The War to Stay Secure: Online Privacy and the Battle in the Civil Courts against Sexual Cyberharassment

By Elisa D'Amico

Privacy Is Fundamental, Right?

Over one hundred years ago, Samuel Warren and Louis Brandeis recognized that individual rights were fundamental and "as old as the common law." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 193 (1890), *available at* http://groups.csail.mit.edu/mac/classes/6.805/articles/privacy/Privacy_brand_warr2.html. "Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society." *Id.* As social norms change and as technologies develop, so then do our fundamental rights. Today we are faced with protecting one of those rights not contemplated over 100 years ago but so sacred to us: our online privacy. Our online privacy and our online presence are so fundamental, and yet we continue to allow ourselves to remain, in many ways, exposed and unprotected.

Plugged In and Tuned Out, IMHO

Today, quite undeniably, we are wholly obsessed with technology and all the glorious ways in which each advancement seems to simplify our lives. And yet we have also come to understand that these technological advancements, while meant for good, are so often used for cruel and immoral purposes. Moreover, so many of these new technologies that we have no less than swooned over and welcomed into our lives with open arms and open wallets have been found to have harmful effects on us and on our children. Jane E. Brody, *Screen Addiction Is Taking a Toll on Children*, N.Y. Times, July 6, 2016, http://well.blogs.nytimes.com/2015/07/06/screen-addiction-is-taking-a-toll-on-children. Doctors in China have already labeled "Internet addiction" as a clinical diagnosis. *Id.* While American physicians have not yet formally diagnosed technology addition as an actual disease, many of us (me included) are guilty of pacifying our children at the restaurant table with some electronic device to make the experience more bearable. Teens find it easier to communicate by text message than by telephone, and many toddlers respond far better to the threat of "taking away the iPad" than the threat of "time out." Although "[t]echnology is a poor substitute for personal interaction," *id.*, we remain tweeting, texting, messaging, emailing, and social-media obsessed machines.

Why is it that we continue to embrace online technologies? When used properly, these tools are positive factors in our lives and extremely beneficial to us. Technology can increase visibility, profits, and communication, and, in some cases, it can save lives. *See* Ann Brenoff, *Facebook Helps Save Life of Man with Disability after His Incoherent Post Caught Friends' Attention*, HuffPost (July 20, 2015), http://www.huffingtonpost.com/entry/facebook-rescued-man-who-fell-from-wheelchair_55ad097ee4b0d2ded39f674e. But when individuals adopt and subsequently manipulate these technologies—using them for non-intended purposes, including for the purpose of harming others—the dangers often overshadow the benefits.

The Weaponization of Social Media: Who Is Pulling the Trigger?

When digital privacy is attacked, often the technology itself is not to blame; rather the fault rests squarely on the shoulders of those bad actors who choose to harass, humiliate, shame, and injure others, often through social media. *See* Stuart Poole-Robb, *The Weaponisation of Social Media*, ITProPortal (June 22, 2015), http://www.itproportal.com/2015/06/22/the-weaponisation-of-social-media (reporting that between 2009 and 2014, the number of cybercrime complaints received by the FBI has increased by three percent: of approximately 250,000 complaints, 12 percent involve some social networking component).

I often am asked my thoughts on why revenge porn, also called sexual cyberharassment, has recently risen to the level of an epidemic. While I am no expert, it seems to me that our society is a petri dish for this type of harassment. Technology continues to advance, creating new and better ways to communicate and share information. And people have also increased their electronic communications, including (most importantly for purposes of discussing sexual cyberharassment) the sharing of intimate images within the confines of a private relationship. *See* Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345, 354 (2014), http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2424&context=fac_pubs ("[R]evenge porn victims . . . shared their explicit images or permitted [them] to be taken because, and *only* because, their partners assured them that the explicit images would be kept

confidential."); Suzanne Choney, *Nearly 1 in 5 Smartphone Users Are Sexting*, Today Money (June 6, 2012), http://www.today.com/tech/nearly-1-5-smartphone-users-are-sexting-816897. The result is the world we are trying to dig ourselves out of, a world where victims find their private, intimate images online, and must spend inordinate amounts of time, money, and energy to remove that offending material and to regain control of their lives.

To be clear, I am not in any way condemning those who consensually and privately share their own intimate images. Nor am I in any way condoning the actions of those individuals who take it upon themselves to disseminate others' intimate images without permission. But what we are left with is a harsh reality, where the Cyber Civil Rights Legal Project (CCRLP) that I co-founded at K&L Gates has a steady influx of sexual cyberharassment victims seeking legal recourse. In fact, there are some days where I have to silence my phone and ignore emails because there are so many victims in need of help and I cannot keep up—there is simply not enough time in each day.

Instantly Gratified, Then Immediately Exploited: You Gotta Fight for Your Right . . . to Privacy

Over a century ago, Warren and Brandeis recognized that "instantaneous photography" could wither away individual privacy rights, and they were spot on. Today, with the swipe of a finger or a single "click," we get what we all so desperately crave: instant gratification. But with the advent of new technologies, information spreads instantaneously, leaving our individual privacy rights in danger.

While the momentum that legislators and lobbyists have gained over the past year or so with respect to laws seeking to criminalize revenge porn is quite commendable, for civil lawyers, only those criminal revenge porn laws that also contain civil components are useful weapons to fight back against perpetrators via the civil justice system. *See States with Revenge Porn Laws*, C.A. Goldberg, PLLC, http://www.cagoldberglaw.com/states-with-revenge-porn-laws/ (last updated Sept. 29, 2015) (as of today, 26 states plus the District of Columbia have passed laws criminalizing "revenge porn," and 11 others have bills pending in legislation); *see, e.g.*, Cal. Civ. Code § 1708.85 (effective July 1, 2015, and permitting recovery of attorney fees and costs); Fla. Stat. § 784.049 (effective Oct. 1, 2015, and authorizing $5,000 statutory damages and attorney fees and costs). Although some of these criminal laws could benefit from a good tweak, those with civil components—particularly those that contain statutory damages provisions—should be celebrated. *See* Elisa D'Amico, *Letter to the Editor: Revenge-Porn Law*, Miami Herald, May 21, 2015, http://www.miamiherald.com/opinion/letters-to-the-editor/article21630009.html. Since there is lag time between when these laws are passed and when they become effective, however, individuals who have *already* been harmed cannot rely on these civil components of state revenge porn laws, but instead need to find other tools to fight back and reclaim their online presence and their lives.

The CCRLP Is the Civil Lining to a Dark Cloud of Harassment and Abuse

Recognizing the need for a solution to help victims in the present, I along with my partner and co-founder David Bateman launched the CCRLP in late September 2014. Through the CCRLP, K&L Gates attorneys volunteer their time to represent victims of revenge porn, using civil tools currently in place to help them seek recourse for the harms they have endured.

How Can Victims Get Help? The Answer Is: "It Depends"

There is no "one-stop" solution. Because each case is very fact specific, the initial analysis requires an attorney to answer some important questions. Here are some questions to think about.

Did you take the photographslvideos? In 1998, Congress enacted the Digital Millennium Copyright Act (DMCA), 17 U.S.C. §§ 512, 1201–1332. The DMCA provides Internet service providers (ISPs) a safe harbor from monetary copyright liability so long as they comply with certain "notice and takedown procedures." 17 U.S.C. § 512(a)–(d). These particular procedures require ISPs to create and maintain a system for copyright owners to report infringement, as well as to promptly respond to takedown requests. If an ISP receives a proper DMCA notice and subsequently removes infringing material, it will enjoy the safe harbor from monetary liability for hosting copyrighted materials. But if an ISP either refuses or fails to take down infringing material following receipt of a proper DMCA notice, it will lose the protection afforded to it by the DMCA. The DMCA's structure provides incentives for ISPs to comply with the removal of copyrighted materials upon receipt of a proper DMCA notice. But if the victim does not comply with the requirements—for example if a DMCA notice is not in the proper form or if it is sent to the wrong recipient—the DMCA notice may be met with a counter-DMCA notice or, even in the case of true copyright infringement, the ISP may leave the offending materials online.

For revenge porn victims, the inquiry to be made is whether they took the offending photographs or videos or if someone else did. If the victim was the photographer, the victim has copyright in that media and can, in many instances, use the DMCA as a tool to combat revenge porn. Because of the sheer number of revenge porn "selfies" at issue, the DMCA is at least a potential tool for many victims. *See* Press Release, Cyber Civil Rights Initiative, Proposed CA Bill Would Fail to Protect Up to 80% of Revenge Porn Victims (Sept. 10, 2013), http://www.cybercivilrights.org/press_releases (reporting that a survey indicated up to 80 percent of victims were also the photographers of the offending media).

The DMCA notice is an incredibly

powerful tool for revenge porn victims. For many victims, their first and only desire is to get the explicit material offline. These victims have been wholly violated by the unauthorized postings. Each new posting is another dagger in the heart. The DMCA notice often is a swift resolution to stop the bleeding. Where the victim is not the photographer, if the victim is able to get the photographer to assign the copyright to the victim, the victim can then send DMCA notices on his or her own behalf. Alternatively, sometimes the victim can convince the photographer to send the DMCA notice directly. In either of these two circumstances, success often is an uphill battle.

Did you know these photographs\videos were being taken? I have spoken to hundreds of victims whose most intimate details have been displayed and disseminated online without their permission. In some instances, these victims had shared intimate photographs voluntarily while in a relationship, for example, with a partner stationed overseas while serving in the military. In other instances, victims had been filmed surreptitiously and were unaware that their most intimate moments were being recorded.

The import of this distinction is, first, that surreptitious recording itself is often illegal activity. But most voyeurism laws require that a perpetrator "trespass" and be "observing" the victim, so many actions that involve technology and would otherwise be considered to be illicit, surreptitious recordings may not actually be illegal. Courts have also found certain other "secret" and "unauthorized" recordings to be non-criminal for failure to satisfy other statutory requirements. *See, e.g.*, *Commonwealth v. Robertson*, 467 Mass. 371 (2014) (reversing order denying motion to dismiss and determining that Massachusetts law does not criminalize "upskirting" because said activity does not satisfy the statutory nudity requirement).

Did you consent to the dissemination of these photographs\videos? Consent is the key to a sexual cyberharassment case. But the focus must be on the right consent: the proper inquiry is not whether the victim consented to the filming or photography of the explicit act at the time the recording was made. Instead, the focus must be on determining whether the individual consented to the *public dissemination* of that media. It is, of course, still important to establish whether the victim was aware of the filming and/or consented to it at the time it occurred. But establishing whether the dissemination was in fact *nonconsensual* is paramount.

Do you know the identity of the perpetrator? If the victim did not consent to the publication of his or her intimate media and knows the perpetrator's identity, the next step for a civil attorney is to analyze whether the civil system is likely to be able to compensate the victim for the emotional and economic harm suffered. The civil justice system is difficult to navigate and not always easy to apply. Civil lawyers can file lawsuits on behalf of victims, naming the perpetrator as the defendant and alleging various privacy torts—including intentional infliction of emotional distress, invasion of privacy, and public disclosure of private facts. When the civil system works, lawsuits can sometimes provide victims with a monetary recovery to compensate them for economic and emotional harms they have suffered. *See, e.g.*, Jordan Darville, *50 Cent Ordered to Pay 50 Million in Stolen Sex Tape Case*, FADER (July 11, 2015), https://www.thefader.com/2015/07/11/50-cent-ordered-to-pay-5-million-in-leaked-sex-tape-case. But a civil lawsuit is often not a feasible remedy—frequently the perpetrators have no ability to satisfy any civil judgment or are beyond the reach of the court's jurisdiction.

If a victim does not know the identity of the perpetrator—for example, where intimate media have been posted on an "imposter profile" on some social media platform—an analysis must be done as to the likelihood that forensic information with the potential to unmask the perpetrator still exists. Websites and ISPs do not keep records forever, so time is a big factor. In many cases, a victim's first instinct is to delete every offending image or video and every related email or text message, which often results in the deletion of forensic evidence.

Did you register your photographs\videos with the U.S. Copyright Office? Federal law also offers victims of nonconsensual pornography some recourse. A victim can sometimes file a federal copyright lawsuit alleging infringement. A prerequisite to filing a federal copyright lawsuit is that the victim must register the works with the United States Copyright Office. *See* 17 U.S.C. §§ 512 *et seq.* Individuals are not, however, required to register their works if they only wish to send DMCA notices. Some of the benefits to filing federal copyright lawsuits can include statutory damages, which are not available in a state tort case.

Consent Is Power, and with Power Comes Great Responsibility

One important goal of the CCRLP and of mine is to empower victims. After they are shamed and humiliated online, victims often (understandably) retreat like hermit crabs. While it may seem counterintuitive to someone who has been exposed, one effective tool is to work on strengthening one's positive image online. To do that, though, an individual needs to affirmatively take action to be present, rather than become invisible. Victims can work on building up their online reputations themselves or through the use of companies specializing in that work. In either situation, victims must affirmatively step out and reclaim their identities.

Over the past year, more and more victims have spoken out, telling their stories and reclaiming their identities and their lives. *See Inside the Torturous Fight to End Revenge Porn,* Broadly, https://broadly.vice.com/en_us/video/inside-the-torturous-fight-to-end-revenge-porn (Feb. 3, 2016). Many have encouraged and empowered other victims to seek help from lawyers, counselors, and advocates, saving

lives in the process. I have spoken to so many young men and women who were so grateful to have some place to turn, some glimmer of hope, and some way to move on.

One client recently accompanied me to the Florida Supreme Court ceremony where I was receiving the Florida Bar Young Lawyers Division Pro Bono Award. Olivia was once hardly able to speak without tears streaming down her face. One year later, I was looking into her eyes as I was delivering remarks to Florida Supreme Court justices, Florida Bar leaders, and a packed courtroom. *See* Elisa D'Amico, Remarks at the Florida Supreme Court Pro Bono Awards (Jan. 28, 2016), a*vailable at* http://thefloridachannel.org/videos/12816-florida-supreme-court-pro-bono-awards/ (at 49:00). I accepted the award as "a symbol of [her] courage and a reminder that this type of harassment is a form of sexual abuse that we simply cannot stand for." *Id.*

The Cure at the End of the Tunnel

The world around us continues to change. Technology lurches forward with new devices and contraptions. While the laws lag behind, we are constantly pushing forward and making progress. As we advance, we are inching closer to a cure for the sexual cyberharassment epidemic. In June 2015, Google announced that it would, upon request, remove nonconsensual pornography from search results. *See* Amit Singhal, *"Revenge Porn" and Search*, Google Pub. Pol'y Blog (June 19, 2015), http://googlepublicpolicy.blogspot.com/2015/06/revenge-porn-and-search.html (noting that victims can "use this webform [https://support.google.com/websearch/troubleshooter/3111061#ts=2889054,2889099] to submit revenge porn removal requests"). One month later, Microsoft announced that it had set up a similar page for victims to report unauthorized explicit images from search results in Bing and would remove access to the content itself when shared on OneDrive or Xbox Live. *See* Jacqueline Beauchere, *"Revenge Porn": Putting Victims Back in Control*, Microsoft on the Issues (July 22, 2015), https://blogs.microsoft.com/on-the-issues/2015/07/22/revenge-porn-putting-victims-back-in-control (noting that "a new reporting Web page" is available: https://support.microsoft.com/en-us/getsupport?oaspworkflow=start_1.0.0.0&wfname=capsub&productkey=RevengePorn&ccsid=635731898720143527). In October 2015, major technology companies Facebook, Google, Microsoft, Pinterest, Twitter, and Yahoo! jointly contributed to a best practices guide for dealing with cases of sexual cyberharassment. *See* Technology and Industry Subcommittee, California Attorney General's Cyber Exploitation Task Force, *Industry Best Practices Regarding the Non-Consensual Distribution of Sexually Intimate Images*, *available at* https://oag.ca.gov/sites/all/files/agweb/pdfs/ce/cyber-exploitation-best-practices.pdf.

In a short while, we have made not just small steps—we have made huge leaps. And while we may not have yet won this sexual cyberharassment war, we are not even close to being done fighting.

For more information about the Cyber Civil Rights Legal Project, please visit http://www.cyberrightsproject.com. If you have any knowledge about any Internet-related crimes involving minors, please contact a representative of the Internet Crimes Against Children Task Force in your jurisdiction: http://www.icactaskforce.org/pages/taskforcecontactinfo.aspx.

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