

# NON-CONSENSUALLY SHARED PORNOGRAPHY AND THE NEED FOR REFORM IN IRELAND

SAM ELLIOTT

## INTRODUCTION

Franks defines non-consensual pornography (or ‘revenge porn’) ‘as the distribution of sexually graphic images of individuals without their consent’.<sup>1</sup> This encompasses both images taken without the consent of the victim (of a voyeuristic nature or otherwise) and images taken consensually, but later distributed without consent.

One might think of revenge porn as a new phenomenon. The truth is that it is not a novel act, but rather one that has adapted and evolved by way of communications technology.<sup>2</sup> Chang identifies the internet as a ‘force multiplier’, making previously-obscure material publicly and internationally available.<sup>3</sup> 30 years ago, the most extreme instances of revenge porn might have involved publication of intimate images in a pornographic magazine or other print media. The modern perpetrator may spread such images to an audience many magnitudes larger with a few taps on a touch screen.

It is an act of three parties – the perpetrator, the victim, and the propagators and consumers of the information. In criminalizing the act, it will be necessary to examine whether either – or both – the perpetrator and consumer should be liable for their respective roles.

The relative ease with which revenge porn may be shared – and potential for extreme damage to a victim’s good name and wellbeing – has elicited various legal responses worldwide. Within the civil sphere victims may pursue traditional remedies by way of tort or copyright law.<sup>4</sup> The judgment in *Google Spain*<sup>5</sup> - wherein the ‘right to be forgotten’ was successfully litigated – is another area of interest to victims.

It is therefore surprising that the criminal law response to revenge porn has been limited. As of June 2015 there is no specific offence under Irish law regarding the creation, distribution, or proliferation of non-consensually shared pornography. Given the increasing rate at which this content is being created and shared, it is time to re-evaluate our position.

## THE NON FATAL OFFENCES AGAINST THE PERSON ACT 1997

It is first important to distinguish cases wherein the victim of revenge porn is a minor. Given the developed nature of Irish law on child pornography – and the robust and consistent

---

<sup>1</sup> Franks “Combating Non-Consensual Pornography: A Working Paper” (2014) [ssrn.com](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336537) accessible at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2336537](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336537)> accessed 8 June 2015.

<sup>2</sup> By way of example *Woods v Hustler Inc.* [1984] 10 Media L. Rep. 2113.

<sup>3</sup> Salter “Responding to revenge porn: Challenges to online legal impunity” (2013) accessible at <[http://www.academia.edu/7833345/Responding\\_to\\_revenge\\_porn\\_Challenges\\_to\\_online\\_legal\\_impunity](http://www.academia.edu/7833345/Responding_to_revenge_porn_Challenges_to_online_legal_impunity)> accessed 18/4/2015. (Herein *Salter*)

<sup>4</sup> Chang “Dozens of Women Join ‘Revenge Porn’ Class Action Lawsuit Against Texxxan.com” (2013) [abcnews.go.com](http://abcnews.go.com) accessible at <<http://abcnews.go.com/Technology/dozens-women-join-revenge-porn-class-action-lawsuit/story?id=18369797>> accessed 09/6/2015

<sup>5</sup> C-131/12 *Google Spain v AEPD and Mario Costeja González* [2014] ECLI:EU:C:2014:317

enforcement of same – there is an existing and tested avenue under which the DPP may pursue perpetrators.

The law becomes less clear when the victim is an adult. With no specific offence relating to revenge porn, section 10 of the Non Fatal Offences Against the Person Act 1997 – and the provisions on criminal harassment therein – may be applicable.

Of particular help is the Law Reform Commission paper on Cybercrime and Privacy.<sup>6</sup> Therein the Commission noted that ‘there may be a gap in Irish law in relation to indirect harassment’ (ie. harassment by proxy). By way of example, if one party were to distribute explicit images of a victim to their colleagues or family, they will not have breached s10 of the 1997 act as they have not communicated directly with the victim.<sup>7</sup> As noted by the Minister for Communications, Energy, and Natural Resources the act ‘is being interpreted in a very narrow sense by the Courts’.

This is a definite shortcoming of the 1997 act, particularly in the context of revenge porn. The ‘aim’ of revenge porn is to humiliate and beset the victim by way of public exposure, not by direct harassment. To this end the perpetrator may post the content to social media, or distribute it to the victim’s friends and family – this is entirely legal once there is no direct link to the victim.

By way of example, the Law Reform Commission examines the case of *R v Debnath* in the UK.<sup>8</sup> Therein the defendant and complainant had a sexual encounter, from which the defendant mistakenly believed she had contracted an STI. She subsequently engaged in proxy harassment – writing to the complainant’s partner and friends, establishing a website containing allegations as to the victim’s sexual orientation, and other similar behaviour. The LRC concluded that this behaviour would not be illegal under the 2007 act, as there was no direct contact between the harasser and the victim. Furthermore, re-uploading or otherwise propagating this content – whilst not mentioned in *Debnath* – also fails to fall under the act for this reason.

### **IDENTIFYING THE CORE SHORTCOMINGS OF THE 1997 ACT**

We can sum up the issues within the current legislation as follows – direct contact is necessary to amount to harassment under the 2007 act, and possession and propagation of the content is not illegal.

The former issue begs the question – why should indirect harassment be criminalized? If there is no direct contact, is there equally no direct harm?

Revenge porn is a unique act, insofar as the intention is to cause harm by way of assault on good name and public image.<sup>9</sup> ‘Traditional’ harassment often amounts stalking, bullying, or other

---

<sup>6</sup> LRC ‘Issues Paper on Cyber-Crime Affecting Personal Safety, Privacy and Reputation including Cyber-Bullying’ (LRC IP 6-2014) accessible at <<http://www.lawreform.ie/fileupload/Issues%20Papers/ip6Cybercrime.pdf>> accessed 20/4/2015.

<sup>7</sup> Non Fatal Offences Against the Person Act 1997 s10(2)(b)

<sup>8</sup> [2005] EWCA Crim 3472

<sup>9</sup> Citron & Franks ‘Criminalizing Revenge Porn’ (2014) ssrn.com accessible at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2368946](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2368946)> accessed 17/6/2015

unwanted behaviour carried out towards the victim. Revenge porn is an entirely different beast; the 'target audience' is often people known to the victim, or anonymous third parties on the internet.<sup>10</sup> Where the latter is the target, personal details of the victim are often simultaneously presented; this is typically to facilitate contact with the victim, in order to harass same.<sup>11</sup>

Both instances of revenge porn have a unifying feature – they are a calculated attack on a person's wellbeing. It is immaterial in effect as to whether the victim was directly contacted or not; the resulting damage to mental health and wellbeing is identical.<sup>12</sup> Given that both the objective and effect are similar, the requirement that harassment be direct has become arbitrary. Reform to section 10 of the 1997 act is therefore in order.

Returning to the second issue – the legal status of possession and propagation of the content – we now address a defining aspect of revenge porn. The images or videos are uploaded by the perpetrator, and subsequently downloaded and redistributed by third parties.<sup>13</sup> As noted by the LRC, the proliferation of mobile technology and the facilitation of such acts by websites and apps makes continued sharing of content relatively straightforward.<sup>14</sup>

Fitzpatrick advises that 'the key to dealing with [revenge porn] is speed – removing the material before the feeding-frenzy of internet virality takes hold'.<sup>15</sup> It is an old and often repeated mantra on the internet that, once content is uploaded, it is irremovable.<sup>16</sup> For example, the Celebrity Photo Hack of 2014 saw the content spread from the image board '4chan.org' to aggregator site 'reddit.com'.<sup>17</sup> Despite both sites complying with takedown requests and requests from law enforcement the content has been rehosted on different websites, and remains accessible by way of search engine.

It is relatively common that – when content is shared with the sole intention of 'getting revenge' – the subject's personal details will be included alongside the intimate images. The now-

---

<sup>10</sup> Ibid

<sup>11</sup> Martinez 'An Argument for States to Outlaw 'Revenge Porn' and for Congress to Amend 47 U.S.C. § 230: How Our Current Laws Do Little to Protect Victims' (2014) 14 JTLPL 141 accessible at <<http://tlp.law-dev.library.pitt.edu/ojs/index.php/tlp/article/download/141/151>>

<sup>12</sup> Goebert 'Impact of Cyberbullying on Substance Use and Mental Health' (2010) *Matern Child Health Journal* accessible at <[http://scholar.google.com/scholar\\_url?url=http://www.researchgate.net/profile/Deborah\\_Goebert/publication/46171023\\_The\\_impact\\_of\\_cyberbullying\\_on\\_substance\\_use\\_and\\_mental\\_health\\_in\\_a\\_multiethnic\\_sample/links/00463528296bebe817000000.pdf&hl=en&sa=X&scisig=AAGBfm2ZMa6B-XKr9QoL6hkPRZF4pC6gtA&nossl=1&oi=scholar](http://scholar.google.com/scholar_url?url=http://www.researchgate.net/profile/Deborah_Goebert/publication/46171023_The_impact_of_cyberbullying_on_substance_use_and_mental_health_in_a_multiethnic_sample/links/00463528296bebe817000000.pdf&hl=en&sa=X&scisig=AAGBfm2ZMa6B-XKr9QoL6hkPRZF4pC6gtA&nossl=1&oi=scholar)> accessed 17/6/2015

<sup>13</sup> Linkous 'It's Time for Revenge Porn to Get a Taste of Its Own Medicine: An Argument for the Federal Criminalization of Revenge Porn' (2014) *Richmond.edu* <<http://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1099&context=law-student-publications>>

<sup>14</sup> Supra 6.

<sup>15</sup> Fitzpatrick 'Best Served Cold' (2015) *Law Society Gazette* available at <<http://www.lawsociety.ie/Documents/Gazette/Gazette%202015/Gazette-april2015.pdf>> accessed 22 June 2015

<sup>16</sup> Cumbow 'Everything posted online is there forever, even after it's been deleted' (2011) *al.com* accessible at <[http://blog.al.com/breaking/2011/03/everything\\_posted\\_online\\_is\\_th.html](http://blog.al.com/breaking/2011/03/everything_posted_online_is_th.html)> accessed 22 June 2015

<sup>17</sup> McCoy '4chan: The 'shock post' site that hosted the private Jennifer Lawrence photos' (2014) *washingtonpost.com* accessible at <<http://www.washingtonpost.com/news/morning-mix/wp/2014/09/02/the-shadowy-world-of-4chan-the-shock-post-site-that-hosted-the-private-jennifer-lawrence-photos/>> accessed 22 July 2015

infamous site 'isanyoneup.com', created by internet personality Hunter Moore in 2010, hosted revenge porn whilst simultaneously linking to the subject's Facebook and Twitter accounts.<sup>18</sup> The site closed two years later during an investigation by the FBI into allegations of hacking and extortion by Moore.<sup>19</sup> Of note is the fact that – despite an estimated 40% of the content on 'isanybodyup.com' being stolen or otherwise non-consensual<sup>20</sup> – no criminal action could be taken solely on the grounds that the site hosted revenge porn.<sup>21</sup>

In Ireland it is legal to distribute pornography – even without the consent of the subjects therein – once one does not engage in direct harassment per the 1997 act. The act is limited to a 'two person' model of harassment. Therefore the second question that must be asked is whether it would be appropriate to expand the definition of harassment to include indirect – and assisted – harassment. It is clear – given the difficulties in the Moore case – that some amount of liability must be attributed to the propagator of the content. Where to draw the line is a far more opaque riddle to be solved.

### **THE CCRI MODEL LAW AND THE US APPROACH**

A number of jurisdictions have criminalized revenge porn.

In the United States 23 jurisdictions have enacted legislation specifically targeting revenge porn – 20 of which enacted these laws between 2013 and 2015.<sup>2223</sup> 17 of these states have been advised by the Cyber Civil Rights Initiative, who have drafted a model law which has been implemented to varying degrees.<sup>24</sup>

The CCRI's model law criminalizes the '[knowing disclosure] of another person who is identifiable from the image itself or information displayed in connection with the image' where the image is of an explicit nature.<sup>25</sup> To be liable for the act, the actor must 'know' or 'be reckless with regard to whether the depicted person has not consented to such disclosure'.<sup>26</sup>

The model law has the advantage of avoiding separate tiers of liability for the original distributor and post-facto distributors of the content. Any person who distributes pornographic images in the knowledge that consent has not been given – or in a manner reckless as to consent – is

---

<sup>18</sup> Zelmer 'Naked & Famous: How A Risque New Website Pushes Boundaries And Buttons' (2011) [altpress.com](http://www.altpress.com) accessible at <  
[http://www.altpress.com/features/entry/naked\\_famous\\_how\\_a\\_risque\\_new\\_website\\_pushes\\_boundaries\\_and\\_buttons](http://www.altpress.com/features/entry/naked_famous_how_a_risque_new_website_pushes_boundaries_and_buttons)> accessed 22 June 2015

<sup>19</sup> Citron 368

<sup>20</sup> Laws 'I've Been Called the "Erin Brockovich" of Revenge Porn, and For the First Time Ever, Here is My Entire Uncensored Story of Death Threats, Anonymous and the FBI' (2013) [xojane.com](http://www.xojane.com) accessible at <  
<http://www.xojane.com/it-happened-to-me/charlotte-laws-hunter-moore-erin-brockovich-revenge-porn>> accessed 22 June 2015

<sup>21</sup> Supra 19

<sup>22</sup> CA Goldberg 'States with Revenge Porn Criminal Laws' (2015) [cagoldberglaw.com](http://www.cagoldberglaw.com) accessible at <  
<http://www.cagoldberglaw.com/states-with-revenge-porn-laws>> accessed 22 June 2015

<sup>23</sup> Franks 'Drafting An Effective "Revenge Porn" Law: A Guide for Legislators' (2015) [endrevengeporn.com](http://www.endrevengeporn.com) accessible at <<http://www.endrevengeporn.org/guide-to-legislation/>> accessed 22 June 2015

<sup>24</sup> Ibid para II

<sup>25</sup> Ibid para IV

<sup>26</sup> Ibid

potentially liable. Exceptions are provided for where exposure is voluntary, or where images are disclosed in the public interest (such as the reporting of unlawful conduct, or for law enforcement purposes).<sup>27</sup>

The CCRI approach has good potential to remedy the issues within Irish domestic law. If enacted as a new – and separate – amendment to the 1997 act, it would supplement the existing law on harassment. By way of example, direct harassment remains illegal in instances of parties contacting the victim. However, where the content is being knowingly propagated, criminal sanction may be pursued.

However, the model law is not perfect. The requirement that the content be ‘knowingly’ or ‘recklessly’ spread introduces a *mens rea* requirement that may be difficult – if not practically impossible – to enforce in certain circumstances. Whilst the archetypical ‘jilted lover’ or voyeuristic hacker may be relatively easy to pursue, a third party actor may be able to simply claim ignorance and avoid prosecution. Given the nature of contemporary revenge porn – which is not distributed by dedicated sites such as ‘isanyoneup.com’, but rather by aggregator sites focused on user created content – the model law may not be as effective as hoped.

A strict liability provision – on the other hand – may serve to stifle instances in which pornography is legitimately shared; checking the source of each and every image and video online is virtually impossible. Whilst the pursuit of propagators of revenge porn is a necessity in order to remedy the act, it should not come at the cost of innocently minded third parties.

Balancing the two competing approaches, a more restrictive approach may be better. Whilst it is harder to enforce, it ensures that due care and fairness is taken into account.

Finally, the recommendation by the LRC that the 1997 act be amended to give the provision extraterritorial effect is a justified one.<sup>28</sup> This would allow the law to be enforced where either the victim or perpetrator are located in Ireland. This is a needed response to the trans jurisdictional nature of the act, which is not bound by borders but rather carried by technology.

## CONCLUSION

On 5 June 2015, Ronan Hughes of Co. Tyrone took his life.<sup>29</sup> It subsequently emerged that he was subject to blackmail following the sharing of intimate pictures of himself via social media. Ronan was 17 years old.

Whilst Ronan did not live within our jurisdiction, his death demonstrates the real effect that revenge porn can have on its victims. Of particular note is the fact that the young man sought advice from the PSNI, who were allegedly ill-equipped to handle cyber harassment.

It is better that a proactive approach be taken towards legislating against revenge porn. The surety that clarity in the law will give to victims of the act is absolutely necessary. Furthermore, criminalizing the distribution of revenge porn will empower law enforcement to take quick and

---

<sup>27</sup> CCRI Model Law para B

<sup>28</sup> Supra 6.

<sup>29</sup> RTÉ ‘Warning issued over posting images online following teenager’s death’ (2015) rte.ie accessible at <<http://www.rte.ie/news/2015/0608/706774-ronan-hughes-north/>> accessed 23 June 2015

decisive action following a complaint. For someone in a situation akin to Ronan Hughes', this could have been lifesaving.

Ireland should seek to implement a tested model. The CCRI model law has that advantage. Through the suggested changes to the 1997 act - and through implementing the model law - a strong and thorough legislative framework can be developed to combat revenge porn.

Bambauer notes that the case of Holly Jacobs – a victim of revenge porn – is unique.<sup>30</sup> Unfortunately, it is not unique due to the nature of the act, but rather due to the relative rarity that it demonstrates a successful conviction on the grounds of sharing revenge porn. Whatever legislative approach is taken in Ireland, it must be given teeth to tackle revenge porn.

## BIBLIOGRAPHY

### ACADEMIA AND MEDIA

Chang “Dozens of Women Join 'Revenge Porn' Class Action Lawsuit Against Texxxxan.com” (2013) abcnews.go.com accessible at <<http://abcnews.go.com/Technology/dozens-women-join-revenge-porn-class-action-lawsuit/story?id=18369797>> accessed 09/6/2015

Citron & Franks ‘Criminalizing Revenge Porn’ (2014) ssrn.com accessible at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2368946](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2368946)> accessed 17/6/2015

Cumbow ‘Everything posted online is there forever, even after it's been deleted’ (2011) al.com accessible at <[http://blog.al.com/breaking/2011/03/everything\\_posted\\_online\\_is\\_th.html](http://blog.al.com/breaking/2011/03/everything_posted_online_is_th.html)> accessed 22 June 2015

Fitzpatrick ‘Best Served Cold’ (2015) Law Society Gazette available at <<http://www.lawsociety.ie/Documents/Gazette/Gazette%202015/Gazette-april2015.pdf>> accessed 22 June 2015

Franks ‘Drafting An Effective “Revenge Porn” Law: A Guide for Legislators’ (2015) endrevengeporn.com accessible at <<http://www.endrevengeporn.org/guide-to-legislation/>> accessed 22 June 2015

Franks “Combatting Non-Consensual Pornography: A Working Paper” (2014) ssrn.com accessible at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2336537](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336537)> accessed 8 June 2015.

Goebert ‘Impact of Cyberbullying on Substance Use and Mental Health’ (2010) Matern Child Health Journal accessible at <[http://scholar.google.com/scholar\\_url?url=http://www.researchgate.net/profile/Deborah\\_Goebert/publication/46171023\\_The\\_impact\\_of\\_cyberbullying\\_on\\_substance\\_use\\_and\\_mental\\_health\\_in\\_a\\_multiethnic\\_sample/links/00463528296bebe817000000.pdf&hl=en&sa=X&scisig=AAGBfm2ZMa6B-XKr9QoL6hkPRZF4pC6gtA&nossl=1&oi=scholar](http://scholar.google.com/scholar_url?url=http://www.researchgate.net/profile/Deborah_Goebert/publication/46171023_The_impact_of_cyberbullying_on_substance_use_and_mental_health_in_a_multiethnic_sample/links/00463528296bebe817000000.pdf&hl=en&sa=X&scisig=AAGBfm2ZMa6B-XKr9QoL6hkPRZF4pC6gtA&nossl=1&oi=scholar)> accessed 17/6/2015

---

<sup>30</sup> Bambauer ‘Law and Revenge Porn’ (2013) Harvard.edu accessible at <<https://blogs.law.harvard.edu/infolaw/2013/10/01/law-and-revenge-porn/>> accessed 23 June 2015

Laws 'I've Been Called the "Erin Brockovich" of Revenge Porn, and For the First Time Ever, Here is My Entire Uncensored Story of Death Threats, Anonymous and the FBI' (2013) xojane.com accessible at < <http://www.xojane.com/it-happened-to-me/charlotte-laws-hunter-moore-erin-brockovich-revenge-porn>> accessed 22 June 2015

Linkous 'It's Time for Revenge Porn to Get a Taste of Its Own Medicine: An Argument for the Federal Criminalization of Revenge Porn' (2014) Richmond.edu < <http://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1099&context=law-student-publications>>

Martinez 'An Argument for States to Outlaw 'Revenge Porn' and for Congress to Amend 47 U.S.C. § 230: How Our Current Laws Do Little to Protect Victims' (2014) 14 JTLP 141 accessible at <<http://tlp.law-dev.library.pitt.edu/ojs/index.php/tlp/article/download/141/151>>

McCoy '4chan: The 'shock post' site that hosted the private Jennifer Lawrence photos' (2014) washingtonpost.com accessible at <<http://www.washingtonpost.com/news/morning-mix/wp/2014/09/02/the-shadowy-world-of-4chan-the-shock-post-site-that-hosted-the-private-jennifer-lawrence-photos/>> accessed 22 July 2015

Salter "Responding to revenge porn: Challenges to online legal impunity" (2013) accessible at < [http://www.academia.edu/7833345/Responding\\_to\\_revenge\\_porn\\_Challenges\\_to\\_online\\_legal\\_impunity](http://www.academia.edu/7833345/Responding_to_revenge_porn_Challenges_to_online_legal_impunity)> accessed 18/4/2015. (Herein Salter)

Zelmer 'Naked & Famous: How A Risque New Website Pushes Boundaries And Buttons' (2011) altpress.com accessible at < [http://www.altpress.com/features/entry/naked\\_famous\\_how\\_a\\_risque\\_new\\_website\\_pushes\\_boundaries\\_and\\_buttons](http://www.altpress.com/features/entry/naked_famous_how_a_risque_new_website_pushes_boundaries_and_buttons)> accessed 22 June 2015

#### **CASE LAW**

C-131/12 Google Spain v AEPD and Mario Costeja González [2014] ECLI:EU:C:2014:317

*R v Debnath* [2005] EWCA Crim 3472

*Woods v Hustler Inc.* [1984] 10 Media L. Rep. 2113.

#### **OFFICIAL PUBLICATIONS**

LRC 'Issues Paper on Cyber-Crime Affecting Personal Safety, Privacy and Reputation including Cyber-Bullying' (LRC IP 6-2014) accessible at <[http://www.lawreform.ie/\\_fileupload/Issues%20Papers/ip6Cybercrime.pdf](http://www.lawreform.ie/_fileupload/Issues%20Papers/ip6Cybercrime.pdf)> accessed 20/4/2015.

#### **LEGISLATION**

Non Fatal Offences Against the Person Act 1997