

Cyber Crimes: Revenge Porn Legislation and its Applicability to Third Party Websites

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Warning: This Blog contains graphic depictions of real events

As technology changes, and society with it, the court has been slow to change with it. The distribution of intimate sexual images has increased with applications such as snapchat that allow for sending of temporary images that disappear after being viewed. But what if they are sent over a more permanent medium? What if the recipient opens it and shows it to others? What if the recipient saves the image, with permission from the sender, but then sends it to others or posts it online for people to see?

It is clear that such actions are not only a gross violation of one's privacy. Intimate images are deeply personal and require a large amount of trust to send and receive. Those whose intimate images are public or part of their professional lives, sign contracts on their disclosure. To disseminate another's intimate images without their consent then is morally reprehensible and can lead to the person whose images have been distributed to suffer from anxiety and depression and to potentially lose friends, family, and professional opportunities. So what recourse can these people have?

Revenge porn laws have been introduced to the Criminal Code in s 162.1, and there are also civil causes of action that can arise. However, aside from the original recipient being charged or sued, what about the websites that host the content? If the recipient posts the images to a website where it can be seen by the public, should people be able to sue the website if they do not take the images down? They could be viewed thousands of times online and saved by strangers. Should those websites be held liable? Should they be forced to take the images down? The law as it stands allows ISPs in Canada to be forced to take images down, but what if the images are re-uploaded at a later date or on a different website?¹

One of the largest pornographic media companies in the world is Mindgeek. Although it is registered in Luxembourg, the company was founded in Montreal and has its headquarters and operations there. Mindgeek owns a number of different pornographic websites, including tube sites such as pornhub and redtube. The question is, if someone uploads intimate images to one of these sites, could the site be held liable for keeping them up? As a company that is headquartered in Canada, would Mindgeek be subject to Canadian law? The matter is further complicated by the fact that some of the tube sites owned by Mindgeek are headquartered internationally, for example Pornhub's headquarters are in Cyprus. Additionally, as a large corporation, Mindgeek has the assets to pay for lawyers to defend themselves, whereas someone seeking recourse for their images or videos being distributed on one of these sites may not have the money to go through the legal battle to have the images removed in civil court. Furthermore, fighting a legal battle that involves such personal and traumatic events is emotionally taxing and some may not want to have it dragged out in court.

S 162.1 says that those who "knowingly" distribute or publish the images can be criminally liable. Many of the people who have had their images published on websites have sent emails to

¹ Canada, West Coast LEAF, #CyberMisogyny: Using and strengthening Canadian legal responses to gendered hate and harassment online, (2014)

their administrators telling them that the images had been distributed without their consent. Is this enough to constitute knowledge?

And what if the images are re-uploaded at a later date? Pornhub claims that they have a third party recognition software that tracks the “digital fingerprint” of prohibited videos, to prevent them from being uploaded. But some claim that this software can be fooled simply by slightly editing a video before uploading it. Do these websites have an onus to do more? Even if the original distributor has been convicted, if the images are still being distributed, the trauma and harm to the sender will continue to proliferate if they continue to be uploaded online. To what extent should pornography websites have the responsibility to keep track of what is being uploaded on its sites? It would seem unfair to have the victim constantly searching to see if images have been re-uploaded months or years after the distribution first took place. Websites should have mechanisms in place to prevent images and videos that have been flagged as non-consensual from being uploaded, and to ensure that these mechanisms work and cannot be worked around.

Once images or videos go online and have been downloaded, it may not be possible to retrieve or delete them from people’s private hard drives. However, public pornography websites such as Pornhub and their parent companies should have a responsibility to ensure that non-consensual images or videos are not uploaded on their sites, and if they are, to have them deleted. This may be practically difficult for these websites or require further administration or care on their part, however considering the extent of the harm caused towards victims in these cases, and the websites’ abilities to amplify this harm, they should work to overcome these difficulties.

To conclude, more clarification is needed regarding the legal consequences of the role of pornography websites in being used to distribute non-consensual intimate images. Parliament should make it clear what the responsibilities of websites are in these cases and potentially strengthen the ability for courts to have images taken down. More clarification is also needed regarding the extent to which a company’s activities need to be in Canada for a takedown notice to be applied, and whether the parent company or the website itself should be liable or sent the notice.