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qLegal Toolkits

The Law and Revenge Porn (England & Wales)

This toolkit will aim to give an overview of the controversial issue of revenge pornography by analysing the various avenues of legal recourse currently available, as well as taking a look at what the future holds both for the victims and the perpetrators.

Introduction

There is nothing quite so unsettling as feeling that one's privacy has been invaded. But this is precisely what countless victims of what has been dubbed as 'revenge pornography' face every day.

This novel kind of harassment is characterised by the online distribution of pictures and videos of the victims' most intimate sexual moments. Often the uploader will be someone who has shared a relationship with the victim in the past, which makes the issue all the more sensitive and emotionally charged. The impact upon the victim of revenge porn can include personal humiliation, serious professional implications, and in more extreme cases, even lead to suicide.

In the last two and a half years there were 149 cases of revenge pornography reported in England and Wales, with victims including children as young as 11.

There are a number of statutes that are currently used to prosecute revenge porn, all of which pre-date the meteoric rise of social media. In addition, victims of revenge porn can turn to private remedies under copyright, harassment and privacy laws. The first criminal conviction was handed down under the Protection from Harassment Act in November of 2014. The perpetrator, Luke King, was sentenced to 12 weeks in prison for continuously threatening and then subsequently posting explicit photographs of his ex-partner on the instant messaging service, WhatsApp. However, the current laws in the UK are largely ill-equipped to handle this new phenomenon.

Beyond the legislative hurdles, victims also have to face the elusive nature of the Internet and the ensuing challenges of policing content that is uploaded online. Attempts at stopping dissemination of content online are often met with the unintended effect of further popularizing it (also known as the Streisand Effect), or with the

appearance of new infringing sources appearing as soon as one is taken down. In addition, in most cases, legal action will be taken after the event, meaning the damage has, to a large extent, already been caused.

Nevertheless, positive steps are being taken in the direction of creating specific legislation for this area, with the criminalisation of revenge porn, implemented through the Criminal Justice and Courts Act having already received Royal Assent. It is hoped that as well as providing a suitable recourse for victims, if properly enforced, the Act will also have a deterrent effect and go some way to tackle this growing crime.

The Harassment Perspective

Revenge porn victims can seek protection under the Protection from Harassment Act 1997 (“PHA 1997”) if the dissemination of the images forms part of a course of conduct that the perpetrator knows or ought to know is causing the victim to feel harassed, alarmed or distressed. From the current legal standpoint this may lead to both criminal and civil sanctions.

Criminal and civil law are two different facets of the law that entail a separate set of rules and punishments. Criminal proceedings deal with crime and the legal punishment of criminal offences, whereas civil proceedings deal with the disputes between individuals, organisations, or between the two, in which the wrongdoer is compelled to offer compensation or restitution to the victim. Criminal proceedings are brought by the State, while civil proceedings are most commonly initiated by private parties (e.g. individuals or organisations).

Criminal remedy

Revenge porn can be defined as harassment which constitutes a criminal offence. Victims can report the offence to the police who will then refer the case to the Crown Prosecutor. As a representative of the State, the Crown Prosecutor can then decide if a suspect should face criminal charges following an investigation and go on to conduct prosecutions in the Court.

Criminal charges for harassment can be brought against the perpetrator by the Crown Prosecutor under s.2A of the PHA 1997 for ‘stalking’, which is also a type of harassment.

Whilst there is no strict legal definition of stalking, section 2A (3) of the PHA 1997 sets out examples which include contacting or attempting to contact a person by any means, and publishing any statement relating to a person or purporting to originate from them.

However, the Prosecutor has to prove, beyond a reasonable doubt, that the perpetrator’s conduct:

- occurred at least on two occasions
- was calculated to alarm or cause him/her distress and
- was oppressive and unreasonable

If the perpetrator is convicted, the Court may issue a restraining order prohibiting them from doing anything described in the order. Moreover, he or she may face up to six months imprisonment and may incur the payment of a level 5 fine (over five thousand pounds for England and Wales).

Civil remedy

Under the law of England and Wales, civil remedies are also available under the Protection from Harassment Act 1997. As explained above, the difference between civil and criminal proceedings is that civil proceedings are privately brought proceedings by the claimant (in this case, the victim). The victim can obtain a civil injunction and subsequently claim damages, including for the anxiety caused by the harassment. The aim of the injunction is to prevent continuing publication and to ensure that the offending pictures or videos are removed.

The procedure before the civil Courts offers one advantage: unlike in criminal cases, the standard of proof in civil proceedings is based on a balance of probabilities. This is a lower and easier-to-meet standard than the higher criminal standard of beyond reasonable doubt. Therefore, it can often be more probable that a civil proceeding seeking damages will be successful than a criminal proceeding resulting in an actual conviction.

Limitations

As the law stands, the PHA 1997 is still the most adequate legislation to deal with revenge pornography. However, its scope is still somewhat restrictive as revenge porn does not fit suitably into the definition of harassment.

This can be attributed to two main factors: first, that revenge porn was not taken into account when drafting the legislation, as it was not nearly as widespread as it is today; and second, that for an act to be considered as harassment under the law, there needs to be at least two instances, whereas revenge porn may only consist of one single act of uploading or sending.

Beyond the scope of the PHA 1997, there are other criminal laws under which perpetrators can also be charged, such as the Malicious Communications Act 1988, the Communications Act 2003, the Protection of Children Act 1978 and the Sexual Offences Act 2003. Nevertheless, each of these laws pre-dates the prevalence of revenge porn and, therefore, also do not provide suitable answers to the issue. By way of example, under the Communications Act 2003, it is an offence to send electronic communications that are ‘indecent’, ‘grossly offensive’ or ‘obscene’ in nature. This can be problematic in the case of revenge porn, as ordinary images of consensual sexual acts are not considered to be ‘obscene’ in the Director of Public Prosecutions’ guidance. It can be an adequate remedy in some uncommon situations, such as the perpetrator sending the images back to the victim as a way to cause embarrassment or distress, but it falls short of being an all-encompassing solution for most of the situations raised by revenge porn.

The Privacy Perspective

Privacy is another way to seek protection against the publication of non-consensual pornography in the UK. The scope of legal protection against the distribution of sexually explicit images and videos by a former partner without consent mostly lies in a fundamental individual's right to privacy, which is guaranteed to UK citizens by the

European Convention on Human Rights (ECHR) as enforced by the Courts through the Human Rights Act 1998. Article 8 of the ECHR, alongside the law of confidence, which puts an obligation (known as the duty of confidence) on a person who receives any personal information in confidence not to disclose it to a third party without their consent, form the foundation of English privacy law.

Article 8 of the ECHR enshrines everyone's 'right to respect for his private and family life, his home and his correspondence'. If a party is posting images or videos of somebody involved in sexual activity online or communicating them by any other means, including text messages, emails or distributing physical copies without consent, this will likely be in breach of this statutory right to privacy. Moreover, further online 'sharing' of the sexually explicit content may also fall under the same category.

If images shared with another party or person (usually a former partner) are then shared with others, it will also constitute a breach of confidence if the victim has a reasonable expectation that they will remain confidential and will never be made available to the public.

In addition, the Data Protection Act 1988 defines images of people related to their sexual life as 'sensitive personal data' and entitles the data subject to stop anyone from processing the data if it is 'causing or is likely to cause substantial damage or substantial distress to him'.

If successful in his or her privacy claim, the victim may claim monetary compensation for the harm caused, as well as an injunction to remove the images or videos from the source of publication.

However, a claim brought under privacy law is a private, civil claim and so can be expensive to pursue through the Courts. But even in case of a successful outcome, it might still be quite challenging to remove images from a website hosted outside of the UK.

Even if an individual were successful in legal action, there are still some downsides to seeking relief against 'revenge porn'. First of all, civil action and remedies are often only deployed after publication when the harm has already been caused.¹ Legal procedure on such a case most likely attracts public attention and increases the numbers of views and 'shares' while simultaneously increasing the humiliation of the claimant. Moreover, once published the images may just be removed from the targeted websites but will not be erased from public domain and will appear again and again, which means that the claimant would need to react to every new publication.

The claimant may seek protection under the 'right to be forgotten', a new legal concept which allows individuals to request a search engine such as Google to remove links containing videos, images or any other information about themselves. However, this is more of a band aid than an actual solution, for though the images or videos are no longer accessible through the search engine, they are still available online on the original websites they are hosted on.

¹ As a demonstration of this problem, see the case concerning the publication of a video by the former partner of X-Factor judge and singer Tulisa Contostavlos, which showed the claimant and the defendant engaged in sex acts. The video had already been released by the time proceedings were commenced. *Contostavlos v. Mendahun* [2012] EWHC 850 (QB)

You can find more relevant information on the ‘right to be forgotten’ in the latest qLegal toolkit found in the following link:

<http://www.qlegal.qmul.ac.uk/docs/146130.pdf>

Since in most cases the act of uploading is done anonymously, it can be extremely difficult to prove that the images were published by an ex-partner. The strategy of a claimant could be to hold accountable other parties who subsequently share and publish private images, including individuals sharing and publishing private images on social networks or owners of revenge porn websites, as joint tortfeasors.

The Copyright Perspective

Victims of revenge porn may have some recourse under copyright law, although only if they can establish authorship of the image or video.

If the victim is merely the subject of the photo or the video and did not have any involvement in its creation, he or she cannot be considered as the author of the work. If this is the case, then copyright laws cannot be invoked by the victim as a way to attempt to prevent their dissemination as the victim has no proprietary claim over the work. However, should the victim have contributed anything to the work, for example, by arranging the lighting or the composition of the space, then he or she might be considered as a co-author of the work and could seek relief under copyright laws.

It has been estimated that about eighty percent of revenge porn photographs are ‘selfies’, i.e. photos of a person taken by the person itself, that are then disseminated by a third party. In this case, the copyright owner is also the victim of the revenge porn. In other words, once a person takes a photo of herself or himself with their phone, for instance, they create a work and own it.

Photographs are considered by law as artistic works and, therefore, are protected by copyright as long as they can be considered as ‘original’.² Videos are granted protection under copyright law as well. Copyright implies a set of moral and economic rights for the owner. Thus, the author has the right to be identified as such whenever the work is published, performed or broadcast, in addition to having the right to maintain the integrity of the work and to object to false attributions (moral rights). Furthermore, the copyright owner likewise has the right to reproduce, distribute, rent, lend the work, perform, play, show it in public and, to broadcast and communicate it to the public (economic rights) and to prevent others from doing so.

Consequently, the act of posting or uploading somebody else’s photo onto the Internet without their consent constitutes an infringement of copyright, as it corresponds to an act of distribution or communication to the public. This is also true in the case of partial copy of the photo (and/or video) being made.

Provided that the victim is the author of the work, he or she is afforded certain remedies under copyright law. The victim can send a takedown notice to the website owner asking for the photo or video to be removed as it constitutes an infringement of copyright. If the website owner does not comply in a timely fashion, it cannot later argue as part of its defence that it was unaware that the image or video it was hosting was an infringement of

² Copyright, Design and Patents Act 1988, section 4.

copyright. This is particularly useful when taking action against websites with significant volumes of third party content such as YouTube, Twitter or Facebook, as they cannot argue that they do not monitor every video or image uploaded to their websites, and therefore cannot be responsible for infringement, if they have already been put on notice.

If the website does not comply with the takedown notice, the victim could begin a civil action in the Courts against the persons or the legal entities publishing or sharing the images. If successful, the victim could be awarded damages as compensation for any harm suffered and/or obtain an injunction, i.e. an order issued by a Court preventing the infringer from showing the infringing content.

Using copyright to combat revenge porn has some advantages. A takedown notice can easily be served on a website by the victim without issuing proceedings in the Court. It is a quick and simple method available for anyone facing the rapid dissemination of infringing content online and puts the website owner on notice of the copyright infringement claim.

Limitations

However, despite its advantages, several aspects make copyright law a flawed instrument for the victims of revenge porn seeking relief.

The notice and takedown process may not be effective, as the website owner may refuse to remove the photo or video. Should it do so, the victim must then decide whether to bring proceedings through the Courts for copyright infringement, which can be a lengthy and costly exercise.

Furthermore, even if the website owner does remove the offending work, this does not prevent other websites or users from reposting it. In this case, the victim is left with no other choice but to send further takedown notices. Thus, it may represent only a temporary relief for the victim who may then be forced to 'chase' infringers around the Internet.

Another problem is that quite often the uploading on revenge porn websites is done anonymously. This means that it is difficult, if not sometimes impossible, for the victim to identify the person who caused the damage or, in some cases, who owns the website. Should the matter go to trial, the victim would need to prove the infringement by every party to the proceedings, which could pose difficulties (for example, when trying to prove who uploaded the image in the first place).

In conclusion, copyright is not the perfect tool to fight against revenge porn. It is a potentially useful instrument, although one that was not designed to deal specifically with this issue. Consequently, it is neither perfect nor suitable for all the situations.

Criminal Justice and Courts Act

As previously mentioned, victims of revenge porn are currently protected under a number of existing statutes in the United Kingdom. However, they do not tackle revenge porn specifically and the penalties do not fit the severity

of the crime. Consequently, the Criminal Justice and Courts Bill ('the Bill') was presented last year before the Parliament to make revenge porn a separate offence.³

The Bill has been debated by both the House of Commons and the House of Lords, and outstanding issues were resolved on 21 January 2015. It received Royal Assent on 12 February 2015, after which it has now become the Criminal Justice and Courts Act ('the Act'). The Act will come into force by way of a statutory instrument containing the order which will be appointed by the Lord Chancellor or the Secretary of the State in the coming months. Once in force, the Act aims to provide measures to toughen up sentencing against such illicit behaviour.

Specifically, Section 33 of the Act makes it an offence for a person to disclose a private sexual photograph or film if the disclosure is made without the consent of the individual who appears in the photograph or film and with the intention of causing that individual distress. Meanwhile, Sections 34 and 35 define the terms 'disclose', 'photograph or film', 'private' and 'sexual' for the purposes of Section 33. These three provisions of the Act make revenge porn an explicit offence, classifying it as 'photographs or films which show people engaged in sexual activity or depicted in a sexual way or with their genitals exposed, where what is shown would not usually be seen in public'.

This novel piece of legislation covers the sharing of images and videos both online and offline. It applies to the distribution of hard copies, the upload on websites or social networking websites such as Facebook and Twitter, and also when shared via text messages and emails.

Victims and others will be able to report offences to the police for investigation. Officers will work with the Crown Prosecution Service to take forward cases for prosecution. Those convicted under the above mentioned provisions of the Act can face maximum imprisonment of up to two years. It provides a stronger remedy for victims of revenge porn as compared to a maximum of six months' imprisonment under other laws previously used to prosecute revenge porn offenders.

Conclusion

As we have seen, copyright, harassment and privacy laws do not provide a lasting and effective answer to revenge pornography. Their application is merely a patchwork, giving victims an adapted legal answer to their problem. It is not a long-term solution, and oftentimes can actually prove to exacerbate the issue rather than ameliorating it.

The law does not always adapt to new social phenomenon with the speed and efficiency one would hope for. It is a slow and methodical process that can leave those most vulnerable grasping for an answer. Moreover, the very nature of content dissemination on the Internet and the anonymity it affords to so many users, blankets perpetrators with a cloak of impunity that leaves victims feeling they are always one step behind. However, the recent conviction of Luke King and the new Criminal Justice and Courts Act designed specifically to tackle the issue of revenge porn provide victims with a more adequate remedy.

These events suggest that the time is ripe for the UK to join the effort to combat the rise of intimate photographs being circulated without consent. The 2014 celebrity photo leaks and recent publications of up to 200,000 Snapchat videos and pictures put into sharp focus the illusion that is privacy on the Internet and the importance of having targeted remedies available.

³ <http://services.parliament.uk/bills/2014-15/criminaljusticeandcourts.html>



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This Act seeks to bring about a cultural shift, whereby revenge porn will be perceived as a clear crime, punishable by imprisonment as opposed to a civil wrong, which is arguably overdue. This shift in perception will ideally be accompanied by greater education on the perils of the Internet, especially among children and teenagers.

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