



**CAN COPYRIGHT PROTECTION BE EXTENDED TO REVENGE PORN?**

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**ABSTRACT**

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*Revenge porn refers to publicly sharing sexually explicit images on an online platform without the pictured individual's consent. While existing laws in the IPC and IT Act can help the victims to get justice, however, the court process is very tedious and expensive and does not guarantee the removal or further distribution of such content from online platforms. In such a case, provisions of the Copyright Act, 1957 may come to the rescue. The rights to such a content either solely belong to the victim who is the author or may come under joint ownership, which makes a case for copyright infringement. Take down notices can be served to platforms serving such content. There have been debates over whether copyright is an effective tool to curb revenge porn. While copyright laws may not act as a sword due to certain practical hurdles in the take down process, content posted anonymously, the "whac-a-mole" problem and the "Streisand effect" which may deter a victim to move to the court, however, these laws can definitely act as a shield by mitigating the harmful effects of revenge porn by speedily taking down such illegal content off the internet and stop its spread.*

Keywords: Porn, Revenge Porn, Copyright, IT Act, IPC



## INTRODUCTION

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“Is Anyone Up?” was a website cum business started by Hunter Moore in 2010, which allowed people to publicly upload sexually explicit images of others, mostly their ex-lovers, without their consent. Such content is classified as revenge porn.<sup>1</sup> It also includes pictures/videos taken of strangers, non-consensually. The rationale behind such an act is to humiliate the victim in front of their friends, family and the society in general. Many such websites featuring revenge porn exist worldwide in today’s time. Despite the government ban on access to pornography, India remains a major consumer of it.<sup>2</sup> Someone who uses the internet is just one click away from accessing any and every kind of pornographic content online. Since India does not have its own commercial porn industry like other countries, most of the content uploaded on such websites by Indians is ‘revenge porn’.<sup>3</sup> There have been some very shocking Indian cases such as the *Delhi MMS scandal*<sup>4</sup> and the infamous *State of West Bengal v. Animesh Bora*<sup>5</sup>, where the accused was in a relationship with the victim, over the course of which, she had shared some sexually explicit images of herself with him, and he later uploaded these on PornHub without her consent. He was found guilty of charges under the Indian Penal Code, 1860 and the Information Technology Act, 2000. There is no doubt that these provisions can help such victims to get their perpetrators punished, however, court procedure can take a lot of time and by then, the victim suffers a lot of damage because these pictures do not get taken off the internet and keeps getting viewed and distributed further.<sup>6</sup>

This paper seeks to analyse whether copyright laws can be used to combat revenge porn by considering how the law applies specifically in this case. It further examines take down notices and whether the intermediaries can be held liable for hosting such content. Further, it analyses the

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<sup>1</sup> Amanda Levendowski, “Using Copyright to combat revenge porn” *New York University* (2011), available at: [https://jipel.law.nyu.edu/wp-content/uploads/2015/05/NYU\\_JIPEL\\_Vol-3-No-2\\_6\\_Levendowski\\_RevengePorn.pdf](https://jipel.law.nyu.edu/wp-content/uploads/2015/05/NYU_JIPEL_Vol-3-No-2_6_Levendowski_RevengePorn.pdf)

<sup>2</sup> Shoib Aslam, “Pornhub release of countries that watch most porn”, available at: <https://blog.socioon.com/pornhub-release-list-of-countries-that-watch-most-porn/>

<sup>3</sup> Joyson Sajan, “Can Copyright be used to as a tool to curb revenge porn?” *The Law Culture* (2020), available at: <https://thelawculture.in/can-copyright-be-used-as-a-tool-to-curb-revenge-porn/>

<sup>4</sup> <https://www.firstpost.com/tag/delhi-public-school-mms-sex-scandal>

<sup>5</sup> C.R.M. No. 11806 of 2017

<sup>6</sup> Shivam Goel, “Revenge Porn: Need for Comprehensive Legislation in India”, *Latest Laws* (2020), available at: <https://www.latestlaws.com/articles/revenge-porn-doxxing-and-downstream-distribution-need-for-comprehensive-legislation-in-india/>



positive aspects as well as the practical limitations that one may face while resorting to copyright laws and makes a few suggestions with respect to the same.

### **COPYRIGHTABILITY OF REVENGE PORN**

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Even though the copyrightability of pornography has not been debated on in India, however, in 1979, a federal court held that pornographic films, just like any other film, are eligible for copyright protection.<sup>7</sup> Hunter Moore, the most hated man on the internet, had made a statement during an interview with Bob Garfield with respect to the ownership and copyright of the content uploaded on his website. He said that when one takes a nude picture of oneself in the mirror (or otherwise), then it is intended as a 'gift' to someone else, hence, the receiver is the actual owner of that particular picture/video. This is an erroneous view when it comes to authorship in copyright.<sup>8</sup> In revenge porn, about 80% of the pictures or videos taken by the victims are selfies.<sup>9</sup> Copyright law protects "any kind of original work of authorship fixed in a tangible medium of expression, including photographs".<sup>10</sup> Authorship of a photograph rests with the person taking the photograph<sup>11</sup> and similarly, a producer who has produced a cinematograph film has the authorship rights to it.<sup>12</sup> According to Section 2 (s), a photograph is "any work which is analogous to photography" and according to Section 2 (f), a cinematograph film is any "visual recording". Thus, if a person i.e. the victim, takes a nude selfie photograph or video, such content qualifies the requirement of being a photograph/cinematograph film and they become the author of the content i.e. revenge porn, in this case. There can also be an instance where a photo or a video is not entirely taken by the victim, but there is involvement of the perpetrator/partner too. In such a scenario, the provision for joint authorship under Section 2 (z) will kick in. It defines the work of joint authorship as a "collaboration between two or more authors", and most certainly, this can be applied in the case of revenge porn. E.g. one of the partners would have started the recording but the other one might have adjusted the angles, posed in a particular way or position, etc., hence,

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<sup>7</sup> Ann Bartow, "Copyright Law and Pornography" *Oregon Law Review*, Vol 91,1, pp. 6 (2012), available at: <https://core.ac.uk/download/pdf/46714022.pdf>

<sup>8</sup> Bob Garfield, "Revenge Porn's latest frontier" *On The Media*, WYNC Studios (2020), available at: <https://thelawculture.in/can-copyright-be-used-as-a-tool-to-curb-revenge-porn/>

<sup>9</sup> Brandi Lupo, "Can Copyright Laws Protect Revenge Porn Victims?" *The Regulatory Review* (2014), available at: <https://www.theregview.org/2014/11/06/lupo-copyright-revenge-porn/>

<sup>10</sup> *Ibid.*

<sup>11</sup> Section 2 (d) (iv) of the Copyright Act, 1957

<sup>12</sup> Section 2 (d) (v) of the Copyright Act, 1957



this is most certainly a collaborative effort and thus, both will have the claim to joint authorship of such a video or photo.<sup>13</sup>

According to Section 17 of the Act, the author of the work is the first owner of the copyright, and such an owner has the exclusive right to disseminate their work in the public domain. When a revenge porn victim sends their private pictures in faith to someone through any electronic means, it is consensual and reasonably anticipated that only the receiver would be viewing it. But when it is distributed without the victim/author's express permission, this amounts to an action against copyright infringement.<sup>14</sup>

### **CAN AN INTERMEDIARY BE HELD LIABLE FOR HOSTING REVENGE PORN?**

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Revenge porn is mostly posted online on websites hosted by intermediaries which makes it imperative to analyze whether such a host on whose website the revenge porn content is uploaded can be forced to take down such content and held to be liable. Section 2 (1) (w) of the Information Technology Act, 2000 defines an intermediary as a person who “on behalf of another person receives, stores or transmits that record or provides any services in respect of it.” Further, Section 79 of the IT Act is like a safe harbour for such intermediaries who cannot be held liable for any third-party information, material or data hosted or made accessible by them, whether posted anonymously or otherwise. But, on the other hand, by virtue of Section 81 of the IT Act, the safe harbour clause will not restrict any other person to take action with respect to copyright infringement. Also, Rule 3 (d) of the Information Technology (Intermediary Guideline) Rules, 2011<sup>15</sup>, requires all intermediaries to exercise caution while they host any content on their website and conduct their due diligence to make sure that such content does not infringe any trademark, copyright, patent laws, etc.<sup>16</sup> In *My Space Inc. v. Super Cassettes Industries Ltd. (2011)*, the court ruled that Section 79 and 81 of the IT Act have to be harmoniously constructed. So, when the intermediary receives actual knowledge through mail or in writing from the affected person (victim of revenge porn, in this scenario), they have to act on it within 36 hours by disabling the access to

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<sup>13</sup> *Supra* 9.

<sup>14</sup> *Supra* 7.

<sup>15</sup> Information Technology (Intermediary Guideline) Rules, 2011, available at: <https://www.wipo.int/edocs/lexdocs/laws/en/in/in099en.pdf>

<sup>16</sup> *Supra* 1.



such information or content.<sup>17</sup> Such a complaint is also known as a ‘take down notice’, which, according to the proviso to Section 52 (1) (c) of the Act, has to be given in writing by the copyright owner who wants such a content to be taken down to the intermediary, who then has to comply with all the requirements mentioned therein.<sup>18</sup> Here, Rule 75 of the Copyright Rules, 2013 is important, because it mentions all the particulars of such a complaint which need to be complied with.<sup>19</sup> It mentions that such a written complaint must include information adequate enough to identify the work, information which establishes the complainant as the owner of the copyright in the work, such an infringing act is not covered by the exceptions mentioned in Section 52, the person responsible for uploading such a content, if known, etc. This means that when a victim of revenge porn sends across a take-down notice to the intermediary, they will have to comply with it if they want to escape liability.<sup>20</sup> But, a part of the problem is that currently, there are no laws which give an absolute right to the victims of revenge porn to take down the infringing content, which makes the process similar to requesting any copyright material to be taken off the internet, which may result in failure too.

## MAJOR HURDLES IN COPYRIGHT ACTION TAKEN AGAINST REVENGE PORN

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There have been debates on whether copyright laws can be an effective tool against revenge porn, in all practical terms. Suggestions have been made against resorting to copyright laws to combat cases of revenge porn. One of the major reasons for this is due to the great amount of copyright infringement and take down notices which already get issued to various websites and ISPs for various reasons. If take down notices in case of revenge porn are also issued, then this would only intensify the problem of the entire take down process and make it slower to get remedy in other cases as well.<sup>21</sup> There are other problems too. Firstly, in order for protect any content from copyright beforehand, you have to file such a request with the Copyright office and get it

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<sup>17</sup> *My Space Inc. v. Super Cassettes Industries Ltd.* FAO OS 540 (2011)

<sup>18</sup> Vikrant Rana and Akshay Gupta, “India: Takedown notice of infringing content over internet” *Mondaq* (2017), available at: <https://www.mondaq.com/india/copyright/575576/takedown-notice-of-infringing-content-over-internet>

<sup>19</sup> The Copyright Rules, 2013. Available at: [https://copyright.gov.in/Documents/Copyright\\_Rules\\_2013\\_and\\_Forms.pdf](https://copyright.gov.in/Documents/Copyright_Rules_2013_and_Forms.pdf)

<sup>20</sup> *Supra 1.*

<sup>21</sup> Jeff Roberts, “No, Copyright is not the answer to revenge porn”, *Gigaom* (2014), available at: <https://gigaom.com/2014/02/06/no-copyright-is-not-the-answer-to-revenge-porn/>



registered, which means that, you will have to submit the details, description and copy the content, which will then be examined by the Registrar. This means that in order to protect the revenge porn material, the victim will have to hand it over to other people now, which will deter them to get their nude pictures/videos registered. One may not want to get their nude pictures/videos registered, because that would expose them even further, which is something that they are instead trying to prevent.<sup>22</sup> This was seen in the case of a revenge porn victim in the United States, who was told to submit copies of her nude pictures and videos to the authorities to get it registered. When she supplied only stills from her videos instead of the entire video (because she was uncomfortable in doing so), it resulted in denial of registration of the videos.<sup>23</sup> This is a major hurdle. Secondly, due to the dynamic nature of the internet, content creators face the “whac-a-mole” phenomenon, which creates problems because as soon as the infringing content is taken off one website, it might “pop up” on a lot of other websites. This makes it difficult to identify the number of websites featuring the content.<sup>24</sup> In the case of revenge porn, this problem is amplified. Thirdly, when a takedown notice is issued or when the victim files a case in the court, it requires the disclosure of personal information, and might result in drawing more attention to the content due to creation of additional posts and news about such victims.<sup>25</sup> This is known as the “Streisand effect”, a social phenomenon whereby an attempt at hiding certain information backfires and unintentionally results in publicizing it even more.<sup>26</sup>

Another major hurdle in curbing revenge porn arises when such a content is uploaded on a website anonymously. In the virtual world of the internet, the perpetrator can create a fake id and hide behind the screen as someone else. This is one of the major issues when it comes to curbing revenge porn because any virtual identities are either misrepresented, unidentifiable or forged on the websites on which such content is uploaded, hence, it becomes difficult to send take down notices to the hosts of such websites. However, there exists a concept of “John Doe” or “Ashok

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<sup>22</sup> Erika Fink, “To fight revenge porn, I had to copyright my breasts”, *CNN Business* (2015), available at: <https://money.cnn.com/2015/04/26/technology/copyright-boobs-revenge-porn/index.html>

<sup>23</sup> *Ibid.*

<sup>24</sup> *Supra* 1.

<sup>25</sup> *Ibid.*

<sup>26</sup> “The Streisand Effect” *C.A. Goldberg Law* (2020), available at: <https://www.cagoldberglaw.com/the-streisand-effect/>



Kumar” (Indian context) <sup>27</sup>orders, where restraining orders can be issued by the court time after time against such anonymous and unidentified people who are displaying, uploading, distributing, etc. any copyrighted content, such as revenge porn. These orders have come in handy in the case of *Eros International Media Limited v. Bharat Sanchar Nigam Limited and Ors. (2016)*<sup>28</sup>, where a John Doe order was sought to protect the rights of the film “Dishoom” from getting uploaded online. A list of about 130 links/URLs were sent to the Bombay High Court, after which the access to all these got blocked. Same recourse was taken when the film “Udta Punjab” was leaked online two days before its release. This can be used in the case of revenge porn too to block all the websites or URLs featuring the infringing content, and according to Section 52 (1) (c) of the Act, the intermediary would be required to block and restrict access to the mentioned URLs for 21 days.<sup>29</sup>

### **POSITIVE ASPECTS OF TAKING THE RECOURSE TO COPYRIGHT LAWS & THE WAY FORWARD**

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Every coin has two sides. Even though there are certain limitations when it comes to resorting to copyright laws to take down revenge porn content, there are some positive aspects to it too. Firstly, with respect to the take down notice, it provides the victims with a reliable means to remove such content from websites. This in turn would compel the intermediaries to remove the revenge porn from their websites and exercise caution. Secondly, it could help the victims and intermediaries to communicate with each other in order to detect the infringing material and remove it.<sup>30</sup> Also, when backed by a court order, websites to whom the take down notice has been served have to compulsorily comply to such requests of removal of the infringing content.<sup>31</sup> This way, Copyright laws will help to deter any person to illegally and illegitimately share revenge porn. Thus, this process is more victim friendly and expedient as compared to filing a criminal case against a perpetrator which would be more expensive, tedious and a lot more time consuming due to the entire court process.<sup>32</sup>

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<sup>27</sup> Nikeita Agarwal, “What are John Doe orders and in which situations are they granted”, *iPleaders* (2017), available at: <https://blog.iplayers.in/john-doe-orders/>

<sup>28</sup> CS No. 620 of 2016

<sup>29</sup> *Supra* 17.

<sup>30</sup> Phillip Takhar, “A proposal for a notice and takedown process for revenge porn” *Harvard Journal of Law and Technology Digest* (2018), available at: <https://jolt.law.harvard.edu/assets/digestImages/PDFs/Takhar-sp18.pdf>

<sup>31</sup> *Supra* 13.

<sup>32</sup> *Supra* 20.



A suggestion to deter perpetrators would be to recognize the issue of revenge porn and pass laws and orders with respect to the same. It is important to take into consideration how copyright laws can help mitigate the damages caused by it by making it compulsory for intermediaries to remove all revenge porn content which is put up without the permission of the author, when a take down notice is sent to them. This must apply even in the case of joint authorship of the intimate content to help the victims get justice.<sup>33</sup> Also, victims who discover that their intimate photos or videos have been posted or reposted on commercial porn websites rather than revenge porn websites are much more likely to succeed in taking down such content. This is because many such websites quickly comply with verified requests for taking down the infringing content. The victims can also try to issue requests to search engines such as google and yahoo to de-index the material to remove any such links from there.<sup>34</sup> This erasure of personal pictures/videos/information is done with respect to the victim's "right to be forgotten".<sup>35</sup> In India, for the first time, this right was talked about in a constitutional court where the judges recognized that victims of revenge porn have the right to be forgotten, thus opening a possibility for such victims in India to appeal for erasure of revenge porn content from the websites featuring them.<sup>36</sup>

It is true that Copyright laws may not help to put a limit on the taking or clicking/recording of such pornographic content, since this comes under the purview of privacy laws. It is also true that it will not help in criminal proceedings against the perpetrator to punish them, where only criminal laws under IPC and the IT Act can be resorted to as a recourse. Privacy laws may indirectly deter people from taking such content in the first place because it focuses solely on the harms of sharing such content in an unauthorized manner.<sup>37</sup> Copyright laws, on the other hand, will not per se prevent people from taking this content, hence, it can be said that it cannot act as an effective "sword" against revenge porn. But, it will certainly deter its recipients from sharing or uploading such content online if action is taken under copyright laws. Hence, these legal provisions are

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<sup>33</sup> Philipa Warr, "Using Copyright to fight revenge porn" *Internet Policy Review* (2015), available at: <https://policyreview.info/articles/news/using-copyright-fight-revenge-porn/360>

<sup>34</sup> *Supra* 28.

<sup>35</sup> "Explained: What is the Right to be Forgotten?", *Times Of India* (Dec 9, 2020), available at: <https://timesofindia.indiatimes.com/india/explained-what-is-the-right-to-be-forgotten/articleshow/79390478.cms>

<sup>36</sup> *Ibid.*

<sup>37</sup> *Supra* 30.





capable of acting as a “shield” to prevent the uploading and distribution of such content by providing the victims with quick relief by taking down the infringing content and impeding it from being spread further on the internet.<sup>38</sup>

## CONCLUSION

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Though copyright laws cannot help in criminally prosecuting the perpetrators who upload such content without the permission of the original author or victim, it can definitely prove to be very beneficial when it comes to taking down such content from the internet to prevent it from spreading. There are some practical and technical hurdles while resorting to copyright laws due to the dynamic nature of the internet and a plethora of unidentified and anonymous ids. It is thus important to make some changes in the law specifically to tackle the problems that the victims of revenge porn might face when they try to take down the infringing content off the websites featuring it. It is time that the menace of revenge porn is recognized in India and using copyright laws to battle the same is explored more, which might prove to be effectively helpful in mitigating the harmful effects that it can have on the victim and their family.<sup>39</sup>

REFERENCE: [HTTPS://LEXFORTI.COM/LEGAL-NEWS/](https://lexforti.com/legal-news/)

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<sup>38</sup> S.P. Boorah, “Copyright: Shield or Sword against Revenge Porn” *Spicy IP* (2014), available at: <https://spicyip.com/2014/02/guest-post-copyright-shield-or-sword-against-revenge-porn.html>

<sup>39</sup> *Supra* 33.