:2014).

However, calls to create a specific criminal offence to prohibit this appalling practice are misguided. Not only would such an offence be ineffective in curtailing such behaviour, but this area is not a matter for the criminal law.

Critically discuss, considering existing criminal legislation and any alternative remedies including non-criminal regulation of online behaviour.

Introduction

It is important to note at the outset that Justine Mitchell's assertion that there is no sui generis law which deals with the publication of non-consensual photography is now in part redundant at least as far as England and Wales is concerned. Section 33 of the Criminal Justice and Courts Act 2015^[1] now makes publication of this category of pornography a criminal offence, although admittedly not much of the act is in force (however s.33 is in force as of 13 April 2015).^[2] Nevertheless, it is worth addressing the point since this is still not the case in many other major jurisdictions in the world. Moreover, the question has academic and policy value.

The Harm Caused by Revenge Porn

Revenge porn has been noted to be proliferating more and more, whilst bringing true horror to its victims^[3]. The scale is also staggering, and there have been estimations that there are tens of thousands of victims suspected.^[4] What is particularly noteworthy is the rate at which this problem has developed, with revenge porn being a complete non-event only a few years ago.^[5] Revenge porn constitutes posting of someone's intimate/sexual pictures/videos online alongside 'disparaging descriptions' of their former lover as well as, crucially, their contact

details (usually at work and at home and sometimes even the contact details of their family members).^[6]

Since the contact details of victims are posted online, the victims are often called by strangers asking for sex.^[7] Not only that, but often victims of revenge porn receive rape threats from viewers of these websites.^[8] The damage which revenge porn causes is therefore manifold – it constitutes harassment, invasion of privacy and can lead to a breakdown in the victim’s relationships with other and/or working relationships.^[9] This is borne out in practice, with the victims of revenge porn often being either fired or quitting and also having to suffer harassment from strangers; in fact, some victims have had to change their names and the way they look to avoid the consequences of revenge porn.^[10] In fact, some victims of revenge porn have committed suicide as a result.^[11] Moreover, revenge porn exposes victims to real danger of harm from others, with some victims being ‘stalked, assaulted or even killed’.^[12]

The Law before the Criminal Justice and Courts Act 2015

Prior to the creation of a specific offence for revenge porn, this activity was in limbo as it fell broadly within the field of attempting to control one’s image. In general, English law does not recognise a free standing right to control the reproduction of one’s image.^[13] There is also no specific “invasion of privacy” cause of action.^[14] However, in the UK, people’s private and family lives are protected by the European Convention of Human Rights^[15] (which is directly enforceable through the Human Rights Act 1998^[16]). The ECHR does not, however, have any horizontal effect, leaving victims with limited options for redress.

Prior to the CJCA 2015, the only horizontal redress for victims was an action in tort, specifically for breach of confidence. Breach of Confidence is capable of punishing those who disseminate confidential images within and without marriage, which obviously extends

to non-consensual pornographic images or videos.^[17] In addition, those who share such images or videos could also be pursued under breach of confidence since it is possible to imply an obligation of confidence on them even when they are not in a relationship of confidence with the victim.^[18] This is because ‘a ‘duty of confidence’ [arises] whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential’^[19] or when the information in question ought to be seen as private.^[20] There are, however, notable problems with relying on a breach of confidence action which are common to all civil law remedies. These are the cost of proceedings and the sheer number of potential defendants. Legal proceedings are always a costly and stressful endeavour, despite recent reforms aimed at reducing costs and simplifying proceedings (such as the Woolf reforms and the Jackson reforms). This could put off victims or simply make it impossible for them to obtain a remedy, depending on their means and ability to obtain funding. Another problem is that once the images are uploaded, they proliferate at a rapid pace and therefore the victim needs to start actions against many defendants if she is to prevent them from continuing to host the offending material, which makes the process difficult. One advantage to a criminal approach in this context is that it is a deterrent and preventative – the argument being that a strong enough criminal penalty would prevent the situation from escalating to the point where the civil actions are necessary.

It is worth noting that it is at least theoretically possible for a victim to gain a measure of redress through the law of copyright.^[21] Whether this does or does not apply largely depends on the situation, since where the victim is only the subject of the photograph and /or video, no copyright claim could be made.^[22] However, where the victim has contributed to the work in some way (be it a photograph or video) or even produced it personally (about 80% of revenge porn is self-made by the victim),^[23] the copyright would subsist in the work and the victim

could enforce it.^[24] Specifically, photographs and videos are protected as artistic works under s.4 of the Copyright, Designs and Patents Act 1988.^[25]

This provides victims with certain potential remedies. For instance and perhaps most importantly, a victim could send a takedown notice to any website owner who is hosting revenge porn featuring the victim.^[26] This is a valuable tool especially where the website normally hosts third party content – by putting the owners on notice the victim could prevent them from arguing that they had no knowledge that they were infringing copyright.^[27] Assuming that the website owners refuse to remove the offending material, then the victim can start a civil action against them on the grounds that they are publishing and/or sharing images which in which the victim has copyright. The potential remedies are both damages and an injunction restraining the website owner from continuing to publish or share the images. This is, arguably, what the victims of revenge porn want the most, even more than to see the original perpetrator (usually their ex) punished. This is one obvious advantage of adopting the copyright route above all others, including all criminal law avenues. Moreover, simply serving a takedown notice to a website owner is simple and easy to do (it also does not cost anything). There are however, notable drawbacks to this method as well. For instance, it is possible for the website owner to ignore the takedown notice, which would mean that the victim would have to carry out a stressful and costly legal action in order to have the images and/or videos removed. Moreover, due to the speed of sharing, dealing with one website could be insufficient as the images could have spread around the internet, leaving the victim with the unmanageable task of sending takedown notices to all of them as they proliferate.^[28]

Aside from image based rights, copyright and privacy rights, there were (and still are) a set of potential avenues for redress which could be relevant depending on the circumstances. For

instance, where a perpetrator uploads an image or video repeatedly, this possibly in conjunction with other behaviour, could amount to a campaign of harassment which would be an offence under the Protection from Harassment Act 1997.^[29] Further, if the publishing of such material is accompanied by blackmail (which is common^[30]), then that behaviour would fall foul of s.21 of the Theft Act 1968^[31]. Further, it is possible for either the Communications Act 2003^[32] and/or the Malicious Communications Act 1988^[33] to apply^[34]. This could happen, for instance, if the defendant has informed either the victim or a third person of the fact that the publication was made, in an indecent, grossly offensive or threatening manner – that could amount to sending a communication with intent to cause anxiety or distress and would be an infringement of the Malicious Communications Act 1988. Further, in situations where the defendant/perpetrator obtained the material in question through unauthorised access to a computer (which is arguably highly likely since even a modern smartphone would qualify as a computer), then this could amount to an offence under the Computer Misuse Act 1990^[35]. In addition, where images are taken without the knowledge of the victim, it is arguably possible for an offence of voyeurism to be made out contrary to the Sexual Offences Act 2003.^[36]

Arguments for and against the criminalisation of Revenge Porn

It is clear from the section above detailing the harm caused by revenge porn that it can do appalling damage to the lives of the victim. There is, arguably, no serious way of asserting that such action should not be punished. The question is, therefore, whether the sanction available before the introduction of the CJCA were sufficient.

Firstly, losing an action in breach of confidence could have serious financial repercussions for a defendant and therefore this could potentially have a deterring effect. Moreover, some have argued that we should be slow to criminalise acts of this nature lest we accidentally catch

others and infringe on freedom of expression; for instance, it has been argued that a badly drafted or interpreted criminal sanction could catch memoirs, “kiss and tell” journalism or novels.^[37]

In addition, revenge porn had not been criminalised until now because it does not integrate smoothly into any recognised “crime” framework. The most appealing criminal framework for “revenge porn” to be assessed under is harassment, but as has been argued both in the UK and US, revenge porn does not necessarily constitute harassment by the perpetrator because harassment must be a consistent act (a pattern of behaviour), whereas revenge porn can be released once, rather than repeatedly.^[38] However, these arguments appear to be facile. While the perpetrator really does commit a one off act, it is clear that this act leads to something which can genuinely be described as harassment (considering victims are subjected to a constant stream of indecent or abusive messages) – it is simply the case that the users of revenge porn websites act as proxies for the harassment the perpetrator would like to inflict on his victim. Moreover, the appalling damage done to victims clearly deserves an appropriately severe response. While breach of confidence actions could have a deterrent effect, it is clear that this is insufficient since revenge porn continues to proliferate.

One further aspect to consider is the fact that there is a noticeably wide range of opportunities (both civil and criminal) available to victims even without recourse to s.33 CJCA. Perhaps the most important is the use of copyright law, which has been highlighted as important by commentators. This is especially true because while a criminal sanction rests on the notion of deterrence, the copyright solution deals with the biggest problem facing victims – the fact that these images are online and must be removed.

Conclusion

It is submitted, therefore, that there is compelling evidence on both sides of this argument. On the one hand the damage done by revenge porn is harrowing and deserves the strongest response, which intuitively seems to mean a sui generis criminal sanction. This is arguably also the most direct solution and the one which will most clearly express condemnation of this reprehensible act. However, there are compelling counterarguments as well. Prior to the introduction of the new sanction some (admittedly rare) dissenting voices had argued that a badly drafted law could lead to unfortunate and unintended infringements on free speech – since the law is so new there has not been enough time to properly assess whether this concern will be borne out in practice. However, the mere fact it is raised should be a reason for pause. This is especially the case considering the fact that a close examination of the available laws has highlighted that depending on the situation a victim potentially has a wide range of legislation to call on. From an empirical point of view however, it appears that regardless of the range of potential legal solutions, there has been no answer as of yet, since revenge porn is increasing rather than decreasing in prevalence. This would suggest, tentatively, that introducing a specific sanction may be the correct approach at this juncture.

Word Count: 2070 without footnotes and bibliography

Footnotes

^[1] Criminal Justice and Courts Act 2015 c.2.

^[2] Dan Bunting, ‘Revenge porn: will the new laws make any difference?’ (2015) February 17, <http://www.halsburyslawexchange.co.uk/revenge-porn-will-the-new-laws-make-any-difference/> accessed 12 May 2015.

^[3] Janice Richardson, ‘If I Cannot Have Her Everybody Can: Sexual Disclosure and Privacy Law’, in *Feminist Perspectives in Tort Law* (Janice Richardson & Ericka Rackley eds., 2012)

145, 145; Elizabeth M. Ryan, 'Sexting: How the State Can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults' (2010) November, 96 IOWA L. REV. 357, 363–64; Eric Schulzke, 'California Lawmakers Target 'Revenge Porn' but Miss, Critics Say' (2013) September 20, Desert News, <http://www.deseretnews.com/article/865586019/California-lawmaker-target-revenge-porn-but-miss-critics-say.php> accessed 12 May 2015.

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[5] Lorelei Laird, 'Victims are Taking on 'Revenge Porn' Websites for Posting Photos They Didn't Consent To' (2013) November 1, A.B.A. J. http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c/ accessed 12 May 2015.

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[7] Emily Bazelon, 'Why do We Tolerate Revenge Porn? A New Bill in California Tries to Address the Problem, but Doesn't Go Far Enough' (2013) September 25 SLATE, http://www.slate.com/articles/double_x/doublex/2013/09/revenge_porn_legislation_a_new_bill_in_california_doesn_t_go_far_enough.php accessed 12 May 2015; Mary Anne Franks, 'Drafting an Effective "Revenge Porn" Law: A Guide for Legislators' (2014) July 25, End

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^[8] Kitchen (n 6).

^[9] Elizabeth Adjin-Tettey, 'Sexual Wrongdoing: Do the Remedies Reflect the Wrong?' (2012) in Janice Richardson & Erika Rackley eds., *Feminist Perspectives on Tort Law* (Routledge 2012) 179, 181.

^[10] Lorelei Laird, 'Victims are Taking on 'Revenge Porn' Websites for Posting Photos They Didn't Consent To' (2013) November 1, A.B.A. J. ;SunealBedi, 'California's Attempt to Avenge Revenge Porn' (2013) September 9, Huffington Post, http://www.huffingtonpost.com/suneal-bedi/california-revenge-porn_b_3879916.php accessed 12 May 2015

^[11] Michael Salter et al., 'Beyond Criminalisation and Responsibilisation: Sexting, Gender and Young People' (2012), 24 *Current Issues in Criminal Justice* 301, 303.

^[12] Franks (n 7).

^[13] *Fenty v Arcadia Group Brands Ltd (t/a Topshop)* [2013] EWHC 2310 (Ch); [2013] W.L.R.(D.) 310 at [2] (Birss J.); *Douglas v Hello* [2007] UKHL 21; [2007] 4 All E.R. 545.

^[14] *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; [2004] 2 A.C. 457 at [11] (Lord Nicholls); *Wainwright v Home Office* [2003] UKHL 53; [2004] A.C. 406.

^[15] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.php>

[16] Human Rights Act 1998 c.42.

[17] A v B Plc [2002] EWCA Civ 337; [2003] Q.B. 195.

[18] Duchess of Argyll v Duke of Argyll [1967] Ch. 302; [1965] 2 W.L.R. 790 at 322 (Ungoed-Thomas J).

[19] Att-Gen v Guardian Newspapers Ltd (No.2) [1990] 1 A.C. 109 at 281 (Lord Goff).

[20] Campbell v Mirror Group Newspapers Ltd [2004] UKHL 22 at [14] (Lord Nicholls).

[21] Amanda M. Levendowski, Using Copyright to Combat Revenge Porn (2014). Tri-State Region IP Workshop, Winter 2014; NYU Journal of Intellectual Property & Entertainment Law, Vol. 3, 2014. Available at SSRN: <http://ssrn.com/abstract=2374119> or <http://dx.doi.org/10.2139/ssrn.2374119>

[22] Queen Mary Legal Advice Centre, 'The Law and Revenge Porn (England & Wales)' (2015) 2 April, qLegal Toolkits, <http://www.qlegal.qmul.ac.uk/docs/151857.pdf> accessed 15 May 2015.

[23] Ibid

[24] Queen Mary Legal Advice Centre (n 22).

[25] Copyright, Designs and Patents Act 1988 c.48.

[26] Queen Mary Legal Advice Centre (n 22).

[27] Queen Mary Legal Advice Centre (n 22).

[28] Queen Mary Legal Advice Centre (n 22).

[29] Protection from Harassment Act 1997 c.40.

[30] Halsbury's Law Exchange, 'Revenge porn – are we in need of stronger laws?' (2014) July 14, Halsbury's Law Exchange, <http://www.halsburyslawexchange.co.uk/revenge-porn-are-we-in-need-of-stronger-laws/> accessed 16 May 2015.

[31] Theft Act 1968 c.60.

[32] Communications Act 2003 c.21.

[33] Malicious Communications Act 1988 c.27.

[34] Halsbury's Law Exchange (n 30).

[35] Computer Misuse Act 1990 c.18.

[36] Sexual Offences Act 2003 c.42.

[37] Robert Sharp, 'A Word of Caution on Criminalising Revenge Porn' (2014) July 3, Robert Sharp, <http://www.robertsharp.co.uk/2014/07/03/a-word-of-caution-on-criminalising-revenge-porn/> accessed 12 May 2015.

[38] Ibid; Danielle Keats Citron and Mary Anne Franks, 'Criminalising Revenge Porn' (2014) http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2424&context=fac_publications accessed 12 May 2015.

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