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**Vriendelijke groet,**

**Jolien Beyens**

**ABSTRACT**

Revenge porn – or ‘non-consensual pornography’ – can be described as the act of distributing or sharing photos, videos or any other form of recording depicting one or more persons in sexually suggestive or explicit circumstances without the explicit consent of the person(s) pictured. Since 80% of all known revenge porn incidents occurs online (shared on mainstream porn site, dedicated revenge porn platforms or common social media websites), the harmful impact of revenge porn can grow exponentially over the course of mere days and is often felt both in the on- and offline world. Following their online exposure, victims have lost their jobs, suffered from anxiety and depression and some have even committed suicide. As such, the toll that revenge porn takes on its victims – and on society in general – is excessively high. Because this highly destructive conduct – which first emerged in the United States of America – recently became prevalent in Europe (and in Belgium), the question rises whether Belgian law in its current state allows for the effective prosecution of revenge porn perpetrators in a way that both satisfies the victims’ needs to be vindicated and deters potential culprits from exhibiting the same behaviour in future.

Hence, the first research question of this master thesis pertains to the legal status quo in Belgium, outlining the relevant sections of the Belgian law codes (with a special focus on the Belgian Criminal Code) and putting them to the test with regard to sanctioning both revenge porn users (or ‘uploaders’) and third party facilitators (ISP’s and website owners). Since revenge porn originated in the United States, American legislation is at present the most advanced on this topic. Today specific anti-revenge porn laws have been adopted in twenty-four separate American states with new bills still pending review and enactment in several other state-level parliaments. Therefore, my second research question aims to analyse these new legislative initiatives and their practical application in order to gain new useful insights on how to tackle revenge porn in Belgium. Finally, I briefly shine a light on the EU’s ‘Right to be Forgotten’ and check its merit in allowing the removal of revenge porn imagery from the Internet.

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**LIST OF ABBREVIATIONS**

* BCC : Belgian Criminal Code
* BCEL : Belgian Code of Economic Law
* Cass. : Court of Cassation (BE)
* CCC : Cybercrime Convention (COE)
* CCRI : Cyber Civil Rights Initiative
* ECHR : European Convention of Human Rights
* ECJ : European Court of Justice
* ECtHR : European Court of Human Rights
* EDPS : European Data Protection Supervisor
* EWHC : England & Wales High Court
* FBI : Federal Bureau of Investigation
* FTC : Federal Trade Commission
* ISP : Internet Service Provider
* LEA : Law Enforcement Agency
* OSP : Online Service Provider
* UGC : User Generated Content
* WEC : Law of 13 June 2005 concerning electronic communications.

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* Annex I – FRANKS, M.A., “Drafting an Effective ‘Revenge Porn Law’: A Guide for Legislators”, *End Revenge Porn* Online 18 July 2014, <http://www.endrevengeporn.org/main_2013/wp-content/uploads/2014/08/Guide-for-Legislators_7-18-14.pdf> dc 25 April 2015.
* Annex II – Court of First Instance of the Province of Eastern Flanders, Department of Dendermonde, ruling in Criminal Matters (19D Chamber), 20 January 2015, unpublished.
* Annex III – Anti-revenge porn statutes of the New Jersey, California and Illinois.

**INTRODUCTION**

2000 marked the year in which ‘revenge porn’ first made its appearance in cyberspace. In the late nineties ‘realcore pornography’ – a term coined by Italian researcher Sergio Messina to describe the new emerging trend in porn where ‘real’ people are pictured having ‘real sex’ in their own homes[[1]](#footnote-1) - had taken the Internet by storm. By that time digital photography had become widespread and Internet space was both freely available and easy to use[[2]](#footnote-2). At that time, website hosts like Yahoo/Geocities[[3]](#footnote-3), MSN[[4]](#footnote-4) and Usenet[[5]](#footnote-5) tolerated such and other kinds of pornography to be posted to their online platforms and news groups[[6]](#footnote-6). It soon became clear however that not all of these images and videos were being uploaded with the consent of the person or persons pictured.

Commercial websites not only allowed sexually explicit content featuring ex-girl/boyfriends to be posted on their public forums, they often went as far as to steal amateur photographs and appropriate the copyrights to them[[7]](#footnote-7). Since some of this amateur porn was not at all meant for the prying eyes of third parties, the imagery tended to be rather graphic and sexually explicit, discouraging the pictured persons from ever suing any of the websites concerned and thus risking even greater public scrutiny.

As the years progressed, more ‘specialised’ websites started to pop up online specifically dedicated to sharing sensitive imagery of ex-partners. To draw in more visitors these websites and blogs would often *“mix ‘real’ user-submitted revenge porn with staged versions (realexgirlfriends.com and iknowthatgirl.com)”*[[8]](#footnote-8). However, despite numerous competitors in this ‘niche’ market, American website ‘IsAnyoneUp.com’ (or ‘IAU’) is still the most notorious revenge porn website to date. Since its inception in 2010 IAU, under the leadership of founder Hunter Moore (the self-proclaimed ‘most hated man on the Internet’ and ‘professional life ruiner’[[9]](#footnote-9)), has managed to turn vast profits using a simplistic though effective and above all legal business model[[10]](#footnote-10). According to Moore’s formula[[11]](#footnote-11) people would forward him sexually suggestive or explicit content which he would then post to the IAU platform, regardless of age and despite the lack of consent from the individual pictured and often accompanied with personal information of the victim (their real name, home and work address, phone number, e-mail and a link to their social media profile) – a practice known as ‘doxing’[[12]](#footnote-12).

Even though anti-bullying and anti-revenge porn activists in the US had been trying tirelessly to take down IAU – and with it Hunter Moore himself – they were unable to trigger a criminal or civil conviction on the grounds of operating a revenge porn website as there was and still is no (federal) criminal law in place, nor could the immunity granted by §230 of the Communications Decency Act (‘CDA’)[[13]](#footnote-13) be legally circumvented. The sole reason why the FBI ultimately got involved, leading to Moore’s arrest on 23 January 2014, was the fact that Moore had actively hacked several e-mail accounts in order to obtain nude pictures to post to IAU, thus committing a federal crime (18 USC. §1030). He has since been formally charged with *“conspiracy, seven counts of unauthorized access to a protected computer to obtain information, and seven counts of aggravated identity theft”*[[14]](#footnote-14)*.* Though IAU ironically has not been ‘up’ since the name was bought by anti-bullying activists in 2011[[15]](#footnote-15), many revenge porn websites have spawned in its wake, continuing to make more victims every day.

Indeed, revenge porn – by lack of a better term – has shown itself to be a most heinous and intrusive crime that often leaves its victims emotionally and psychologically paralysed and, in some cases, socially and professionally ostracised[[16]](#footnote-16). Currently revenge porn mostly takes place in an online environment through social media platforms (like Facebook[[17]](#footnote-17)), on mainstream porn sites and on dedicated revenge porn websites[[18]](#footnote-18) – though it could just as easily occur offline. Consequently, it can have far-reaching effects, as today’s technology and ever increasing network availability allow every individual to post, copy and share these kinds of visual content with just one click. Once the material has been uploaded, the number of possible viewers can grow exponentially over the course of mere days, leaving the victim exposed and unable to stave off the following barrage of demeaning harassment, both online and in real life[[19]](#footnote-19). Following their online exposure, victims have lost their jobs, suffered from anxiety and depression and some have even committed suicide[[20]](#footnote-20). The toll that revenge porn takes on its victims – and on society at large – is excessively high.

Although some might argue that as soon as these images hit the Internet the damage has already been done and – given the volatile nature of digital information – can no longer be undone, victims who seek justice and compensation must be able to turn to the law. The question remains however whether legislation currently in force is effective in practice and is sufficiently able to satisfy this particular need.

Revenge porn first emerged in the United States where it has since been a prominent topic of discussion among feminist activists (as the majority of victims are women[[21]](#footnote-21)) and legal scholars alike[[22]](#footnote-22). Since a few years the nefarious practice of setting up revenge porn websites which provide a forum for third party users to upload and share sexually explicit material depicting – for the most part – ex-partners, further continued its global expansion and has finally crossed the Atlantic Ocean. As a result, it is now a prevalent though still lesser known problem across Europe, including in Belgium. The question therefore rises whether Belgian courts have the necessary legal tools at their disposal to satisfactorily address revenge porn cases.

With the recent highly profiled case of one basketball coach who secretly had been filming his (female) pupils in the shower[[23]](#footnote-23), it was once again made clear that the current Belgian Criminal Law System is substantially flawed when it comes to providing means of redress for victims of sexual harassment, voyeurism and sex crimes in general and to effectively prosecute perpetrators of such crimes[[24]](#footnote-24). Therefore – after having delineated the broad range of behaviours that fall under the scope of what is commonly dubbed ‘revenge porn’ and having briefly delineated the most relevant obstacles in the fight against cybercrime in general – my first research question will pertain to the legal status quo in Belgium: does Belgian law in its current state allow for the prosecution of revenge porn perpetrators in a way that both satisfies the victims’ needs to be vindicated and deters potential culprits from doing the same thing?

Since at present there is no literature available by Belgian scholars nor pertinent Belgian case law which specifically deals with revenge porn[[25]](#footnote-25), I will answer my first research question by first outlining the relevant sections of the Belgian Criminal Code and examining their scope and potential to sanction future criminal conduct given the different forms that ‘revenge porn’ can take. Secondly, as many revenge porn cases involve images produced by the victims themselves, I will examine possible remedies provided by Belgian copyright law. Since Belgium is a member of the European Union (‘EU’) the study of Belgian copyright legislation will necessarily require the inclusion of relevant European regulation and jurisprudence. The same applies to the third topic of study: Belgium’s privacy law and the freedom of expression. In this area, the significance of the case law produced by the European Court of Human Rights (‘ECtHR’) is indispensible for a sufficient understanding of the national legal climate of Belgium in this particular field. Lastly, considering the prevalence of revenge porn on the Internet, my fourth topic of examination will be the legal position of third party facilitators such as Internet service providers (‘ISPs’) and website owners. Again, EU-legislation and jurisprudence will be discussed in this particular context. After having researched these legal sources, I will attempt to answer the question whether or not the Belgian legal system is sufficiently equipped to deal with possible future revenge porn lawsuits, and if not, suggest the most appropriate sort of law to be introduced to cater to such cases.

My second research question will focus on the legal situation in the United States in order to gain useful insights on how to better tackle revenge porn in Belgium. Since revenge porn originated there, American legislation is at present the most advanced on this topic. Today specific anti-revenge porn laws have been adopted in twenty-four separate American states with new bills still pending review and enactment in several other state-level parliaments[[26]](#footnote-26). Hence, I will first analyse these new legislative initiatives, their practical implications and their legal ‘quality’ in terms of scope and potential for deterrence. To make for a useful analysis and to clearly identify the strengths and weaknesses of these statutes, I will select the three most diverging counter-revenge porn laws that are currently in force at the US state level for an in-depth analysis[[27]](#footnote-27). Next, I will outline the legal theory surrounding the right to privacy and the freedom of expression as developed by the Supreme Court of the United States (‘SCOTUS’) in order to assess whether or not the existing state level counter-revenge porn laws are likely to pass constitutional scrutiny in light of the First Amendment. Thirdly, I will address the impact of § 230 of the CDA which affords Internet users, ISPs and website operators a significant liability exemption in case of user generated content (‘UGC’) which could potentially impact the effectiveness of dedicated anti-revenge porn laws. In this context, the remedial potential of a federal legal initiative will briefly be examined. As a result of the earlier emergence of revenge porn in the US, the public debate on the subject has evolved greatly and at a high pace during the last five years. Consequently, I was able to conduct a thorough literary study on this topic. Scholars like Mary-Ann Franks, Danielle Keats-Citron, Ann Bartow, Jacqueline D. Lipton and Amanda M. Levendowski have been especially vocal in this regard and their legal insights and expertise have proven invaluable to my research into the legal status quo in the US. Finally, I will briefly shine a light on the ‘Right to be Forgotten’ as developed by the European Court of Justice and check its merit in allowing the removal of revenge porn imagery from the Internet.

**DEFINITION & CONTEXT**

1. **Definition and subject delineation** 
   1. **Dismantling the terminology**

Current mainstream media often define ‘revenge porn’ rather narrow, offering the common scenario where a scorned ex-lover posts naked, consensually taken pictures of a person to a specialised revenge porn website, mainstream porn sites or on social media platforms[[28]](#footnote-28). The term itself will be used in a more broad sense throughout this thesis as the problem of revenge porn is not limited to this particular construction. Making abstraction of how and under which circumstances the nude imagery originally came to be and regardless of which medium is ultimately used to disseminate the images (posted on the Internet or distributed using flyers or posters in an offline environment), the defining act of revenge porn is the distribution of the procured images to third parties against the will of or even unbeknownst[[29]](#footnote-29) to the person pictured. In other words, there are two basic levels to be discerned: the primary level where the explicit imagery of person A is somehow created and subsequently falls into the hands of person B; and the secondary level where person B distributes the images or makes them accessible to third parties against the will or knowledge of person A. Regardless of what happens at the primary level where person B is either handed the explicit material willingly by person A who trusts the images to remain private or person B uses deceitful or even criminal means to somehow procure the images from person A (theft, hacking, voyeurism, …), the intentional act of disclosure by person B without the consent of person A, which happens at the secondary level, constitutes the behaviour known as revenge porn within the context of this thesis.

Hence, ‘revenge porn’ is more adequately defined as the act of dispensing sexually explicit images or videos without the consent of the person pictured[[30]](#footnote-30) as it includes instances, which occur either on- or offline, where the victim was unaware of or did not consent to being photographed or filmed, or had the imagery which was in their possession either digitally or by analogue means stolen through common theft or computer hacking.

Despite the term’s prevalence in both today’s media and current scholarly literature, the phrase ‘revenge porn’ is in itself problematic for several reasons[[31]](#footnote-31). First, the word ‘revenge’ creates the impression that the dissemination of sexually explicit content, against the will of – or unbeknownst to – the person portrayed, only occurs when an ex-partner wants to avenge a break-up and punish the person he/she deems responsible for the hurt caused. This narrow delineation of the intent with which the images were disseminated could unintentionally create a legal loophole through which perpetrators who shared such content online motivated by goals other than getting back at a former lover – or even absent any particular motivation – could escape any kind of liability[[32]](#footnote-32).

One must recognise that the problem of revenge porn goes beyond the commonly relayed revenge plot[[33]](#footnote-33). As anti-revenge porn advocate Prof. M. A. FRANKS points out: *“[n]on-consensual pornography [also] includes the recording and broadcasting of a sexual assault for prurient purposes and distributing sexually graphic images obtained through hacking or other illicit means”*[[34]](#footnote-34)*.* Indeed, the spurned ex-lover is not always the (only) one to blame. Misogyny and financial gain are likewise potent driving forces behind any revenge porn network, perhaps even more so than just mere vengeance[[35]](#footnote-35). Since the upheaval ‘Gamergate’[[36]](#footnote-36) recently caused, it is beyond dispute that certain regions of the Internet are veritable breeding grounds for sexism and misogynistic viewpoints that seem to be predominantly adhered to by men[[37]](#footnote-37). Revenge porn is only one of many forms of cyber gender harassment these individuals turn to in order to punish or humiliate women online[[38]](#footnote-38). Cyber-bullying, -stalking and doxing[[39]](#footnote-39) are still disproportionately targeted at women and girls[[40]](#footnote-40).

Furthermore, much like child pornography, the dissemination of revenge porn is often profit-driven[[41]](#footnote-41). As was already mentioned *supra* in the introductory note, a popular revenge porn website – especially one as controversial as Hunter Moore’s IAU – is estimated to gross up to 20.000,00 USD a month[[42]](#footnote-42).

Therefore, it is argued that revenge is not the only possible motivator for engaging in revenge porn and must therefore never be made a constituting element of the illegal behaviour or act one intends to criminalise, as it is likely to amplify the burden of proof for both prosecutors and victims[[43]](#footnote-43).

Secondly, the term ‘pornography’ is equally problematic, if not more so. Whatever anyone’s view on pornography in general may be[[44]](#footnote-44), it is generally presumed that *“pornography […] at a minimum be restricted to individuals who are (1) adults and (2) consenting”*[[45]](#footnote-45)*.* It follows then that ‘non-consensual pornography’ – a term coined by FRANKS as an alternative to ‘revenge’ porn’ – is a *contradictio in terminis*. What is more, there is a legitimate expectancy of privacy inherent to victims of revenge porn, whether they put their trust in an intimate partner (though in hindsight apparently misplaced) or whether their constitutional and fundamental right to privacy was surreptitiously breached by hackers or just any opportunist with a smart phone. Such an expectation is never present in mainstream pornography as a matter of course. There *“A and B have zero expectation of privacy and intend for there to be a nonparticipating C”*[[46]](#footnote-46)*.*

Absent a more apt terminology, I will continue using the phrase ‘revenge porn’ throughout the course of this thesis keeping in mind that ‘revenge’ does not indicate a required intent. Moreover, given the fact that dissemination forms an integral part of the conduct that constitutes revenge porn, the term ‘pornography’ as used here is especially broadly interpreted as:

*“The* ***act of distributing or sharing*** *photo’s, video’s or any other form of recording depicting one or more persons, either real or manipulated, in the nude, semi-nude or in sexually suggestive or explicit circumstances”.*

Hence, ‘revenge porn’ points to this particular act of distribution undertaken without the explicit consent of the person(s) pictured. Bearing in mind that this is just a rudimentary working definition merely construed to allow discussion and research within the confines of this thesis, a properly fitting, comprehensive and inclusive definition will be examined under titles 3 and 4 where a possible legal response to this problematic conduct is contemplated.

Lastly, the notion of consent is key to properly defining revenge porn. It should be made quite clear from the start that even when intimate pictures are made public which, at the time of their ‘production’ were taken with the explicit consent of the person pictured (person A) and were thereupon forwarded by A to person B, the initial consent given by A does *not* automatically cover the further dissemination of those images by B to C. Though this contention might seem self-evident, it is remarkable how often it is questioned whether the traditional limits of consent also apply with relation to revenge porn. Not only does this question occur on online blogs and in comment sections, both scholars and lawmakers have voiced similar doubts[[47]](#footnote-47). As FRANKS argues, the reason why the ‘consent’ question resurfaces in contemporary debates on revenge porn is to be found in society’s unyielding penchant for victim-blaming[[48]](#footnote-48). This becomes evident especially when nude ‘selfies’ are concerned, which raises the following questions: *“[d]oes public perception of revenge porn depend on whether the intimate images were recorded by victims’ ex-partners or the victims themselves? Are victims perceived as more blameworthy or as experiencing less harm in cases involving distribution of ‘selfies’? Do such victims, in fact, experience less harm?”*[[49]](#footnote-49)*.*

FRANKS and CITRON write: *“[t]his disregard for harms undermining women’s autonomy is closely tied to idiosyncratic, dangerous views about consent with regard to sex. A victim’s consensual sharing of sexually explicit photo’s with a trusted confidant is often regarded as wide-ranging permission to share them with the public”*[[50]](#footnote-50)*.* Indeed, there is no fathomable legal or factual reason why the range of consent should be in any way altered, let alone extended, when a person’s sexual integrity (especially a woman’s) has been compromised. When someone hands a waiter a credit card to pay in a restaurant that person may reasonably assume that the waiter is trustworthy and will not share or further distribute the credit card information that was briefly available to him. The same goes with sending naked selfies to a trusted partner. Consent to share intimate pictures in one setting does not offer a license to post them online for all the world to see[[51]](#footnote-51). This is very much the essence of revenge porn or ‘non-consensual pornography’. Any divergence of this assumption threatens any attempt to create meaningful and effectual legislation which offers real means of redress for victims and society at large.

* 1. **Who is the victim? Who is the perpetrator?**

As was already mentioned *supra* both adults and minors can become victims of revenge porn. Underage children and teenagers below the age of eighteen are thought to be protected by child pornography laws in both the USA and the EU, which might be useful in the context of revenge porn. But the application of these laws can prove to be problematic, especially when it comes to sexting.

When teenagers send each other ‘sexts’ they are often inclined or encouraged to add some more graphic material to the mix and go beyond merely sending sexually suggestive text-messages. Thus, they take a nude or partially nude photograph of themselves (‘selfie’) and send it to a specific person, presuming the image will be kept private and will not be shared by this person with others. Under most child pornography laws the taking of a naked selfie by a minor will in itself constitute the production of child pornography[[52]](#footnote-52). Hence, when young adults who have not reached the age of eighteen take naked selfies criminal charges can be brought against them for producing child pornography; when they ‘sext’ and send such an image to a boy-or girlfriend, they could be found guilty of distributing child pornography[[53]](#footnote-53). Though arguably contrary to the impetus of anti-child pornography laws (to protect children), this has already happened in the USA where numerous states *“initially prosecuted sexters for the distribution, production, or possession of child pornography; some states [even] continue that practice. [Luckily though], some states legislators realize that child pornography statutes are an inappropriate way to stop sexting. […] Criminal acts should be behaviors that our society has deemed universally egregious and dangerous. Sexting does not fit into this definition because it is not always harmful if the sexters both consent to it and if they keep the pictures confidential”*[[54]](#footnote-54)*.* One could indeed argue that it is far more harmful to society to have consenting teenagers, who have been convicted on the grounds of child pornography for consensual primary ‘sexting’, get registered as sex offenders and thus rob them of any chance they might have had at a college education or perhaps any sort of future whatsoever[[55]](#footnote-55).

In Europe anti-child pornography legislation defines and targets the same basic criminal conduct as the federal statute in the US (18 USC 2251 – 2260A)[[56]](#footnote-56). Similar scenarios as those mentioned above are theoretically possible under most European jurisdictions. However, both the EU Directive on combating the sexual abuse and sexual exploitation of children and child pornography[[57]](#footnote-57), as well as the COE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse[[58]](#footnote-58) provide that it lies within the discretion of every Member State to decide whether or not they criminalise the production and possession of pornographic material involving children who have reached the age of sexual consent[[59]](#footnote-59) where that material was produced and possessed *with the consent* of those children and solely for their *private use*, in so far as the acts did not involve any kind of abuse. As of yet, the Belgian legislator has not made use of this discretionary power, leaving the current article 383bis of the Belgian Criminal Code unchanged and outdated[[60]](#footnote-60). In order to maintain legal certainty and to also acknowledge the spectrum of sexual exploration and development amongst teenagers, scholars have suggested an update of the Belgian Criminal Code[[61]](#footnote-61).

Evidently it can never be tolerated that the law confuses the identity of the victim with that of the perpetrator and *vice versa.* Responsibility (and appropriate criminal and civil liability) must be placed with posters and – as a last resort and under specific circumstances (see *infra*) – with website hosts and ISPs. Since tracing and subsequently uncovering the identity of those users who actively post non-consensual pornography is inherently difficult due to the elusive and anonymous nature of any and all cyber-activity, victims who go to trial tend to focus their efforts on website hosts and ISPs as they technically enable third party users to share such content on their online platforms and websites. Practice has shown however that both website owners and ISPs enjoy rather extensive exemptions from criminal and even civil liability under both the Communications Decency Act (CDA)[[62]](#footnote-62) in the US and the E-commerce Directive in Europe[[63]](#footnote-63) – and more specifically book XII of the Commercial Code in Belgium[[64]](#footnote-64). The relevant provisions of these laws that allegedly provide a safe harbour for UGC-platforms and ISPs will be discussed below for both Belgium and the US under titles 3.4 and 4.3 respectively. Since at least there are anti-child pornography laws in place at present which provide some form of protection for minors who become the victim of revenge porn, this thesis will concern itself with the legal possibilities that are open to adult victims at present.

1. **Combating revenge porn: practical and legal barriers**

When victims of online revenge porn turn to the authorities to file an official complaint, they are often met with numerous barriers that stand in the way of effectively detecting and consequently prosecuting those responsible. One such common hindrance is the trivialisation of revenge porn taking place on the Internet[[65]](#footnote-65) and – more generally speaking – of any kind of cyber gender harassment[[66]](#footnote-66).

As many victims have reported law-enforcement agencies (hereafter ‘LEAs’) either refuse to follow up on these complaints because they believe the conduct in question is legally insignificant[[67]](#footnote-67) or does not constitute a criminal offence, or they point to the fact that cyberspace, as the *locus delicti[[68]](#footnote-68)*, makes it impossible to pinpoint the geographical location of the cybercrime which leads them to renounce any jurisdiction over it[[69]](#footnote-69). This leads to the dismissal of the complaint and eventually the under enforcement of criminal law. Moreover, if and when authorities do decide to take action and follow up on a complaint, they are faced with the onerous task of tracing both the damning content and the persons who put it online through the ever-changing current of cyberspace. Since those two are hardly ever located within the same geographical confines, effective online searches - as well as the eventual litigation - carry an inherent cross-border element forcing law-enforcement agencies and public prosecution officials to manoeuver through the murky waters of transnational jurisdiction and cross-border searches[[70]](#footnote-70).

Indeed, determining exactly where (and when) an act takes place is challenging. The action of publishing a website that offers criminal content (such as child pornography or hate speech) might be considered to be located at the very computer through which this data was initially uploaded. Unfortunately, *“the act of uploading can cover several countries, if the content provider is in Country A while the hosting provider is in Country B: in that case, the act of uploading is initiated in A and terminated in B, and it may even be considered to occur in the intermediate countries through which the data is transported. But publishing the Web site may also be considered to take place at the location of the host computer where the material is actually located, since the publication is an ongoing act that takes place continuously from the moment of uploading onwards. In this reasoning, the criminal act only takes place in the country of the host computer”*[[71]](#footnote-71)*.* How national judges handle these conundrums will vary from court to court because most statutes merely list a number of options for activating jurisdiction[[72]](#footnote-72) and remain quiet when it comes to actual guidance on which factors courts must ultimately consider to be decisive.

Not only courts and LEAs are facing new challenges with the onset of international cyber criminality. Intermediaries such as ISPs oftentimes find themselves caught between a rock and a hard place: either they risk being held criminally or civilly liable for damnatory content hosted on their online platforms or they are pressured into impinging the privacy and data protection rights of social network users and other online patrons[[73]](#footnote-73). Since ISPs seem to fear criminal sanctions more than privacy related claims, many of them have taken a more pro-active stance with regard to the potential (cyber-)criminal behaviour of their users. As the so-called ‘gatekeepers to the Internet’[[74]](#footnote-74) ISPs and OSP’s have included specific provisions into their customer agreements and terms of service reserving the right to disclose customer data to LEAs in ‘specified circumstances’[[75]](#footnote-75).

According to the Facebook data policy for instance, these ‘circumstances’ can be – though not exclusively – (1) when they feel, in good faith, that it is their duty under the law to access, preserve or share personal data of their users with domestic (USA) and foreign LEAs when responding to a legal request (i.e. a search warrant, court order or subpoena), or (2) when they are convinced such is necessary to detect, prevent and address fraud or other illegal activity in order to protect the company itself, the user and others, or to prevent death or imminent bodily harm[[76]](#footnote-76). Then again, these kinds of provisions are certain to come into conflict with the current European Data Protection model and its highly protected concept of ‘consent’. As the Cybercrime Convention Committee of the COE (T-CY) noted in its third guidance note of 2014: *“[i]n most Parties, cooperation in a criminal investigation would require explicit consent. For example, general agreement by a person to terms and conditions of an online service used might not constitute explicit consent even if these terms and conditions indicate that data may be shared with criminal justice authorities in cases of abuse”*[[77]](#footnote-77)*.* It would appear that keeping the balance between Internet users on the one hand and LEAs on the other presents probably the greatest challenge of all.

As this brief introduction to jurisdiction in cyberspace shows, in order to fully appreciate the strenuous nature of the fight against crimes that occur online[[78]](#footnote-78), one must assess both the legal and practical barriers that turn the fight against cybercrime into such a cumbersome endeavour. However, to elaborate further on the challenges jurisdiction in the Digital Age faces, would be stretching the confines of this thesis too far. Nevertheless it must be borne in mind that international, inter-regional and even intersectional[[79]](#footnote-79) cooperation is indispensable to effectively and pragmatically fight cyber-criminality and to ensure that positive and especially negative jurisdiction conflicts are prevented or at the very least solved[[80]](#footnote-80).

**FIRST RESEARCH QUESTION**

1. **Status quo in Belgium**

The first research question asks whether Belgian legislation in its current state allows for the prosecution of revenge porn perpetrators in a way that both satisfies the victims’ needs to be vindicated and deters potential culprits from doing the same thing. In order to satisfactorily answer this question, I will first examine the relevant sections of the Belgian Codes regarding criminal, copyright and privacy law. Then, the legal position of third party facilitators in Belgium such as Internet service providers (‘ISPs’) and website owners will be analysed.

* 1. **Criminal Code**

At present in Belgium there is no specific law in force – criminal or otherwise – that specifically counters the act of publishing non-consensual pornography. We must therefore examine the Criminal Code in order to ascertain whether this particular behaviour is in any way sanctioned under the existing criminal law provisions.

* **Article 373 Belgian Criminal Code – ‘Assault on virtue’**

Firstly, article 373 of the Belgian Criminal Code (hereafter ‘BCC’) criminalises every act, contrary to morality, that is purposefully executed onto or with the aid of a specific person though without that person’s lawful consent, that offends the general standard of virtue[[81]](#footnote-81). It is punishable with imprisonment from six months up to five years. Such an ‘assault on virtue’[[82]](#footnote-82) requires a certain degree of severity which aggrieves the sexual integrity of a person[[83]](#footnote-83) as perceived by the collective consciousness of one specific society at a certain moment in time. What regards the moral constitutive element of the assault, the motivation of the perpetrator is deemed irrelevant[[84]](#footnote-84). So far – and in as much as a court would indeed confirm the severe nature of revenge porn – article 373 seems promising.

However, in order to be qualified as an actual assault on virtue where adult victims are involved, the material act must carry an element of physical intimidation or violence. When it comes to revenge porn, the material act would be *“the distribution or sharing of photo’s, video’s or any other form of recording depicting one or more persons, either real or manipulated, in the nude, semi-nude or in sexually suggestive or explicit circumstances without their express consent”* (see title 1.1 *supra*)*.* It remains to be seen whether a court would deem such conduct an act of violence or intimidation towards the victim in the sense of article 373*.* Both courts and scholars have accepted that violence can be withheld when the perpetrator used a ruse or surprised his or her victim, thereby forcing the victim to undergo the sudden and/or unforeseen acts(s) from which he or she was unable to physically escape in time[[85]](#footnote-85). This acceptance of the element of ‘surprise’ – which is often present in revenge porn scenarios since most victims only find out about it after the photos were uploaded onto the Internet – as an act of violence in conformity with article 373 could potentially lead to the criminalisation of revenge porn, were it not for the required physicality. As courts have repeatedly affirmed, the assault on virtue presumes actual physical touch, so that mere words, propositions, gestures or passive voyeurism do not fit the bill[[86]](#footnote-86). Following that rationale, the assault of virtue was not withheld in a case where a number of unknowing couples had been filmed while having consensual sex in a hotel room and where the hotel manager had subsequently sold the video tapes[[87]](#footnote-87). It can therefore reasonably be inferred that article 373 BCC, due to its very narrow interpretation by the courts, is presently unsuitable to criminalise revenge porn.

For article 373 BCC to become useful to revenge porn victims, courts would (1) first have to re-examine the prerequisite of a physical bodily effect and would (2) secondly have to come to terms with the fact that, when victims find out their intimate photographs are made public online, their sexual integrity is very much aggrieved[[88]](#footnote-88). Moreover, an updated stance on the concepts of ‘violence’ and ‘intimidation’ could perhaps move courts to recognise that the act of publishing someone’s sexually explicit images online, in full disregard of that person’s consent, is at the very least an act of intimidation. So far though, no such case law exists.

* **Article 442*bis* Belgian Criminal Code – ‘Stalking’**

Since 1998 the BCC has criminalised the harassment of a person in such a way as to create a substantial[[89]](#footnote-89) nuisance for the targeted person (article 442*bis)*. Stalking is not limited to harassment of a sexual nature and requires the victim to actively press charges in order for law enforcement to become involved[[90]](#footnote-90). It is punishable with imprisonment from 15 days up to 2 years and comes with a fine of 300,00 to 1.800,00 EUR. With regard to the criminal intent of the perpetrator it is sufficient to show that he or she knew – or should have known – that their conduct severely harassed the targeted person[[91]](#footnote-91). In case the stalking was motivated by discriminatory intent (*i.e.* on the basis of gender or sexual preference) article 442*ter* BCC prescribes that the minimum sanctions mentioned in 442*bis* can be doubled[[92]](#footnote-92). This aggravated circumstance might prove useful in revenge porn cases, which are often fuelled by sexist or misogynistic motives.

Even though the Belgian legislator had expressly intended for article 442*bis* to be applicable not only to repetitive acts but also to acts of harassment committed in one take[[93]](#footnote-93) – as for instance the transient act of posting revenge porn online – the Court of Cassation did not share this point of view[[94]](#footnote-94). Nevertheless, art. 145 §3*bis* of the Law on Electronic Communication (hereafter ‘WEC’)[[95]](#footnote-95) holds a specialised criminal provision targeting stalking by means of electronic communication (networks and tools) that does not require the repetitive nature of the stalking[[96]](#footnote-96), nor does it require the victim to formally file a complaint to activate a criminal investigation[[97]](#footnote-97).

However, it remains highly doubtful that the mere posting of a photograph to a website could legally be considered a use of an electronic telecommunication network[[98]](#footnote-98) or service in the sense of article 145 §*3bis* WECsince article 2, 5° WEC expressly excludes the following services from its scope of application:

1. services whereby by means of electronic communication networks and services transferred content is being delivered or checked with respect to its substantial content;
2. information society services as defined in article I.18 of the Belgian Economic Law Code (hereafter ‘BCEL’) that do not entirely or substantially constitute the transfer of signals via electronic communication networks.

It is therefore certain that the use of (cell) phones and email services falls within its scope, whereas revenge porn remains well within the realm of legal uncertainty, at least until new case law is produced that sheds a light on this particular topic. Presently, no case law is available that expressly deems the act of posting content to an online platform or website a ‘use’ in the sense of article 145 §3 WEC.

Yet, an absence of clarifying case law is not the only problematic aspect particular to electronic stalking. As article 145 §*3bis* describes the victim as a ‘recipient’ of a telecommunication, the relevance of this provision in relation to revenge porn, which is often posted to an online platform without being directly targeted at the person pictured, might be rather slim. Moreover, the specific criminal intent to harass or cause damage to the recipient of the telecommunication must be present in the person of the stalker[[99]](#footnote-99). As was discussed under title 1.1. *supra* this specific intent is not always present in posters of revenge porn.

Even if – hypothetically – revenge porn were to fall within the scope of article 145 §3*bis* it would still not be qualified as a sex crime[[100]](#footnote-100), which means that a host of specially designed provisions regarding *i.a.* extraterritorial jurisdiction, the limitation of legal proceedings (in time) and the audio-visual interrogation of minors would not apply in relation to revenge porn[[101]](#footnote-101). Also, given the havoc revenge porn wreaks on a person’s life, a prison sentence of 2 to 4 years *ad maximum* (art. 443*ter* BCC) or just a mere 15 days *ad minimum* is disproportionate.

In conclusion, neither article 442*bis* BCC, nor article 145 §3*bis* WEC offer a satisfactory base for the criminalisation and eventual prosecution of revenge porn.

* **Articles 443, 444 and 448 Belgian Criminal Code – ‘Slander, defamation and insult’**

Slander, defamation and insult all require the specific criminal intent to hurt or to offend. Although case law dictates that this specific intent can be deduced from the surrounding facts[[102]](#footnote-102), certain cases of revenge porn may fall outside of the scope of application of these articles since this particular motivation will not always be present, nor will the proof of such intent be readily available to the victim. Moreover, both slander and defamation require the publication[[103]](#footnote-103) of a *fact* or *allegation* that is liable to hurt a person’s honour or that might expose him or her to public scrutiny and contempt. As is regularly the case in revenge porn, the publication of a photograph may be accompanied by additional contact information or by any possible kind of allegation (though fabricated sexual fantasies seem to be quite popular). In such instances the posting of revenge porn may be considered to constitute slander and/or defamation if the specific intent can be sufficiently proven. When the pictures are solely accompanied by slurs that do not merit the term ‘allegation’ or ‘fact’, the publication will by punishable under article 448 BCC, again provided that the so-called *animus iniuriandi* is present (though this specific intent can be deduced from the simple fact that offensive slurs and insults are used)[[104]](#footnote-104).

Not every revenge porn poster will however affix supplementary personal information or fictitious sexual preferences to an uploaded picture. If a simple photograph without any additional wording is posted online, the next question will be whether that picture can be considered as detrimental to a person’s honour or liable to expose him or her to public scrutiny and contempt. Though no recent case law is available that answers this question, it is very much a matter of public morality whether or not a victim of revenge porn is deemed to have been harmed or offended by the publication of an initially consensual though private photograph[[105]](#footnote-105). Suffice it to refer to the citation by FRANKS under title 1.1 of this thesis where she points out an ingrained societal proclivity towards victim-blaming, which often muddies public debate on this topic and even court decisions.

Again, even if it is possible to convincingly show that the dissemination of non-consensual pornography could be punishable under articles 443, 444 or 448 BCC, the criminal sanctions that match these crimes seem trivial: when defamation or slander in the sense of articles 443 and 444 is withheld, the poster would risk being incarcerated for eight days to one year at the most and having to pay a fine of 1.200,00 EUR *ad maximum*; in case an insult in the sense of article 448 is withheld the maximum penalty becomes a meagre two month of imprisonment and/or a maximum fine of 3.000,00 EUR. Considering the magnitude of emotional distress and reputational harm revenge porn can cause, sentences such as these render the prosecution of revenge porn all but inconsequential.

Finally, in order to effectively trigger a criminal investigation the victim must file an official complaint with an LEA. This in itself is problematic. For instance, revenge porn is published in the context or in the aftermath of an abusive relationship, the victim might justifiably be too frightened to go to the authorities. Even outside of this kind of scenario, victims are very likely to stay silent as not to draw even more attention to their ordeal and will therefore not easily involve the relevant authorities. Justice should not be preserved for those who are bold or strong enough to stand up for themselves. It should not be up to the victim to instigate a criminal investigation when the stakes are this high. Criminal prosecution is inherently a government task, one that should not be delegated onto private citizens[[106]](#footnote-106).

For these reasons, articles 443, 444 and 448 BCC offer an insufficient remedy.

* **Article 383 Belgian Criminal Code – ‘Public offence against morality’**

In accordance with article 383 BCC the person who publicly displays, sells or distributes (including online)[[107]](#footnote-107) songs, pamphlets, pictures or photographs that are contrary to public morality, is punishable with imprisonment for a period from eight days to six months and with a fine from 156,00 to 3.000,00 EUR. Though article 383 does not require the victim to actively press charges and even though revenge porn would very possibly fall within its scope of application, these sanctions are simply too lenient. Furthermore, the fact that the criminality of these acts depends entirely upon the content of the pictures and not so much on the act of publishing them, the implication arises that the depicted person(s) is in some way obscene or shameful for revealing her or his body and/or engaging in a sexual act, an undertone which is not acceptable in this particular context. As such, article 383 BCC will not be examined further.

In conclusion, the Belgian Criminal Code in its present wording offers victims but a poor and inadequate tool in the fight against revenge porn. The BCC dates back to 1867 and was obviously not drafted with crimes like revenge porn in mind. Unsurprisingly, the offences currently listed in it often turn out to be just square pegs for round holes[[108]](#footnote-108).

* 1. **Copyright Law**

Since the majority of revenge porn images appear to be ‘selfies’[[109]](#footnote-109), some authors have proposed copyright law as a means for victims to fight back[[110]](#footnote-110).

In Belgium photographs and images are copyright protected under the Belgian Economic Law Code (‘BCEL’)[[111]](#footnote-111). Art. XI.165 § 1 stipulates that only the author of a work has the right to reproduce it or have it reproduced, in any way or form, directly or indirectly, temporarily or permanently. The right to distribute the work and to make it public are also exclusive rights pertaining to the author. In case of infringement, articles XV.104 to 106 provide criminal punishments of ‘level six’, imposing a monetary fine of 500,00 to 100,000,00 EUR and a prison sentence of one to five years[[112]](#footnote-112).

Of course, for a work to be effectively copyright protected under the law, it must necessarily be ‘original’. Before the European Court of Justice (‘ECJ’) stepped in to harmonise the concept for the whole of Europe, the ‘originality’ of a work in Belgium depended on two factors: (1) whether the work was an intellectual creation of the author; and (2) whether it was an expression of the author’s personality[[113]](#footnote-113). In its *Infopaq* decision of 2009 the ECJ turned the criterion of ‘originality’ - an author’s intellectual creation – into a so-called ‘community notion’, thereby ensuring a harmonised interpretation of the term throughout the European Union (‘EU’)[[114]](#footnote-114). Although this judgment caused quite a stir among European scholars at the time, the community concept of originality, in effect, hardly differs from the standards used by the Belgian Court of Cassation up until that point[[115]](#footnote-115).

One might question whether a naked selfie – and, by extension, pornography in general – meets this particular prerequisite. In keeping with unanimous Belgian case law, the originality of a photograph is predominantly judged by its lighting, the image itself, its development or the paper on which it is eventually printed *and* regardless of the subject, the content, the purpose or even the artistic or aesthetic quality of the picture[[116]](#footnote-116). Neither the explicit wording of the law, nor the Belgian courts have ever made copyright protection of sexually explicit or suggestive imagery (photo or video) dependent on morality or decency. Hence, pornography – even its hard-core variant – is copyright protected under Belgian law when all legal requirements are met[[117]](#footnote-117).

As a result, when a third party publishes a selfie online without the express permission of the person who owns the copyright, that third party commits a copyright infringement. The same is true of any person who subsequently copies and reposts that same picture to other websites or who in any other way further disseminates it. Even if a selfie is in any way altered or manipulated (perhaps photoshopped) by a third party who afterwards posts it online, this person cannot claim it as his own intellectual creation and exercise the corresponding copyright to it[[118]](#footnote-118).

Once it is established that a copyrighted selfie was spread without permission, the first priority of the victim will be to have it promptly removed. In order to achieve this – and under the assumption that the likely uploader is known to the victim – the victim or his or her lawyer can write to the culprit and to any other identified party involved, *“requiring them to urgently: (1) procure the removal of the photographs from the internet; (2) deliver the images; (3) undertake not to further disseminate the images; and (4) provide full details of an onward dissemination”*[[119]](#footnote-119)*.* Should they fail to cooperate, an interim injunction for immediate removal can be sought on the basis of art. XVII.14 §3.[[120]](#footnote-120). If they still refuse to engage after issuing such an injunction, the victim will be forced to issue a formal summons to initiate court proceedings[[121]](#footnote-121). Of course, given the sensitive nature of revenge porn cases, victims will sooner leave it at that then face the inevitable media attention that commonly accompanies such open court cases. Plus, the ease and speed with which content can now be copied and promulgated online means that one can never be absolutely certain that the images were indeed removed from every possible server worldwide[[122]](#footnote-122). As is often the case with dedicated revenge porn websites, as soon as infringing content is effectively removed from one source, it ‘pops up’ somewhere else, a phenomenon poignantly referred to as the ‘Whack-a-Mole’ problem[[123]](#footnote-123).

When on the other hand the victim is completely in the dark as regards the identity of the uploader, he or she must turn to the ISP – or any other intermediary – in order to have the content removed or at the very least blocked. Art. XVII.14 §4 BCEL offers the possibility of an injunction against intermediaries – such as website owners or ISPs – whose services were used by third parties to infringe upon the copyright of the victim[[124]](#footnote-124). When it comes to blocking access to websites that host illegal content however, a host of obstacles are to be considered. Objections regarding the freedom of expression aside[[125]](#footnote-125), blocking measures are relatively easy to circumvent and often incur high implementation costs[[126]](#footnote-126). Moreover, in 2010 the European Data Protection Supervisor (‘EDPS’) voiced concerns regarding the legal certainty of private blocking by ISPs on their own accord, without the well-defined legal framework that is (supposedly) present when such actions are taken by police or other judicial authorities[[127]](#footnote-127).

As LEVENDOWSKI puts it, copyright is not a perfect solution but it does provide a powerful tool to combat revenge porn for the time being, especially since it offers both civil and criminal redress[[128]](#footnote-128). Nevertheless, apart from all the above mentioned legal and practical grievances, the tool that copyright offers remains limited to those victims who took the exposed pictures themselves, leaving a significant number of people out of reach of its protection. Since copyright is therefore incapable of offering a satisfactory solution to revenge porn victims, an all-encompassing approach must be sought elsewhere.

* 1. **Right to Privacy v. the Freedom of Expression**

Since Belgium is an EU member state, the privacy of its citizens is protected on several different levels. First, the Belgian courts have acknowledged that every person inherently holds the right to her own image or likeness. This right, which is essential to every natural person, was created by the Belgian courts and has therefore no concrete legislative basis[[129]](#footnote-129). In accordance with a judgment of the Court of First Instance of Brussels in 2001 the right to one’s own image is an aspect of the right to privacy engrained in article 22 of the Belgian Constitution and in article 8 of the European Convention of Human Rights (ECHR)[[130]](#footnote-130). In two separate cases the ECtHR determined that the right to one’s likeness and the right to a good name (or reputation) are both ‘related’ to article 8[[131]](#footnote-131). Consequently, article 8 constitutes a second level of legal protection for personal privacy.

It should be pointed out that the right to privacy includes an inherent subjective right that permits civil litigation. In other words, privacy claims do not follow general torts law[[132]](#footnote-132). Instead, the claimant merely has to prove the absence of consent with the intrusion into his or her private life[[133]](#footnote-133) which, in terms of burden of proof, is a much more comfortable starting position than the one under the torts law paradigm.

Thirdly, there is the Law of 8 December 1992 on the protection of personal privacy with regard to the processing of personal data – hereinafter referred to as the ‘Privacy Law’. Congruent with a judgment of the Court of First Instance of the Province of Eastern Flanders, Department of Dendermonde, of 20 January 2015 the use of cameras and the storage of the footage can be qualified as processing personal data in the sense of article 1 of the Privacy Law, even if there was no actual data registration[[134]](#footnote-134). If the processing has any bearing on the sex life of the data subject and is done without an honest and legitimate cause and absent the subject’s unambiguous consent[[135]](#footnote-135), the data processor (which can be both the uploader and the website operator or owner) can be held accountable for the unlawful invasion of privacy[[136]](#footnote-136). Moreover, the Court of Dendermonde explicitly deemed it beyond any reasonable doubt that a person’s body constitutes ‘personal data’ since it conveys information on an identifiable natural person[[137]](#footnote-137).

Belgium’s Privacy Law is also equipped with several criminal law provisions stating that anyone guilty of the unlawful invasion of privacy can incur a fine ranging from 6.000,00 to 600.000,00 EUR[[138]](#footnote-138). However, as was the objection to the use of article 442*bis* BCC (stalking – see *supra*) in the fight against revenge porn, the dissemination of non-consensual pornography is not considered a sex crime under the Privacy Law. Presently, this ill-fitting law is used by criminal courts to punish passive voyeurism since this behaviour is currently not illegal in Belgium, showing once again the outdated state of Belgian Criminal Law in the field of sexual harassment[[139]](#footnote-139). Plus, the fact that as of yet[[140]](#footnote-140) some Belgian courts still accept proof of ‘implicit’ consent[[141]](#footnote-141), only adds to the legal uncertainty that still surrounds the effective prosecution of revenge porn perpetrators in Belgium.

Furthermore, when it comes to revenge porn, *“[t]he unauthorised dissemination of intimate photographs in this way is unquestionably a misuse of private information and the courts are likely to be sympathetic to a claimant who has had their trust abused in such a fashion. The claimant will have a reasonable expectation of privacy (as per article 8 [ECHR][…]) that will rarely be trumped by the freedom of expression (article 10)/public interest arguments that often run in media privacy cases”*[[142]](#footnote-142)*.*

Nevertheless, the freedom of expression is a popular objection in revenge porn debates in the USA where pornography is considered ‘free speech’ that can only be restricted in a limited number of circumstances (*i.e.* in case of ‘obscene’ content – see *infra* title 4.3). When it comes to Europe – and Belgium in particular – the ECtHR has the last say in this matter. Just like the right to privacy that was just discussed, the freedom of expression in Belgium is protected by the two-tiered approach found in both article 19 and 25 of the Constitution and in article 10 of the ECHR.

Over the years, the ECtHR has been given several opportunities to fine-tune its policy regarding the relationship between article 10, public morals and ‘obscenity’[[143]](#footnote-143). In the case of *Perrin v. United Kingdom*, where a UK citizen had been convicted to a prison sentence of thirty months under the UK Obscenity Act for publishing extraordinarily graphic sex scenes, the Court held *“that the applicant’s conviction and sentence […] constituted an interference with his right to freedom of expression”*[[144]](#footnote-144)*.* As this case clearly demonstrates, spreading pornography online is considered protected speech in the sense of article 10[[145]](#footnote-145). Yet, following article 10’s second paragraph, the right to freedom of speech is by no means absolute. *“Certain ‘expressions’ or content are considered so reprehensible that restrictions may be justified”*[[146]](#footnote-146)*.*

Indeed, in reviewing the ECtHR’s case law regarding article 10, it is clear that the Court simultaneously asserts its role as final judge while also allowing EU Member States a considerable ‘margin of appreciation’ to determine which expressions cross the line of morality within their respective jurisdictions and which do not[[147]](#footnote-147). When it comes to the necessity of government restrictions to the freedom of expression *“[t]he Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a ‘restriction’ is reconcilable with freedom of expression as protected by Article 10”*[[148]](#footnote-148)*.*

In other words, everything will depend upon the wording of the law that Belgium would use (or construe – see *infra* title 3.5) to address revenge porn since it must fulfil the three conditions article 10 §2 puts forward. First, the envisioned restriction must be prescribed by a clearly formulated law. After having examined the possible solutions to revenge porn offered by Belgian law in its current state *supra*, one must conclude that no such unambiguous law is in force at present. Legislative initiative might therefore be required to fill this legal void. Secondly, if such a law were to be contemplated it must achieve a certain goal of public interest. In the case of revenge porn, these would be the prevention of crime and the protection of women’s health and wellbeing. As the Court stated in *KU v. Finland*: *“[a]lthough freedom of expression and confidentiality or communications are primary considerations and users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression must be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of rights and freedoms of others”[[149]](#footnote-149).*

Lastly, article 10 §2 requires the law in question to be necessary in a democratic society, which suggests the existence of a pressing social need. Of course, the margin of appreciation will play a significant part is this assessment in that individual national governments will judge the gravity – or even the very existence – of such a need very differently. Nevertheless, keeping in mind the irreparable damage non-consensual pornography can cause to a person’s life, the need for retaliation and prevention is most direly felt by the victims and – by extension – by society as a whole. It is therefore safe to say that a law especially designed to counter revenge porn falls well within the proportionality requirement of article 10 §2. Concerns are often raised though with regard to the proportionality of blocking content online, such as the risk of over-inclusiveness and the already mentioned overall ineffectiveness of blocking measures[[150]](#footnote-150). To address such (legitimate) concerns the law must foresee transparent procedures and adequate safeguards to ensure these kinds of restrictive measures stay limited to what is necessary and proportionate[[151]](#footnote-151).

As for the Belgian Constitution, both the general article 19 and article 25, which specifically aims to protect the freedom of expression of journalists in written media, keep causing confusion and debate, especially since the arrival of the new media and the Internet. The fact that the Belgian Constitution is in no way adapted to the new media outlets of the 21st century has forced the Court of Cassation – Belgium’s primary judicial entity – to re-interpret these articles, arguably with mixed results. By contrast, article 10 ECHR is formulated in a technology neutral way, making it a multi-applicable and easy to wield legal instrument. Since the ECHR holds the top position in the legislative hierarchy and has direct effect on national court proceedings[[152]](#footnote-152), I will not discuss these articles here further but refer to the work of LEMMENS for an in-depth analysis of the ways in which the Belgian Constitution is antiquated and highly problematic, chiefly with regard to the special status of print media covered by article 25[[153]](#footnote-153).

Suffice it to say that it will be no small task for the Belgian courts and legislators to aptly navigate both the right to privacy of victims and the freedom of expression of revenge porn perpetrators when ruling in these kinds of cases or drafting dedicated legislation. As is common practice when fundamental rights collide, one must be weighed against the other in order to ensure a certain balance. During this balancing exercise courts and legislators alike must primarily consider the harm done to society when either right is allotted priority. This inevitably means whether or not – and if so, to what degree – the people depicted in pornography are harmed by it and whether it therefore still merits protection under free speech law[[154]](#footnote-154). Then again, closing the door on pornography might inadvertently open another door to value judgments and morality policing[[155]](#footnote-155). After all, if consensual ‘mainstream’ pornography were to be outlawed, the line between merely sexually suggestive and actual pornographic imagery would be drawn using moral standards that by definition are highly personal and subject to change, resulting in legal uncertainly and potentially puritanical restrictions on free speech.

Even though no obvious solution to this conundrum is readily available, we must refrain from minimising or ignoring the potential for real societal harm as some authors have done[[156]](#footnote-156). This myopic viewpoint pre-emptively closes the debate in this matter and inadvertently puts self-gratification before the rights of others (predominantly women)[[157]](#footnote-157), rendering their privacy a mere commodity instead of a right[[158]](#footnote-158). In any case, where the alleged right to freedom of speech of users and uploaders of revenge porn is pitted against the privacy rights of women, society at large is inarguable better served by protecting the latter.

* 1. **Position of ISPs – liability or immunity?**

Since not every revenge porn case features an easily identifiable ex-lover, unknown and anonymous uploaders are generally near impossible to track down. In those rare cases where law enforcement fortuitously prevails and catches those responsible, the ensuing *“suits stand little chance of success because so many defendants are judgment-proof – that is, they don’t have the financial resources to satisfy a judgment”*[[159]](#footnote-159)*.* Luckily, the EU Directive 2000/31/EC of 2000[[160]](#footnote-160) created a harmonised liability model for Internet intermediaries to apply when (illegal) user generated content (‘UGC’) is discovered on the websites they host. Even though UGC platform providers do not quite fit into either the classic publisher model of liability used in media law[[161]](#footnote-161) or even the hosting model of the E-Commerce Directive, the well-defined *modus operandi* of most revenge porn websites suggests that their liability should be examined in respect of the latter[[162]](#footnote-162).

Generally, ISPs provide technical support, services, access and connectivity to the net; they provide transmission lines, manage domain names, provide email facilities, store material and host websites for Internet users worldwide[[163]](#footnote-163). Sometimes though, and however inadvertently, ISPs provide the means, enable or make it easier for those individuals who use the Internet infrastructure to commit all manner of crimes[[164]](#footnote-164). In an effort to free ISPs from this precarious position and protect them against a swarm of potential lawsuits, the EU adopted the E-Commerce Directive[[165]](#footnote-165). Thus, ISP liability was reduced, albeit within three more or less clear-cut confines. As Recital 42 to Directive explains: *“[t]he exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored”*[[166]](#footnote-166)*.*

Articles 12 to 15 of the E-Commerce Directive – or articles XII.17 to 19 BCEL that largely stayed true to the wording of the Directive – foresee (1) mere conduit, (2) caching and (3) hosting of information as separate grounds of exemption. Relevant to the (alleged) hosting model of most revenge porn websites, article XII.19 BCEL stipulates that an ISP will not be held liable for storing content at the request of the recipient of a service when (a) the provider does not have *actual knowledge* of any illegal activity or information or is not aware of any facts or circumstances from which the illicit activity or information is apparent[[167]](#footnote-167); and (b) the provider, upon obtaining such knowledge or awareness, *acts expeditiously* to remove or to disable access to the information.

Thus, the E-Commerce Directive created *“a horizontal and conditional exemption from (penal and civil) liability for certain service providers for a wide range of illegal information (copyright infringement, libel and defamation, child pornography, xenophobia, etc.) provided by a recipient of the service”*[[168]](#footnote-168)*.* However, it is highly unlikely that a Belgian court would accept the ‘hosting’ exemption in a case of revenge porn[[169]](#footnote-169). Even where revenge porn hosts provide a tool on their websites where users can freely upload any content they want and even when those users have signed an online form that supposedly exonerates the website host from any legal liability, it is hard to imagine that a court would accede that such services could be offered without the host’s actual knowledge or awareness of the illegal nature of the UGC. Since these websites make money through ads, pay-per-click modules and even the sale of t-shirts[[170]](#footnote-170), they consciously select the ‘best’ or most believably revenge-related photographs in order to attract more visitors[[171]](#footnote-171). Revenge porn websites are therefore sustained by both ad companies and their own patrons (UGC) so that fixed costs are low, which in turn causes other likeminded ‘entrepreneurs’ to set up their own dedicated website, creating a tremendous level of competition[[172]](#footnote-172). This means that websites need to stand out and make a name for themselves in order to attract visitors and make money. The more notoriety and controversy their website attracts, the more successful they become. It is therefore not surprising that often the uploaded pictures are accompanied by personal information and/or offensive slurs directed at the victim[[173]](#footnote-173). Plus, when victims eventually stumble upon their pictures online and ask the hosts to take them down, they are often required to pay some sort of ransom or fee in order to have the photographs removed from the site, with no guarantee whatsoever that these are not passed on further to other websites or simply uploaded again later[[174]](#footnote-174). Of course, extortion arguably counts as ‘expeditious legal action’ in the sense of article XII.19 so that any limitation of liability in such a case is out of the question.

It was with the goal of protecting other, well-meaning providers and the users of their services that the exemptions to their liability were initially implemented. More to the point, in addition to achieving economic objectives, the European lawmaker sought to secure the freedom of expression[[175]](#footnote-175). It is conceivable that *“[i]mposing a great risk of legal liability on the ISPs’ shoulders would create an incentive for them to heavily censor the information passing through their storage services”*[[176]](#footnote-176).

Apart from this potential ‘chilling effect’, the practical application of the hosting exemption is equally challenging when it comes to identifying the Internet actors meant to benefit from article XII.19’s particular safe haven: *“[…] is it necessary for an ISP to technically host the information on its own servers, or does this also include the case where the provider of an online platform uses the services of a third person to technically stock the content? Also, should UGC platform providers be seen as a modern version of hosting providers, or are they more than that (given the fact that, in some cases, their role is more important than the mere technical storage)?”*[[177]](#footnote-177)*.* Because of this legal uncertainty within the law, case law has a decisive role to play in this respect.

Unfortunately, national court decisions from the EU Member States show fragmentation and a general lack of guidance in this regard[[178]](#footnote-178). Even within the confines of Belgian jurisprudence, consistency is somewhat lacking[[179]](#footnote-179). Since the notions of ‘knowledge’ and ‘expeditious action’ both essentially involve a value judgment, evaluated on a case-by-case basis, this disjunction does not come as a surprise.

Furthermore, both the detection and collection of proof of gross misconduct or illegal activity by users online or the actual knowledge thereof by ISPs have proven to be difficult. Again the law is not entirely clear where it absolves ISPs, who only offer mere conduit, caching or hosting services, from a general obligation to monitor all the information that they store or which passes through them or to actively seek out suspicious circumstances and behaviours[[180]](#footnote-180). As was rightly pointed out by the Brussels Court in 2008, article XII.20 §1, 1° BCEL (which was still article 21 §1 of Belgium’s E-Commerce Act at that time) dictates that on the one hand ISPs are not burdened by a general obligation to supervise the information they host, nor can they be held to actively search for facts or circumstances that might indicate illegal activity, whereas – seemingly to the contrary – recital 48 to the E-Commerce Directive offers EU Member States the opportunity to adopt laws that *do* impose upon these intermediaries a general duty to monitor online content and behaviour. Subsequently, the essence of article 15 of the Directive (or article XII.20 §1, 1° BCEL) appears to be undermined by its own recital[[181]](#footnote-181). Indeed, the judge – in line with the French TGI[[182]](#footnote-182) - clearly stated that the special exemption for online ‘hosts’ does not impart a full-scale immunity[[183]](#footnote-183) upon them, even though, according to the preparatory legal works of the Belgian E-Commerce Act[[184]](#footnote-184), an online ‘host’ has no general duty to monitor, no duty to conduct a minimum number of random surveys, nor is it obliged to obtain specific council on the matter. Recital 40 even expressly recommends *“the development of rapid and reliable procedures for removing and disabling access to illegal information”* and advises ISPs to implement their own security measures as long as they are on par with current EU legislation on privacy and the processing of personal data[[185]](#footnote-185). Despite the EU’s apparent support for these so-called ‘self-help’ measures, they have been forcefully contested by scholars[[186]](#footnote-186).

Belgium has made use of the possibility *ex* recital 48 of the Directive and has imposed a duty to co-operate with LEAs when they are called upon in the course of a criminal investigation[[187]](#footnote-187). Indeed, Belgium, and especially its LEAs, have had quite some experience with trying to establish the exact scope of this particular article and the role ISPs play in criminal investigations. With *Scarlet v. SABAM* the ECJ concluded that filtering all online traffic for an undetermined period of time constituted a general surveillance measure prohibited by the E-Commerce Directive[[188]](#footnote-188). Applying such a filter was also deemed manifestly incompatible with the right to privacy and the right to information of Internet users[[189]](#footnote-189). This holding was confirmed one year later in *SABAM v. Netlog[[190]](#footnote-190)*.

Though holding ISPs responsible when individual perpetrators remain untraceable is a serviceable tactic for revenge porn victims, especially since the targeted ISPs and website operators will – in most cases – be unable to rely on the exemption of article XII.19 BCEL, there are still those who find this liability model unfair or too burdensome to ISPs[[191]](#footnote-191). As this model has been the standard legal response to situations where the principal perpetrator is somehow out of the law’s reach, these criticisms cannot be supported, especially since ISPs are in a particularly good position to reduce the occurrence and impact of cybercrime[[192]](#footnote-192). In the end, *“Internet service providers control the gateway through which Internet pests enter and re-enter the public computer system”*[[193]](#footnote-193). Therefore they should not be excused from trying to stop these nuisances before they spread and from helping to identify individuals who unleash them in the first place.

As most revenge porn websites are hosted in the US instead of Europe, the near immunity provided to these hosts and operators by §230 of the American CDA creates a much more relevant onus to victims than the exemptions in Belgian or even European E-Commerce regulations[[194]](#footnote-194). Therefore its implications on the search for an adequate weapon to fight revenge porn will be discussed at length *sub* title 4.3 of this thesis.

* 1. **Necessity of specific legislation?**

As the legal analysis of current criminal and civil law options under titles 3.1 to 3.3 has shown, Belgium’s current legal system is ill equipped to adequately address the ever-growing problem of revenge porn. At present, Belgian criminal law provisions (a) do not encompass every possible revenge porn scenario, (b) entail criminal sanctions (if and when provided) that do not sufficiently correspond to the total extent of the harm caused, or (c) they require the victim to take action on his or her own accord instead of having the Public Prosecutor initiate criminal proceedings. Civil suits are equally inadequate since they (a) are time-consuming, if of course there is someone to sue in the first place, (b) can cause legal fees to soar without the guarantee of successful redress and removal of the damning images[[195]](#footnote-195), and (c) will often expose the victim – and the offending material – to even greater public attention and scrutiny.

Thus, it is clear that a new legal initiative is due in order to fill the existing gaps and to adequately deter potential culprits from engaging in revenge porn. If these legal discrepancies are not mended, Belgium runs the risk of being held negligent of protecting its citizens’ basic rights to privacy and personal integrity (art. 8 ECHR)[[196]](#footnote-196). A prompt response is therefore needed.

In deciding in which legal field this new law should be developed, a strong case has been made – notably by American scholars – for criminal law. As FRANKS convincingly put forward: *“we should regard non-consensual pornography as a crime because that is the most accurate and principled characterization of its harm. Non-consensual pornography may indeed also be a violation of privacy or an infringement of copyright, but it is at its base an act of sexual use without consent. […] The fact that perpetrators and victims are not in physical proximity [to one another] […] should not change this analysis. Nor should the fact that such an assault is not physical remove it from the category of criminal sexual use without consent”*[[197]](#footnote-197). Indeed, *“criminal penalties are appropriate in instances where conduct is considered to be harmful to society as a whole”*[[198]](#footnote-198)*.* The fact that revenge porn is exactly that can hardly be contested. Since ‘the Internet never forgets’, its harmful effect is only further exacerbated by the onward circulation of the images, which in itself ensures perpetual re-victimisation. The images are on permanent record and are near impossible to remove from the web[[199]](#footnote-199). In other words, prevention is key.

At present, *“[t]he ever-increasing number of revenge porn sites and victims strongly indicates that the threat of civil or copyright actions is not an effective deterrent against nonconsensual pornography”*[[200]](#footnote-200). But criminal law is perfectly suited to serve a dual purpose. First, criminal laws can allocate severe punishment proportional to the harm done: the greater the damage, the higher the sentence. For them to have a discouraging effect, penalties must raise *“the costs of noncompliance beyond its expected benefits”[[201]](#footnote-201).* Secondly, by effectively criminalising revenge porn an important signal is given to society as a whole. Considering the inherently discriminatory nature of revenge porn, mostly women are targeted – and thus potentially victimised – by this particular scheme[[202]](#footnote-202). It is quintessential to the role of government that it protects its citizens against the intentional wrongdoings of others. Far too often though, the harms done unto women are not recognised as such. They are either rationalised into oblivion or reduced to mere exaggeration[[203]](#footnote-203). Hence, in order to protect its members, society itself must change.

As is the case with many laws in general, criminal law especially has the *“ability to condemn cyber gender harassment and change the norms of acceptable online behaviour. Recognizing cyber harassment for what it is – gender discrimination – is crucial to educate the public about its gendered harms, to ensure that women’s complaints are heard, to convince perpetrators to stop their online attacks, and ultimately to change online (and offline) subcultures of misogyny to those of equality”[[204]](#footnote-204).* KITCHEN calls this the ‘expressive value’ of the law.

However, some people might question whether the criminal law approach will not disproportionately criminalise clueless teenagers as sexting (both primary and secondary) is very popular among their demographic. Of course, that they are still legally minors does not change the fact that even *“[t]eenagers are capable of committing all sorts of crimes, including murder and rape. While society may be inclined to exercise leniency in some individual cases involving young defendants, laws against rape and murder are not thrown out or rewritten simply because teenagers may commit these crimes”*[[205]](#footnote-205)*.* This objection therefore becomes inconsequential in the context of non-consensual secondary sexting – or ‘revenge porn’.

Online revenge porn first appeared in the United States of America[[206]](#footnote-206) where a number of individual states have taken legislative initiatives to try and fight back, with varying degrees of success. Still, their efforts hitherto merit examination, especially since Belgium might soon have to follow suit. In the next chapter of this thesis, I will focus on the revenge porn debate as it is currently raging in the US and to the progress that has been made thus far.

**SECOND RESEARCH QUESTION**

1. **Legal landscape in the United States of America**

This second research question focuses on the legal status quo in the US in order to gain useful insights on how to tackle revenge porn in Belgium. Therefore, I will first analyse three new American legislative anti-revenge porn initiatives in order to clearly identify their respective strengths and weaknesses. Then follows an outline of the legal theory surrounding the right to privacy and the freedom of expression as developed by the Supreme Court of the United States (‘SCOTUS’) in order to assess whether these existing state level counter-revenge porn laws are likely to pass constitutional scrutiny in light of the First Amendment. Thirdly, § 230 of the CDA is addressed, as it equips Internet users, ISPs and website operators with a considerable safe haven. In this context, the remedial potential of a federal legal initiative will also be considered.

* 1. **Devoted anti-revenge porn legislation**

In the conclusion of the first part of this thesis, the question of whether or not there is a need for dedicated anti-revenge porn legislation in Belgium was answered affirmatively. Likewise, a growing number of states in the US have come to the same conclusion with regard to their own legislations. At present, no federal law is in place that adequately and specifically criminalises the behaviour here defined as revenge porn[[207]](#footnote-207). Much the same as in Belgium, existing torts and criminal laws at the national level of the US are inefficient with regard to revenge porn as the same concerns apply as cited under title 3.5. Most state codes provide statutes on child pornography, unlawful surveillance, dissemination of video and images obtained through unlawful surveillance, sexual assault, aggravated harassment, domestic violence, cyber-stalking, extortion and hacking, none of which provide an all-inclusive protection and redress to revenge porn victims[[208]](#footnote-208). Though there have been cases where victims successfully brought tort claims against readily identifiable ex-lovers[[209]](#footnote-209), it remains next to impossible to effectively go after unknown uploaders or third party intermediaries as §230 CDA prevents them from holding both websites and users responsible for continuing to distribute the explicit images[[210]](#footnote-210). *“While some criminal laws can be mobilized against revenge porn, on the whole, existing criminal laws simply do not address the issue”*[[211]](#footnote-211).

For this reason, scholars like LEVENDOWSKI and BARTOW have suggested turning to copyright law[[212]](#footnote-212), especially since the above mentioned immunity of §230 CDA does not affect copyright infringements[[213]](#footnote-213). In order to be constitutionally protected under 17 USC Chapters 1 - 13 (popularly known as the DMCA – the Digital Millennium Copyright Act) a work must be the original writing of an author. As a constitutional prerequisite to copyrightability, *“[o]riginality is a complex construct, embodying both the concept of independent origin and a minimal level of creativity, a modest amount of intellectual labor. […] The requisite level of creativity is extremely low; even a slight amount will suffice”*[[214]](#footnote-214)*.* No morality or value judgment is therefore provided under federal law that would cause pornographic images to be undeserving of copyright protection. Yet, as is the case with current US common tort and criminal law, copyright law too offers victims but a limited means of redress. This is especially the case given the fact that a victim, who took the published photographs herself[[215]](#footnote-215), is required by law to register her copyright with the US Copyright Office within ninety days of first publication or within one month after the victim first learns of the infringement *“before she can request a website to remove the photos or ask Google to remove them from its search results”*[[216]](#footnote-216). Though at first sight, such a registration might seem like a reasonable precondition for issuing a take-down-notice, it actually requires a victim to send the leaked image or video to the Copyright Office in Washington DC in order to conclusively prove that she is indeed the legitimate owner of the alleged copyright, thus forcing the victim to once again be unwillingly exposed to third parties[[217]](#footnote-217). Evidently, this registration-requirement causes the failure of copyright protection given the reluctance of revenge porn victims to risk further publicity and even possible re-victimisation. As the physical proof of the copyright must be delivered either by postal delivery or in person these fears are hardly unwarranted.

Hence, with no adequate federal ‘umbrella’ currently in place to cater to every revenge porn victim nationwide, several state legislators took it upon themselves to remedy this situation by adopting their own state level statutes. The exponential rise in high profile – often dramatic – revenge porn cases that occurred during the last few years and the media attention that came with them, have caused legislative anti-revenge porn initiatives at state level to soar[[218]](#footnote-218). As of 5 January 2015, fifteen states – New Jersey, Alaska, Texas, California, Idaho, Utah, Wisconsin, Virginia, Georgia, Maryland, Colorado, Hawaii, Pennsylvania, Delaware, and Illinois – had already enacted legislation that treats revenge porn as a crime in and of itself[[219]](#footnote-219). Since then, eleven more states have followed suit, bringing the total up to twenty-four, nearly half the states in the Union[[220]](#footnote-220). Also of note is that in seven of these states civil law provisions are in place, alongside the dedicated criminal statutes, which allow victims to sue offenders for damages[[221]](#footnote-221). Only thirteen of all fifty member state legislatures still remain completely tacit on the subject, while thirteen others have new bills pending before parliament[[222]](#footnote-222).

Nevertheless, the fact that so many states have now adopted counter-revenge porn laws does not necessarily entail that they are all suitable legislative means by which perpetrators can be brought to justice. Many of them *“suffer from narrow applicability and/or constitutional infirmities”[[223]](#footnote-223).* Since an elaborate analysis of these statutes would take us beyond the confines of this thesis, I will focus on the three most pertinent examples: those of New Jersey, California and Illinois: the New Jersey statute was the first to cover revenge porn as a criminal offense and its wording still holds up to this day, potentially making it an exemplary text on which to base new legal initiatives; the California statute is often deemed one of the weaker anti-revenge porn statutes to date and will therefore be studied in order to identify the legal pitfalls a law maker might step into when drafting this kind of dedicated legislation; lastly the Illinois statute was written in close cooperation with professors FRANKS and CITRON, which – given the particular expertise of these scholars regarding revenge porn – makes it a worthwhile object for further study.

* **New Jersey**

By passing the ‘Invasion-of-Privacy’ statute on 8 January 2004, New Jersey became the first US state to officially criminalise revenge porn, making the dissemination of a person’s sexually explicit pictures without their consent a third-degree felony[[224]](#footnote-224). Quite remarkably, the New Jersey law has remained unchanged after eleven years and has not once *“faced a serious constitutional challenge”*[[225]](#footnote-225)*.* It is still one of the most comprehensive and inclusive counter-revenge porn statutes currently in force, despite the fact that it hails from a time when revenge porn was anything but the hot button issue it is today[[226]](#footnote-226). Joined by a score of enthusiastic scholars, FRANKS has repeatedly complemented its statutory language for treating *“the conduct seriously while providing specific definitions and affirmative defenses that guard the statute against First Amendment overbreadth”*[[227]](#footnote-227)*.* It is hence unsurprising that it has served as a template for several other state-level revenge porn bills[[228]](#footnote-228).

The first paragraph of the statute reads as follows:

*“c. An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he discloses any photograph, film, videotape, recording or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure”*[[229]](#footnote-229).

As is instantly apparent from the wording, the statute expresses *“the idea that the exposure of (the victim’s) ‘intimate parts’ or ‘sexual contacts’ is inherently intrusive”*[[230]](#footnote-230)*.* It makes the criminal nature of the disclosure – which it defines in its second paragraph as *“to* *sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise or offer”* – dependent upon the absence of consent, thereby empowering the intent of the victim rather then that of the perpetrator. As the California statute will show *infra*, this prioritisation is not present everywhere.

Moreover, New Jersey officials also *“gave the law enough teeth to serve as a deterrent, threatening those convicted of posting lewd images or video of someone without license or privilege with a third-degree crime, punishable with a prison sentence of 3 to 5 years”*[[231]](#footnote-231)*.* In addition, the statute’s third paragraph grants courts the opportunity to add a substantial fine of up to 30,000.00 USD to this prison sentence[[232]](#footnote-232). This *“deterrent effect, in particular, seems to be lacking in many of the other states that have proposed legislation to punish revenge porn”*[[233]](#footnote-233). Once again, the Californian Statute can be counted as one of these (see *infra*).

Lastly, subsection d. of the New Jersey statute holds a possible defence available to a person suspected of having maliciously committed the act of ‘revenge porn’:

*“d. It is an affirmative defense to a crime under this section that:*

*(1)the actor posted or otherwise provided prior notice to the person of the actor's intent to engage in the conduct specified in subsection a., b., or c., and*

*(2)the actor acted with a lawful purpose”*[[234]](#footnote-234)*.*

Apart from being covered by the explicit consent of the person pictured (under the first paragraph – *supra*), it is of the utmost importance that a statute criminalising revenge porn affords clear exemptions for the voluntary exposure of sexually explicit images in a public or commercial setting[[235]](#footnote-235). Absent such provision, any person would risk prosecution for forwarding or linking to commercial pornography, or even when they record and report unlawful activity, like for instance flashing[[236]](#footnote-236)*.* The New Jersey statute covers this under *littera* d. 1) and 2).

* **California**

Even though the New Jersey Statute and the Californian Criminal Code (as amended in 2013) are alike in spirit and good intentions, the Californian law is flawed for several reasons, some of which have already been mentioned. The CA Penal Code § 647(j)(4) currently reads as follows :

*“(4) (A) Any person who intentionally distributes the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates, under circumstances in which the persons agree or understand that the image shall remain private, the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress.*

*(B) A person intentionally distributes an image described in subparagraph (A) when he or she personally distributes the image, or arranges, specifically requests, or intentionally causes another person to distribute that image”*[[237]](#footnote-237)*.*

After Senate Bill 225 was passed in 2013 implementing § 647(j)(4) into the Californian criminal code, it suffered an almost immediate backlash as it only applied to cases in which the person distributing the images had also photographed or recorded them in the first place, thus excluding ‘selfies’ which represent 80% of all revenge porn material[[238]](#footnote-238). Furthermore, the original bill did not penalise the re-distribution of the leaked images. *“Consequently, operators of revenge porn websites, who often encourage the posting of these materials [could not] be punished under the law”[[239]](#footnote-239)*. With the guidance and input from the Cyber Civil Rights Initiative[[240]](#footnote-240) California swiftly amended its law in 2014 correcting these two flaws[[241]](#footnote-241). However, even despite these changes its scope remains problematic for several other reasons.

One such reason is that it does not cover images obtained through hacking. While there are satisfactory laws in place at the federal level that efficiently deal with hacking itself[[242]](#footnote-242), the Californian law does not cover the dissemination of recordings or photographs stolen from a victim’s computer or cell phone[[243]](#footnote-243). Moreover, the law applies solely to ‘circumstances where the parties agree or understand that the image shall remain private’. *“This requirement of confidentiality in the law’s language creates a loophole through which perpetrators can evade punishment”* merely by claiming they were under the impression that the victim did not intend for the images to remain private[[244]](#footnote-244). Inevitably, if *“the defendant and victim disagree about their expectations for the recording, […] conviction [would become] difficult or impossible”*[[245]](#footnote-245)*.* This ultimately raises the question of how anyone could prove thatthe perpetrator was aware of the victim’s desire that the images would remain confidential[[246]](#footnote-246)*.*

Furthermore, Californian law requires that the defendant intended to cause the victim ‘serious emotional distress’[[247]](#footnote-247). This too limits the actionable scope of the law since it puts an almost unbearable burden of proof on both the victim and the Public Prosecutor[[248]](#footnote-248). Nevertheless, California is not the only state making this a requirement[[249]](#footnote-249).

As such, it is an often heard criticism of counter-revenge porn measures that their respective scopes of applicability shrink to an unacceptable level when the purposeful intent of the poster to harass, embarrass or cause serious emotional distress to the victim is included as the necessary criminal intent. This means that, absent such intent (*i.e.* when merely posted for laughs or for profit), no crime can be withheld and culprits who claim to have had no intent to harm or harass get off scot-free. Though most counter-revenge porn statutes demand that the perpetrator disseminated the imagery ‘intentionally’ (or ‘knowingly’) – yet not necessarily with the intent to harass, it is commendable to direct any motivational requirement towards the victim (absence of consent) rather than to the perpetrator (presence of intent to harass or distress). In other words, *mens rea*[[250]](#footnote-250)must not be confused with motive[[251]](#footnote-251). In drafting an inclusive though not overly broad anti-revenge porn clause, the targeted conduct must be described as *“the knowing disclosure of sexually explicit photographs and videos of an identifiable person when the discloser knows or should have known that the depicted person has not consented to such disclosure. This is necessary to ensure that individuals making wholly unintentional disclosures are not punished, nor individuals who had no way of knowing that the person depicted did not consent to the disclosure”*[[252]](#footnote-252)*.*

Finally – and comparatively speaking, the Californian law holds the weakest penalty. In California revenge porn is considered a misdemeanour, punishable by up to six months in prison and a 1.000,00 USD fine and up to one year in prison and a 2.000,00 USD fine in case of a second offense, whereas the New Jersey bill and other proposed bills classify non-consensual pornography as a felony[[253]](#footnote-253).

* **Illinois**

The most recent of its kind, the anti-revenge porn statute of Illinois took effect on 1 June 2015[[254]](#footnote-254). Like eighteen other counter-revenge porn laws that are currently in force or pending parliamentary vote, Illinois lawmakers received help drafting their bill from the CCRI, which includes both FRANKS and CITRON as its best-known counter-revenge porn legislation advocates[[255]](#footnote-255). As a result, the law holds strong, clear and carefully delineated legislative language, starting with a list of definitions under 720 IlCS 5/11-23.5 (a)[[256]](#footnote-256). The most pertinent ones to the research question are the following :

*“(a) (…) ‘Image’ includes a photograph, film, videotape, digital recording, or other depiction or portrayal of an object, including a human body.*

*(…) ‘Sexual activity’ means any :*

1. *knowing touching or fondling by the victim or another person or animal, either directly or through clothing, of the sex organs, anus, or breast of the victim or another person or animal for the purpose of sexual gratification or arousal; or*
2. *any transfer or transmission of semen upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or another; (…)”[[257]](#footnote-257).*

The way the Illinois law interprets an ‘image’ covers both digital and analogue recordings of the human body, so that it also includes the distribution of sexual imagery outside of cyberspace through more ‘traditional’ means such as newspapers, posters or flyers, as well as low-tech forms such as DVR-cassettes and DVDs. One might wonder though whether its scope is not too far-reaching as any ‘other depiction or portrayal of a human body’ would for example also encompass sketches and drawings. In congruence with FRANKS’s own guidelines on the topic, this would mean the law is too broadly drafted[[258]](#footnote-258). Nevertheless, the Illinois law is commendable for not requiring ‘nudity’ in the published image. To the contrary even,*“[it] recognizes that not all intimate sexual acts involve nudity. For instance, the Illinois law would apply when a victim is depicted performing oral sex or has been ejaculated upon, regardless of whether the victim is nude”*[[259]](#footnote-259)*.*

Further on, *sub* 720 IlCS 5/11-23.5 (b) the description of the envisioned criminal conduct reads as follows:

*“(b) A person commits non-consensual dissemination of private sexual images when he or she:*

1. *intentionally disseminates an image of another person :*
2. *who is at least 18 years of age; and*
3. *who is identifiable from the image itself or information displayed in connection with the image; and*
4. *who is engaged in a sexual act or whose intimate parts are exposed, in whole or in part; and*
5. *obtains the image under circumstances in which a reasonable person would know or understand that the image was to remain private; and*
6. *knows or should have known that the person in the image has not consented to the dissemination”*[[260]](#footnote-260)*.*

Nowhere in this draft does the Illinois law exclude images or videos shot by the victim him- or herself, nor does it prescribe any specific precondition regarding the intent or identity of the perpetrator. By applying the ‘reasonable person’ standard, downstream distribution by secondary recipients comes within range of the law. Any person – be it a current partner, an ex-lover or a complete stranger – who knows or understands that an image was meant to remain private and that the depicted person did not consent to the dissemination, can be held criminally liable. Of particular note is subsection (b)(1)(B) which requires the victim to be ‘identifiable’ thus excluding images that do not allow identification and are therefore unlikely to cause harm to the person in the images[[261]](#footnote-261). This specification is imperative to avoid an overreaching scope of applicability. However, when a person is unrecognisable in the picture but can be identified by way of personal information affixed to the image (doxing, see *supra*[[262]](#footnote-262)) the law will still apply. Since additional information is displayed alongside the published images in 59% of all revenge porn cases, this kind of provision is paramount to any effective counter-revenge porn scheme[[263]](#footnote-263).

Lastly, the Illinois law distinguishes itself from most other anti-revenge porn legislation in that it provides strong punishments to reflect the severe nature of the crime:

*“(e) A person convicted under this Section is subject to the forfeiture provisions in Article 124B of the Code of Criminal Procedure of 1963.*

*(f) Sentence. Non-consensual dissemination of private sexual images is a Class 4 felony”*[[264]](#footnote-264)*.*

In making revenge porn a crime punishable by one to three years in prison, possibly accompanied with a fine of up to 25.000,00 USD, the Illinois law is less stringent than the New Jersey Statute of 2004 which provides a sentence of three to five years for so-called ‘third degree felonies’ and a maximum fine of 30.000,00 USD (see *supra*). Nonetheless, the Illinois law adds an extra penalty by including the forfeiture of profits derived from the illegal distribution of the sexually explicit material[[265]](#footnote-265). This small addition serves as a significant deterrent to those persons who are primarily driven by financial gain.

Though the number of US states offering dedicated anti-revenge porn legislation continues to grow, a few problems remain. Firstly, the above examination of three of these laws clearly demonstrates a pertinent lack of uniformity with varying levels of protection, often insufficient means of deterrence and no guarantee of the definitive removal of the images from the Internet[[266]](#footnote-266). As such, many of them are utterly inept at dealing with the societal harm that is wrought by revenge porn enthusiasts. Secondly, even those that are inclusive enough to offer forcible legal recourse to victims are unlikely to survive constitutional scrutiny when they are overly broad[[267]](#footnote-267). A third problem is that state-level legislation does not provide jurisdiction beyond state-borders so that persons who are victimised in a state that is not equipped with dedicated legislation will be unable to find relief there[[268]](#footnote-268). As a fourth point, it is interesting to note that the states that to this day have not introduced a counter-revenge porn bill are those that hold predominantly Republican majorities[[269]](#footnote-269). Given these conservative political majorities, it is rather unlikely that we will see any credible legislative attempts being made in the near future in these specific areas[[270]](#footnote-270). This is where a homogeneous approach, implemented at the federal level of government, could offer solace. Since the CDA grants substantial immunity to ISPs for the acts of private parties[[271]](#footnote-271), congressional action is the only way to *“punish those who create and manage the websites that host and encourage revenge porn”[[272]](#footnote-272).*

Federal law is – at present – unable to achieve this goal. The existing ‘Sexual Exploitation and Other Abuse of Children Act’ (18 USC. 2257), the ‘Interstate Anti-Stalking Punishment and Prevention Act’ (18 USC. 2261A), the ‘Video Voyeurism Prevention Act’ (18 USC. 1801) and the ‘Computer Fraud and Abuse Act’ (18 USC. 1030) all fall short in this regard[[273]](#footnote-273). Meanwhile though, a promising effort has been made by Democratic Congresswoman Jackie Speier[[274]](#footnote-274) who, together with FRANKS, has drafted the federal ‘Intimate Privacy Protection Act’ of 2015[[275]](#footnote-275). At the time of writing, however, the bill has yet to be formally introduced to Congress[[276]](#footnote-276).

* 1. **Right to Privacy v. the Freedom of Expression**

Article 10 ECHR has its overseas counterpart in the First Amendment to the US Constitution, which guarantees the freedom of expression (or ‘speech’)[[277]](#footnote-277). The freedom of speech warrants protection against unduly restrictive governmental interference based on *“its message, its ideas, its subject matter, or its content”*[[278]](#footnote-278) if the speech or expression *“promotes ideas and information necessary for a self-governing citizenry to make decisions about what kind of life it wishes to live. […] [It] facilitates deliberation about public issues and hence promotes democratic governance”*[[279]](#footnote-279). Hence, as in the Strasbourg approach, political speech in particular is considered the highest and most protected category of expression under the US Constitution[[280]](#footnote-280).

However, this elevated level of protection awarded to expressions of a political nature does not preclude First Amendment protection to speech that is seemingly of lesser importance to the furtherance of democratic values. In this regard, the United States Supreme Court (hereafter ‘SCOTUS’) has repeatedly condemned laws that restrict speech intended to annoy, harass, offend or cause emotional distress as unconstitutional[[281]](#footnote-281). For instance, in *Hustler Magazine, Inc. v. Falwell* the SCOTUS recalled its *“longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience”*[[282]](#footnote-282), confirming what it had held in *FCC v. Pacifica Foundation,* *i.e.* that *“the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection”*[[283]](#footnote-283)*.*

According to KEARNS this particular order of speech – second to political discourse – is the *“less strenuously protected category of ‘indecent’ speech […]. Indecent speech is entitled to constitutional protection provided that it involves expressive and communicative content […]. Such speech does not tend to overlap with political speech; instead, it involves issues such as sex and violence”*[[284]](#footnote-284). Hence, mainstream pornography – in which presumably all featured participants are consenting adults – will in most cases be considered protected speech[[285]](#footnote-285). In *American Booksellers Association v. Hudnut*[[286]](#footnote-286) the 7th Circuit Court even *“explicitly stated that the prohibition of pornography or the imposition of state laws that have the effect of restricting this kind of publication are unconstitutional”*[[287]](#footnote-287)*.* Nevertheless, the freedom of speech protected under the First Amendment – though a basic human right – is by no means absolute. The question therefore rises whether ‘expressions’ like revenge porn can be exempted from the kind of constitutional protection that consensual pornography merits. In other words, can a law that limits the sort of speech that qualifies as revenge porn (meaning dedicated anti-revenge porn legislation) be considered constitutionally sound while a law constricting consensual pornography cannot? The answer will depend on the severity of the harm that the restricted speech is liable to cause: only when such harm can be proven, can an exception to the First Amendment potentially be tolerated[[288]](#footnote-288).

Over time, the SCOTUS has identified a series of specific instances where speech is not protected. These include defamation, fraud, incitement, speech integral to criminal conduct, threats, fighting words, child pornography and obscenity[[289]](#footnote-289). This last ground especially has been favoured by activists and scholars as a means to justify the implementation of counter-revenge porn measures[[290]](#footnote-290). In *Miller v. California* the SCOTUS produced a list of guiding standards by which the ‘obscenity’ of the material under scrutiny must be determined (and by which First Amendment protection be denied): a court of law should therefore consider *“(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole appeals to the prurient interest, (…); (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically denied by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value”*[[291]](#footnote-291). As was already mentioned *supra*, ‘consensual’ (or ‘mainstream’) pornography has not been found to be obscene *in se* by the SCOTUS[[292]](#footnote-292). In *Reno v. American Civil Liberties Unions* it explicitly held that sexual expression, which by nature can be considered indecent or offensive by some, is not inherently obscene[[293]](#footnote-293). For it to be found obscene, pornography must ‘pass’ the *Miller* test. Obscenity must be specifically and clearly defined by the regulating state legislator[[294]](#footnote-294).

This is where the ‘obscenity’ defence of counter-revenge porn measures falls short. The SCOTUS has never before ruled that the distribution of material (*i.e.* uploading sexually explicit imagery to a website) can render said content obscene[[295]](#footnote-295). Hence, there is no relevant precedent to date which supports the contention that revenge porn (the non-consensual dissemination of pornographic material) is in itself obscene *because* of its inherent distribution. Nowhere in the *Miller* decision does the SCOTUS indicate that obscenity depends on transmission or distribution. Quite to the contrary, the Court considers the *content* of the images, rather than their *“mass-mailing distribution”*[[296]](#footnote-296).

In summation, revenge porn – especially where consensually recorded intimate material is concerned – does not fit well within the current categories of unprotected speech[[297]](#footnote-297). Consequently, the First Amendment is often cited as a formidable stumbling block for dedicated anti-revenge porn legislation as such legislation could potentially have a chilling effect on free speech[[298]](#footnote-298). Opponents of these laws fear that they might be too broadly drafted, criminalising protected speech that is not specifically targeted by the laws in question and hence discouraging the free flow of opinions and information[[299]](#footnote-299). In this regard, the American Civil Liberties Union (hereafter ‘ACLU’) especially has been actively opposing legislative counter-revenge porn efforts. The most commonly heard argument is that the proposed revenge porn bills do not set the requirement of harm, rendering them overbroad and thus unfit to pass constitutional scrutiny[[300]](#footnote-300). Although this point of criticism and others may be justified in relation to some laws (for instance, those that do not require the victim to be identified or at least be identifiable)[[301]](#footnote-301), this is not (and need not be) indiscriminately true for all existing or currently pending anti-revenge porn laws.

As many scholars argue, it is entirely possible to draft a narrowly tailored though sufficiently inclusive anti-revenge porn bill without running afoul of the First Amendment[[302]](#footnote-302). Even Eugene VOLOKH, a prominent First Amendment scholar, has acknowledged that *“a suitably clear and narrow statute banning non-consensual posting of nude pictures of another, in a context where there’s good reason to think that the subject did not consent to the publication of such pictures, would likely be upheld in courts. […] [C]ourts can rightly conclude that as a categorical matter such nude pictures indeed lack First Amendment value”*[[303]](#footnote-303)*.*

Judging from the SCOTUS’s historical record on matters of free speech, this indeed seems to be a fair assumption. For instance,in *New York Times v. Sullivan* the Court noted that criminal statutes especially *“afford more safeguards to defendants than tort actions, suggesting that criminal regulation of conduct raises fewer First Amendment issues than tort actions. […] [It then follows that] a carefully-crafted criminal statute prohibiting the publication of private facts – including the non-consensual publication of sexually intimate images – should pass constitutional muster”*[[304]](#footnote-304).Furthermore*,* the SCOTUS has recognised that laws which restrict the disclosure of private information can simultaneously serve a considerable speech-enhancing function[[305]](#footnote-305)*.* In *Bartnicki v. Vopper* Justice Breyer concurred with the majority judgment stating that while non-disclosure laws do in fact place “*direct restrictions on speech, the Federal Constitution must tolerate laws of this kind because of the importance of these privacy and speech-related objectives”*[[306]](#footnote-306), such as *“fostering private speech”*[[307]](#footnote-307). Justice Breyer further wrote that *“the Constitution permits legislatures to respond flexibly to the challenges future technology may pose to the individual’s interest in basic personal privacy. […] [W]e should avoid adopting overly broad and rigid constitutional rules, which would unnecessarily restrict legislative flexibility”*[[308]](#footnote-308)*.*

Since the existing state-level anti-revenge porn laws have yet to be challenged before the SCOTUS, the question of their compatibility with the First Amendment remains a point of uncertainty and contention. Nevertheless, the right to personal privacy has been one of the cornerstones of American society since the 1890’s[[309]](#footnote-309) and can therefore not as easily be set aside in favour of the right to information or the freedom of expression of others. Since the sexual life of non-public persons has no impact on their co-workers, friends or people with whom they socially interact, their right to personal privacy outweighs the right to information as protected within the ambit of the First Amendment[[310]](#footnote-310). Moreover, in balancing these conflicting fundamental rights, the US government has a compelling interest in curtailing revenge porn in order to protect its female citizens, who are still disproportionately aggrieved by this nefarious practice[[311]](#footnote-311).

* 1. **Position of ISPs - liability or immunity?**

As was mentioned sporadically *supra*, the US Federal Law Code holds 47 USC. 230, also known as §230 of the Communications Decency Act (hereafter ‘CDA’)[[312]](#footnote-312). Even more so than the First Amendment, §230 CDA presents an obstinate hurdle for people who are victimised online since it offers a safe harbour for ISPs, website operators *and* uploaders of revenge porn who share or host UGC on the Internet[[313]](#footnote-313). This particular feature would not be problematic *per se* (in fact, §230 is in that sense comparable to the EU’s E-Commerce Directive – see *supra*), were it not for the highly lenient interpretation of this section by the courts, which has effectively created a blanket immunity for ISPs with regard to communications initiated by third parties[[314]](#footnote-314).

§230 of the CDA was first adopted by Congress in response to ISPs’ concerns that they would be held liable for acts or opinions voiced by their users through the online services they provide[[315]](#footnote-315). These concerns were fuelled by a New York court’s ruling from 1995 (the so-called *‘Prodigy’* decision)[[316]](#footnote-316) in which it was held that, under the then applicable version of the CDA, the provider of an online message board was liable as a ‘publisher’ for the defamatory comments posted by one of its users since the company exercised significant editorial control and actively monitored the bulletin board on which the comments were posted[[317]](#footnote-317). As such, liability was withheld despite the fact that the provider in question had genuinely attempted to remove the troubling material[[318]](#footnote-318). Congress found it vastly disturbing that the judiciary had used a provider’s good-faith remedial measures to establish that it was responsible for the actions of others[[319]](#footnote-319). It feared that a lack of legal protection in this area would cause websites to limit the amount or types of content their users could generate, ultimately constraining free speech[[320]](#footnote-320). Moreover, Congress sought to re-incentivise ISPs to ‘self-police’. Since the *Prodigy* decision *“turned on the editorial control the company exercised, it essentially discouraged companies from monitoring hosted content”*[[321]](#footnote-321)in order to not be considered a ‘publisher’ but rather a mere ‘distributor’ who only incurs liability if they knew or should have known about the existence of the defamatory content[[322]](#footnote-322). Given the choice between self-monitoring with the risk of being held liable if derogatory UGC is posted and doing nothing absent such risk, it is fairly obvious which option most ISPs would prefer[[323]](#footnote-323). To avoid a scenario where ISPs would opt out of monitoring their online platforms altogether, Congress stepped in to allow ISPs to self-regulate without fear of liability or prosecution[[324]](#footnote-324). This ultimately led to the passage of §230 in 1996, which since reads as follows:

*“c) Protection for ‘Good Samaritan’ blocking and screening of offensive material*

*(1) Treatment of publisher or speaker:*

*No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.*

*(2) Civil liability: No provider or user of an interactive computer service shall be held liable on account of-*

*(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or*

*(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1)”*[[325]](#footnote-325).

However, the perverse result of this ‘Good Samaritan’ provision in the CDA is that it effectively immunises both operators *and* users of websites who solicit and principally host revenge porn and other forms of cyberstalking as long as they do not get involved with the actual content that is posted[[326]](#footnote-326). This directly influences any victim’s chances of finding effective legal recourse. Since individual uploaders are famously difficult to track down and identify, especially without the co-operation of online intermediaries, ISPs themselves are the most promising link in the chain of communications for victims to pursue[[327]](#footnote-327). They are uniquely positioned to monitor and control harmful online conduct[[328]](#footnote-328). Without the involvement of intermediaries who practically enable the functionality of dedicated revenge porn websites, victims stand little to no chance against the often judgment-proof individuals who initially posted the explicit images online[[329]](#footnote-329). This makes the broad interpretation of §230 CDA by the American courts all the more problematic, especially since online intermediaries have historically been acutely averse to both self-monitoring and any type of external policing.

Despite their optimal position and visibility, ISPs and OSPs have always vehemently fought attempts from law enforcement to gain their allegiance and assistance in exposing online wrongdoers[[330]](#footnote-330). Since the inception of the Internet itself, US courts have tried to develop a set of guidelines for pinpointing those specific situations where ISPs would be legally obligated to unmask a potential perpetrator[[331]](#footnote-331). Of course, it is no easy task to balance the interests of anonymous online platform users with the interests of victims in attaining legal redress, as was evidenced by the *Prodigy* decision in 1995[[332]](#footnote-332). Shortly after the adoption of the amended §230 though, case law of US courts took a considerable turn in favour of online intermediaries.

Quite contrary to the CDA’s original impetus, ISPs at present bear no responsibility whatsoever for exclusively hosting UGC, nor are they under any legal obligation to lift their users’ anonymity and facilitate the identification of those individuals who post damaging materials online[[333]](#footnote-333). The highly liberal interpretation adopted by the courts resulted in a blanket immunity for ISPs for defamation and associated liability for highly grievous conduct[[334]](#footnote-334). In *Zeran v. America Online Inc.* the Fourth Circuit Court of Appeals ruled that America Online (‘AOL’) was not responsible for the defamatory speech a user had posted to its bulletin board[[335]](#footnote-335). The Court held that *“distributor liability is merely a subset, or a species, of publisher liability,’ and is therefore also foreclosed by § 230. Although the Prodigy decision left open the possibility of distributor liability [if the ISP knew or should have know that injurious speech was posted to its platform], the court in Zeran interpreted the statute to provide immunity to both publishers and distributors, thereby eroding the significance of the editorial control distinction suggested in Prodigy”*[[336]](#footnote-336)*.* In other words, the absence of any knowledge of defamatory speech is no longer required for an ISP to be immune.

In the same vein, the Texas Court of Appeals recently decided the high profile revenge porn case of *Hollie Toups et. al. v. GoDaddy.com, Texxxan.com et. al*..[[337]](#footnote-337) Together with a number of other victims, Hollie Toups had brought a class action lawsuit against GoDaddy.com – an interactive computer service provider – which hosted a few revenge porn websites, among which Texxxan.com. In the absence of a dedicated counter-revenge porn law in Texas at the time of filing, the causes of action against GoDaddy included the publication of obscenity, child pornography, intentional infliction of emotional distress and the tort of invasion of privacy[[338]](#footnote-338). Even though it went undisputed that GoDaddy effectively knew that revenge porn was being posted on its websites, the Texan Court held that GoDaddy merely acted as an ISP (‘host’) and could not be considered an ‘information *content* provider’ with regard to the material published on its websites; hence, plaintiffs could not maintain claims against GoDaddy which treated it as a publisher of that material[[339]](#footnote-339). The Court further refers to its own case law, explicitly noting that *“section 230 does not provide a right to request a website’s owner to remove false and defamatory posts placed on a website by third parties, and does not provide the injured person with a remedy in the event the website’s owner then fails to promptly remove defamatory posts. […] [nor does section 230 provide that] an intentional violation of criminal law should be an exception to the immunity from civil* *liability given to internet service providers. Such a finding would effectively abrogate the immunity where a plaintiff simply alleged intentional conduct. Instead ‘lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content – are barred”*[[340]](#footnote-340).

Still – and despite the overly broad interpretation of the section by US courts – the immunity offered by §230 is not absolute because it does not cover ISPs who help create the insulting content and enable criminal activity[[341]](#footnote-341). Some courts have even permitted recovery in such cases since the ISP had ‘paved the way’ for the third party to injure or harm another[[342]](#footnote-342). Even though there have been several cases where courts have broken through the sizeable barricade of §230[[343]](#footnote-343), the question remains whether yet another congressional intervention is needed to correct the aberrant trend of overprotection in current case law[[344]](#footnote-344). Furthermore, even in the event that an ISP or website remains strictly passive and does not actually editorialise or actively attract the revenge porn related content, is not an amendment to §230 CDA nevertheless warranted given the exceptionally harmful nature of the content?

Scholars seem widely divided on the subject. While some are adamantly against changing the law[[345]](#footnote-345), others suggest copyright as a viable (though limited) alternative given that §230 does not immunise ISPs from copyright claims[[346]](#footnote-346), whereas still others mean to redirect the wording of the law in order to exempt from §230’s safe harbour those websites or operators that predominantly host illegal activity[[347]](#footnote-347). CITRON for instance argues that a revenge porn website qualifying for §230 immunity is contrary to and incompatible with the congressional purpose of the CDA[[348]](#footnote-348). She suggests that *“Congress should […] adopt a narrow amendment to Section 230, excluding from its safe harbor provisions websites designed to facilitate illegal conduct or are principally used to that end”*[[349]](#footnote-349).

Whatever stance Congress might take regarding a second amendment to its CDA, the value of a federal anti-revenge porn law in this regard becomes exceedingly apparent since the broad immunity that the CDA currently provides against state criminal laws and tort claims does not offer protection against federal criminal charges[[350]](#footnote-350). Moreover, a federal bill to counter revenge porn would merely *“add the prohibition of nonconsensual pornography to the list of hundreds of federal criminal laws already on the books (including laws against child pornography, extortion, and identity theft) against which online entities cannot raise a special defense. Such a law would have no effect on the normal defenses any entity, offline or online, could raise, and it would include a safe harbor provision similar to those already used for copyright violations and child pornography”*[[351]](#footnote-351)*.* Lastly, the relevance for Europe – and by extension the rest of the world – in there being a strong US legislative response to revenge porn websites cannot be understated. In the end, if men and women located outside of the US discover images of themselves posted to US based Internet forums, social networking sites or dedicated revenge porn platforms a coherent anti-revenge porn law in their home country will do little or nothing to help them[[352]](#footnote-352). Hence, in order for a country outside of the US to develop and maintain an effective anti-revenge porn strategy, it will be paramount to keep track of any new developments in the American legal landscape regarding §230 CDA which – at present – still provides uploaders and revenge porn website operators[[353]](#footnote-353) with a seemingly impermeable defensive shield.

* 1. **Useful lessons to take away**

The study under title 4.1 of three dedicated state-level counter-revenge porn statutes has revealed a few points of particular interest to the drafting of an effective anti-revenge porn bill. Firstly, the New Jersey statute incorporated the commendable idea that the unwilling exposure and onward dissemination of intimate photographs is *inherently* intrusive. This idea is expressed by the fact that the criminal nature of the disclosure is entirely dependent upon the absence of *consent* of the person(s) pictured. Contrary to the requirement of the *intent* to cause ‘serious emotional distress’ or harm*,* present in the person of the perpetrator, the usage of *consent* as a constitutive element of the criminal conduct empowers the victim and recognises his or her own sexual agency.

Furthermore, it is paramount for a useful counter-revenge porn measure to include a conclusive list of clear-cut legal definitions. As such, concepts like ‘image’[[354]](#footnote-354), ‘sexual activity’[[355]](#footnote-355) and ‘disclosure’*[[356]](#footnote-356)* must be comprehensively delineated. Both the New Jersey and the Illinois statute offer decent examples in this respect. The Illinois text especially should serve as an inspiration as it uses a very inclusive and realistic language in describing ‘sexual activity’. By not making ‘nudity’ an essential element of the disclosed image, it recognises the broad range of possible sexual behaviours, which encompass a broad range acts where the person(s) involved might appear in varying stages of undress or indeed fully clothed. With regard to the person of the victim, it is also imperative that she or he be ‘identifiable’, either from the image itself or from the information displayed in connection to the image. Persons who cannot be identified from the image itself or from any additional information, cannot purport to be harmed by this kind of disclosure.

As the study under title 4.2 on the possible impact of First Amendment doctrine on the constitutionality of counter-revenge porn statutes has shown, the legal language of the bill must not be over-inclusive and thus impinge upon free speech. Though such concerns do appear to be more prevalent in the US, it is nevertheless important to pro-actively meet these concerns and provide enough (but not too many) exemptions from criminal liability where they are deemed necessary. For instance, a commercial exception must be provided for the secondary distribution of images that were produced with the consent of the model involved and are used for advertising purposes. Law enforcement officials too must be allowed to distribute sensitive images within the confines and for the purposes of a criminal investigation[[357]](#footnote-357).

Aside from offering a clear description of the targeted criminal conduct, its constitutive elements and possible defences, an anti-revenge porn bill must also be sufficiently dissuasive. Such a deterrent quality can only be achieved by adding penalties that reflect the seriousness of the penalised behaviour. Therefore, monetary fines and sentences associated with mere misdemeanours will prove insufficient[[358]](#footnote-358). As both the New Jersey and the Illinois statute show, a prison sentence of three to five years, complemented by a monetary fine of up to 30.000,00 USD (which corresponds to an approximate 27.350,00 EUR) and possible forfeiture of the profits received from exploiting the criminal conduct, would seem appropriate.

Keeping in mind these useful pointers, drafting a fitting anti-revenge porn bill seems like a perfectly attainable goal. Since FRANKS has already assisted numerous US states (and Congresswoman Speier) in crafting their own counter-revenge porn statutes, her guidelines on the matter might also offer valuable points of legal advice, even to foreign jurisdictions such as Belgium[[359]](#footnote-359).

**POSSIBLE ALTERNATIVE**

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1. **The right to be forgotten**

As was demonstrated in chapters 3 and 4, national counter-revenge porn responses in Belgium and the US are – save for a few praiseworthy exceptions at state level – either entirely nonexistent or to some degree wanting. Therefore, absent a satisfactory – preferably criminal – legal device to bring the actual perpetrators and redistributors of revenge porn images to justice, persons who were victimised online must look for alternative ways of limiting their unwanted exposure. If the current state of the law does not permit the issuance of effective take-down orders or offer other means of curtailing the further dissemination of the leaked imagery over the Web, one must try and limit their online visibility as much as possible[[360]](#footnote-360). One way of doing this is through the so-called ‘right to be forgotten’.

Though it is often portrayed as a ‘new’ right officially endorsed by the EU in its proposed General Data Protection Regulation[[361]](#footnote-361), the right to be forgotten has a rich legal history within the European framework and has been part of the EU Data Protection Directive since its inception in 1995[[362]](#footnote-362): *“Article 12 – Right of access. Member States shall guarantee every data subject the right to obtain from the (data) controller:*

1. *[…]*
2. *as appropriate the rectification,* ***erasure*** *or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data;*
3. *notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking carried out in compliance with (b), unless this proves impossible or involves a disproportionate effort”*[[363]](#footnote-363)*.*

Contrary to actually ‘creating’ it, the new Data Protection Regulation will merely re-affirm the already existent right to be forgotten – or more accurately ‘the right of erasure’ – by adopting even stronger rights to erase[[364]](#footnote-364). The future article 17 of the Regulation will enable a data subject[[365]](#footnote-365) to require a data controller[[366]](#footnote-366) to erase the data subject’s personal information if there is no (longer) a legitimate reason for retaining it[[367]](#footnote-367). Moreover, the Commission proposed to reverse the burden of proof, requiring the requested company – and not the individual making the request – to prove that the data cannot be erased because allegedly it is still necessary or relevant[[368]](#footnote-368). Instead, to make such an assessment, the requested company must check (on a case-by-case basis) the targeted links for accuracy, adequacy, relevance – including time passed – and proportionality, in relation to the purposes of the processing of the data[[369]](#footnote-369). In addition, the same article 17 will include *“the obligation of the controller which has made the personal data public to inform third parties on the data subject's request to erase any links to, or copy or replication of that personal data. It also integrates the right to have the processing restricted in certain cases”[[370]](#footnote-370).* Lastly – and perhaps most significantly – the proposal appears to be sensitive to the context in which the information to which the link refers was initially published: it asks whether the content was voluntarily made public by the data subject (*i.e.* consent)[[371]](#footnote-371).

Even more pivotal to the enhanced rights of EU citizens, however, was the judgment of the ECJ of 13 May 2014 in the case of *Google Spain and Google Inc. v. Agencia Espagnola de Proteccion de Datos (AEPD) and Mario Costeja Gonzalez[[372]](#footnote-372).* In this case the ECJ established that Internet search engines are ‘controllers of personal data’ in the sense of article 2 of the EU Data Protection Directive[[373]](#footnote-373). Consequently, Google or any other search engine can no longer escape its responsibilities under EU Data Protection law – more specifically article 12 of the Directive – by claiming it is a mere search engine[[374]](#footnote-374). In turn, this means Google must adhere to requests regarding the right to erasure and remove search results which link to revenge porn websites and platforms[[375]](#footnote-375). The importance of this ruling for victims of revenge porn cannot be emphasised enough. Since online revenge porn imagery is often accompanied by additional, mostly personal, information about the person pictured, revenge porn websites dominate the top search results when the victim’s name is entered into an online search engine, most prominently Google[[376]](#footnote-376). About 90% of Europeans use Google as their go-to search engine[[377]](#footnote-377). If a certain link is removed from the search results or is ‘delisted’, it virtually ceases to exist, thus drastically limiting the visibility and accessibility of the targeted websites and their subsequent content[[378]](#footnote-378).

Despite its obvious benefits for revenge porn victims, the rollout of the European right to be forgotten – and the ECJ ruling especially – has not been without controversy. Particularly in the US the *Google Spain and Inc* judgment has been condemned for infringing the First Amendment as it purportedly abridges the right to free speech online[[379]](#footnote-379). The reason for this US reluctance regarding any legislation which potentially limits or impinges upon the freedom of expression, lies in the rather differing ways in which the US and Europe have historically treated the juxtaposition of privacy v. free speech[[380]](#footnote-380). To be sure, the EU – with its ECHR and most recently the EU Charter of Fundamental Rights[[381]](#footnote-381) – has a multitude of checks and balances in place to ensure that no fundamental right or freedom is ever unduly affected by its regulatory texts or by the jurisprudence of its courts[[382]](#footnote-382). These US fears are therefore unfounded.

In any case, the wide scope of the European Data Protection laws – including the right to be forgotten – delineated by the ECJ in its *Google Spain* ruling is encouraging for Europe-based revenge porn victims: *“(e)ven if the physical server of a company processing data is located outside Europe, EU rules (will) apply to search engine operators if they have a branch or a subsidiary in a Member State which promotes the selling of advertising space offered by the search engine”*[[383]](#footnote-383). Regardless of the wide net that the EU has cast here, it remains to be seen how foreign non-EU search engines operating in the EU will adhere to their new obligations under EU Data Protection laws. As most dedicated revenge porn websites are still stored on servers located outside of EU territory[[384]](#footnote-384), the practical usefulness of the right to be forgotten for victims of revenge porn will depend on the outcome of this very question.

**TO CONCLUDE**

1. **Conclusion**

After having closely examined the state of Belgian legislation likely to be useful when addressing a revenge porn case, it seems justified to conclude that, at present, Belgian law – specifically the BCC, the WEC and the ‘Privacy Law’ – is unfit to sufficiently handle the wide array of possible revenge porn scenarios in a way that both satisfies victims’ need for redress and society’s interest in deterring the same future criminal conduct. Either the conduct described as ‘revenge porn’ is not included within the scope of application of the existent law or the provided sanctions are unlikely to have a convincingly dissuasive effect on potential perpetrators. Hence, in response to the first research question of this thesis, I posit that a new legislative initiative – supported by heightened societal awareness – will be necessary to remedy this lacuna[[385]](#footnote-385).

In light of the second research question, the current legal situation in the US was outlined, examining the dedicated anti-revenge porn laws currently adopted in New Jersey, Illinois and California. A comparison between these three revealed a high level of divergence and a general lack of consistency amongst US state-level legislations. Given the polarised political landscape of the US, this might not be that surprising, but it does affect the means of redress available to a victim of revenge porn in each individual member state. To solve these remaining disparities, congressional action has already been initiated. As such, Congress will soon start the examination of a formal federal anti-revenge porn bill following the initiative of Congresswoman Jackie Speier. Regardless of the eventual outcome of this particular enterprise, the study of these three state-level statutes – or more specifically, of their strengths and shortcomings – has yielded several useful insights and pointers that can guide any dedicated legislative effort, even outside of US borders.

Furthermore, the study of the position of third party intermediaries online (such as ISPs and website operators) both in Belgium – and by extension in the EU – and in the US has shown that the interpretation by courts has been decidedly different, even if the wording of the laws that regulate the liability of ISPs with regard to UGC are quite similar. Through their (overly) broad interpretation of §230 CDA US courts have effectively created a quasi immunity for ISPs and other online intermediaries, a result contrary to the initial impetus of the CDA. Whether another congressional interference is required to correct this judicial trend is still a highly controversial topic in the US, subject to much speculation and uncertainty.

Moreover, the way the public debate on dedicated revenge porn legislation has been waged in the US is likely to be indicative of the manner in which such a legislative response would be hailed in Belgium. The same concerns regarding the freedom of speech and the right to privacy can be expected to surface in Belgium (and Europe), although perhaps not as vehemently as in the (politically highly polarised) US. Nevertheless, as has been convincingly argued by a team of American scholars[[386]](#footnote-386), these concerns are not the insurmountable obstacles they are often said to be. After all, finding the right balance between conflicting interests is at the heart of any sincere law-making process. Taking into account the various valuable lessons that the Belgian legislator can take away from examining the American legislative efforts so far (see title 4.4), any potential concerns about under-inclusiveness or overbreadth can pre-emptively be addressed.

New legislative initiatives aside, a societal change of consciousness will be equally vital to guaranteeing solid redress to victims of revenge porn and to eradicating the onerous conduct altogether[[387]](#footnote-387). As CITRON poignantly pointed out, the longer we trivialise cyber gender harassment and refuse to see it for what it is – namely a sex crime, the more difficult it will be to eventually end it[[388]](#footnote-388). To avoid the knee-jerk reactions of victim-blaming and the minimisation of revenge porn’s harms, it must become the subject of public discussion. In the US, CITRON has suggested to make the fight against revenge porn part of a so-called ‘cyber civil rights agenda’, designed to raise awareness and public understanding. The Cyber Civil Rights Initiative (‘CCRI’ – part of endrevengeporn.com) has done exactly this[[389]](#footnote-389). Moreover, carried by scholars like CITRON and FRANKS, the CCRI is for a considerable part responsible for a number of anti-revenge porn laws adopted at state level[[390]](#footnote-390). Other similar initiatives have sprung to life in the wake of the CCRI, like the Cyber Rights Project[[391]](#footnote-391), which offers *pro bono* legal assistance to victims with insufficient financial means to take perpetrators to court. Considering the viral impact that the #wijoverdrijvenniet campaign has had[[392]](#footnote-392), it seems fair to assume that Belgium too carries the activist potential necessary to jumpstart social change by setting up similar initiatives to the CCRI.

The first half of 2015 has also seen a surge of encouraging policy changes in some of the most prominent social media giants and ISPs. Companies like Reddit[[393]](#footnote-393), Facebook[[394]](#footnote-394) and Twitter[[395]](#footnote-395) have adapted their respective terms of use to include a section stipulating that posting intimate photos or videos taken or distributed without the subject’s consent is henceforth forbidden. Most notable perhaps was the announcement of Google on 18 June 2015[[396]](#footnote-396) that it would start *“treating sexually explicit images the same way it treats other sensitive personal information -- that is,* [*removing*](http://bits.blogs.nytimes.com/2015/06/19/google-to-remove-revenge-porn-images-from-search-results/) *them from search results if they are published without consent”*[[397]](#footnote-397)*.*

Though these policy changes are promising efforts that will likely deliver results for victims more quickly than a dedicated law would be able to (*i.e.* remove the content as soon as possible), they nevertheless deserve a critical side note. Both FRANKS and CITRON have suggested that it can be no coincidence that this rather sudden change of heart by the very core of the tech industry has come around the same time as when Congresswoman Jackie Speier plans to introduce a federal counter-revenge porn bill to Congress[[398]](#footnote-398). FRANKS interprets it as a statement that private companies are perfectly capable of handling this problem themselves[[399]](#footnote-399).

Time will tell if this presumption is indeed true. In the meantime, it is encouraging to see the further spread of dedicated counter-revenge porn legislation in the US and perhaps soon the adoption of a federal statute. The situation in Belgium however remains shrouded in legal uncertainty, at least for the time being. Although social media and easy Internet access are often exacerbating factors to any cyber harassment scheme, they can also be part of the solution. They carry the nexus that interconnects everyone to everything worldwide. In this capacity, they may yet play a pivotal role in readying the public perception and understanding of revenge porn both in Belgium and Europe as a whole and, in so doing, they might pave the way for a dedicated anti-revenge porn law of our own.

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1. T. GEMIN, “Realcore : Sergio Messina And Online Porn”, *Digicult Online Magazine* 2006, Issue 19, <http://www.digicult.it/digimag/issue-019/realcore-sergio-messina-and-online-porn/> dc 23 April 2015. [↑](#footnote-ref-1)
2. S. HARDY, “The New Pornographies : Representation of Realities?”, in F. ATTWOOD (ed.), *Mainstreaming Sex : The Sexualisation of Western Culture*, London, IB Tauris & Co. Ltd., 2009, chapter I (pages unnumbered). [↑](#footnote-ref-2)
3. Yahoo! still allows ‘adult’ content to be posted to its platforms for users aged 18 or older. Section 2 of their Terms of Service of 16 March 2012 reads as follows: *“[please be aware that Yahoo has created certain areas on the Yahoo services that contain adult or mature content. You must be at least 18 years of age to access and view such areas”*, <https://policies.yahoo.com/us/en/yahoo/terms/utos/index.htm> dc 1 August 2015. See also P. FESTA, “GeoCities’ porn ads spark controversy”, *CNET website* 30 April 1999, <http://www.cnet.com/news/geocities-porn-ads-spark-controversy/> dc 1 August 2015. [↑](#footnote-ref-3)
4. In 2001 MSN decided to crack down on pornographic content shared by users on its online platforms. As the spokesperson for MSN.co.uk said in 2001: *"*[*MSN.co.uk*](http://www.msn.co.uk/) *has a zero tolerance policy toward retailers on the shopping channel distributing pornographic material from its site. Since 'top shelf pornography' is not illegal for consenting adults over the age of 18 material of this nature is categorised in communities as 'adult' on the MSN site. Users searching under adult terms on MSN Search will be asked to confirm that they are wanting to access adult material and if they answer positively will be diverted on to a separate site - Nightsurf"*, quote taken from A. VICKERS, “Pulling the Porn”, *The Guardian* *Online* 7 May 2001, <http://www.theguardian.com/technology/2001/may/07/media.mondaymediasection> dc 1 August 2015. It is of course questionable whether a porn-policy involving the redirection to a separate porn site can be deemed ‘zero tolerance’. In its latest service agreement of 14 June 2015 Microsoft (current owner of MSN) states in its code of conduct that Users may not post or share inappropriate content or other materials (such as nude, bestiality, pornography, extreme violence or criminal activities), see Chapter 3 – code of conduct, a) iv. at <http://www.microsoft.com/nl-nl/servicesagreement/> dc 1 August 2015. [↑](#footnote-ref-4)
5. To this day Usenet’s Terms of Service hold no restrictive policy regarding adult content or pornography. It merely states: *“You understand that we are providing you with unfiltered access to Usenet. We cannot control the content that you will receive via Usenet. Usenet groups may carry offensive, harmful, or inaccurate material, and in some cases postings that have been mislabeled or are otherwise deceptive. We expect that you will use caution--and common sense--when using Usenet”,* <https://www.usenetserver.com/terms-of-service.php> dc 1 August 2015. They did take up an anti-child pornography policy in the wake of the revelation by the New York Attorney General who found at least 88 usenetgroups dedicated to sharing child pornography. See D. MCCULLAGH, “N.Y. attorney general forces ISPs to curb Usenet access”, *CNET Online* 10 June 2008, <http://www.cnet.com/news/n-y-attorney-general-forces-isps-to-curb-usenet-access/> dc 1 August 2015. [↑](#footnote-ref-5)
6. T. GEMIN, “Realcore : Sergio Messina And Online Porn”, *Digicult Online Magazine* 2006, Issue 19, <http://www.digicult.it/digimag/issue-019/realcore-sergio-messina-and-online-porn/> dc 23 April 2015. [↑](#footnote-ref-6)
7. M. DERY, “Naked Lunch: Talking Realcore with Sergio Messina”, in K. JACOBS, et.al. (eds.), *C’Lick Me : a Netporn Studies Reader*, Amsterdam, Institute of Network Cultures, 2007, 18, [www.sergiomessina.com/media/clckmdrmssn.pdf](http://www.sergiomessina.com/media/clckmdrmssn.pdf) dc 23 April 2015. [↑](#footnote-ref-7)
8. A. TSOULIS-REAY, “A Brief History of Revenge Porn”, *New York Magazine* 21 July 2013, <http://nymag.com/news/features/sex/revenge-porn-2013-7/> dc 26 April 2015. [↑](#footnote-ref-8)
9. C. CADWALLADR, “Charlotte Laws’ fight with Hunter Moore, the internet’s revenge porn king”, *The Guardian* *online* 30 March 2014, last modified 3 June 2014, <http://www.theguardian.com/culture/2014/mar/30/charlotte-laws-fight-with-internet-revenge-porn-king> dc 26 April 2015. [↑](#footnote-ref-9)
10. Z. FRANKLIN, “Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites”, *California Law Review*, 2014, Vol. 102, Issue 5, 1308, <http://scholarship.law.berkeley.edu/californialawreview/vol102/iss5/11/> dc 10 April 2015. [↑](#footnote-ref-10)
11. As described in the final Judgment in the defamation case brought by anti-bullying activist James McGibney against Hunter Moore *“people would e-mail Moore photos of nude and semi-nude men and women that they either took themselves or, more commonly, had privately obtained from the photographed subject during the course of a relationship or extracted from a victim’s hacked e-mail or cell phone account. 26. Images in these latter categories – photos sent to ex-boyfriends or ex-girlfriends, or stolen through hacking – were sent to Moore without the permission of the depicted individuals. In turn, Moore published and distributed these images on IAU without permission of the individuals depicted in those photographs”*, District Court of Clark County, Nevada, Judgment of 8 March 2013, *James McGibney v. Hunter Moore*, No. A-12-667156-C, § 25 - 26. [↑](#footnote-ref-11)
12. *“[A] slang term for document tracing, which is when a person’s personal details—home address, phone numbers, bank details, and, in some cases, social-security number—are made public on the Internet. Doxing carries with it a tacit invitation to harangue and harass the subject”*, S. PARKIN, “Zoe Quinn’s Depression Quest”, *The New Yorker Online* 9 September 2014, <http://www.newyorker.com/tech/elements/zoe-quinns-depression-quest> dc 1 August 2015. See also L. LAIRD, “Victims are Taking on ‘Revenge Porn’ Websites for Posting Photos They Didn’t Consent To”, (American Bar Association) *ABA-Journal* 1 November 2013, <http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c> dc 13 April 2015. [↑](#footnote-ref-12)
13. Communications Decency Act (47 USC. §230). More on this *infra*. [↑](#footnote-ref-13)
14. FBI, “Two California Men Arrested in E-Mail Hacking Scheme That Yielded Nude Photos That were Posted on ‘Revenge Porn’ Website”, posted following the formal indictment by the US Attorney’s Office of the Central District of California on 23 January 2014, <http://www.fbi.gov/losangeles/press-releases/2014/two-california-men-arrested-in-e-mail-hacking-scheme-that-yielded-nude-photos-that-were-posted-on-revenge-porn-website> dc 11 April 2015. [↑](#footnote-ref-14)
15. E. PLANK, “Hunter Moore Lawsuit : Anti-Bullying Activist Gets Revenge on Revenge Porn King”, *Mic* 12 March 2013, <http://mic.com/articles/29558/hunter-moore-lawsuit-anti-bullying-activist-gets-revenge-on-revenge-porn-king> dc 26 April 2015. [↑](#footnote-ref-15)
16. S. DESAI, “Smile for the Camera: The Revenge Pornography Dilemma, California’s Approach and its Constitutionality”, *Hastings Constitutional Law Quarterly* 2015, Vol. 42, Issue 2, 445, <http://www.hastingsconlawquarterly.org/archives/V42/I2/Desai_Website%20FINAL.pdf> dc 22 April 2015. [↑](#footnote-ref-16)
17. A. BARTOW, "Pornography, Coercion, and Copyright Law 2.0", *Vanderbilt Journal of Entertainment and Technology Law* 2008, 10.4, 114, <http://works.bepress.com/ann_bartow/31> dc 14 April 2015. [↑](#footnote-ref-17)
18. D. KEATS-CITRON, M. A. FRANKS, “Criminalizing Revenge Porn”, *Wake Forest Law Review*, 2014, Vol. 49, 347, <http://digitalcommons.law.umaryland.edu/fac_pubs/1420/> dc 10 April 2015. [↑](#footnote-ref-18)
19. D. KEATS-CITRON, M. A. FRANKS, “Criminalizing Revenge Porn”, *Wake Forest Law Review*, 2014, Vol. 49, 350 - 354, <http://digitalcommons.law.umaryland.edu/fac_pubs/1420/> dc 10 April 2015. S. LICHTER, “Unwanted Exposure : Civil and Criminal Liability for Revenge Porn Hosts and Posters”, *Harvard Journal of Law & Technology* 28 May 2013, <http://jolt.law.harvard.edu/digest/privacy/unwanted-exposure-civil-and-criminal-liability-for-revenge-porn-hosts-and-posters> dc 10 April 2015. [↑](#footnote-ref-19)
20. J. DAHL, “Audrie Pott, Rehteah Parsons suicides show sexual cyber-bullying is ‘pervasive’ and ‘getting worse,’ expert says”, *CBS News site* 12 April 2013, <http://www.cbsnews.com/news/audrie-pott-rehtaeh-parsons-suicides-show-sexual-cyber-bulling-is-pervasive-and-getting-worse-expert-says/> dc 3 July 2015. [↑](#footnote-ref-20)
21. A. BARAK, “Sexual Harassment on the Internet”, *Social Science Computer Review* Spring 2005, Vol. 23, Issue 1, 81, <http://ssc.sagepub.com/content/23/1/77.abstract> dc 23 April 2015; *“Any existing statistical evidence surrounding cyber gender harassment is likely to underestimate the phenomenon as women tend to underreport it due to feelings of shame and embarrassment”* citing D. KEATS-CITRON, “Law’s Expressive Value in Combating Cyber Gender Harassment”, *Michigan Law Review* 2009, Vol. 108, 373, under footnote 1, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1352442> dc 18 April 2015. See also Attorney General’s Office, “Cyberstalking : A New Challenge for Law Enforcement and Industry”, Report of Attorney General Janet Reno to the Vice President of 16 September 1999, <http://www.justice.gov/archive/opa/pr/1999/September/421ag.htm> dc 23 April 2015. [↑](#footnote-ref-21)
22. Today one of the most vocal and zealous initiatives in the USA in this regard is [www.endrevengeporn.org](http://www.endrevengeporn.org). Founded in 2012 by revenge porn victim Dr. Holly Jacobs and now supported by a strong team of legal professionals (lawyers, scholars), endrevengeporn.org has grown to be a nation-wide initiative, part of the Cyber Civil Rights Initiative (CCRI), that works to raise awareness and inform the public, urge state and federal legislators to draft well-crafted anti-revenge porn bills and help victims tell their story and get them the assistance they need. [↑](#footnote-ref-22)
23. X, “Cassatie: ‘Coach die stiekem naakte meisjes filmde, heeft eerbaarheid niet aangerand”, *De Morgen (Online)* 9 April 2015, <http://www.demorgen.be/binnenland/cassatie-coach-die-stiekem-naakte-meisjes-filmde-heeft-eerbaarheid-niet-aangerand-a2280851/> dc 1 August 2015. [↑](#footnote-ref-23)
24. A. SNOEYS, “Experte seksueel strafrecht : ‘Strafwetboek is niet aangepast aan onze tijdsgeest’”, *De Morgen (Online)* 9 April 2015, <http://www.demorgen.be/binnenland/experte-seksueel-strafrecht-strafwetboek-is-niet-aangepast-aan-onze-tijdsgeest-a2281457/> dc 18 April 2015. [↑](#footnote-ref-24)
25. The literary study that I conducted in the context of my first research question is therefore necessarily limited to scholarly pieces on current Belgian law and case law that do not specifically concern the concept of revenge porn. [↑](#footnote-ref-25)
26. M. MASNICK, “Federal Revenge Porn Bill Will Look To Criminalize Websites”, 2 April 2014, <https://www.techdirt.com/articles/20140330/08413326735/federal-revenge-porn-bill-will-look-to-criminalize-websites.shtml> dc 10 April 2015; D. KEATS-CITRON, “Revenge Porn Site Operators and Federal Criminal Liability”, *Concurring Opinions* 30 January 2013, <http://concurringopinions.com/archives/2013/01/revenge-porn-site-operators-and-federal-criminal-liability.html> dc 18 April 2015; S. MISTLER, “Maine lawmakers move to outlaw revenge porn”, *Portland Press Herald* 26 February 2015, <http://www.pressherald.com/2015/02/26/maine-lawmakers-move-to-outlaw-revenge-porn/> dc 25 April 2015; L. WHITEHURST, “Layton man gets jail time in Utah ‘revenge porn’ case”, *Desert News* 17 March 2015, <http://www.deseretnews.com/article/865624437/Layton-man-gets-jail-time-in-Utah-revenge-porn-case.html?pg=all> dc 25 April 2015. See also for frequent updates <http://www.cagoldberglaw.com/states-with-revenge-porn-laws/> dc 2 August 2015. [↑](#footnote-ref-26)
27. The statutes of New Jersey, California and Illinois. See annex for the relevant passages. [↑](#footnote-ref-27)
28. X, “YouTube-ster Chrissy naar de rechter om wraakporno”, *NOS Online* 4 June 2015, <http://nos.nl/op3/artikel/2039434-youtube-ster-chrissy-naar-de-rechter-om-wraakporno.html> dc 1 August 2015. Also L. SIOEN, S. VANKERSSHAEVER, “Het voelt als een verkrachting, en je kunt er niets tegen doen”, *De Standaard Online* 22 September 2015, <http://www.standaard.be/cnt/dmf20140919_01277466> dc 1 August 2015. Though offline revenge porn is possible too, the online variant occurs in 80% of all revenge porn cases in the US, see J. K. STOKES, “The Indecent Internet : Resisting Unwarranted Internet Exceptionalism in Combating Revenge Porn”, *Berkeley Technology Law Journal* January 2014, Vol. 29, Issue 4, 923, <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2040&context=btlj> dc 14 April 2015. [↑](#footnote-ref-28)
29. And thus necessarily without the consent of the unsuspecting person pictured in the images. [↑](#footnote-ref-29)
30. *“What is Revenge Porn? Revenge porn, n.- A form of sexual abuse that involves the distribution of nude/sexually explicit photos and/or videos of an individual without their consent. Revenge porn, sometimes called cyber-rape or non-consensual pornography, is usually posted by a scorned ex-lover or friend, in order to seek revenge after a relationship has gone sour”,* <http://www.endrevengeporn.org/about/> dc 27 April 2015. [↑](#footnote-ref-30)
31. FRANKS was the first to coin the term non-consensual pornography as an alternative to ‘revenge porn’. M. A. FRANKS, “Combating Non-Consensual Pornography – A Working Paper”, last edited 7 October 2013, 1 – 18, <http://www.endrevengeporn.org/main_2013/wp-content/uploads/2013/10/Franks-NCP-Working-Paper-10.7.pdf> dc 3 July 2015. [↑](#footnote-ref-31)
32. S. LICHTER, “Unwanted Exposure : Civil and Criminal Liability for Revenge Porn Hosts and Posters”, *Harvard Journal of Law & Technology* 28 May 2013, <http://jolt.law.harvard.edu/digest/privacy/unwanted-exposure-civil-and-criminal-liability-for-revenge-porn-hosts-and-posters> dc 10 April 2015. [↑](#footnote-ref-32)
33. M.A. FRANKS, “Why We Need a Federal Criminal Law Response to Revenge porn”, *Concurring Opinions* 15 February 2013, <http://concurringopinions.com/archives/2013/02/why-we-need-a-federal-criminal-law-response-to-revenge-porn.html> dc 27 April 2015; S. DESAI, “Smile for the Camera : The Revenge Pornography Dilemma, California’s Approach and its Constitutionality”, *Hastings Constitutional Law Quarterly* 2015, Vol. 42, Issue 2, 446, <http://www.hastingsconlawquarterly.org/archives/V42/I2/Desai_Website%20FINAL.pdf> dc 22 April 2015. [↑](#footnote-ref-33)
34. More in particular, revenge porn victims are often *“photographed or filmed without their consent […] include[ing] women engaged in consensual sex acts, or mere acts of undressing, who are filmed or photographed surreptitiously, as well as victims of rapists who capture and broadcast footage of their acts”*, M.A. FRANKS, “Why We Need a Federal Criminal Law Response to Revenge porn”, *Concurring Opinions* 15 February 2013, <http://concurringopinions.com/archives/2013/02/why-we-need-a-federal-criminal-law-response-to-revenge-porn.html> dc 27 April 2015. [↑](#footnote-ref-34)
35. A. BARTOW, “Internet Defamation as Profit Center: The Monetization of Online Harassment”, *Harvard Journal of Law and Gender* 2009, Vol. 32, Issue 2, 384 - 392, <http://www.law.harvard.edu/students/orgs/jlg/vol322/383-430.pdf> dc 26 April 2015. [↑](#footnote-ref-35)
36. Gamergate is the term used to describe the upheaval that took place online amongst gamers as a result of a new video game launched by female game developer Zoe Quinn. Her ex-partner, fellow game-developer Eron Gjoni, alleged that she had slept with five Game reviewers in order to get good reviews for her game, an allegation she has always vehemently denied. Using the #GamerGate, a number of gamers soon took the allegations for truth and joined in harassing, doxing and threatening Zoe Quinn under the justification that she was corrupted and that policing her sexual history was part of and relevant to game journalism. As it grew exponentially over the course of mere days, Gamergate became an actual online movement concerned with ‘ethics in game journalism’ and protecting the "gamer" identity. See J. HATHAWAY, “What is Gamergate, and Why? An Explainer for Non-Geeks”, *Gawker* 10 October 2014, <http://gawker.com/what-is-gamergate-and-why-an-explainer-for-non-geeks-1642909080> dc 1 August 2015. However, many have called out Gamergate for its blatantly misogynistic viewpoints, targeting women in the gaming world. Journalist Leigh Alexander especially has been a vocal critic of Gamergate, see L. ALEXANDER, “’Gamers’ don’t have to be your audience. ‘Gamers’ are over”, *Gamasutra* 28 August 2014, <http://www.gamasutra.com/view/news/224400/Gamers_dont_have_to_be_your_audience_Gamers_are_over.php> dc 1 August 2015. [↑](#footnote-ref-36)
37. H. LEWIS, “Gamergate : a brief history of a computer-age war”, *The Guardian* 11 January 2015, <http://www.theguardian.com/technology/2015/jan/11/gamergate-a-brief-history-of-a-computer-age-war> dc 28 April 2015. [↑](#footnote-ref-37)
38. *“Cyber gender harassment invokes women’s sexuality and gender in ways that interfere with their agency, livelihood, identity, dignity, and well-being”,* D. KEATS-CITRON, “Law’s Expressive Value in Combating Cyber Gender Harassment”, *Michigan Law Review* 2009, Vol. 108, 384, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1352442> dc 18 April 2015; J. FILIPOVIC, “Blogging While Female : How Internet Misogyny Parallels ‘Real-World” Harassment”, *Yale Journal of Law and Feminism* 2007-2008, Vol. 19, 295 - 332, <http://heinonline.org/HOL/LandingPage?handle=hein.journals/yjfem19&div=13&id=&page>= dc 27 April 2015. [↑](#footnote-ref-38)
39. See footnote 12 *supra*. [↑](#footnote-ref-39)
40. K. JAISHANKAR, V. UMA SANKARY, “Cyberstalking: A Global Menace in the Information Super Highway”, Revised version of Paper presented at 29th All India Criminology Conference at Madurai Kamaraj University, 2006, <http://www.erces.com/journal/articles/archives/volume2/v03/v02.htm> dc 28 April 2015. This is not to say of course that men do not fall victim to revenge porn. For instance, in 2009 screenwriter Dustin Lance (known for the Harvey Milk biopic released in 2008) became a victim after an ex-partner posted a so called ‘sex tape’ of the then couple online. See <http://www.queerty.com/shock-dustin-lance-black-sex-tape-leaks-20090612> dc 28 June 2015. The incident caused the Pasadena City College to rescind an invitation extended to Lance, who is a prominent LGBTQ-activist, to deliver the commencement address at an alumni event. To avoid a lawsuit, the college later settled the dispute for an amount of 26,050.00 USD. See MCCORMICK, P., “Oscar-winning Alum’s Settlement Unveiled”, *The PCC Courier* 15 October 2014, <http://www.pcccourier.com/2014/10/15/dlb-2/> dc 27 June 2015. [↑](#footnote-ref-40)
41. K. DEMEYER, E. LIEVENS, J. DUMORTIER, “Blocking and Removing Illegal Child Sexual Content: Analysis from a Technical and Legal Perspective”, *Policy & Internet* 2012, 4: 3-4, 3. [↑](#footnote-ref-41)
42. Z. FRANKLIN, “Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites”, *California Law Review*, 2014, Vol. 102, Issue 5, 1308, <http://scholarship.law.berkeley.edu/californialawreview/vol102/iss5/11/> dc 10 April 2015. [↑](#footnote-ref-42)
43. This potential effect on the burden of proof is further examined *infra* under title 4.1. [↑](#footnote-ref-43)
44. *“We define pornography as a practise of sex discrimination, a violation of women’s civil rights, the opposite of sexual equality”*, citing C. MACKINNON, “Pornography, Civil Rights and Speech” in L. VAUGHN, *Doing Ethics: Moral Reasoning and Contemporary Issues*, New York, W. W. Norton & Company, 2010, 303, <http://www.analogfeminism.net/Pornography__Civil_Rights_and_Speech_-_MacKinnon_DOING_ETHICS_ed_by_Lewis_Vaughn.pdf> dc 26 April 2015; in line with MacKinnon, Bartow highlights the ease with which legislators and courts ignore harm created by ‘legal’ pornography, which further incites pornographers to keep making porn. See A. BARTOW, "Pornography, Coercion, and Copyright Law 2.0", *Vanderbilt Journal of Entertainment and Technology Law* 2008, 10.4, 101-142, <http://works.bepress.com/ann_bartow/31>dc 14 April 2015; dissenting opinion by S. BALMER, “The Limits of Free Speech, Pornography and the Law”, *Aberdeen Student Law Review* 2010, Vol. 1, Issue 66, 66 – 82, [https://www.abdn.ac.uk/law/documents/steven\_balmer.pdf dc 26 April 2015](https://www.abdn.ac.uk/law/documents/steven_balmer.pdf%20dc%2026%20April%202015). [↑](#footnote-ref-44)
45. M. A. FRANKS, “Why We Need a Federal Criminal Law Response to Revenge porn”, *Concurring Opinions* 15 February 2013, <http://concurringopinions.com/archives/2013/02/why-we-need-a-federal-criminal-law-response-to-revenge-porn.html> dc 27 April 2015. [↑](#footnote-ref-45)
46. A. M. HAYNES, “The Age of Consent: When is Sexting No Longer Speech Integral to Criminal Conduct”, *Cornell Law Review* January 2012, Vol. 97, Issue 2, 402, <http://scholarship.law.cornell.edu/clr/vol97/iss2/5> dc 22 April 2015. [↑](#footnote-ref-46)
47. S. MISTLER, “Maine lawmakers move to outlaw revenge porn”, *Portland Press Herald* 26 February 2015, <http://www.pressherald.com/2015/02/26/maine-lawmakers-move-to-outlaw-revenge-porn/> dc 25 April 2015. [↑](#footnote-ref-47)
48. M. A. FRANKS, “Adventures in Victim Blaming: Revenge Porn Edition”, *Concurring Opinions*, 1 February 2013, <http://concurringopinions.com/archives/2013/02/adventures-in-victim-blaming-revenge-porn-edition.html> 12 April 2015, in response to statements made by E. GOLDMAN saying that for individuals *“who prefer not to be a revenge porn victim […] the advice will be simple : don’t take nude photos or video’s”,* in E. GOLDMAN, “What Should We Do About Revenge Porn Sites Like Texxxan?”, *Tech., Mktg. & L. Blog* of 28 January 2013, <http://www.forbes.com/sites/ericgoldman/2013/01/28/what-should-we-do-about-revenge-porn-sites-like-texxxan/> dc 14 April 2015. [↑](#footnote-ref-48)
49. C. J. NAJDOWSKI, M. M. HILDEGRAND, “The Criminalization of Revenge Porn”, *Monitor on Psychology* January 2014, Vol. 45, Issue 1, <http://www.apa.org/monitor/2014/01/jn.aspx> dc 11 April 2015. [↑](#footnote-ref-49)
50. D. KEATS-CITRON, M. A. FRANKS, “Criminalizing Revenge Porn”, *Wake Forest Law Review*, 2014, Vol. 49, 345 - 383, <http://digitalcommons.law.umaryland.edu/fac_pubs/1420/> dc 10 April 2015. [↑](#footnote-ref-50)
51. C. MARTINEZ, “An Argument for States to Outlaw ‘Revenge Porn’ and for Congress to Amend 47 USC. § 230: How Our Current Laws Do Little to Protect Victims”, *Pittsburgh Journal of Technology Law & Policy* Spring 2014, Vol. 14, Nr. 2, 236 – 252, <http://tlp.law.pitt.edu/ojs/index.php/tlp/article/view/141> dc 16 April 2015. [↑](#footnote-ref-51)
52. For the USA see 18 USC. 2256; for Belgium see article 383bis Belgian Criminal Code; for Council of Europe Member States see article 20 Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse; for EU Member States see articles 5 and 6 Directive on combating the sexual abuse and sexual exploitation of children and child pornography. [↑](#footnote-ref-52)
53. A.M. HAYNES, “The Age of Consent: When is Sexting No Longer Speech Integral to Criminal Conduct”, *Cornell Law Review* January 2012, Vol. 97, Issue 2, 369 – 404, <http://scholarship.law.cornell.edu/clr/vol97/iss2/5> dc 22 April 2015. [↑](#footnote-ref-53)
54. A. KUSHNER, “The Need for Sexting Law Reform: Appropriate Punishments for Teenage Behaviors”, *University of Pennsylvania Journal of Law and Social Change* 2013, Vol. 16, Issue 3, 283, <http://scholarship.law.upenn.edu/jlasc/vol16/iss3/4> dc 22 April 2015. This has not stopped some states in the US to adopt specific sexting laws in order to sanction teens sending naked selfies to one another. See also S. DONALDSON, “New Texting Laws Put College Students At Risk”, *Public Release University of Rhode Island* 20 July 2012, <http://www.eurekalert.org/pub_releases/2011-07/uori-nsl072011.php> dc 22 April 2015. [↑](#footnote-ref-54)
55. R. D. RICHARDS, C. CALVERT, “When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case”, *Hastings Communications and Entertainment Law Journal* 2009, Vol. 32, Issue 1, 9, <http://comm.psu.edu/assets/pdf/pennsylvania-center-for-the-first-amendment/sexcellphones.pdf> dc 29 April 2015. [↑](#footnote-ref-55)
56. X, “Child Pornography: Model legislation and global review”, International Centre for Missing and Exploited Children, 2013 (7th Edition), 15 - 40, <http://icmec.org/en_X1/icmec_publications/English__6th_Edition_FINAL_.pdf> dc 10 May 2015. [↑](#footnote-ref-56)
57. See article 8 §3, 2nd paragraph of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography repealing Framework Decision 2004/68/JHA. [↑](#footnote-ref-57)
58. See article 20 of COE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, CETS No. 201, 25 October 2007, Lanzarote. [↑](#footnote-ref-58)
59. This age limit is equally partial to the discretion of the individual EU Member States. [↑](#footnote-ref-59)
60. E. CALLEBAUT, “Kinderrechten inzake Seksualiteitsbeleving: Van bescherming naar het toekennen van rechten?”, Master Thesis Ugent, 2011, 93, <http://lib.ugent.be/fulltxt/RUG01/001/786/947/RUG01-001786947_2012_0001_AC.pdf> dc 10 May 2015; G. VERMEULEN, F. DHONT, “Bescherming van minderjarigen via het strafrecht. Verdiensten en beperkingen van de Wet van 28 november 2000 betreffende de strafrechtelijke bescherming van minderjarigen”, *T. Strafr.* 2002, 131. [↑](#footnote-ref-60)
61. For instance professor Liesbet Stevens. See A. SNOEYS, “Experte seksueel strafrecht: ‘Strafwetboek is niet aangepast aan onze tijdsgeest’”, *De Morgen (Online)* 9 April 2015, <http://www.demorgen.be/binnenland/experte-seksueel-strafrecht-strafwetboek-is-niet-aangepast-aan-onze-tijdsgeest-a2281457/> dc 18 April 2015. [↑](#footnote-ref-61)
62. 47 USC 230 ‘Protection for private blocking and screening of offensive material’, enacted on 19 June 1934, ch. 653, title II, §230, as added Pub. L. 104-104, title V, 6509, 8 Feb. 1996, 110 Stat. 137; Amended Pub. L. 105-277, div. C, title XIV, 61404(a), Oct. 21, 1998, 112 Stat. 2681-739, <http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title47-section230&num=0&edition=prelim> dc 14 April 2015. [↑](#footnote-ref-62)
63. EU, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-Commerce Directive). [↑](#footnote-ref-63)
64. The law of 11 March 2003 concerning certain legal aspects of information-society services, *BS* 17 March 2003 (Act implementing the E-Commerce Directive of 2000) was integrated into the Belgian Code of Economic Law as of 31 May 2014. [↑](#footnote-ref-64)
65. Currently there is no readily available data regarding the location of the servers on which most revenge porn websites are saved. Still, as these websites are often operating within the fringes of society, it is likely that they are hosted from safe haven jurisdictions. Moreover, given the near immunity offered by §230 of the CDA, the USA seems to be a particularly attractive location for revenge porn hosts to keep their websites. Furthermore, not only mainstream Internet has been home to revenge porn websites and platforms. The Dark Web too has been known to host them, making the search for those responsible that much harder. See D. GILBERT, “Pink Meth Revenge Porn Darknet Website Shut Down by FBI in Operation Onymous”, *International Business Times Online* 10 November 2014, <http://www.ibtimes.co.uk/pink-meth-revenge-porn-darknet-website-shut-down-by-fbi-operation-onymous-1474013> dc 2 August 2015. [↑](#footnote-ref-65)
66. D. KEATS-CITRON, “Law’s Expressive Value in Combating Cyber Gender Harassment”, *Michigan Law Review* 2009, Vol. 108, 402, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1352442> dc 18 April 2015. [↑](#footnote-ref-66)
67. P. BOCIJ, *Cyberstalking: Harassment in the Internet Age and How to Protect Your Family*, Westport, Praeger Publishers, 2004, 17. [↑](#footnote-ref-67)
68. The location of the criminal act(s) is the most commonly used factor in jurisdiction provisions. For the COE Cyber Crime Convention it is the main constituting factor of jurisdiction (see art. 22 (1)(A)). [↑](#footnote-ref-68)
69. D. KEATS-CITRON, “Revenge Porn Site Operators and Federal Criminal Liability”, *Concurring Opinions* 30 January 2013, <http://concurringopinions.com/archives/2013/01/revenge-porn-site-operators-and-federal-criminal-liability.html> dc 18 April 2015. [↑](#footnote-ref-69)
70. S. BRENNER, B. J. KOOPS, “Approaches to Cybercrime Jurisdiction”, *Journal of High Technology Law* 2004, Vol. 4, Nr. 1, 15. [↑](#footnote-ref-70)
71. S. BRENNER, B. J. KOOPS, “Approaches to Cybercrime Jurisdiction”, *Journal of High Technology Law* 2004, Vol. 4, Nr. 1, 15. [↑](#footnote-ref-71)
72. Apart from the *locus delicti*, there are several other grounds for jurisdiction. See COE, Discussion Paper ‘Cybercrime and Internet Jurisdiction’ (draft prepared by H.W.K. KASPERSEN), 5 March 2009, 8 – 12. [↑](#footnote-ref-72)
73. Many working groups at the level of both the COE and the EU have published guidelines for ISPs with regard to their obligations under privacy and data protection legislation, as well as regarding the necessity of their cooperation with LEAs. See for example: COE, Global Conference Cooperation against Cybercrime, Guidelines for the Cooperation between Law Enforcement and Internet Service Providers against Cybercrime, 2 April 2008; EU, European Commission, “Opinion 5/2009 on online social networking”, O1189/09/EN, Adopted on 12 June 2009 by the Article 29 Working Party, WP 163. [↑](#footnote-ref-73)
74. Phrase coined by W. E. WELLS in "Protecting The Victims Of Child Pornography: An Analysis Of The Current State Of The Law, With A View Towards Amending The CDA 230 Safe Harbor", *eRepository@Seton Hall Law* 1 May 2014, 3, <http://scholarship.shu.edu/student_scholarship/605> dc 16 April 2015. [↑](#footnote-ref-74)
75. M. O’FLOINN, “It wasn’t all white light before *Prism*: Law enforcement practices in gathering data abroad, and proposals for further transnational access at the Council of Europe”, *Computer Law & Security Review* 2013, nr. 29, 611 (see in particular footnote 10 therein). [↑](#footnote-ref-75)
76. See <https://www.facebook.com/about/privacy/> and <https://www.facebook.com/legal/terms/update>, both accessed on 15 May 2015. [↑](#footnote-ref-76)
77. COE, Cybercrime Convention Committee, Guidance Note: Trans-border access to data (Article 32), 3 December 2014, 7. [↑](#footnote-ref-77)
78. Revenge porn is not limited to an online environment and can just as easily take place offline, by using newspapers, flyers, cd’s, dvd’s, etc. as a means of spreading the sexually explicit images. [↑](#footnote-ref-78)
79. LEA v. ISP/OSP. [↑](#footnote-ref-79)
80. A. COTTIM, “Cybercrime, Cyberterrorism and Jurisdiction: An Analysis of Article 22 of the COE Convention on Cybercrime”, *European Journal of Legal Studies* Autumn 2010, Vol. 2, Issue 3, <http://www.ejls.eu/6/78UK.htm> dc 26 April 2015. See also K. DE SCHEPPER, F. VERBRUGGEN, “Ontsnappen *space invaders* aan onze *pacmannen*? De materiële en formele strafrechtsmacht van België bij strafbare weigering van medewerking door elektronische dienstverleners”, *T. Strafr.* 2013, Vol. 3, 165-166. [↑](#footnote-ref-80)
81. Cass. 24 May 2011, AR P.10.1990.N. [↑](#footnote-ref-81)
82. In Dutch : ‘aanranding van de eerbaarheid’. [↑](#footnote-ref-82)
83. If a court should not withhold a degree of severity sufficient to aggrieve the sexual integrity of a person, the disputed conduct may still legally qualify as stalking, which is criminalised under article 442*bis* BCC. See Court of First Instance of Brussels, ruling on Civil Issues, 2 February 2000, *R.D.P.* 2001, 347. [↑](#footnote-ref-83)
84. A. DE NAUW, *Inleiding tot het Bijzonder Strafrecht*, Mechelen, Kluwer, 2010, 139 - 140. [↑](#footnote-ref-84)
85. Cass. 3 June 1940, *Arr. Cass.* 1937-40, 61; Cass. 13 March 1944, *Arr. Cass*. 1944, 117; A. VANDEPLAS, “Aanranding van de eerbaarheid bij verrassing – Noot bij Cass. 20 september 2005”, *RW* 2005 – 2006, 1662. [↑](#footnote-ref-85)
86. A. DE NAUW, *Inleiding tot het Bijzonder Strafrecht*, Mechelen, Kluwer, 2010, 138; the fact that voyeurism in Belgium is not a criminal offence was recently confirmed by the highest Judicial Court in Belgium, the Court of Cassation, in its judgment of 31 March 2015 (Cass. 31 March 2015, AR P.14.0293.N.). [↑](#footnote-ref-86)
87. Cass. 23 January 2008, AR P.08.0105.F. [↑](#footnote-ref-87)
88. Much like when rape victims were drugged at the time of their assault and only find out at a later time what happened to them, they will unequivocally feel that their sexual integrity was assaulted in the sense of art. 373. See S. VANDORME, “Zijn het stiekem filmen van seksuele betrekkingen en andere vormen van voyeurisme strafbaar als aanranding van de eerbaarheid?”, *T. Strafr.* 2014, Vol. 6, Issue 41, 365, see also footnote 8 therein. [↑](#footnote-ref-88)
89. Mere annoyance is therefore not sufficient, though the courts will judge the severity of the harassment on a case by case basis. See F. VROMAN, “Stalking (belaging)”, in X., *Postal Memoralis. Lexicon strafrecht, strafvordering en bijzondere wetten*, Kluwer, Mechelen, 2014, S 106/10. [↑](#footnote-ref-89)
90. A. MURAT, “Klachtendelicten”, in X., *Postal Memoralis. Lexicon strafrecht, strafvordering en bijzondere wetten*, Kluwer, Mechelen, 2014, K 58/01 – K 58/02. [↑](#footnote-ref-90)
91. L. STEVENS, “Stalking strafbaar – Commentaar bij de wet van 30 oktober 1998 tot invoeging van artikel 442bis in het Strafwetboek houdende de strafbaarstelling van belaging”, *RW* 1998-1999, nr. 38, 1379. [↑](#footnote-ref-91)
92. F. VROMAN, “Stalking (belaging)”, in X., *Postal Memoralis. Lexicon strafrecht, strafvordering en bijzondere wetten*, Kluwer, Mechelen, 2014, S 106/15. [↑](#footnote-ref-92)
93. See Preparatory Legislative Documents for the Law of 30 October 2008 on the introduction of article 442*bis* into the Criminal Code criminalising stalking, *Gedr. St.* Chamber of Representatives 1996 – 1997, no. 1046/8, 6 and 8. [↑](#footnote-ref-93)
94. Cass. 21 February 2007, AR P.06.1415.F. [↑](#footnote-ref-94)
95. Law of 13 June 2005 concerning electronic communication, *BS* 26 June 2005 (WEC). The criminal sanctions in its article 145 §3*bis* are identical to those listed in 442*bis* BCC. [↑](#footnote-ref-95)
96. A. DE NAUW, *Inleiding tot het Bijzonder Strafrecht*, Mechelen, Kluwer, 2010, 267 *in fine*. [↑](#footnote-ref-96)
97. F. VROMAN, “Stalking (belaging)”, in X., *Postal Memoralis. Lexicon strafrecht, strafvordering en bijzondere wetten*, Kluwer, Mechelen, 2014, S 106/18. [↑](#footnote-ref-97)
98. See definition in art. 2, 3° WEC. [↑](#footnote-ref-98)
99. F. SCHUERMANS, “Elektronische belaging : moreel bestanddeel van het misdrijf – Noot bij Corr. Turnhout 16 mei 2012”, *T. Strafr.* 2012, Vol. 6, 476. [↑](#footnote-ref-99)
100. In Dutch ‘zedendelict’. [↑](#footnote-ref-100)
101. The assault on virtue does qualify as a sex crime. See S. VANDORME, “Zijn het stiekem filmen van seksuele betrekkingen en andere vormen van voyeurisme strafbaar als aanranding van de eerbaarheid?”, *T. Strafr.* 2014, Vol. 6, Issue 41, 368. [↑](#footnote-ref-101)
102. Cass. 10 July 1916, *Pas.* 1917, I, 191. [↑](#footnote-ref-102)
103. Online discussion platforms that are accessible to a certain number of people satisfy the legal requirement of ‘publicity’. See A. DE NAUW, *Inleiding tot het Bijzonder Strafrecht*, Mechelen, Kluwer, 2010, 271; A. REMY, “Telematica: aspecifieke misdrijven”, in X., *Postal Memoralis. Lexicon strafrecht, strafvordering en bijzondere wetten*, Kluwer, Mechelen, 2014, T 57/13. [↑](#footnote-ref-103)
104. A. VANDEPLAS, “Betreffende beledigingen – Noot onder Corr. Brugge (13 K.) 18 april 2001”, *RW* 2002 - 2003, Vol. 14, 552. [↑](#footnote-ref-104)
105. In 1990, the Court of Cassation ruled in the case of Verweirde / Caes case which was referred to the Court upon appeal issued against a judgment of the Brussels Court of Appeals of 21 March 1989. The case concerned insult/offence through the use of images/photographs. As is apparent from the wording of the judgment by the Court of Cassation, the judges on appeal, together with the initial judge, agreed that the publication of the pictures concerned did not harm the plaintiff and were not offensive towards her since she had voluntarily and in ‘public company’ posed nude and had subsequently sent the picture to another person. The judges even conceded that she had provoked the further publication herself and could not be ‘shocked’ by the publicity that ensued. See Cass. 29 May 1990, AR. 3441. [↑](#footnote-ref-105)
106. L. STEVENS, “Parket moet (ex-)partnergeweld ernstig nemen”, *De Juristenkrant* 2001, Issue 25, 2. [↑](#footnote-ref-106)
107. Court of First Instance of the Province of Antwerp, Department of Antwerp, ruling in Civil Matters, 8 November 2006, *Juristenkrant* 2006, Issue 140, 12. [↑](#footnote-ref-107)
108. See same conclusion with regard to UK law in the summer of 2014: I. WILSON, “’Revenge porn’ legal remedies”, *The Law Society Gazette* 14 July 2014, <http://www.lawgazette.co.uk/law/legal-updates/revenge-porn-legal-remedies/5042142.fullarticle> dc 10 April 2015. [↑](#footnote-ref-108)
109. Press Releases, Cyber Civil Rights Initiative, www. cybercivilrights.org/press\_releases dc 7 May 2015. [↑](#footnote-ref-109)
110. A. BARTOW, "Pornography, Coercion, and Copyright Law 2.0", *Vanderbilt Journal of Entertainment and Technology Law* 2008, 10.4, 101-142, <http://works.bepress.com/ann_bartow/31> dc 14 April 2015; I. WILSON, “’Revenge porn’ legal remedies”, *The Law Society Gazette* 14 July 2014, <http://www.lawgazette.co.uk/law/legal-updates/revenge-porn-legal-remedies/5042142.fullarticle> dc 10 April 2015. [↑](#footnote-ref-110)
111. Section XI on Intellectual Property Law, which was included into the BCEL by Law of 19 April 2014, entered into force on 1 January 2015. [↑](#footnote-ref-111)
112. M. JANSSENS, H. VANHEES, V. VANOVERMEIRE, “De intellectuele eigendomsrechten verankerd in het Wetboek Economisch Recht : een eerste analyse”, *IRDI* 2014, Issue 2, 498. [↑](#footnote-ref-112)
113. Cass. 27 April 1989, *Pas*. 1989, I, 908; [↑](#footnote-ref-113)
114. ECJ 16 July 2009, C-5/08 (*Infopaq International v. Danske Dagblades Forening*); see also D. KUR, T. DREIER, *European Intellectual Property Law – Text, Cases & Materials*, Cheltenham, Edward Elgar Publishing Limited, 2013, 291. [↑](#footnote-ref-114)
115. From the wording of the judgment (especially par. 45) it is obvious that a work must also be the result of a creative choice or effort, not just a banal creation. A. HALLEMANS, “Cassatie vergist zich bij de invulling van de geharmoniseerde oorspronkelijkheidsvereiste in het auteursrecht”, in X., *Jaarboek Marktpraktijken, Intellectuele Eigendom en Mededinging* 2012, 948-950; J. DEENE, “Intellectuele Rechten Kroniek 2010”, *NJW* 2011, Issue 245, 442. [↑](#footnote-ref-115)
116. Court of First Instance of Brussels, Department of Brussels, ruling in Civil Matters, 22 December 2011, *ICIP* 2012, Issue 4, 887. A photograph must express the author’s personality. If the author made no apparent creative choice(s) (*i.e.* regarding lighting, positioning, color-scheme, etc.) no originality will be withheld, see Court of First Instance of Brussels, Department of Brussels, ruling in Civil Matters, 14 April 2011, *JLMB* 2012, Issue 21, 988. [↑](#footnote-ref-116)
117. J. H. SPOOR, D. W. F., VERKADE, J. G. VISSER, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Mechelen, Kluwer, 2011, 78. [↑](#footnote-ref-117)
118. Court of First Instance of Brussels, Department of Brussels, ruling in Civil Matters, 13 October 2008, *JLMB* 2009, Issue 22, 1029. [↑](#footnote-ref-118)
119. I. WILSON, “’Revenge porn’ legal remedies”, *The Law Society Gazette* 14 July 2014, <http://www.lawgazette.co.uk/law/legal-updates/revenge-porn-legal-remedies/5042142.fullarticle> dc 10 April 2015. [↑](#footnote-ref-119)
120. If the infringement was discovered by a civil servant, art. XV 31 §1 gives them the authority to issue a takedown notice. If the addressee does not comply with the notice, the file is sent to the Public Prosecutor’s Office for further criminal investigation. [↑](#footnote-ref-120)
121. The victim can choose to initiate civil court proceeding (art. XI 334 and 335) or go to LEA who will then, by the discretion of the Public Prosecutor or the Investigative Judge, launch a criminal investigation, possibly followed by a trial. [↑](#footnote-ref-121)
122. *“Technically, this requires that the content is no longer on a computer system that is connected to or ‘part of’ the Internet”.* Of course, the Internet is not the only means for content sharing (peer-to-peer (P2P), Internet Relay Chat (IRC), File Transfer Protocol (FTP), Usenet newsgroups, Tor, etc.), see K. DEMEYER, E. LIEVENS, J. DUMORTIER, “Blocking and Removing Illegal Child Sexual Content: Analysis from a Technical and Legal Perspective”, *Policy & Internet* 2012, 4: 3-4, 2. [↑](#footnote-ref-122)
123. A. LEVENDOWSKI, “Using Copyright to Combat Revenge Porn”, *NYU Journal of Intellectual Property & Entertainment Law* 2014, Vol. 3, 422 – 446, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2374119> dc 22 April 2015. [↑](#footnote-ref-123)
124. In addition, and in accordance with art. XV.30 BCEL, the Public Prosecutor or – when activated – the investigative judge has the authority to order that the alleged perpetrator’s business be shut down preliminarily. Art. XV 61 BCEL, which provides an administrative sanction along with the possibility for the culprit to accept an amicable settlement, will not apply in that case. M. JANSSENS, H. VANHEES, V. VANOVERMEIRE, “De intellectuele eigendomsrechten verankerd in het Wetboek Economisch Recht : een eerste analyse”, *IRDI* 2014, Issue 2, 496. [↑](#footnote-ref-124)
125. See *infra* title 3.3. [↑](#footnote-ref-125)
126. K. DEMEYER, E. LIEVENS, J. DUMORTIER, “Blocking and Removing Illegal Child Sexual Content: Analysis from a Technical and Legal Perspective”, *Policy & Internet* 2012, 4: 3-4, 7-8. [↑](#footnote-ref-126)
127. P. HUSTINX, European Data Protection Supervision (EDPS) Opinion of 10 May 2010 on the proposal for a Directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA, 2 (nr. 8). [↑](#footnote-ref-127)
128. A. LEVENDOWSKI, “Using Copyright to Combat Revenge Porn”, *NYU Journal of Intellectual Property & Entertainment Law* 2014, Vol. 3, 426, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2374119> dc 22 April 2015 [↑](#footnote-ref-128)
129. G. BAETEMAN, E. GULDIX, “Staat van personen”, in *Overzicht van de rechtspraak. Personen- en familierecht (1995 – 2000)*, *TPR* 2001, Issue 3, 1601. [↑](#footnote-ref-129)
130. Court of First Instance of Brussels, Department of Brussels, ruling in Civil Matters, 20 September 2001, *AM* 2002, 77. [↑](#footnote-ref-130)
131. *White v. Sweden* and *Gourguenidze v. Georgia*, P. DE HERT, R. SAELENS, “Recht op afbeelding”, *TPR* 2009, Vol. 2, 882. [↑](#footnote-ref-131)
132. Which requires the claimant to prove (1) fault (or tort), (2) cause and (3) culpability. See articles 1382 ff. Belgian Civil Code. [↑](#footnote-ref-132)
133. G. BAETEMAN, E. GULDIX, “Staat van personen”, in *Overzicht van de rechtspraak. Personen- en familierecht (1995 – 2000)*, *TPR* 2001, Issue 3, 1611. [↑](#footnote-ref-133)
134. Court of First Instance of the Province of Eastern Flanders, Department of Dendermonde, ruling in Criminal Matters (19D Chamber), 20 January 2015, unpublished, 10. [↑](#footnote-ref-134)
135. According to the proposal for the new EU General Data Protection Regulation (GDPR), which is set to replace the Data Protection Directive currently in force, the data controller must obtain the written and explicit consent for a specified purpose. Implied consent will no longer be a legal basis. See M. ROTENBERG, D. JACOBS, “Updating the Law of Information Privacy: The New Framework of the European Union”, *Harvard Journal of Law and Public Policy* Spring 2013, Vol. 36, Issue 2, 632, <http://www.harvard-jlpp.com/wp-content/uploads/2013/04/36_2_605_Rotenberg_Jacobs.pdf> dc 16 April 2015. [↑](#footnote-ref-135)
136. Articles 4 §1, 5 and 6 of the Law of 8 December 1992 on the protection of the personal privacy with regard to the processing of personal data, *BS* 18 March 1993. [↑](#footnote-ref-136)
137. Court of First Instance of the Province of Eastern Flanders, Department of Dendermonde, ruling in Criminal Matters (19D Chamber), 20 January 2015, unpublished, 10. [↑](#footnote-ref-137)
138. Article 39 Privacy Law. [↑](#footnote-ref-138)
139. S. VANDORME, “Zijn het stiekem filmen van seksuele betrekkingen en andere vormen van voyeurisme strafbaar als aanranding van de eerbaarheid?”, *T. Strafr.* 2014, Vol. 6, Issue 41, 368, nr. 16. [↑](#footnote-ref-139)
140. At least until the GDPR is formally adopted, see footnote 135 *supra*. [↑](#footnote-ref-140)
141. P. DE HERT, R. SAELENS, “Recht op afbeelding”, *TPR* 2009, Vol. 2, 873 – 875. [↑](#footnote-ref-141)
142. I. WILSON, “’Revenge porn’ legal remedies”, *The Law Society Gazette* 14 July 2014, <http://www.lawgazette.co.uk/law/legal-updates/revenge-porn-legal-remedies/5042142.fullarticle> dc 10 April 2015. [↑](#footnote-ref-142)
143. See for an analysis of the most prominent cases P. NOORLANDER, “European Court of Human Rights judgments on the right to freedom of expression – Bulletin XXIX: Focus on obscenity, public morals and freedom of expression”, *Human Rights Action Montenegro* 20 January 2014, 1 – 5, <http://www.hraction.org/wp-content/uploads/Bulletin-XXIX-Obscenity-and-public-morals.pdf> dc 25 May 2015. [↑](#footnote-ref-143)
144. *“The Court considers that the applicant’s conviction and sentence, under section 2 of the Obscenity Act 1959, as amended (“the 1959 Act”) for publishing an obscene article, constituted an interference with his right to freedom of expression”*, ECtHR 18 October 2005, application nr. [5446/03](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#%7B%22appno%22:%5B%225446/03%22%5D%7D) (*Perrin v. United Kingdom*), 5. [↑](#footnote-ref-144)
145. Although the limited scope of this master thesis does not allow for further research into this observation, it is nevertheless *“opined that pornography, as opposed to art, is not philosophically or socially regarded as a precious commodity, but, rather, as a gratuitously venal, ignoble, expedient, and self-indulgent device. It is therefore fundamentally problematic to apply classical scholastic arguments for the protection of freedom of expression to pornography because of the lack of intrinsic value that is habitually found in it. As Dworkin observes, although a right to freedom of expression can, of course, be justified in the interests of individuals and society in general, including regarding even morally shocking entities, pornography is difficult to defend using free speech justifications, not least because it cannot be argued realistically that increasing society’s pornography resources is really an epistemic benefit”,* P. KEARNS, “The Judicial Nemesis : Artistic Freedom and the European Court of Human Rights”, *The Irish Law Journal* 2012, Vol. 1,61 – 62, <http://irishlawjournal.com/wp-content/uploads/2013/05/The-Judicial-Nemesis-Artistic-Freedom-and-the-European-Court-of-Human-Rights.pdf> dc 27 April 2015. [↑](#footnote-ref-145)
146. K. DEMEYER, E. LIEVENS, J. DUMORTIER, “Blocking and Removing Illegal Child Sexual Content: Analysis from a Technical and Legal Perspective”, *Policy & Internet* 2012, 4: 3-4, 11. [↑](#footnote-ref-146)
147. P. KEARNS, “The Judicial Nemesis: Artistic Freedom and the European Court of Human Rights”, *The Irish Law Journal* 2012, Vol. 1,60. [↑](#footnote-ref-147)
148. ECtHR 6 May 2003, application nr. 48898/99 (*Perna v. Italy*), § 39. [↑](#footnote-ref-148)
149. ECtHR 2 December 2008, application nr. 2872/02 (*KU v. Finland*), § 49. [↑](#footnote-ref-149)
150. The quintessential example of excessive government blocking can be found in the case of Ahmet Yildirim v. Turkey (ECtHR 18 December 2012, application nr. 3111/01 (*Ahmet Yildirim v. Turkey*)). [↑](#footnote-ref-150)
151. The same concerns were voiced in the discussions leading up to the adoption of Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography. If the Belgian legislator were to consider drafting dedicated counter revenge porn legislation, the preparatory works to this Directive – as well as the final result – would be to be useful tools. See further K. DEMEYER, E. LIEVENS, J. DUMORTIER, “Blocking and Removing Illegal Child Sexual Content : Analysis from a Technical and Legal Perspective”, *Policy & Internet* 2012, 4: 3-4, 12. [↑](#footnote-ref-151)
152. K. HENRARD, *Mensenrechten vanuit internationaal en nationaal perspectief*, Den Haag, Boom Juridische Uitgevers, 2006, 49 – 56. [↑](#footnote-ref-152)
153. K. LEMMENS, “Misbruiken van de meningsuiting via Internet: is het recht Web 2.0-compatibel? Pleidooi voor een technologieneutrale bescherming van de uitingsvrijheid”, *De orde van de dag* March 2010, Episode 49, 15 – 22. In addition, see Cass. 6 March 2012, AR P.11.1374.N and Cass. 6 March 2012, AR P.11.0855.N which establish that the expression of an opinion on the Internet is not covered by article 25 of the Belgian Constitution, so that the correctional tribunals are competent to rule on abuses of the freedom of speech occurring online. [↑](#footnote-ref-153)
154. See footnote 131, P. KEARNS, “The Judicial Nemesis: Artistic Freedom and the European Court of Human Rights”, *The Irish Law Journal* 2012, Vol. 1,61 – 62. [↑](#footnote-ref-154)
155. C.WEST, “Pornography and Censorship”, *Stanford Encyclopedia of Philosophy* 5 May 2004, revised on 1 October 2012, <http://plato.stanford.edu/entries/pornography-censorship/> dc 25 May 2015. [↑](#footnote-ref-155)
156. *“The restriction of pornography violates Mill’s harm principle and infringes our right to free speech and personal liberty”*, S. BALMER, “The Limits of Free Speech, Pornography and the Law”, *Aberdeen Student Law Review* 2010, Vol. 1, Issue 66, 81, <https://www.abdn.ac.uk/law/documents/steven_balmer.pdf> dc 26 April 2015. [↑](#footnote-ref-156)
157. Given the fact that the majority of revenge porn victims are women, the act itself has an extra gendered dimension. Though men too can be victimized, the fact that women are disproportionately represented in revenge porn cases renders it a women’s rights issue. [↑](#footnote-ref-157)
158. S. LICHTER, “Unwanted Exposure: Civil and Criminal Liability for Revenge Porn Hosts and Posters”, *Harvard Journal of Law & Technology* 28 May 2013, <http://jolt.law.harvard.edu/digest/privacy/unwanted-exposure-civil-and-criminal-liability-for-revenge-porn-hosts-and-posters> dc 10 April 2015. [↑](#footnote-ref-158)
159. M. A. FRANKS, answering FAQ’s at the <http://www.endrevengeporn.org/faqs/> website, dc 28 May 2015. [↑](#footnote-ref-159)
160. EU, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-Commerce Directive). This Directive was implemented into national Belgian law by the Law of 11 March 2003 concerning certain legal aspects of information-society services, *BS* 17 March 2003. (Belgian E-Commerce Act), which in turn was implemented into the Belgian Code of Economic Law (BCEL) by the Law of 15 December 2013 concerning the implementation of Book XII, “Law of electronic economy”, into the Code of Economic Law, and concerning the insertion of the definitions peculiar to Book XII and of the enforcement provisions peculiar to Book XII, into Books I and XV of the Code of Economic Law, *BS* 14 January 2014. [↑](#footnote-ref-160)
161. This model, elaborated under article 25 of the Belgian Constitution, is profoundly outdated and remains highly unworkable in the context of the digitalisation of today’s society. For more on this outdated model, see K. LEMMENS, “Misbruiken van de meningsuiting via Internet: is het recht Web 2.0-compatibel? Pleidooi voor een technologieneutrale bescherming van de uitingsvrijheid”, *De orde van de dag* March 2010, Episode 49, 20 – 21. [↑](#footnote-ref-161)
162. P. VALCKE, M. LENAERTS, A. KUCZERAWY, “Who’s Author, Editor and Publisher of User-Generated content? Applying Traditional Media Concepts to UGC Providers”, *International Review of Law, Computers & Technology* 1 June 2014, 86, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2584916> dc 19 April 2015. [↑](#footnote-ref-162)
163. D. KUR, T. DREIER, *European Intellectual Property Law – Text, Cases & Materials*, Cheltenham, Edward Elgar Publishing Limited, 2013, 449 – 450. [↑](#footnote-ref-163)
164. D. KUR, T. DREIER, *European Intellectual Property Law – Text, Cases & Materials*, Cheltenham, Edward Elgar Publishing Limited, 2013, 450. [↑](#footnote-ref-164)
165. As evidenced by recitals 1, 2 and 3, the EU also intended to boost the development of e-commerce because of its significant employment opportunities, to stimulate economic growth and eventually forge closer links between the States and peoples of Europe. [↑](#footnote-ref-165)
166. Emphasis was added by the author. [↑](#footnote-ref-166)
167. *“When challenged with a civil action (claim for compensation), the mere knowledge of facts or circumstances that indicate the illegal character of the relevant information (‘constructive knowledge’) could thus preempt a claim to the exception”,* K. DEMEYER, E. LIEVENS, J. DUMORTIER, “Blocking and Removing Illegal Child Sexual Content: Analysis from a Technical and Legal Perspective”, *Policy & Internet* 2012, 4: 3-4, 13 – 14. [↑](#footnote-ref-167)
168. K. DEMEYER, E. LIEVENS, J. DUMORTIER, “Blocking and Removing Illegal Child Sexual Content: Analysis from a Technical and Legal Perspective”, *Policy & Internet* 2012, 4: 3-4, 13. [↑](#footnote-ref-168)
169. In a case involving hosting an online platform where users could post links to child pornography websites, the Court of Cassation held that the exemption of article 20 of the E-Commerce Act could not exonerate the website host as his ‘involvement’ was sufficiently proven by the fact that he had purchased the site and further exploited it as a place where – upon his own responsibility – he offered a set of hyperlinks that solely linked to websites featuring child pornography. See S. VANDORME, “Geen strafuitsluiting voor website die alleen verwijst naar kinderporno”, *De Juristenkrant* 10 March 2004, nr. 85, 6. [↑](#footnote-ref-169)
170. K. HILL, “Hunter Moore Will Post Your Nude Photos But Will Only Include Your Home Address If He Thinks You’re A Horrible Person”, *Forbes* 12 May 2012, <http://www.forbes.com/sites/kashmirhill/2012/12/05/hunter-moore-is-going-to-start-posting-your-nude-photos-again-but-will-only-post-your-home-address-if-he-thinks-youre-a-horrible-person/> dc 28 May 2015. [↑](#footnote-ref-170)
171. Z. FRANKLIN, “Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites”, *California Law Review*, 2014, Vol. 102, Issue 5, 1308, <http://scholarship.law.berkeley.edu/californialawreview/vol102/iss5/11/> dc 10 April 2015. [↑](#footnote-ref-171)
172. Z. FRANKLIN, “Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites”, *California Law Review*, 2014, Vol. 102, Issue 5, 1307 - 1308, <http://scholarship.law.berkeley.edu/californialawreview/vol102/iss5/11/> dc 10 April 2015. [↑](#footnote-ref-172)
173. X, “Anonymous Hunts Hunter Moore to Hold Him ‘Accountable’ for His Revenge Porn Empire”, *The Observer* 20 December 2014, <http://observer.com/2012/12/anonymous-hunts-hunter-moore-to-hold-him-accountable-for-his-revenge-porn-empire/> dc 26 April 2015. See also L. LAIRD, “Victims are Taking on ‘Revenge Porn’ Websites for Posting Photos They Didn’t Consent To”, (American Bar Association) *ABA-Journal* 1 November 2013, <http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c> dc 13 April 2015. [↑](#footnote-ref-173)
174. See for instance the case of website operator Craig Britton who offered to take down the intimate images in return for hundreds of dollars using fake take-down notices. FTC, “Website Operator Banned from the ‘Revenge Porn’ Business After FTC Charges He Unfairly Posted Nude Photos”, Press Release FTC in the matter of Craig Britton, 29 January 2015, <https://www.ftc.gov/news-events/press-releases/2015/01/website-operator-banned-revenge-porn-business-after-ftc-charges> dc 10 April 2015. [↑](#footnote-ref-174)
175. See Recital 9 to the E-Commerce Directive. [↑](#footnote-ref-175)
176. P. VALCKE, M. LENAERTS, A. KUCZERAWY, “Who’s Author, Editor and Publisher of User-Generated content? Applying Traditional Media Concepts to UGC Providers”, *International Review of Law, Computers & Technology* 1 June 2014, 91, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2584916> dc 19 April 2015. [↑](#footnote-ref-176)
177. P. VALCKE, M. LENAERTS, A. KUCZERAWY, “Who’s Author, Editor and Publisher of User-Generated content? Applying Traditional Media Concepts to UGC Providers”, *International Review of Law, Computers & Technology* 1 June 2014, 91, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2584916> dc 19 April 2015. [↑](#footnote-ref-177)
178. See for examples of both French and English case law: P. VALCKE, M. LENAERTS, A. KUCZERAWY, “Who’s Author, Editor and Publisher of User-Generated content? Applying Traditional Media Concepts to UGC Providers”, *International Review of Law, Computers & Technology* 1 June 2014, 92 - 93, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2584916> dc 19 April 2015. [↑](#footnote-ref-178)
179. In 2009 a court in Brussels ruled that a ‘host’ within the meaning of the law merely acts on a technical, automated and passive basis so that *a contrario* a platform moderator cannot invoke the exemption of liability (Court of First Instance of Brussels, Department of Brussels, ruling in Civil Matters, 25 November 2009, *AM* 2010, Issue 3, 294); one year earlier another Brussels court held that an intermediary who only provided storage of UGC and who could prove he was a ‘host’ in conformity with the law could rely on the exemption *despite* any other activities this intermediary was involved in through his website or the profits he reeled in, those other activities being subject to general torts law (Court of Commerce of Brussels, Department of Brussels, 31 July 2008, *IRDI* 2008, Issue 3, 244). Equally relevant is French case law: in 2010 the French Court of Cassation held that a website operator who offered the ability to create personal websites to its users and offered ad space for advertisers, all managed by the operator, could *not* be qualified as a mere ‘host’ (FRA, Cour de Cassation 14 January 2010, *AM* 2010, Issue 2, 170); see also FRA, TGI (Tribunal de Grande Instance de Paris) 15 April 2008, *Lafesse v. Dailymotion* where the TGI did not accept the exemption even though it had recognised that the intermediary acted as a ‘host’ within the meaning of the law. With regard to the interpretation of ‘expeditiously’, see Court of Commerce of Leuven, Department of Leuven, ruling by the President of the Court on urgent matters, 5 May 2009, *Jaarboek Handelspraktijken & Mededinging* 2009, 492. [↑](#footnote-ref-179)
180. Even before the E-Commerce Directive came into play, Belgian courts had established that no general duty to monitor online content rested on ISPs. See for instance Court of First Instance of the Province of Limburg, Department of Hasselt, ruling in Criminal Matters (18th Chamber), 17 November 2000, *AM* 2001, Issue 1, 161. [↑](#footnote-ref-180)
181. Court of Commerce of Brussels, Department of Brussels, 31 July 2008, *IRDI* 2008, Issue 3, 244. [↑](#footnote-ref-181)
182. FRA, TGI (Tribunal de Grande Instance de Paris) 15 April 2008, *Lafesse v. Dailymotion*. [↑](#footnote-ref-182)
183. Court of Commerce of Brussels, Department of Brussels, 31 July 2008, *IRDI* 2008, Issue 3, 244). [↑](#footnote-ref-183)
184. Preparatory Legislative Documents for the Law of 11 March 2003 concerning certain legal aspects of information-society services, *Parliamentary Document* Chamber of Representatives and Senate 2002 – 2003, no. 50S1480. [↑](#footnote-ref-184)
185. See also Recitals 13 and 14 to the E-Commerce Directive. [↑](#footnote-ref-185)
186. See for a more thorough analysis of self-help: O.S. KERR, “Virtual Crime, Virtual Deterrence: A Skeptical View of Self-Help, Architecture and Civil Liberty”, *Journal of Law, Economics & Policy* 1 January 2005, Vol. 1, 1 – 28, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=605964> dc 14 May 2015; and K. DEMEYER, E. LIEVENS, J. DUMORTIER, “Blocking and Removing Illegal Child Sexual Content: Analysis from a Technical and Legal Perspective”, *Policy & Internet* 2012, 4: 3-4, 14 – 16. [↑](#footnote-ref-186)
187. See articles 46*bis* §2, 88*bis* §2 and 90*quater* §2 of the Belgian Criminal Prosecution Code. See also H. BERKMOES, “Identificatie van (gebruikers van) elektronische communicatie”, in X., *Postal Memoralis. Lexicon strafrecht, strafvordering en bijzondere wetten*, Kluwer, Mechelen, 2014, 3/18; K. DE SCHEPPER, F. VERBRUGGEN, “Ontsnappen *space invaders* aan onze *pacmannen*? De materiële en formele strafrechtsmacht van België bij strafbare weigering van medewerking door elektronische dienstverleners”, *T. Strafr.* 2013, Vol. 3, 152 – 156. [↑](#footnote-ref-187)
188. ECJ 24 November 2011, C-70/10 (*Scarlet v. SABAM).* [↑](#footnote-ref-188)
189. B. TSHIANANGA, “Europees Hof van Justitie: Filtering in strijd met Europees recht”, *Timelex online blog* 24 November 2011, <http://www.timelex.eu/nl/blog/detail/europees-hof-van-justitie-filtering-in-strijd-met-europees-recht> dc 27 May 2015. [↑](#footnote-ref-189)
190. ECJ 16 February 2012, C-36/10 (*SABAM v. Netlog)*, see also F. COUDERT, “SABAM v. Netlog: ECJ confirms general filtering systems installed for the prevention of copyright infringements are disproportionate”, *Timelex online blog* 16 February 2012, <http://www.timelex.eu/nl/blog/detail/sabam-v-netlog-ecj-confirms-general-filtering-systems-installed-for-the-prevention-of-copyright-infringements-are-disproportionate> dc 27 May 2015. [↑](#footnote-ref-190)
191. See A. HAMDANI, “Who’s Liable for Cyberwrongs?”, *Cornell Law Review* May 2002, Vol. 87, Issue 4, 918, <http://scholarship.law.cornell.edu/clr/vol87/iss4/1> dc 30 May 2015; N.K. KATYAL, “Criminal Law in Cyberspace”, *University of Pennsylvania Law Review* 2001, Vol. 149, 1007 – 1008, <http://scholarship.law.upenn.edu/penn_law_review/vol149/iss4/2/> dc 30 May 2015. [↑](#footnote-ref-191)
192. See the publisher model under article 25 of the Belgian Constitution *supra*. [↑](#footnote-ref-192)
193. D. LICHTMAN, E. POSNER, “Holding Internet Service Providers Accountable”, University of Chicago Law & Economics, Olin Working Paper No. 217, July 2004, 2, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=573502> dc 15 May 2015. [↑](#footnote-ref-193)
194. Even on a global scale, the leniency of §230 CDA exceeds most national liability exemptions for ISPs, see J. HUGHES, “The Internet and the Persistence of Law”, *Boston College Law Review* 2003, Vol. 43, 380, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=370380> dc 27 May 2015. [↑](#footnote-ref-194)
195. The prime objective of revenge porn victims is not financial compensation but the removal of the images. Law should reflect this, in addition to adequate deterrence. See A.N. KITCHEN, “The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment”, *Chicago-Kent Law Review* 30 January 2015, Vol. 90, Issue 1, 251, <http://scholarship.kentlaw.iit.edu/cklawreview/vol90/iss1/11> 11 April 2015. [↑](#footnote-ref-195)
196. This happened to Sweden due to its lack of adequate criminal laws punishing voyeurism, another crime that is still legal in Belgium. See ECtHR 12 November 2013, application nr. 5786/08 (*Söderman v. Sweden*) and S. VANDORME, “Zijn het stiekem filmen van seksuele betrekkingen en andere vormen van voyeurisme strafbaar als aanranding van de eerbaarheid?”, *T. Strafr.* 2014, Vol. 6, Issue 41, 367 – 368. [↑](#footnote-ref-196)
197. Emphasis added by author, M.A. FRANKS, “Why We Need a Federal Criminal Law Response to Revenge porn”, *Concurring Opinions* 15 February 2013, <http://concurringopinions.com/archives/2013/02/why-we-need-a-federal-criminal-law-response-to-revenge-porn.html> dc 27 April 2015. [↑](#footnote-ref-197)
198. S. LICHTER, “Unwanted Exposure: Civil and Criminal Liability for Revenge Porn Hosts and Posters”, *Harvard Journal of Law & Technology* 28 May 2013, <http://jolt.law.harvard.edu/digest/privacy/unwanted-exposure-civil-and-criminal-liability-for-revenge-porn-hosts-and-posters> dc 10 April 2015. [↑](#footnote-ref-198)
199. A.N. KITCHEN, “The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment”, *Chicago-Kent Law Review* 30 January 2015, Vol. 90, Issue 1, 251, <http://scholarship.kentlaw.iit.edu/cklawreview/vol90/iss1/11> 11 April 2015. [↑](#footnote-ref-199)
200. M.A. FRANKS on <http://www.endrevengeporn.org/faqs/> dc 30 May 2015. [↑](#footnote-ref-200)
201. D. KEATS-CITRON, “Law’s Expressive Value in Combating Cyber Gender Harassment”, *Michigan Law Review* 2009, Vol. 108, 377, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1352442> dc 18 April 2015. [↑](#footnote-ref-201)
202. A. BARAK, “Sexual Harassment on the Internet”, *Social Science Computer Review* Spring 2005, Vol. 23, Issue 1, 81, <http://ssc.sagepub.com/content/23/1/77.abstract> dc 23 April 2015; *“Any existing statistical evidence surrounding cyber gender harassment is likely to underestimate the phenomenon as women tend to underreport it due to feelings of shame and embarrassment”* citing D. KEATS-CITRON, “Law’s Expressive Value in Combating Cyber Gender Harassment”, *Michigan Law Review* 2009, Vol. 108, 373, under footnote 1, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1352442> dc 18 April 2015. [↑](#footnote-ref-202)
203. In March 2015 a campaign started in Belgium by blogger Yasmine Schillebeeckx went viral under the hashtag #wijoverdrijvenniet after she posted an article on how she resented the trivialisation of everyday sexism and harassment, urging women everywhere to share their stories. The movement got an overwhelming response, gained massive media attention and was successful at raising awareness for the engrained sexism and misogyny that women encounter daily. The original blogpost can be found at Y. SCHILLEBEECKX, “Mijn naam is niet ‘hey sexy’”, blogpost of 7 March 2015, <http://www.thespectacularreality.com/2015/03/07/mijn-lichaam-is-van-mij/> dc 30 May 2015. For more information about the campaign itself, visit <http://wijoverdrijvenniet.org/>. [↑](#footnote-ref-203)
204. D. KEATS-CITRON, “Law’s Expressive Value in Combating Cyber Gender Harassment”, *Michigan Law Review* 2009, Vol. 108, 373 - 374, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1352442> dc 18 April 2015. [↑](#footnote-ref-204)
205. M.A. FRANKS on <http://www.endrevengeporn.org/faqs/> dc 30 May 2015. [↑](#footnote-ref-205)
206. The earliest court case was brought against Hustler Magazine, which had published (in print – offline) an image without the consent of the person pictured. See: Hustler Beaver Hunt: United States Court of Appeals, 5th Circuit, Judgment of 11 September 1984, *Lajuan and Billy Wood v. Hustler Magazine Inc.*, S.D. Tex. 736 F.2d 108410, <http://www.ecases.us/case/ca5/441918/wood-v-hustler-magazine-inc> dc 16 April 2015. [↑](#footnote-ref-206)
207. See for an extensive analysis on current federal criminal law J. D. LIPTON, “Combating Cyber-Victimization”, *Berkeley Technology Law Journal* March 2011, Vol. 26, Issue 2, 1119 - 1122, <http://scholarship.law.berkeley.edu/btlj/vol26/iss2/5> dc 25 April 2015. [↑](#footnote-ref-207)
208. See M.A. FRANKS at <http://www.endrevengeporn.org/related-laws/> dc 30 May 2015. [↑](#footnote-ref-208)
209. In one case the plaintiff was awarded 435,000 USD for intentional infliction of emotional distress, defamation and public disclosure of private fact. District Court of Hawaii, District of Hawaii, Judgment of 11 July 2011, *Taylor v. Franko*, No. 09-00002 JMS/RLP, <http://www.gpo.gov/fdsys/pkg/USCOURTS-hid-1_09-cv-00002/pdf/USCOURTS-hid-1_09-cv-00002-2.pdf> dc 25 June 2015. Also worth mentioning is one of the first ‘analogue’ (offline) revenge porn cases in which the court held that porn magazine Hustler had committed an invasion of privacy *“both by publicly disclosing private facts in an offensive manner and by placing them in an offensive false light.”* The court awarded the plaintiff an amount of 150.000,00 USD in compensatory damages. See United States Court of Appeals, 5th Circuit, Judgment of 11 September 1984, *Lajuan and Billy Wood v. Hustler Magazine Inc.*, S.D. Tex. 736 F.2d 108410, <http://www.ecases.us/case/ca5/441918/wood-v-hustler-magazine-inc> dc 16 April 2015. [↑](#footnote-ref-209)
210. Section 230 refers to §230 CDA. A. LEVENDOWSKI, “Using Copyright to Combat Revenge Porn”, *NYU Journal of Intellectual Property & Entertainment Law* 2014, Vol. 3, 431, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2374119> dc 22 April 2015. [↑](#footnote-ref-210)
211. D. KEATS-CITRON, M. A. FRANKS, “Criminalizing Revenge Porn”, *Wake Forest Law Review*, 2014, Vol. 49, 104, <http://digitalcommons.law.umaryland.edu/fac_pubs/1420/> dc 10 April 2015. [↑](#footnote-ref-211)
212. A. LEVENDOWSKI, “Using Copyright to Combat Revenge Porn”, *NYU Journal of Intellectual Property & Entertainment Law* 2014, Vol. 3, 439, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2374119> dc 22 April 2015; A. BARTOW, "Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law", *American University Journal of Gender, Social Policy & the Law* 2006, Vol. 14, Issue 3, 551 – 584, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=902632> dc 17 May 2015. In this essay, Bartow suggests limiting the scope of copyright protection to imagery which is not harmful to the person (women) pictured, especially directed to excluding certain types of violent pornography. See also A. BARTOW, A., "Pornography, Coercion, and Copyright Law 2.0", *Vanderbilt Journal of Entertainment and Technology Law* 2008, 10.4, 101-142, <http://works.bepress.com/ann_bartow/31> dc 14 April 2015; and W.E. WELLS, "Protecting The Victims Of Child Pornography: An Analysis Of The Current State Of The Law, With A View Towards Amending The CDA 230 Safe Harbor", *eRepository@Seton Hall Law* 1 May 2014, 1 – 26, <http://scholarship.shu.edu/student_scholarship/605> dc 16 April 2015. [↑](#footnote-ref-212)
213. 47 USC. § 230 (1)(2) – *“Nothing in this section shall be construed to limit or expand and any law pertaining to intellectual property”.* [↑](#footnote-ref-213)
214. S.W. HALPER, “Copyright Law and the Challenge of Digital Technology”, in L. P. GROSS, J. S. KATZ, J. RUBY (eds.), *Image Ethics in the Digital Age*, Minnesota University Press, Minneapolis, 2003, 151. [↑](#footnote-ref-214)
215. As most victims of revenge porn are women, I will sporadically refer to the victim as ‘her’/’she’. This is of course not to say that men do not fall victim to revenge porn. [↑](#footnote-ref-215)
216. 17 USC. 412. Citing A. N. KITCHEN, “The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment”, *Chicago-Kent Law Review* 30 January 2015, Vol. 90, Issue 1, 258, <http://scholarship.kentlaw.iit.edu/cklawreview/vol90/iss1/11> 11 April 2015. [↑](#footnote-ref-216)
217. Payment of a registration fee is also required. See for more details <http://www.copyright.gov/onlinesp/> dc 30 June 2015. [↑](#footnote-ref-217)
218. *“In 2010, Rutgers University student Dahrun Ravi was charged under the New Jersey statute after he secretly filmed his roommate Tyler Clementi having sex with a man and watched the live feed with six friends”*, driving Clementi to commit suicide the next day when he found out about the incident, D. KEATS-CITRON, M. A. FRANKS, “Criminalizing Revenge Porn”, *Wake Forest Law Review* 2014, Vol. 49, 124, <http://digitalcommons.law.umaryland.edu/fac_pubs/1420/> dc 10 April 2015. More in general regarding sexual cyber-harassment see J. DAHL, “Audrie Pott, Rehteah Parsons suicides show sexual cyber-bullying is ‘pervasive’ and ‘getting worse,’ expert says”, *CBS News site* 12 April 2013, <http://www.cbsnews.com/news/audrie-pott-rehtaeh-parsons-suicides-show-sexual-cyber-bulling-is-pervasive-and-getting-worse-expert-says/> dc 3 July 2015. [↑](#footnote-ref-218)
219. M. A. FRANKS answering FAQ’s online at <http://www.endrevengeporn.org/faqs/> dc 30 May 2015. [↑](#footnote-ref-219)
220. Arkansas, Florida, Louisiana, New Mexico, Nevada, North Dakota, Oregon, Utah, Vermont, District of Columbia, Washington and Maine. See <http://www.cagoldberglaw.com/states-with-revenge-porn-laws/> dc 1 August 2015. [↑](#footnote-ref-220)
221. See <http://www.cagoldberglaw.com/states-with-revenge-porn-laws/> dc 2 July 2015. [↑](#footnote-ref-221)
222. States that remain silent are Alabama, Indiana, Iowa, Michigan, Minnesota, Mississippi, New Hampshire, North Carolina, Ohio, Oklahoma, Rhode Island, South Dakota, West Virginia and Wyoming. [↑](#footnote-ref-222)
223. M. A. FRANKS on <http://www.endrevengeporn.org/faqs/> dc 2 July 2015. [↑](#footnote-ref-223)
224. It carries a prison sentence of three to five years. See the New Jersey Code of Criminal Justice Section 2C: 14-9 - Invasion of privacy, degree of crime; defences, privileges ([NJ Rev Stat § 2C:14-9 (2013)](http://law.justia.com/citations.html)), <http://law.justia.com/codes/new-jersey/2013/title-2c/section-2c-14-9/> dc 28 June 2015 (Annex III). See also C. J. NAJDOWSKI, M. M. HILDEGRAND, “The Criminalization of Revenge Porn”, *Monitor on Psychology* January 2014, Vol. 45, Issue 1, <http://www.apa.org/monitor/2014/01/jn.aspx> dc 11 April 2015. [↑](#footnote-ref-224)
225. C. MARTINEZ, “An Argument for States to Outlaw ‘Revenge Porn’ and for Congress to Amend 47 USC. § 230: How Our Current Laws Do Little to Protect Victims”, *Pittsburgh Journal of Technology Law & Policy* Spring 2014, Vol. 14, Nr. 2, 241 <http://tlp.law.pitt.edu/ojs/index.php/tlp/article/view/141> dc 16 April 2015. [↑](#footnote-ref-225)
226. A. N. KITCHEN, “The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment”, *Chicago-Kent Law Review* 30 January 2015, Vol. 90, Issue 1, 267, <http://scholarship.kentlaw.iit.edu/cklawreview/vol90/iss1/> 11 April 2015. [↑](#footnote-ref-226)
227. M. A. FRANKS, “Combating Non-Consensual Pornography – A Working Paper”, last edited 7 October 2013, 9, <http://www.endrevengeporn.org/main_2013/wp-content/uploads/2013/10/Franks-NCP-Working-Paper-10.7.pdf> dc 3 July 2015. [↑](#footnote-ref-227)
228. Maryland’s bill for one clearly mirrors the New Jersey approach. D. KEATS-CITRON, M. A. FRANKS, “Criminalizing Revenge Porn”, *Wake Forest Law Review* 2014, Vol. 49, 124, <http://digitalcommons.law.umaryland.edu/fac_pubs/1420/> dc 10 April 2015. [↑](#footnote-ref-228)
229. [NJ Rev Stat § 2C:14-9, 1st para. (2013)](http://law.justia.com/citations.html). [↑](#footnote-ref-229)
230. A. GILDEN, “Cyberbullying and the Innocence Narrative”, *Harvard Civil Rights – Civil Liberties Law Review* 2013, Vol. 48, 383 – 384, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208737> dc 3 July 2015. [↑](#footnote-ref-230)
231. B. GILES, “State Legislators retaliate against ‘revenge porn’”, *LegalNews.com* 25 December 2013, <http://www.legalnews.com/detroit/1384213> dc 4 July 2015. [↑](#footnote-ref-231)
232. *“c. […] Notwithstanding the provisions of subsection b. of N.J.S.2C:43-3, a fine not to exceed $30,000 may be imposed for a violation of this subsection* “, NJ Rev Stat § 2C:14-9 (2013). [↑](#footnote-ref-232)
233. C. MARTINEZ, “An Argument for States to Outlaw ‘Revenge Porn’ and for Congress to Amend 47 USC. § 230: How Our Current Laws Do Little to Protect Victims”, *Pittsburgh Journal of Technology Law & Policy* Spring 2014, Vol. 14, Nr. 2, 241, <http://tlp.law.pitt.edu/ojs/index.php/tlp/article/view/141> dc 16 April 2015. [↑](#footnote-ref-233)
234. NJ Rev Stat § 2C:14-9 (2013). [↑](#footnote-ref-234)
235. Thus providing *“protection for the adult film industry and other instances where individuals give consent to have their nude images distributed or published”,* C. MARTINEZ, “An Argument for States to Outlaw ‘Revenge Porn’ and for Congress to Amend 47 USC. § 230: How Our Current Laws Do Little to Protect Victims”, *Pittsburgh Journal of Technology Law & Policy* Spring 2014, Vol. 14, Nr. 2, 241 <http://tlp.law.pitt.edu/ojs/index.php/tlp/article/view/141> dc 16 April 2015. [↑](#footnote-ref-235)
236. M. A. FRANKS, “Drafting an Effective ‘Revenge Porn Law’: A Guide for Legislators”, *End Revenge Porn* Online 18 July 2014, 3, <http://www.endrevengeporn.org/main_2013/wp-content/uploads/2014/08/Guide-for-Legislators_7-18-14.pdf> dc 25 April 2015. [↑](#footnote-ref-236)
237. Highlights added by the author. California Penal Code Section 647(j)(4)(A) & (B) (CA Penal Code § 647(j)(4)(A)-(B)(2013)), <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=pen&group=00001-01000&file=639-653.2> dc 28 June 2015 (Annex III). [↑](#footnote-ref-237)
238. C. J. NAJDOWSKI, M. M. HILDEGRAND, “The Criminalization of Revenge Porn”, *Monitor on Psychology* January 2014, Vol. 45, Issue 1, <http://www.apa.org/monitor/2014/01/jn.aspx> dc 11 April 2015. See also the Press Release of 2 October 2013, <http://www.cybercivilrights.org/press_releases> dc 4 July 2015. [↑](#footnote-ref-238)
239. C. MARTINEZ, “An Argument for States to Outlaw ‘Revenge Porn’ and for Congress to Amend 47 USC. § 230: How Our Current Laws Do Little to Protect Victims”, *Pittsburgh Journal of Technology Law & Policy* Spring 2014, Vol. 14, Nr. 2, 243, <http://tlp.law.pitt.edu/ojs/index.php/tlp/article/view/141> dc 16 April 2015. [↑](#footnote-ref-239)
240. See *supra* footnote 22. [↑](#footnote-ref-240)
241. C. GOLDBERG, “Seven Reasons Illinois is Leading the Fight Against Revenge Porn”, *End Revenge Porn* Online 31 December 2014, <http://www.endrevengeporn.org/seven-reasons-illinois-leading-fight-revenge-porn/> dc 25 April 2015. [↑](#footnote-ref-241)
242. Also referred to as the Computer Fraud and Abuse Act. See 18 USC 1030 ‘Fraud and Related Activity in Connection with Computers’ Chapter 47, <http://uscode.house.gov/browse/prelim@title18/part1/chapter47&edition=prelim> dc 7 July 2015. [↑](#footnote-ref-242)
243. E. GOLDMAN, “California’s New Law Shows It’s Not Easy to Regulate Revenge Porn”, *Tech., Mktg. & L. Blog* 16 October 2013, <http://www.forbes.com/sites/ericgoldman/2013/10/08/californias-new-law-shows-its-not-easy-to-regulate-revenge-porn/> dc 4 July 2015. See also Annex III for the current text of the law. [↑](#footnote-ref-243)
244. C. MARTINEZ, “An Argument for States to Outlaw ‘Revenge Porn’ and for Congress to Amend 47 USC. § 230: How Our Current Laws Do Little to Protect Victims”, *Pittsburgh Journal of Technology Law & Policy* Spring 2014, Vol. 14, Nr. 2, 243, <http://tlp.law.pitt.edu/ojs/index.php/tlp/article/view/141> dc 16 April 2015. [↑](#footnote-ref-244)
245. E. GOLDMAN, “California’s New Law Shows It’s Not Easy to Regulate Revenge Porn”, *Tech., Mktg. & L. Blog* 16 October 2013, <http://www.forbes.com/sites/ericgoldman/2013/10/08/californias-new-law-shows-its-not-easy-to-regulate-revenge-porn/> dc 4 July 2015. [↑](#footnote-ref-245)
246. . N. KITCHEN, “The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment”, *Chicago-Kent Law Review* 30 January 2015, Vol. 90, Issue 1, 272, <http://scholarship.kentlaw.iit.edu/cklawreview/vol90/iss1/> 11 April 2015. [↑](#footnote-ref-246)
247. Actual proof that the victim has effectively suffered such distress is equally required though is not expected to be problematic. Demanding proof of harm avoids overreach and is encouraged. See D. KEATS-CITRON, M. A. FRANKS, “Criminalizing Revenge Porn”, *Wake Forest Law Review* 2014, Vol. 49, 138, <http://digitalcommons.law.umaryland.edu/fac_pubs/1420/> dc 10 April 2015. [↑](#footnote-ref-247)
248. A. N. KITCHEN, “The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment”, *Chicago-Kent Law Review* 30 January 2015, Vol. 90, Issue 1, 281 – 282, <http://scholarship.kentlaw.iit.edu/cklawreview/vol90/iss1/11> 11 April 2015. [↑](#footnote-ref-248)
249. Utah for instance (Utah H.B. 71 at <http://le.utah.gov/~2014/bills/static/HB0071.html> dc 7 July 2015). A. FRANKS, “Drafting an Effective ‘Revenge Porn Law’: A Guide for Legislators”, *End Revenge Porn* Online 18 July 2014, 3, <http://www.endrevengeporn.org/main_2013/wp-content/uploads/2014/08/Guide-for-Legislators_7-18-14.pdf> dc 25 April 2015. [↑](#footnote-ref-249)
250. *“Criminal intent. The state of mind indicating culpability which is required by statute as an element of a crime*”. See, e.g. [Staples v. United States, 511 US 600 (1994)](http://www.law.cornell.edu/wex-cgi/wexlink?wexns=USR&wexname=511:600)”, <https://www.law.cornell.edu/wex/mens_rea> dc 4 July 2015. See also D. KEATS-CITRON, D., M. A. FRANKS, “Criminalizing Revenge Porn”, *Wake Forest Law Review* 2014, Vol. 49, 136 – 137, <http://digitalcommons.law.umaryland.edu/fac_pubs/1420/> dc 10 April 2015. [↑](#footnote-ref-250)
251. M. A. FRANKS, “Drafting an Effective ‘Revenge Porn Law’: A Guide for Legislators”, *End Revenge Porn* Online 18 July 2014, 3, <http://www.endrevengeporn.org/main_2013/wp-content/uploads/2014/08/Guide-for-Legislators_7-18-14.pdf> dc 25 April 2015. [↑](#footnote-ref-251)
252. Highlights and demarcations added by the author. M. A. FRANKS, “Drafting an Effective ‘Revenge Porn Law’: A Guide for Legislators”, *End Revenge Porn* Online 18 July 2014, 3, <http://www.endrevengeporn.org/main_2013/wp-content/uploads/2014/08/Guide-for-Legislators_7-18-14.pdf> dc 25 April 2015. [↑](#footnote-ref-252)
253. More precisely, the misdemeanour of ‘disorderly conduct’, D. KEATS-CITRON, D., M. A. FRANKS, “Criminalizing Revenge Porn”, *Wake Forest Law Review* 2014, Vol. 49, 126, <http://digitalcommons.law.umaryland.edu/fac_pubs/1420/> dc 10 April 2015. [↑](#footnote-ref-253)
254. Illinois Criminal Code Section 11- 23.5 (720 ILCS 5/11-23.5 (2015)), <http://www.ilga.gov/legislation/ilcs/ilcs4.asp?ActID=1876&ChapterID=53&SeqStart=17800000&SeqEnd=25000000> dc 28 June 2015 (Annex III). [↑](#footnote-ref-254)
255. For more information on their past achievements visit <http://www.cybercivilrights.org/>. [↑](#footnote-ref-255)
256. See Annex III. [↑](#footnote-ref-256)
257. See Annex III. [↑](#footnote-ref-257)
258. M. A. FRANKS, “Drafting an Effective ‘Revenge Porn Law’ : A Guide for Legislators”, *End Revenge Porn* Online 18 July 2014, 4, <http://www.endrevengeporn.org/main_2013/wp-content/uploads/2014/08/Guide-for-Legislators_7-18-14.pdf> 25 April 2015. [↑](#footnote-ref-258)
259. C. GOLDBERG, “Seven Reasons Illinois is Leading the Fight Against Revenge Porn”, *End Revenge Porn* Online 31 December 2014, <http://www.endrevengeporn.org/seven-reasons-illinois-leading-fight-revenge-porn/> dc 25 April 2015. [↑](#footnote-ref-259)
260. 720 IlCS 5/11-23.5 (b). [↑](#footnote-ref-260)
261. In the event that the photograph is posted without any other additional descriptions that would still allow for identification. [↑](#footnote-ref-261)
262. See *supra* footnote 12. [↑](#footnote-ref-262)
263. C. GOLDBERG, “Seven Reasons Illinois is Leading the Fight Against Revenge Porn”, *End Revenge Porn* Online 31 December 2014, <http://www.endrevengeporn.org/seven-reasons-illinois-leading-fight-revenge-porn/> dc 25 April 2015. [↑](#footnote-ref-263)
264. 720 ILCS 5/11-23.5 (2015). [↑](#footnote-ref-264)
265. C. GOLDBERG, “Seven Reasons Illinois is Leading the Fight Against Revenge Porn”, *End Revenge Porn* Online 31 December 2014, <http://www.endrevengeporn.org/seven-reasons-illinois-leading-fight-revenge-porn/> dc 25 April 2015.

     720 ILCS 5/11-23.5 (2015). [↑](#footnote-ref-265)
266. A. N. KITCHEN, “The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment”, *Chicago-Kent Law Review* 30 January 2015, Vol. 90, Issue 1, 269, <http://scholarship.kentlaw.iit.edu/cklawreview/vol90/iss1/> 11 April 2015. [↑](#footnote-ref-266)
267. A. N. KITCHEN, “The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment”, *Chicago-Kent Law Review* 30 January 2015, Vol. 90, Issue 1, 276, <http://scholarship.kentlaw.iit.edu/cklawreview/vol90/iss1/> 11 April 2015. [↑](#footnote-ref-267)
268. M. A. FRANKS, “Why We Need a Federal Criminal Law Response to Revenge porn”, *Concurring Opinions* 15 February 2013, <http://concurringopinions.com/archives/2013/02/why-we-need-a-federal-criminal-law-response-to-revenge-porn.html> dc 27 April 2015. [↑](#footnote-ref-268)
269. To name just a few, the list includes Alabama, Mississippi, Wyoming and South Dakota. See X, “How red or blue is your state?”, *The Hill* 24 October 2014, <http://thehill.com/blogs/ballot-box/house-races/221721-how-red-or-blue-is-your-state> dc 5 July 2015. [↑](#footnote-ref-269)
270. American conservatives are known for their reluctance to seriously addressing and furthering women’s issues and advancing women’s rights. See C. WOLBRECHT, *The Politics of Women’s Rights – Parties, Positions and Change*, Princeton, Princeton University Press, 2000, “ 3 – 22; see also for the current debate on legal abortion and the possible reversal of *Roe v. Wade*, T. CULP-RESSLER, “House GOP schedules Vote on a National Abortion Ban”, *ThinkProgress Online* 13 January 2015, <http://thinkprogress.org/health/2015/01/13/3611027/house-gop-abortion-vote/> dc 8 August 2015. The GOP anti-abortion bill was ultimately pulled before being voted. A. ROGERS, “House GOP Pulls Anti-Abortion Bill on Roe v. Wade Anniversary”, *Time Magazine Online*  22 January 2015, <http://time.com/3678280/house-republicans-abortion-bill/> dc 8 August 2015. [↑](#footnote-ref-270)
271. A. N. KITCHEN, “The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment”, *Chicago-Kent Law Review* 30 January 2015, Vol. 90, Issue 1, 269, <http://scholarship.kentlaw.iit.edu/cklawreview/vol90/iss1/> 11 April 2015. See further *infra* title 4.3. [↑](#footnote-ref-271)
272. C. MARTINEZ, “An Argument for States to Outlaw ‘Revenge Porn’ and for Congress to Amend 47 USC. § 230: How Our Current Laws Do Little to Protect Victims”, *Pittsburgh Journal of Technology Law & Policy* Spring 2014, Vol. 14, Nr. 2, 244, <http://tlp.law.pitt.edu/ojs/index.php/tlp/article/view/141> dc 16 April 2015. [↑](#footnote-ref-272)
273. For an elaborate analysis of these acts and the reasons why they are inadequate in providing recourse for every revenge porn victim, I refer the reader to FRANKS, M. A., “Combating Non-Consensual Pornography – A Working Paper”, last edited 7 September 2014, 6 – 7, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336537> dc 3 July 2015. [↑](#footnote-ref-273)
274. Congresswoman Speier has been a vocal champion of women’s rights in the past. Some of her previous achievements can be found at <http://speier.house.gov/index.php?option=com_content&view=article&id=389&Itemid=72> dc 6 July 2015. [↑](#footnote-ref-274)
275. M. A. FRANKS, “How to Defeat ‘Revenge Porn’: First, Recognize It’s About Privacy, Not Revenge”, *Huffington Post Online* 22 June 2015, <http://www.huffingtonpost.com/mary-anne-franks/how-to-defeat-revenge-porn_b_7624900.html> dc 5 July 2015. [↑](#footnote-ref-275)
276. S. NELSON, “Congress Set to Examine Revenge Porn”, *USNews Online* 30 July 2015, <http://www.usnews.com/news/articles/2015/07/30/congress-set-to-examine-revenge-porn> dc 2 August 2015. [↑](#footnote-ref-276)
277. *“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press […]”* US Constitution, First Amendment, <https://www.law.cornell.edu/constitution/first_amendment> dc 13 April 2015. [↑](#footnote-ref-277)
278. United States Supreme Court, Judgment of 13 May 2002, *Ashcroft v. American Civil Liberties Union*, 535 US 564, 573, <https://www.law.cornell.edu/supct/html/00-1293.ZO.html> dc 16 July 2015. [↑](#footnote-ref-278)
279. D. KEATS-CITRON, “Cyber Civil Rights”, *Boston University Law Review* 2009, Vol. 89, 101, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1271900> dc 23 April 2015. [↑](#footnote-ref-279)
280. P. KEARNS, “The Judicial Nemesis: Artistic Freedom and the European Court of Human Rights”, *The Irish Law Journal* 2012, Vol. 1,84, <http://irishlawjournal.com/wp-content/uploads/2013/05/The-Judicial-Nemesis-Artistic-Freedom-and-the-European-Court-of-Human-Rights.pdf> dc 27 April 2015. [↑](#footnote-ref-280)
281. A. N. KITCHEN, “The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment”, *Chicago-Kent Law Review* 30 January 2015, Vol. 90, Issue 1, 274, <http://scholarship.kentlaw.iit.edu/cklawreview/vol90/iss1/> 11 April 2015. [↑](#footnote-ref-281)
282. United States Supreme Court, Judgment of 24 February 1988, *Hustler Magazine, Inc. v. Falwell*, 485 US 46, 55, <https://www.law.cornell.edu/supremecourt/text/485/46> dc 14 July 2015. [↑](#footnote-ref-282)
283. United States Supreme Court, Judgment of 3 July 1978, *FCC v. Pacifica Foundation*, 438 US 726, 745, <https://supreme.justia.com/cases/federal/us/438/726/case.html> dc 14 July 2015. [↑](#footnote-ref-283)
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288. *“Any attempt to control pornography would be resisted by liberal theorists, who would emphasise the right to consume pornography, in the absence of a proven harm”*, S. BALMER, “The Limits of Free Speech, Pornography and the Law”, *Aberdeen Student Law Review* 2010, Vol. 1, Issue 66, 68, [https://www.abdn.ac.uk/law/documents/steven\_balmer.pdf dc 26 April 2015](https://www.abdn.ac.uk/law/documents/steven_balmer.pdf%20dc%2026%20April%202015). [↑](#footnote-ref-288)
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290. M.A. FRANKS, “Why We Need a Federal Criminal Law Response to Revenge porn”, *Concurring Opinions* 15 February 2013, <http://concurringopinions.com/archives/2013/02/why-we-need-a-federal-criminal-law-response-to-revenge-porn.html> dc 27 April 2015. See also D. KEATS-CITRON, “Cyber Civil Rights”, *Boston University Law Review* 2009, Vol. 89, 101 - 106, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1271900> dc 23 April 2015. [↑](#footnote-ref-290)
291. United States Supreme Court, Judgment of 21 June 1973, *Miller v. California*, 413 US 15, 24, <https://supreme.justia.com/cases/federal/us/413/15/> dc 7 July 2015. [↑](#footnote-ref-291)
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293. United States Supreme Court, Judgment of 26 June 1997, *Reno v. American Civil Liberties Union*, 521 US 844, <https://supreme.justia.com/cases/federal/us/521/844/> dc 19 July 2015. [↑](#footnote-ref-293)
294. *“[N]o one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive ‘hard core’ sexual conduct specifically defined by the regulating state law, as written or construed”,* United States Supreme Court, Judgment of 21 June 1973, *Miller v. California*, 413 US 15, 27, <https://supreme.justia.com/cases/federal/us/413/15/> dc 7 July 2015. [↑](#footnote-ref-294)
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353. And, by default, ISPs. [↑](#footnote-ref-353)
354. *”‘Image’ includes a photograph, film, videotape, digital recording […] of an object, including a human body”,* 720 IlCS 5/11-23.5 (a). See also Annex III, c. [↑](#footnote-ref-354)
355. *“‘Sexual activity’ means any: (3) knowing touching or fondling by the victim or another person or animal, either directly or through clothing, of the sex organs, anus, or breast of the victim or another person or animal for the purpose of sexual gratification or arousal; or (4) any transfer or transmission of semen upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or another; (…)”,*720 IlCS 5/11-23.5 (a). See also Annex III, c. [↑](#footnote-ref-355)
356. To ‘disclose’ is: *“to sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise or offer”,* NJ Rev Stat § 2C:14-9, 1st para., c) (2013). See also Annex III, a. [↑](#footnote-ref-356)
357. See for example NJ Rev Stat § 2C:14-9, 1st para. d) – g). Annex III, a. [↑](#footnote-ref-357)
358. California Penal Code Section 647(j)(4)(A) & (B) (CA Penal Code § 647(j)(4)(A)-(B)(2013)). Also see Annex III, b. [↑](#footnote-ref-358)
359. See Annex I. [↑](#footnote-ref-359)
360. L. EDWARDS, “Revenge porn: why the right to be forgotten is the right remedy”, 29 July 2014, <http://www.theguardian.com/technology/2014/jul/29/revenge-porn-right-to-be-forgotten-house-of-lords> dc 13 April 2015. [↑](#footnote-ref-360)
361. M. ROTENBERG, D. JACOBS, “Updating the Law of Information Privacy: The New Framework of the European Union”, *Harvard Journal of Law and Public Policy* Spring 2013, Vol. 36, Issue 2, 632, <http://www.harvard-jlpp.com/wp-content/uploads/2013/04/36_2_605_Rotenberg_Jacobs.pdf> dc 16 April 2015. M. L. AMBROSE, J. AUSLOOS, “The Right to Be Forgotten Across The Pond”, *Journal of Information Policy* 2013, Vol. 3, 7 – 8, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2032325> dc 24 July 2015. [↑](#footnote-ref-361)
362. M. L. AMBROSE, J. AUSLOOS, “The Right to Be Forgotten Across The Pond”, *Journal of Information Policy* 2013, Vol. 3, 1 – 2, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2032325> dc 24 July 2015. [↑](#footnote-ref-362)
363. Article 12 of EU, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Data Protection Directive) – emphasis added by the author. [↑](#footnote-ref-363)
364. See at p. 10, title 3.4.3.3. of EU, Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), 25 January 2012, COM/2012/011 final, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52012PC0011> dc 23 May 2015. [↑](#footnote-ref-364)
365. *“(a) ‘personal data’ shall mean any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity”,* article 2 (a) Data Protection Directive. [↑](#footnote-ref-365)
366. *“d) ‘controller’ shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law”*, article 2 (d) Data Protection Directive. [↑](#footnote-ref-366)
367. M. ROTENBERG, D. JACOBS, “Updating the Law of Information Privacy: The New Framework of the European Union”, *Harvard Journal of Law and Public Policy* Spring 2013, Vol. 36, Issue 2, 632, <http://www.harvard-jlpp.com/wp-content/uploads/2013/04/36_2_605_Rotenberg_Jacobs.pdf> dc 16 April 2015. [↑](#footnote-ref-367)
368. Fact-sheet of the European Commission on the ‘Right to be Forgotten’ Ruling (C-131/12), no date specified, 3, <http://ec.europa.eu/justice/dataprotection/files/factsheets/factsheet_data_protection_en.pdf> dc 8 April 2015. [↑](#footnote-ref-368)
369. Paragraph 93 of ECJ 13 May 2014, C-131/12 (*Google Spain and Inc v. Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzalez*). [↑](#footnote-ref-369)
370. See at p. 10, title 3.4.3.3. of EU, Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), 25 January 2012, COM/2012/011 final, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52012PC0011> dc 23 May 2015. [↑](#footnote-ref-370)
371. *“I want to explicitly clarify that people shall have the right – and not only the ‘possibility’ – to withdraw their consent to the processing of their personal data”,* V. REDING, “EU Data Protection Reform and Social Media: Encouraging Citizens’ Trust and Creating New Opportunities”, speech at the New Frontiers for Social Media Marketing Conference, Paris, 29 November 2011, <http://europa.eu/rapid/press-release_SPEECH-11-827_en.htm?locale=en> dc 24 July 2015. See also the Guiding Principles of the Article 29 Data Protection Working Party (especially principles 5, 6, 8, 9 and 10), Guidelines on the implementation of the Court of Justice of the European Union Judgment on “Google Spain and Inc v. Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzalez” C-131/12, Adopted on 26 November 2014 by the Article 29 Working Party, WP 225, <http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf> dc 8 April 2015. [↑](#footnote-ref-371)
372. ECJ 13 May 2014, C-131/12 (*Google Spain and Inc v. Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzalez*). [↑](#footnote-ref-372)
373. Paragraph 28 (‘processor of personal data’) and paragraph 33 (‘controller’) of ECJ 13 May 2014, C-131/12 (*Google Spain and Inc v. Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzalez*). [↑](#footnote-ref-373)
374. Fact-sheet of the European Commission on the ‘Right to be Forgotten’ Ruling (C-131/12), no date specified, 1, <http://ec.europa.eu/justice/dataprotection/files/factsheets/factsheet_data_protection_en.pdf> dc 8 April 2015. [↑](#footnote-ref-374)
375. Fact-sheet of the European Commission on the ‘Right to be Forgotten’ Ruling (C-131/12), no date specified, 2, <http://ec.europa.eu/justice/dataprotection/files/factsheets/factsheet_data_protection_en.pdf> dc 8 April 2015. [↑](#footnote-ref-375)
376. S. LICHTER, “Unwanted Exposure: Civil and Criminal Liability for Revenge Porn Hosts and Posters”, *Harvard Journal of Law & Technology* 28 May 2013, <http://jolt.law.harvard.edu/digest/privacy/unwanted-exposure-civil-and-criminal-liability-for-revenge-porn-hosts-and-posters> dc 10 April 2015. [↑](#footnote-ref-376)
377. L. EDWARDS, “Revenge porn: why the right to be forgotten is the right remedy”, 29 July 2014, <http://www.theguardian.com/technology/2014/jul/29/revenge-porn-right-to-be-forgotten-house-of-lords> dc 13 April 2015. [↑](#footnote-ref-377)
378. On the severe ramifications the search results for an individual’s name can engender, see M. L. AMBROSE, J. AUSLOOS, “The Right to Be Forgotten Across The Pond”, *Journal of Information Policy* 2013, Vol. 3, 2, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2032325> dc 24 July 2015. [↑](#footnote-ref-378)
379. J. K. STOKES, “The Indecent Internet: Resisting Unwarranted Internet Exceptionalism in Combating Revenge Porn”, *Berkeley Technology Law Journal* January 2014, Vol. 29, Issue 4, 938, <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2040&context=btlj> dc 14 April 2015. Although there are some scholars who have attempted to fit a right to be forgotten into the American legislative tradition (*i.e.* via an implied confidentiality contract). For more see R. K. WALKER, “The Right to Be Forgotten”, *Hastings Law Review* 2012, Vol. 64, 278, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2017967> dc 24 July 2015. [↑](#footnote-ref-379)
380. M. L. AMBROSE, J. AUSLOOS, “The Right to Be Forgotten Across The Pond”, *Journal of Information Policy* 2013, Vol. 3, 11 – 13, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2032325> dc 24 July 2015. [↑](#footnote-ref-380)
381. EU, Charter of Fundamental Rights of the European Union 2010/C 83/02, published 30 March 2010. [↑](#footnote-ref-381)
382. Fact-sheet of the European Commission on the ‘Right to be Forgotten’ Ruling (C-131/12), no date specified, 4 – 5, <http://ec.europa.eu/justice/dataprotection/files/factsheets/factsheet_data_protection_en.pdf> dc 8 April 2015; Guidelines on the implementation of the Court of Justice of the European Union Judgment on “Google Spain and Inc v. Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzalez” C-131/12, Adopted on 26 November 2014 by the Article 29 Working Party, WP 225, <http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf> dc 8 April 2015. [↑](#footnote-ref-382)
383. Fact-sheet of the European Commission on the ‘Right to be Forgotten’ Ruling (C-131/12), no date specified, 1, <http://ec.europa.eu/justice/dataprotection/files/factsheets/factsheet_data_protection_en.pdf> dc 8 April 2015. [↑](#footnote-ref-383)
384. The safe haven offered by §230 CDA makes the US a particularly attractive home base. See footnote 65 *supra*. [↑](#footnote-ref-384)
385. *“Nonconsensual pornography is a serious invasion of privacy and an infringement upon the freedom of private expression. Compared to many other types of conduct traditionally punished by criminal law – e.g. theft, drug possession, destruction of property – the harm caused is often far more severe, lasting, and irremediable. Given the immediate, devastating, and irreversible impact of this conduct, every reasonable effort must be made to prevent it from occurring in the first place. In addition to imposing appropriate punishment, criminal penalties offer the most potential for deterrence”*, citing M. A. FRANKS, answering FAQ’s at the <http://www.endrevengeporn.org/faqs/> website, dc 28 May 2015. Moreover, the UK has come to the same conclusion earlier in 2015 when it amended the existing Criminal Justice and Courts Statute and added revenge porn to the list of punishable acts. See UK, Criminal Justice and Courts Bill 2015, chapter 2, part 1 (6)(c) 33 – 35, <http://www.legislation.gov.uk/ukpga/2015/2/section/33/enacted> dc 8 August 2015. [↑](#footnote-ref-385)
386. Most prominently M.A. FRANKS, D. KEATS-CITRON and A.N. KITCHEN. See also Annex I. [↑](#footnote-ref-386)
387. EDWARDS calls revenge porn a societal problem, not a legal one. L. EDWARDS, “Revenge porn: why the right to be forgotten is the right remedy”, 29 July 2014, <http://www.theguardian.com/technology/2014/jul/29/revenge-porn-right-to-be-forgotten-house-of-lords> dc 13 April 2015. [↑](#footnote-ref-387)
388. D. KEATS-CITRON, “Law’s Expressive Value in Combating Cyber Gender Harassment”, *Michigan Law Review* 2009, Vol. 108, 410, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1352442> dc 18 April 2015. [↑](#footnote-ref-388)
389. Cyber Civil Rights Initiative, www. cybercivilrights.org dc 2 August 2015. [↑](#footnote-ref-389)
390. M. A. FRANKS, “Drafting an Effective ‘Revenge Porn Law’ : A Guide for Legislators”, *End Revenge Porn* Online 18 July 2014, 2, <http://www.endrevengeporn.org/main_2013/wp-content/uploads/2014/08/Guide-for-Legislators_7-18-14.pdf> dc 25 April 2015. [↑](#footnote-ref-390)
391. See [www.cyberrightsproject.com](http://www.cyberrightsproject.com) dc 2 August 2015. [↑](#footnote-ref-391)
392. See footnote 203 *supra*. [↑](#footnote-ref-392)
393. See <http://www.reddit.com/r/announcements/comments/2x0g9v/from_1_to_9000_communities_now_taking_steps_to/> dc 2 August 2015. Though Reddit was the first to update its privacy policy, it does not mean to monitor its content actively, placing the onus of alerting administrators of privacy violations on the victims themselves. To remedy this, FRANKS has suggested a ‘victim-protective’ consent form system, requiring users to gain and prove consent *before* posting. See FRANKS cited by A. HESS, “Reddit Has Banned Revenge Porn. Sort Of.”, *Slate* 25 February 2015, <http://www.slate.com/blogs/the_slatest/2015/02/25/reddit_bans_revenge_porn_victims_advocates_and_the_aclu_react_to_the_new.html> dc 2 August 2015. [↑](#footnote-ref-393)
394. See <https://www.facebook.com/communitystandards> dc 2 August 2015. Facebook has included the prohibition of posting revenge porn in its ‘Community Standards’ under the section dealing with sexual violence and abuse. It states that Facebook will monitor and delete content when transgressions are detected or when they are reported by other users. Notably, Facebook specifically states that threatening to post intimate images will also not be tolerated. [↑](#footnote-ref-394)
395. See <https://support.twitter.com/articles/20170459> dc 2 August 2015. Though Twitter allocates the responsibility for its content for the largest part with its users, it does state that it will monitor and intervene where certain specified forbidden content is nonetheless posted. It also provides a link where misconduct can be reported. [↑](#footnote-ref-395)
396. A. SINGHAL, “’Revenge porn’ and Search”, *Google Public Policy Blogspot* 18 June 2015, <http://googlepublicpolicy.blogspot.be/2015/06/revenge-porn-and-search.html> dc 3 August 2015. [↑](#footnote-ref-396)
397. M. A. FRANKS, “How to Defeat ‘Revenge Porn’: First, Recognize It’s About Privacy, Not Revenge”, *Huffington Post Online* 22 June 2015, <http://www.huffingtonpost.com/mary-anne-franks/how-to-defeat-revenge-porn_b_7624900.html> dc 5 July 2015. [↑](#footnote-ref-397)
398. Even though interest groups such as CCRI have been trying for years to convince these companies to exact the changes they now seemingly spontaneously adopt. K. V. BROWN, “The Internet can Forget – Why did it take so long to ban revenge porn?”, *Fusion Online* 29 June 2015, <http://fusion.net/story/157734/revenge-porn-bans-were-long-time-coming/> dc 3 august 2015. [↑](#footnote-ref-398)
399. A. HESS, “Reddit Has Banned Revenge Porn. Sort Of.”, *Slate* 25 February 2015, <http://www.slate.com/blogs/the_slatest/2015/02/25/reddit_bans_revenge_porn_victims_advocates_and_the_aclu_react_to_the_new.html> dc 2 August 2015. [↑](#footnote-ref-399)