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What Gets Posted Can Come Down: Where Florida's Revenge Porn Ban Falls Short, Other Tools Exist

On Oct. 1, 2015, nonconsensual posting of nude photos of another – so called “revenge porn” – will become illegal in Florida. This summer, Florida became the 16th state to criminalize the practice when Governor Rick Scott conducted a ceremonial bill signing for the new law, which makes the posting of revenge porn a first-degree misdemeanor punishable by up to one year in jail and \$1,000 for a first offense. A subsequent offense is a third-degree felony, punishable by up to five years in prison and a \$5,000 fine.

Standing beside the Governor at the ceremonial bill signing was Greenberg Traurig client Carly Hellstrom, a recent graduate of Florida State University. The new law was passed in large part due to an advocacy effort led by Ms. Hellstrom, who became a victim of revenge porn when a person she had dated during her freshman year of college posted a nude image of her to an inter-fraternity group on a social network. During a student conduct code hearing, her ex-boyfriend admitted posting the image in an effort to harass and embarrass her. For that and other conduct, the State prosecuted him for stalking, but was unable to force the takedown of the images – which by then had spread to numerous websites, including TheDirty.com, MyEx.com, TinyPic.com, PhotoBucket.com, and Imgur.com. Soon, the images had received well over 100,000 views on TheDirty.com alone, and Ms. Hellstrom believed her name would forever be linked to nude images and defamatory postings on the Internet.

The posting receiving the most views was hosted on TheDirty.com. Greenberg Traurig lawyers reached out to the site and to thought leaders nationwide to devise a solution. The responses received, even from a national firm with a pro bono practice group dedicated to addressing revenge porn, were consistent: Ms. Hellstrom was out of luck as far as removal of the postings were concerned because she had not taken the photographs and therefore was not the owner of the copyright in such photos. They told Ms. Hellstrom that while she may be able to sue her ex-boyfriend for damages, she would never be able to take the pictures down.

Nevertheless, the Greenberg Traurig team secured an assignment to Ms. Hellstrom of the copyrights and devised a solution using takedown notices issued under the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512 to achieve the removal of the offending photographs. Within hours of servicing DMCA takedown notices, all offending images were gone from all of the websites. In addition, through strategic use of subpoenas and other legal remedies, Greenberg Traurig was able to obtain forensic data to unmask and confront would-be anonymous persons who later sought to obtain copies of the nude images. As a proof-of-method exercise, Greenberg Traurig was able to use the same method to remove revenge porn postings of another victim to MyEx.com with similar results – again within hours.

While Florida’s anticipated criminalization of revenge porn may help discourage these outrageous invasions of privacy, the new statute offers no help in removing the offending images from the Internet once they are up. Websites enjoy broad immunity from claims relating to posting by third-parties if they comply with the provisions of the DMCA. Moreover, the new Florida law, like laws now passed in 23 other states, expressly provides that providers of Internet and storage services – the websites hosting revenge porn – are not liable. Certainly, websites such as TheDirty.com and MyEx.com did not fail after the first 15 states criminalized revenge porn. Instead, they take adamant stands against removing such pictures in the absence of a takedown notice from the copyright owner, and have historically been recalcitrant in the face of desperate pleas from revenge porn’s victims. The passage of state revenge porn laws does not change that.

Anyone suffering from the effects of revenge porn, Internet defamation, or cyber-harassment should know that the same removal method may be available. If they wish to also identify the poster to pursue potential civil – and in Florida, criminal – remedies, they must move quickly, as IP logs and necessary forensic data can be lost forever under current law within mere days of the posting. While that does not allow much time to “catch the thief,” the more important issue – restoring privacy – remains available even after the offender’s trail has run cold. Under any circumstance, we recommend promptly contacting counsel to discuss the chances of a remedy under the DMCA.

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