



2015

# Comments: Not All Is Fair (Use) in Love and War: Copyright Law and Revenge Porn

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## Recommended Citation

Folderauer, Kaitlan M. (2015) "Comments: Not All Is Fair (Use) in Love and War: Copyright Law and Revenge Porn," *University of Baltimore Law Review*: Vol. 44: Iss. 2, Article 5.

Available at: <http://scholarworks.law.ubalt.edu/ublr/vol44/iss2/5>

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# NOT ALL IS FAIR (USE) IN LOVE AND WAR: COPYRIGHT LAW AND REVENGE PORN

## I. INTRODUCTION

The recent growth of social media has enabled the dissemination of information and images faster than ever before.<sup>1</sup> This technology has also spawned a new form of vengeance and cyber-bullying: “revenge porn.”<sup>2</sup> Revenge porn describes the consensual sharing of sexually explicit images followed by one person’s use of those images to harm the other by placing the images on websites or distributing the images to the victim’s family, friends, peers, colleagues, and employer.<sup>3</sup>

The victims of revenge porn tend to be female and tend to be the young.<sup>4</sup> Some websites have been created solely for the purpose of posting revenge porn and over the past few years such sites have continued to multiply.<sup>5</sup> Some of these websites also provide the victim’s full name, social media profile, and personal information.<sup>6</sup>

Victims have few avenues through which they may seek relief from these actions and instead suffer serious repercussions from revenge

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1. “The term ‘social media’ refers to the dissemination of information through social interaction that is enabled by web-based technologies that have facilitated and creation and explosive growth of social media sites such as Facebook, LinkedIn, YouTube, Twitter and others that are being launched daily around the world.” ALAN S. GUTTERMAN, BUSINESS TRANSACTIONS SOLUTIONS § 223:32 (2014) (Westlaw).
  2. Non-consensual pornography is the overarching category that encompasses revenge porn. See Mary Anne Franks, *Criminalizing “Revenge Porn”: Frequently Asked Questions* 1 (Oct. 9, 2013) (working paper), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2337998](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2337998). Non-consensual pornography also includes images taken without the subject’s knowledge—e.g., hidden cameras, computer hacking, etc.—and images taken during sexual assaults. *Id.*
  3. *Id.*
  4. Lorelei Laird, *Victims are Taking on ‘Revenge Porn’ Websites for Posting Photos They Didn’t Consent To*, A.B.A. J. (Nov. 1, 2013, 9:30 AM), [http://www.abajournal.com/magazine/article/victims\\_are\\_taking\\_on\\_revenge\\_porn\\_websites\\_for\\_posting\\_photos\\_they\\_didnt\\_c](http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c).
  5. *Id.* For example, Hunter Moore created the first “revenge porn” website, “IsAnyoneUp.com,” which linked a victim’s nude photographs to their social media accounts. Neal Karlinksky et al., *Anti-Bullying Website Takes Over, Shuts Down ‘Revenge Porn’ Website*, ABC NEWS (April 19, 2012), <http://abcnews.go.com/US/anti-bullying-website-takes-shuts-revenge-porn-website/story?id=16174425>. Other “revenge porn” websites include “Texxxan.com” and “IsAnybodyDown.com.” See Laird, *supra* note 4.
  6. See Laird, *supra* note 4.

porn. Many have lost jobs and experienced great embarrassment when these images are viewed by their family and friends.<sup>7</sup> Recently, those seeking to address the issue of revenge porn have presented solutions from a criminal law standpoint.<sup>8</sup> Copyright law, however, provides a more lucrative and reliable avenue for victims of revenge porn to seek damages for the harm inflicted upon them.<sup>9</sup> Often, victims own the copyrights to the photos that are the subject of revenge porn.<sup>10</sup> As a result, copyright law not only offers significant monetary damages for the victims of revenge porn but can also provide a substantial deterrent for individuals who would otherwise face little to no repercussions for their act of revenge and bullying.<sup>11</sup>

In order for copyright law to best aid victims of revenge porn, the registration requirement for statutory damages must be dissolved.<sup>12</sup> Currently, a victim of copyright infringement must register her copyrighted work with the United States Patent and Trademark Office (USPTO) in order to seek statutory damages when the copyright of her work is infringed.<sup>13</sup> The owner of an unregistered copyrighted work can only recover if she is able to prove actual damages.<sup>14</sup> However, victims of revenge porn are often unable to demonstrate any actual monetary damages that they suffer from copyright infringement.<sup>15</sup> Therefore, if revenge porn victims are able to seek statutory damages without a registration then they will be able to obtain greater damages from the infringer, up to \$150,000 in damages.<sup>16</sup> This may not be enough to entirely restore a victim's reputation and dignity, but it will enable victims to seek significant monetary damages and will hopefully be a large enough deterrent to revenge pornographers.

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7. See Franks, *supra* note 2, at 1.

8. See *infra* Part IV.A.

9. See discussion *infra* Part IV.B.

10. See Laird, *supra* note 4; *c.f.* Franks, *supra* note 2, at 2 (indicating that if the victim is not the person who took the photograph then they are not a copyright holder).

11. See *infra* Part V.A.

12. See *infra* Part V.A–B.

13. If a United States citizen who is a victim of revenge porn had their image registered with the United States Patent and Trademark Office then they would have the ability to file suit. See 17 U.S.C. § 412 (2012) (stating that registration of a copyrighted work is a prerequisite to certain remedies for infringement, *i.e.*, statutory damages). However, it is unlikely that victims of revenge porn will have had their images registered.

14. See *id.*; see also *id.* § 504 (indicating that actual damages may be received in lieu of statutory damages if statutory damages are unavailable to the copyright owner).

15. See *infra* Part II.

16. See § 504(c)(2); Bradley E. Abruzzi, *Copyright and the Vagueness Doctrine*, 45 U. MICH. J.L. REFORM 351, 383 (2012).

This Comment proceeds in four parts after this introduction. Part II of this Article discusses the issues created by the distribution of revenge porn. Part III establishes the various types of revenge porn. Part IV.A discusses the current criminal law approaches to combating revenge porn. Presently, few states have specific laws to address this widespread issue. Part IV.B addresses the current copyright approach to revenge porn. Finally, Part IV.C demonstrates that the existing legal remedies are inadequate for victims of revenge porn.

Subsequently, Part V.A provides an analysis of the need to dissolve the registration requirement to provide the majority of victims of revenge porn with a means of recovery. Part V.B will establish that this change is not unreasonable, as the registration requirement is not placed on owners of foreign published works who seek to file a claim for copyright infringement in the United States. Finally, legal defenses for individuals who are sued for copyright infringement for distributing revenge porn will be discussed in Part V.C. Throughout this article, it will be established that the removal of the registration requirement for copyrighted images that are utilized as revenge porn is necessary to enable victims to seek relief.

## II. REVENGE PORN IS A PROBLEM THAT MUST BE ADDRESSED

Revenge porn enables “[a] vengeful ex-partner or malicious hacker” to “upload an explicit image of a victim to a website where thousands of people can [copy] it and hundreds of other websites can [copy and distribute] it.”<sup>17</sup> Within days, explicit photographs of a victim become available to strangers for sexual entertainment, as well as, to the victim’s friends, family, peers, employer, and co-workers.<sup>18</sup> Finally, as technology continues to develop, “social media applications now make it possible for users to share information using their cell phones, which means that information about anything can be posted from anywhere, and at any time, by anyone with a mobile device.”<sup>19</sup>

The numbers are staggering. A forty-hour study conducted by the Internet Watch Foundation (IWF) found 12,224 pornographic photographs taken by teenage victims of themselves had been posted

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17. Franks, *supra* note 2.

18. *Id.*

19. GUTTERMAN, *supra* note 1.

on pedophilic websites.<sup>20</sup> Approximately “60 to 70 percent of online harassment (including revenge porn)” involves women as victims.<sup>21</sup>

Both women and men have been subjected to revenge porn and cyber-bullying.<sup>22</sup> “Gender-based harassment online interferes with the professional lives of targeted individuals, increases their vulnerability to sexual violence, causes emotional harm, and sends the message that the targeted individuals are inferior, sexual objects.”<sup>23</sup> Unfortunately, some victims of revenge porn turn to alcohol and drugs to cope, others have committed suicide as a result of being victimized by revenge porn.<sup>24</sup> There have also been cases in which women have been blackmailed by the potential publication of intimate photographs if they refuse to have sex with or pay money to

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20. Daniel Martin, *How Teens' 'Sexting' Photos End Up On Paedophile Websites*, MAIL ONLINE (Oct. 14, 2013), <http://www.dailymail.co.uk/news/article-2458252/How-teens-sexting-photos-end-paedophile-websites.html>. The number of similar photographs available online is likely far larger given the brevity of this search. See *id.* Photographs of children under 18 years old can constitute abuse. See 18 U.S.C. § 2252(b)(1)–(2) (2012).

21. See Laird, *supra* note 4.

22. *Frequently Asked Questions for Victims/Survivors*, WITHOUT MY CONSENT: PATHS TO JUSTICE FOR SURVIVORS OF ONLINE HARASSMENT, [www.withoutmyconsent.org/faq](http://www.withoutmyconsent.org/faq) (last visited Jan. 11, 2015).

23. *Id.* (citing Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 375 (2009)).

24. For example, Amanda Todd, a 12-year-old female, was driven to suicide as a result of cyber-bullying through pornography. *A Life Taken Too Soon: The Story of Amanda Todd*, END REVENGE PORN (Oct. 10, 2013), <http://www.endrevengeporn.org/a-life-taken-too-soon-the-story-of-amanda-todd/>. Amanda was convinced by an individual, whom she met online, to take a photograph of herself topless with her webcam. The individual that received this photograph sent it to Amanda's family and friends and created a Facebook account using Amanda's topless photograph as the profile picture. Amanda was tormented and bullied on a daily basis at school. Unfortunately, Amanda turned to alcohol and drugs, and she became severely depressed and anxious. In October 2012, Amanda committed suicide. *Id.*

Similarly, an 18-year-old young man committed suicide shortly after a video of his sexual encounter with another man was published online by his roommate. Lisa W. Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES (Sept. 29, 2010), [http://www.nytimes.com/2010/09/30/nyregion/30suicide.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2010/09/30/nyregion/30suicide.html?pagewanted=all&_r=1&).

their blackmailer.<sup>25</sup> While still others suffer the loss of jobs and damage to their reputations.<sup>26</sup>

None of the injuries suffered by revenge porn victims can be easily quantified into damage awards.<sup>27</sup> The injuries previously described can be divided into objective and subjective harms.<sup>28</sup> Objective harms are external losses suffered by the victim that can be easily identified by onlookers.<sup>29</sup> This type of harm may result when information such as intimate photographs are used against the victim to harm them in an external way, such as loss of a job.<sup>30</sup> Equally important, however, more difficultly quantified are subjective harms which involve the victim's internal sense of the harm.<sup>31</sup> This results from harm such as the victim's perception of loss of privacy.<sup>32</sup> This type of harm may be ongoing and acute.<sup>33</sup>

### III. THREE TYPES OF REVENGE PORN

There are three types of revenge porn which affect the victim's rights to the private image including: (1) victim as the creator, (2) victim as a consenting model, and (3) victim as a non-consenting model.<sup>34</sup>

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25. See, e.g., *Serrano v. Butler*, No. C. 06-04433 JW, 2010 WL 5300902, at \*1–2 (N.D. Cal. Dec. 20, 2010); *People v. Khoa Khac Long*, 117 Cal. Rptr. 3d 451, 456 (Cal. Ct. App. 2010); *People v. Power*, 70 Cal. Rptr. 3d 799, 803–05 (Cal. Ct. App. 2008); *People v. Cavazos*, No. A124274, 2010 WL 1858139, at \*2 (Cal. Ct. App. May 11, 2010); *S.B. v. Duffy*, No. FV-12-001919-08, 2009 WL 2707340, at \*1 (N.J. Supp. Ct. App. Div. May 12, 2009) (per curiam).
  26. A female employee of the Federal Aviation Administration lost her job when her co-worker circulated nude photographs of her. Second Amended Complaint and Demand for Jury Trial at ¶¶ 12–17, *Lester v. Mineta*, No. C-04-3074 SI (N.D. Cal. Mar. 3, 2006), 2006 WL 1042226 (alleging claims for violation of (1) the Civil Rights Act of 1964, (2) the Rehabilitation Act of 1973, (3) 42 U.S.C. § 1983, (4) 42 U.S.C. § 1985(3), and (5) 42 U.S.C. § 1986).
  27. M. Ryan Calo, *The Boundaries of Privacy Harm*, 86 IND. L. J. 1131, 1143 (2011).
  28. *Id.* at 1142–43.
  29. *Id.* at 1143, 1148.
  30. See *id.* at 1148–1149.
  31. *Id.* at 1142.
  32. *Id.*
  33. *Id.*
  34. See Clay Calvert, *Revenge Porn and Freedom of Expression: Legislative Pushback to an Online Weapon of Emotional and Reputational Destruction*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673, 678–79 (2014); Franks, *supra* note 2.

The most common photograph that is produced by a victim as the creator is a “selfie.”<sup>35</sup> A victim photographer who has created a selfie that possesses even a minimal amount of originality is entitled to copyright protection for their self-portrait, because they are the creator and author of the image.<sup>36</sup> Eighty percent of images utilized for revenge porn are selfies.<sup>37</sup> A victim creator may also be entitled to copyright protection in situations in which the victim is in the photograph and is responsible for injecting creativity and originality into the photograph although she may not actually be the person who presses the button to capture the image.<sup>38</sup>

The second type of revenge porn occurs when the victim consents to a photograph taken by another individual.<sup>39</sup> The photographer later victimizes the model by utilizing the private photograph as revenge porn.<sup>40</sup> In this situation, the victim may not possess a copyright interest in the photograph because she is not the creator of the photograph.<sup>41</sup> Usually, photographers receive copyrights due to the originality they incorporate into a photograph.<sup>42</sup> A model may

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35. A selfie (plural “selfies”) is defined as “a photograph that one has taken of oneself, typically one taken with a smartphone or webcam . . . .” *Definition of Selfie in English*, OXFORD DICTIONARIES (2013), <http://www.oxforddictionaries.com/definition/english/selfie?q=selfie>. Selfie is a fairly new term that first appeared in Oxford Dictionaries quarterly update in August 2013. Oxford Dictionaries U.S., *Oxford Dictionaries Word of the Year 2013*, OXFORD DICTIONARIES (Nov. 19, 2013), [www.blog.oxforddictionaries.com/press-releases/oxford-dictionaries-word-of-the-year-2013/](http://www.blog.oxforddictionaries.com/press-releases/oxford-dictionaries-word-of-the-year-2013/).
36. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59 (1884) (holding that there is a low threshold for establishing originality); see generally Laird, *supra* note 4 (explaining that victims who own copyrights can notify the websites it is in violation of copyright law and have the photos removed from the site).
37. *Proposed CA Bill Would Fail to Protect Up to 80% of Revenge Porn Victims*, THE CYBER CIVIL RIGHTS INITIATIVE (Sept. 10, 2013), [http://www.cybercivilrights.org/press\\_releases](http://www.cybercivilrights.org/press_releases) [hereinafter *Proposed CA Bill & Revenge Porn Victims*].
38. See *Easter Seal Soc’y for Crippled Children & Adults of Louisiana, Inc. v. Playboy Enters.*, 815 F.2d 323, 337 (5th Cir. 1987) (stating that a television station was entitled to copyright protection for an independent work of authorship where the employees of the station “did not simply set up one camera on a tripod . . . [but] worked cooperatively and dynamically with the performers to create the field tapes”).
39. See Calvert, *supra* note 34, at 678.
40. *Id.*
41. See Marc Whipple, *Model Releases, Copyrights, and Other Intellectual Property Concerns for Photographers and Models*, AVVO, <http://www.avvo.com/legal-guides/ugc/model-releases-copyrights-and-other-intellectual-property-concerns-for-photographers-and-models> (last visited Jan. 11, 2015).
42. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884) (holding that a photographer creates an original photograph by simply arranging the scene which may include positioning drapes and other elements of the scenery).

become a co-owner of the copyright if she contributed to the creativity of the image.<sup>43</sup> However, “[a] co-owner of a copyright cannot be liable to another co-owner for infringement of the copyright.”<sup>44</sup> Therefore, the co-owner model would not have a recognizable claim against the photographer for copyright infringement.<sup>45</sup>

A model may also enjoy the rights of publicity and privacy.<sup>46</sup> A photographer must have the model sign release forms which grant permission to the photographer to distribute the model’s image without violating the rights of publicity and privacy.<sup>47</sup> The rights of publicity and privacy are governed by state law and can be addressed by laws unrelated to copyright.<sup>48</sup>

The third type of revenge porn occurs when the victim is a non-consenting model.<sup>49</sup> This type of image is captured without the victim’s knowledge or permission.<sup>50</sup> This type of revenge porn is better addressed by criminal and privacy laws rather than copyright laws because the victim does not have copyright ownership of the image.<sup>51</sup>

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43. *See Morrill v. Smashing Pumpkins*, 157 F. Supp. 2d 1120, 1126 (C.D. Cal. 2001) (quoting *Oddo v. Ries*, 743 F.2d 630, 632–33 (9th Cir. 1984)).

44. *Id.*

45. *See id.*

46. *See Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1182 (C.D. Cal. 2002) (explaining the common law elements for the right of publicity include: “(1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury”).

47. *See id.* (indicating that Perfect 10 received assignment of the rights of publicity of the models featured in the images).

48. *Compare id.*, with *Whipple*, *supra* note 41. In situations where a model does not sign release forms, she may utilize privacy laws and criminal laws prohibiting revenge porn that have been established in California and New Jersey. *See infra* Part IV.A. For situations in which a consenting model is a victim of non-consensual pornography, it would be beneficial for other states to incorporate criminal laws similar to those established in California and New Jersey.

49. *Franks*, *supra* note 2, at 1–3.

50. *Id.*

51. *Id.* at 2.

#### IV. CURRENT LAW AND ATTEMPTS TO ADDRESS REVENGE PORN AND SIMILAR PROBLEMS

##### A. *Criminal Law Approaches*

There have been few attempts to address revenge porn from the criminal law standpoint.<sup>52</sup> New Jersey and California are among the only states that maintain criminal consequences for the publication of non-consensual pornography.<sup>53</sup> “While New Jersey’s law is fairly comprehensive, California’s law is very limited, protecting only victims whose image were taken by another party and only reaching perpetrators who act with the intent to cause serious emotional distress.”<sup>54</sup> New Jersey provides the most protection, allowing a maximum fine of \$30,000 if an individual disseminates an intimate image without the victim’s consent.<sup>55</sup> On the other hand, California’s law only makes revenge porn a misdemeanor punishable by a \$1,000 fine, one year of jail, or both.<sup>56</sup> However, California law is limited since it does not protect a victim if the photograph that is distributed is a selfie.<sup>57</sup> Since 80 percent of images utilized as revenge porn are selfies, these criminal laws provide insufficient protection for victims.<sup>58</sup>

Some other states utilize anti-voyeurism laws to address revenge porn. Victims, however, are only protected if the images were taken without their consent or knowledge.<sup>59</sup> Similar to California’s revenge porn law, anti-voyeurism laws do not protect a victim whose selfie

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52. *See id.* Since 2013, 13 states have enacted revenge porn legislation. These states include: Arizona, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Maryland, New York, Pennsylvania, Utah, Virginia, and Wisconsin. *State ‘Revenge Porn’ Legislation*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Nov. 19, 2014), <http://www.ncsl.org/research/telecommunications-and-information-technology/state-revenge-porn-legislation.aspx#Overview>.

53. Franks, *supra* note 2, at 2.

54. *Id.*

55. *Tackling the Menace of Revenge Porn*, BLOOMBERG VIEW (Oct. 13, 2013, 6:00 PM), <http://www.bloomberg.com/news/2013-10-13/tackling-the-menace-of-revenge-porn.html>; *Voyeurism Statutes 2009*, NAT’L DIST. ATTY’S ASS’N, [http://www.ndaa.org/pdf/voyeurism\\_statutes\\_mar\\_09.pdf](http://www.ndaa.org/pdf/voyeurism_statutes_mar_09.pdf) (last updated March 2009). The disseminator may be protected from liability if they can argue that they were “privileged” to disseminate the image. *Id.*

56. Samantha Tata, *Calif. Lawmakers Pass ‘Revenge Porn’ Bill*, NBC S. CAL. (Sept. 13, 2013, 6:10 AM), <http://www.nbclosangeles.com/news/local/Cyber-Revenge-Porn-California-Law-Gov-Jerry-Brown-223549611.html>.

57. *Id.*

58. *Proposed CA Bill & Revenge Porn Victims*, *supra* note 37.

59. *See* Franks, *supra* note 2.

was published without consent.<sup>60</sup> Further, “[f]ederal and state laws prohibiting harassment and stalking only apply if the victim can show that the non-consensual pornography is part of a larger pattern of conduct intended to distress or harm the victim . . . .”<sup>61</sup> Even if these requirements are satisfied, victims still may be unaided by police who are “used to ‘brick-and-mortar crime scenes’ . . . and may not think to apply those laws to online behavior.”<sup>62</sup>

In cases where the revenge porn victim is under the age of eighteen, child pornography laws may be utilized to prosecute the creator or distributor of the private image.<sup>63</sup> Therefore, a victim may be less inclined to inform authorities that they are being victimized by child pornography if they are among the eighty-percent of individuals who are victimized by a sexually explicit selfie.<sup>64</sup> This is because underage individuals who distribute sexually explicit selfies may also be prosecuted for distributing child pornography of themselves.<sup>65</sup>

### B. Current Copyright Approach

Currently, copyright law provides a means of protection for a victim who owns the copyrights to the photograph that is published online without the victim’s permission.<sup>66</sup> A victim owns copyrights to a sufficiently original selfie and may claim copyright infringement if his or her copyrighted photograph is copied or distributed without his or her permission.<sup>67</sup> Even if the selfie is not registered with the

60. *Id.*

61. *Id.*

62. Laird, *supra* note 4.

63. Tab O’Neal, *Selfies, Child Pornography and the Law*, WVTF PUBLIC RADIO (Feb. 10, 2014 8:38 AM), <http://wvtf.org/post/selfies-child-pornography-and-law>.

64. *See id.*; *Proposed CA Bill & Revenge Porn Victims*, *supra* note 37.

65. *See* O’Neal, *supra* note 63. (“[A] 16 year old Virginia girl was arrested for creating child pornography. She admitted to taking ‘lewd’ photos of herself, posting them to Twitter and sending them directly to male friends.”).

66. *See What is a DMCA Notice?*, WOMEN AGAINST REVENGE PORN, <http://www.womenagainstrevengeporn.com/#!dmca-notice/co0y> (last visited Jan. 11, 2015) (explaining the process for taking down a copyrighted selfie from various websites).

67. *Id.* A valid copyright infringement claim requires a plaintiff to show: “(1) ownership of a valid copyright; and (2) that the defendant violated the copyright owner’s exclusive rights under the Copyright Act.” *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (citing 17 U.S.C. § 501(a) (2003)). Copyright liability may be established by “direct copyright infringement, contributory copyright infringement, and vicarious copyright infringement.” *Id.* at 1076. “[A] plaintiff must show that he owns the copyright and that the defendant himself violated one or more of the

copyright office the owner may still send a takedown notice, per the Digital Millennium Copyright Act (DMCA), to the website hosting the victimizing selfie.<sup>68</sup> Victims who have utilized takedown notices report that they are usually successful in having their private image removed from the website since website operators lose their DMCA “safe harbor” immunity if a victim files a lawsuit against the website operator.<sup>69</sup>

A takedown notice provides a means for victims to have the photograph removed,<sup>70</sup> but the notice fails to provide victims with any means of monetary recovery for injuries caused by the victimizing photograph. A victim who files suit for copyright infringement is unable to receive damages unless she registers her photograph within 90 days of the infringement.<sup>71</sup> A takedown notice for the hosting website also does not discourage the individual who

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plaintiff’s exclusive rights under the Copyright Act” in order to prove direct copyright infringement. *Id.* Contributory infringement is a type of secondary liability that is established by demonstrating the defendant had actual or constructive knowledge of the infringing activity and he caused, induced, or “materially contribute[d] to the infringing conduct of another.” *Id.* (quoting *Gershwin Publ’g Corp. v. Columbia Artists Mgmt. Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)). Finally, vicarious liability may be established if the defendant “enjoys a direct financial benefit from another’s infringing activity and ‘has the right and ability to supervise’ the infringing activity.” *Id.* (quoting *A & M Records v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001)).

68. Laird, *supra* note 4; see also *What is a DMCA Notice?*, *supra* note 66; *3 Ways to Remove Photos, WOMEN AGAINST REVENGE PORN* (2012), <http://www.womenagainstrevengeporn.com/helpful-hints/#!/photo-removal/c9fv> (last visited Jan. 11, 2015) (providing a step-by-step guide for victims of revenge porn to follow to have their photographs removed from hosting websites). Takedown notices do not always result in a successful removal of a victimizing photograph from a website, especially if the website is hosted in a foreign country. See Laird, *supra* note 4.

69. Laird, *supra* note 4. In 1998, Congress enacted the DMCA “to comply with international copyright treaties and to update domestic copyright law for the online world.” *Ellison*, 357 F.3d at 1076 (citing Digital Millennium Copyright Act, Pub. L. No. 105–304, 112 Stat. 2860 (1998)). Congress also adopted several safe harbor provisions to enable online service providers to limit their liability for copyright infringement claims. *Id.* at 1076–77 (“These safe harbors provide protections from liability for: (1) transitory digital network communications; (2) system caching; (3) information residing on systems or networks at the direction of users; and (4) information location tools.”). These safe harbors prevent a service provider from incurring secondarily liable for infringement if they take the appropriate action when they receive a takedown notice, such as removing the alleged infringing material. See 17 U.S.C. § 512(c)(1)(A) (2012). Therefore, service providers have incentive to remove images that are alleged to be infringing.

70. Laird, *supra* note 4.

71. *Id.*

posted the revenge porn from doing so in the future.<sup>72</sup> It only provides victims a means of having a photograph removed once it has already been made available to the general public via the internet.<sup>73</sup> Therefore, as the law currently stands, the best approach for a victim of revenge porn is to register her photographs so she may potentially receive damages for copyright infringement.<sup>74</sup>

### C. Inadequate Legal Resolutions

The available legal resolutions are severely inadequate for victims of revenge porn. In some states, criminal law may provide a means for punishing an individual who distributes revenge porn, but victims are still left with a damaged reputation and no means of relief.<sup>75</sup> Further, the potential reward from a civil lawsuit—i.e. an injunction—is extremely low considering the high cost of the civil lawsuit.<sup>76</sup>

#### 1. Hosting Website Immunity

Online service providers and hosts of non-consensual pornography receive protection and immunity from some lawsuits under the Communications Decency Act, 47 U.S.C. § 230 (2012).<sup>77</sup> Section 230 was intended to preserve freedom of speech and provide service providers with protection for violations of criminal law.<sup>78</sup> Section 230 expressly provides protection for service providers in cases of obscenity and child pornography.<sup>79</sup> However, an exception is made for violations of copyright law.<sup>80</sup> Section 230 has led some to suggest that stronger civil rights laws that protect against online harassment

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72. *Id.*

73. *Id.*

74. *See id.*

75. *See* N.J. Stat. Ann. § 2C:14-9 (West 2005); H.B. 563, 2014 Leg., 173rd Sess. (Idaho 2014); H.B. 43, 2014 Leg., 435th Sess. (Md. 2014).

76. Franks, *supra* note 2.

77. Laird, *supra* note 4. Section 230 of the Communications Decency Act provides that “many websites and social media sites are protected from civil liability” with the exception of copyright claims. Franks, *supra* note 2. Cases in which section 230 applies, victims may still have potential claims against the individual who distributed the revenge porn.

78. *See* Laird, *supra* note 4.

79. 47 U.S.C. § 230 (2012).

80. Laird, *supra* note 4. However, the First Amendment does not provide protection for obscenity. *Id.*

may provide a greater means of protection for victims of online harassment and revenge porn.<sup>81</sup>

Case law demonstrates victims' failure to succeed in lawsuits against online service providers in cases of revenge porn and online harassment.<sup>82</sup> Uniformly, victims' lack of success results from online service providers' protection under section 230.<sup>83</sup> If the service provider maintains a platform on which a user actively creates or uploads information onto the server, the service provider is free of legal liability.<sup>84</sup>

## 2. Shortage of Effective Attorneys

Very few attorneys are willing to represent victims of revenge porn in lawsuits.<sup>85</sup> One reason is that many attorneys do not know or are unfamiliar with the laws that are broken as a result of the publication of revenge porn.<sup>86</sup> Legal avenues that attorneys may attempt to utilize are copyright law,<sup>87</sup> criminal law,<sup>88</sup> and child pornography law.<sup>89</sup> A lack of familiarity with these laws, combined with the fact that revenge porn lawsuits are not lucrative, leave many attorneys unwilling to spend time on these lawsuits.<sup>90</sup> By one estimate, there are only four or five attorneys in the country who actively represent revenge porn victims.<sup>91</sup>

## V. A CHANGE IN THE LAW IS NEEDED TO PROVIDE RELIEF TO VICTIMS

Victims need a means of recovery for the subjective and objective harms that they have suffered,<sup>92</sup> which may not be easily quantified in

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81. *See id.*

82. *Frequently Asked Questions for Victims/Survivors, supra note 22.*

83. *Id.*

84. The service provider may not receive protection if they have knowledge of the infringing activity and take no action. *See Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122, 1124 (9th Cir. 2003) (holding a service provider for an online matchmaking website to be free of liability for a false profile created by a user that resulted in the victim sending threatening and sexual voicemails and emails because the service provider played no significant role in the creation of the account).

85. Laird, *supra note 4.*

86. *See id.*

87. *See discussion supra Part IV.B.*

88. *See discussion supra Part IV.A.*

89. *See discussion supra Part IV.A.* Child pornography rights laws are relevant only if the victim is under the age of 18. 18 U.S.C. § 2251 (2012).

90. Laird, *supra note 4.*

91. *Id.*

92. *See supra notes 26–31 and accompanying text.*

monetary terms, as well as a mechanism for deterring individuals from distributing revenge porn. As the law currently stands, individuals who distribute these images face little to no consequences other than having the images removed from the website to which they were posted.<sup>93</sup> Victims, who are captured in compromising situations, as well as those who share intimate images while they are a part of a private, consensual relationship, need laws to protect their rights to privacy and to prevent them from harassment.

#### A. *Revising the Registration Requirement*

“The registration requirement of the Copyright Act was designed to encourage copyright holders to register their copyrights.”<sup>94</sup> The requirements for federal copyright registration are proscribed under 17 U.S.C. § 408. “[R]egistration is not a condition of copyright protection.”<sup>95</sup> However, a copyright owner is only entitled to statutory damages if the work is registered with the Copyright Office prior to the occurrence of the infringement, within three months of the infringement, or within one month after the copyright owner becomes aware of the infringement.<sup>96</sup>

Without registration, a copyright owner may only recover actual damages for infringement of their copyrighted work.<sup>97</sup> This includes “the actual damages suffered by [the copyright owner] as a result of infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.”<sup>98</sup>

Victims of revenge porn are typically unable to quantify actual damages or profits of the infringer because often times the losses relate to their reputation, dignity, relationships with family and friends, and potential jobs.<sup>99</sup> Actual damages are also determined by

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93. For example, this typically occurs if the victim is able to have a service provider take down his or her image by issuing the service provider a takedown notice and claiming copyright infringement. *See supra* Part IV.C.1. However, California and New Jersey have established criminal penalties for individuals who partake in publishing “revenge porn.” *See Franks, supra* note 2.

94. 5 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 17:78 n.4 (quoting *Hustlers Inc. v. Thomasson*, 253 F. Supp. 2d 1285, 1291 (N.D. Ga. 2002)).

95. 17 U.S.C. § 408(a) (2012).

96. *Id.* § 412.

97. *See id.*; *see generally* 17 U.S.C. § 504 (2012) (detailing award of actual and statutory damages).

98. 17 U.S.C. § 504.

99. *See Franks, supra* note 2.

the number of copies made of the work that was infringed upon.<sup>100</sup> This too may be difficult for victims of revenge porn to determine. Every time an internet user views an image a copy is made on her individual computer.<sup>101</sup> Therefore, once images are placed on the internet it becomes increasingly difficult to determine the number of copies that have been made and distributed.<sup>102</sup>

Removal of the registration requirement provides a solution to this problem for victims of revenge porn. By removing the registration requirement in cases of revenge porn, victim copyright owners who have had their copyrights infringed may receive statutory damages without the registration prerequisite.<sup>103</sup> Therefore, they would not be limited to unquantifiable actual damages.<sup>104</sup> Statutory damages allow the injured party to recover damages without having to prove actual incurred damages. Therefore, without the registration requirement, revenge porn victims would have a means of recovery.

Additionally, the number of infringed works determines statutory damages, rather than the number of copies made of the work.<sup>105</sup> This would provide a simpler means of determining potential damages since the only requirement would be the determination of the number of private images that were infringed. Furthermore, statutory damages would also discourage individuals from sharing revenge porn online and in any form.

Statutory damages vary based on the circumstances under which the infringement occurs.<sup>106</sup> Basic statutory damages range from \$750

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100. 50 AM. JURIS. PROOF OF FACTS 2D § 5 (1988); *see also* Seoul Broad. Sys. Int'l, Inc. v. Sang, 754 F. Supp. 2d 562, 566 (E.D.N.Y. 2010) (indicating that actual damages are determined by the number of copies made by the infringing party).

101. *See* Jessica Richardson, *Surfing the Web for Copyright Law: Why Infringement Claims Are All Wet*, 2 MINN. INTELL. PROP. REV. 73, 81 (2001).

102. *Cf.* Melissa A. Troiano, Comment, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U. L. REV. 1447, 1456 (2006) (noting Congress' "recognition of the speed with which the Internet could disseminate enormous amounts of information").

103. *See supra* notes 13–16 and accompanying text.

104. *See supra* notes 97–100 and accompanying text.

105. 17 U.S.C. § 504(c)(1) (2012); *WB Music Corp. v. RTV Commc'n Grp., Inc.*, 445 F.3d 538, 540 (2d Cir. 2006) ("[T]he total number of awards of statutory damages that a plaintiff may recover in any given action depends on the number of works that are infringed and the number of individually liable infringers, regardless of the number of infringements of those works." (quoting *Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183, 192–93 (1st Cir. 2004) (emphasis omitted) (internal quotation marks omitted)); *accord* *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1381 (2d Cir. 1993); *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990).

106. 17 U.S.C. § 504(c)(1)–(2).

to \$30,000 per infringed work.<sup>107</sup> Statutory damages for innocent infringement allow a victim to recover a minimum of \$200 per work.<sup>108</sup> Finally, victims of willful infringement, which would apply to revenge porn, may recover a maximum of \$150,000 per work.<sup>109</sup>

Courts have discretion when awarding statutory damages.<sup>110</sup> Statutory damages are not meant to provide a “windfall recovery” for a plaintiff; however, they are often utilized for punitive and compensatory purposes.<sup>111</sup> The “partially punitive character” of statutory damages “serve[s] a deterrent purpose.”<sup>112</sup> Therefore, deterrent damages that are awarded for willful copyright infringement are calculated “to hurt the offender’s pocketbook enough for her to take notice.”<sup>113</sup> Depending upon the defendant’s resources, statutory damages for revenge porn may vary greatly; however, the deterrent purpose will still be maintained.<sup>114</sup>

Currently, the approaches for addressing revenge porn are from a criminal law standpoint.<sup>115</sup> However, a change in copyright law may actually provide a more beneficial solution for victims who own the images utilized as revenge porn. Not only will removal of the registration requirement enable victims to recover for the subjective and objective harms that otherwise cannot be quantified in monetary terms, but the high amount of potential statutory damages will also provide a strong deterrent for individuals who are considering publishing copyrighted non-consensual pornography.

The suggested change in copyright law would be very beneficial to 80 percent of the victims of revenge porn because they would be able to recover for infringement of their original copyrighted images.<sup>116</sup> This change does not completely solve the problem of revenge porn, because victims who are non-consenting models still may not be able to use this solution to recover.<sup>117</sup> However, the removal of the registration requirement may still help other victims that would not be directly aided by the change in the law. Registration requirement

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107. Abruzzi, *supra* note 16 at 383.

108. *Id.*

109. *Id.*

110. See 17 U.S.C. § 504(c)(1).

111. See *Nat’l Football League v. PrimeTime 24 Joint Venture*, 131 F. Supp. 2d 458, 478 n.17 (S.D.N.Y. 2001) (citations omitted).

112. *Id.* (quoting *RSO Records, Inc. v. Peri*, 569 F. Supp. 2d 531, 532 (S.D.N.Y. 1984)).

113. *SESAC, Inc. v. WPNT, Inc.*, 327 F. Supp. 2d 531, 532 (W.D. Pa. 2003).

114. See *id.*

115. See *supra* Part IV.A.

116. See *Proposed CA Bill & Revenge Porn Victims*, *supra* note 37.

117. See Franks, *supra* note 2, at 2.

removal may cause other areas of the law to provide protection for victims who do not own copyrights to the revenge porn photographs.

*B. The United States is Harming its Citizens by Requiring Registration*

In 1988, the Berne Convention Implementation Act established that U.S. copyright law does not require foreign authors to obtain registration for their copyrighted works before bringing a lawsuit for infringement.<sup>118</sup> “While the Berne Convention Implementation Act purports to ensure that foreign member nations’ copyrighted works enjoy the same protection as U.S. copyrights in the United States, it arguably treats foreign works better than U.S. works.”<sup>119</sup> Although foreign copyright holders need not acquire registration before filing a lawsuit for infringement, U.S. copyright holders do not enjoy the same privilege.<sup>120</sup> U.S. copyright holders are still required to obtain registration for their copyrighted works prior to filing a lawsuit despite the “exception” that is provided to foreign copyright holders.<sup>121</sup> In other words, the United States provides more rights and privileges to authors that publish their works in other countries than it does for its own citizens publishing in the United States.<sup>122</sup>

It is not an absurd suggestion to remove the registration requirement for U.S. authors, especially since the United States already exempts foreign published works of this requirement. Most of the world does not have the registration formality, therefore the United States was obligated to remove this requirement for foreign authors in order to become a member of the Berne Convention.<sup>123</sup> This change would simply require the United States to treat native copyright owners as well as it treats foreign copyright owners.<sup>124</sup> For the purpose of aiding victims of revenge porn, removal of the registration requirement should be applied to cases involving revenge porn.

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118. Melvyn J. Simburg et al., *International Intellectual Property Law*, 47 INT’L LAW. (THE YEAR IN REVIEW) 213, 226 (2013).

119. *Id.*

120. *Id.*

121. *Id.*

122. See 17 U.S.C. § 411(a) (2012); 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 5:39, at 507–08 (2014); Edward Lee, *Copyright, Death, and Taxes*, 47 WAKE FOREST L. REV. 1, 21 (2012).

123. Lee, *supra* note 122.

124. See *id.*

C. *Legal Defenses are Available for Defendants in Revenge Porn Copyright Infringement Lawsuits*

There are defenses available for individuals charged with copyright infringement for revenge porn. Typical copyright infringement defenses which may also be utilized in a case of revenge porn include implied license<sup>125</sup> and fair use.<sup>126</sup>

An implied license functions “as a means of allowing reasonable use of [a] work by one party . . . by attributing to the work’s creator/copyright owner implicit consent for such use.”<sup>127</sup> Implied licenses may be established “when (1) a person (the licensee) requests the creation of a work, (2) the creator (the licensor) makes that particular work and delivers it to the licensee who requested it, and (3) the licensor intends that the licensee[-requestor] copy and distribute his work.”<sup>128</sup> It is an issue of fact whether the implied license was created.<sup>129</sup> Situations in which images are shared in a private, consensual relationship, and one party in the relationship later distributes those images to harm the other party, would not qualify as an impliedly licensed use because the copyright owner (or licensor) did not provide implicit consent to the distribution of the private photograph.<sup>130</sup>

A copyright defendant in a revenge porn case may claim that his or her actions are protected by the fair use defense.<sup>131</sup> Courts determine whether a use of a copyrighted work is a fair use on a case-by-case basis by utilizing four factors.<sup>132</sup> The determination of whether a particular use of a copyrighted work is a fair use requires the consideration of

- (1) the purpose and character of the use . . . ;
- (2) the nature of the copyrighted work;

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125. See Orit Fischman Afori, *Implied License: An Emerging New Standard in Copyright Law*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 275, 277 (2009).

126. 17 U.S.C. § 107 (2012).

127. Afori, *supra* note 125.

128. *Nelson-Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505, 514 (4th Cir. 2002) (quoting *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 776 (7th Cir. 1996)); see also Charles M.R. Vethan, *The Defenses of Estoppel and Implied License in Copyright Infringement Claims in the Online World: A Case Study*, 49 S. TEX. L. REV. 433, 439 (2007).

129. See Vethan, *supra* note 128.

130. Franks, *supra* note 2.

131. See 17 U.S.C. § 107.

132. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577–78 (1994) (indicating that the four statutory factors must be considered collectively).

- (3) the amount and substantiality of the [copyrighted work] used . . . ; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>133</sup>

The first three factors are the most relevant to a fair use analysis for revenge porn since the victim does not seek to utilize her image in any marketplace; therefore the fourth factor is irrelevant.

The first factor requires an analysis of the use and purpose of the alleged infringing work.<sup>134</sup> A finding of commercial use tends to indicate unfair use.<sup>135</sup> However, it is unlikely that the distribution of revenge porn would constitute commercial use since the intended purpose of distribution is not to profit but rather to embarrass the victim.<sup>136</sup> Courts also consider whether the work is reproduced “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research . . . .”<sup>137</sup> The distribution of revenge porn, which is typically for the purpose of embarrassing the victim and harming the victim’s reputation, fails to satisfy any of the above mentioned requirements that would favor a finding of fair use.

The second factor of the fair use analysis is the nature of the copyrighted work.<sup>138</sup> Publication by the copyright owner of the copyrighted work tends to lean against a finding of fair use.<sup>139</sup> However, revenge porn by its very nature is unpublished by its copyright owner.<sup>140</sup> Further, facts and simple expressions may not receive protection.<sup>141</sup> Only a small amount of originality is required

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133. 17 U.S.C. § 107.

134. *Id.*

135. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

136. *See id.* (“The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material . . .”).

137. *Id.* at 587 (quoting 17 U.S.C. § 107).

138. 17 U.S.C. § 107.

139. *See Harper & Row Publishers, Inc.*, 471 U.S. at 552–53 (“[T]he commercial value of . . . [first publication] right lies primarily in exclusivity. Because the potential damage to the author from judicially enforced ‘sharing’ of the first publication right with unauthorized users of his manuscript is substantial, the balance of equities in evaluating such a claim of fair use inevitably shifts.”).

140. The purpose of the distribution of revenge porn is to embarrass the victim. If the victim copyright holder has previously published the private image then distribution by another party would not have the intended effect of embarrassing the victim.

141. *See Harper & Row Publishers, Inc.*, 471 U.S. at 547–48 (indicating that facts compiled into a collection may receive copyright protection due to the creativity and originality that is added).

to produce a creative and thus copyrightable work.<sup>142</sup> Therefore, revenge porn may easily be categorized as a creative work.<sup>143</sup>

Next, courts look at the amount of the original work that is used by the alleged infringer.<sup>144</sup> Use of the entire copyrighted work favors a finding of unfair use.<sup>145</sup> An infringer who distributes revenge porn clearly utilizes the entire private image in order to embarrass the victim and damage their reputation.

Although defenses are available, in a case of revenge porn, an individual charged most likely will be unable to prove that she had an implied license or that the use was fair.<sup>146</sup>

## VI. CONCLUSION

The copyright registration requirement must be removed to provide relief to the 80 percent of revenge porn victims who are injured by the distribution of their sexually explicit selfies.<sup>147</sup> Few states, including California and New Jersey, have created laws criminalizing revenge porn.<sup>148</sup> Further, in California the 80 percent that are victimized by publication of their selfies are left helpless, as the California law only protects victims who did not take the photograph of themselves.<sup>149</sup> The 80 percent must be given a means by which they are able to recover from the subjective and objective harms that they have suffered. Such harms include harms to their reputation and relationships, as well as loss of employment.<sup>150</sup>

The removal of the registration requirement for copyrighted works that are utilized for revenge porn is necessary for victims to have a

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142. *See Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59 (1884) (holding that the threshold for establishing originality is low).

143. *See id.*

144. *See Harper & Row Publishers*, 471 U.S. at 564 (“[T]he act directs us to examine the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”).

145. *See id.* at 564–65.

146. These defenses are important to prevent this proposed change in the law from going too far and impeding the purpose behind the Copyright Act, which is to spread ideas and knowledge. *See* U.S. CONST. art. I, § 8, cl. 8. (“The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

147. *See supra* notes 32–35 and accompanying text.

148. *See supra* Part IV.A.

149. *See supra* note 52 and accompanying text.

150. *See supra* Part II.

means of recovery.<sup>151</sup> This change in the law would enable victims to seek statutory damages for the otherwise unquantifiable harm that they have incurred.<sup>152</sup> The change would also discourage individuals who may consider distributing revenge porn due to the risk of lofty damages in a copyright infringement case.<sup>153</sup>

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151. *See supra* Part V.A.

152. *See supra* Part V.A.

153. *See supra* Part V.A.