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**More than “Revenge Porn”
Civil Remedies for the Non-
consensual Distribution of
Intimate Images**

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**More than “Revenge Porn”
Civil Remedies for the Non-consensual Distribution of Intimate Images**

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INTRODUCTION

The non-consensual distribution of intimate images, or “revenge porn” as it is colloquially known, is a growing phenomenon in the digital era that has devastated the lives of countless individuals. Targets of this conduct have suffered both short and long-lasting harms that have had serious repercussions on their mental health, physical well-being, and safety. Once their intimate images have been shared without their consent, they can face damage to their personal and professional reputations. There are reported cases where individuals have lost their jobs, have had to relocate, were stalked and harassed, experienced some form of emotional trauma, and had their privacy violated after their images were shared.² It is a jarring experience to say the least. Most want the images taken off down as soon as possible, but attempting to remove the images from the Internet can be a costly endeavour. This collection of harms and damages beg for a civil remedy. As a result, some individuals have begun turning to the civil courts to seek remedies for the damages they have incurred.³ This paper explores some civil remedies that may be available for individuals who have had their intimate images shared without their consent, but is no way an exhaustive list of civil actions or remedies that may be available.

In four parts, this paper (1) introduces and describes common manifestations of this problematic behaviour, (2) outlines a selection of civil remedies that are available to individuals who have had their intimate images shared without their consent, (3) reviews some remedies and relief that may be available; and (4) provides useful practice tips for lawyers serving clients who have had their intimate images shared without consent. It also includes an appendix with information on civil legislation in other Canadian jurisdictions, the criminal response to this behaviour, and links to organizations that are addressing the non-consensual distribution of intimate images.

PART ONE: NON-CONSENSUAL DISTRIBUTION OF INTIMATE IMAGES

What is the non-consensual distribution of intimate images?

The non-consensual distribution of intimate images occurs when someone shares an intimate image, usually an image of another person in the nude or engaging in sexual activity, without that

² Samantha Bates, "Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors" (2016) 12:1 Feminist Criminology 22; Ari Ezra Waldman, "A Breach of Trust: Fighting 'Revenge Porn' (2017) 102 Iowa Law Review 709; Safety Net Canada, "Canadian legal remedies for Technology-Enabled Violence Against Women" (2013) Safety Net Canada; Danielle Keats Citron, "Law's Expressive Value in Combating Cyber Gender Harassment" (2009) 108-3 Michigan Law Review 373; Nicola Henry & Anastasia Powell, "Technology-Facilitated Sexual Violence: A Literature Review of Empirical Research" (2016) Trauma, Violence & Abuse 1.

³ *Jane Doe 725111 v Morgan*, 2018 ONSC 6607; *Jane Doe 464533 v ND*, 2016 ONSC 541 [*Doe v ND*]; Torys LLP has brought a statement of claim against an individual as well as a pornography website, see: *Jane Doe v 9219-1568 Quebec Inc (c.o.b. Mindgeek Canada) and Adam Dabrowski*, Court File No CV-17-575704; Wadell Phillips has brought a class action against a Winnipeg Ballet photographer who allegedly coerced students into taking nude photos which he later sold online, see: <http://waddellphillips.ca/class-actions/royal-winnipeg-ballet-class-action/>.

person's consent. This could be simply showing the image to one other person, but more commonly it involves sharing an image to a larger audience via text message or social media, or by posting it on a publicly available website. When intimate images are shared without consent, they are usually sent to the friends, employers, and family members of the person in the images in an effort to humiliate that person.⁴

If the images are shared on public facing websites, it is common for the person's full name, contact information, social media pages, and/or employment information to be included alongside the image, instigating further harms to the target as unwanted internet traffic and communication is drawn towards her.⁵ This form of doxing (sharing identifying information online without consent) is particularly damaging for these individuals as their intimate images are then identifiable in Google's search results under their name. The images are frequently paired with degrading comments that encourage other viewers to harass and stalk the person in the image.

Due to the ease of information sharing in digital spaces and the difficulty of removing digital content once the image has been published online, it can be challenging, if not impossible, to fully rid the Internet of copies of the image.⁶ Criminal courts have noted that this results in ongoing harms to the person in the image who is perpetually victimized each time the image is shared or viewed.⁷

When people think of this behaviour, they often think of the jilted ex-lover posting the images online in an effort to humiliate their previous romantic or sexual partner, however, the non-consensual distribution of intimate images comes in many other forms including the sharing of images obtained by computer hackers, voyeuristic images, images of sexual assaults, collections of intimate images, and images that have been digitally manipulated to make it appear as though the person was nude or engaging in sexual behaviour when they were not. The threat of distribution has also been used to extort the individual in the images in problematic ways. Below, we will outline some of the more common forms of non-consensual distribution of intimate images.

⁴ Rachel Hill, "Cyber-Misogyny: Should 'Revenge Porn' be Regulated in Scotland, and if so, How?" (2015) 12-2 Scripted 118.

⁵ Ganaele Langlois & Andrea Slane, "Economies of Reputation: The Case of Revenge Porn" (2017) 14-2 Communication and Critical/Cultural Studies 120-138; also see *R v AC*, 2017 ONCJ 317; *R v JTB*, 2018 ONSC 2422. Please note: The authors chose to use gendered language in this paper in some instances, as statistics show that many of the reported targets are female and that the impact on women is often most severe. There have been relatively few civil cases, however, Statistics Canada reported 295 police reported incidence of non-consensual distribution of intimate images in 2016. Of those reports, 271 victims were female and 33 were male. Ultimately, 108 males were charged with the offence and 41 females were charged with the offence. According to research done by The eQuality Project, of the 18 reported criminal law cases, all of the accused were male and all victims' were female, online: <http://www.equalityproject.ca/cyberviolence-criminal-case-law/>. However, we also recognize that male and gender-variant individuals are also impacted by the non-consensual distribution of intimate images.

⁶ Alexa Dodge, "Digitizing Rape Culture: Online Sexual Violence and the Power of the Digital Photograph" (2016) 12:1 Crime Media Culture 65.

⁷ *R v AC*, 2017 ONCJ 317.

Distribution by a previous romantic or sexual partner

In these cases, the intimate images are originally shared in a consensual sexual or romantic partnership, with the understanding that the images are only to be viewed by the person they were sent to in the context of the relationship.⁸ Following the breakdown of the relationship, the partner who is dissatisfied with some aspect of the previous relationship forwards the intimate image to their ex-partner's friends, family and/or professional associates via email or social media, or posts the images on a public pornography website in an effort to degrade their ex-partner, among other reasons. It is not unusual for the images to be further shared by the recipients among their social circle or across additional pornography sites.⁹

Hacked photos

In these cases, the images have been stolen from the individual's computer by a person who gained access to their images through computer hacking or unauthorized access to the device. This was the case in 2014, when several female Hollywood celebrities had their iCloud storage accounts broken into and had their photos stolen. Their nude images were copied from their accounts and posted on the website 4Chan.¹⁰ Hacked photos were also central to an American criminal case involving a website dedicated to posting women's nude images along with their social media profiles without their consent. In that case, the website operator, Hunter Moore, plead guilty to identity theft and abetting in the unauthorized access of a computer. He had paid a hacker for hundreds of nude photos that were stolen from women's email accounts to post on his site. He would then charge the women a fee to have the photos taken off the website.¹¹ There have been reported cases of computer technicians stealing intimate images off the devices they are repairing and then sharing them without consent.¹² The women in these cases did not know their hackers, but the hacker can also be known to the person targeted, such as when a friend, romantic partner, or roommate who steals intimate images from a woman's phone or email and then shares them without consent.

Voyeuristic photos

In these cases, the intimate images have been taken without the knowledge of the person in them. This includes images that were taken by hidden cameras or screenshots of video chats that were taken without the knowledge of the other person and later distributed, as was the well known case

⁸ A study out of the Kinsey Institute showed that 73% of people who shared sexual images with their romantic or sexual partner reported discomfort with the unauthorized sharing of their messages beyond the intended recipients. See: Justin Garcia et al, "Sexting Among Singles in the USA: Prevalence of Sending, Receiving, and Sharing Sexual Messages and Images" (2016) 13:5 *Sexual Health* 428.

⁹ Anastasia Powell & Nicola Henry, *Sexual Violence in a Digital Age* (London: Palgrave MacMillan 2017); Clare McGlynn & Erika Rackley, "Image-Based Sexual Abuse" (2017) 37:3 *Oxford Journal of Legal Studies* 534 at 537.

¹⁰ Samuel Osborne, "Hacker who Stole Nude Photos of Jennifer Lawrence and Countless Other Celebrities Jailed for 18 Months" *Independent* (28 October 2016).

¹¹ US Attorney's Office (Central District of California), "Man Who Operated 'Revenge Porn' Website Pleads Guilty in Hacking Scheme That Yielded Nude Photos from Google E-Mail Accounts" (25 February 2015), online: <https://www.fbi.gov/contact-us/field-offices/losangeles/news/press-releases/man-who-operated-revenge-porn-website-pleads-guilty-in-hacking-scheme-that-yielded-nude-photos-from-google-e-mail-accounts>.

¹² Paul Thompson, "Best Buy Geek Squad employees 'posted woman's nude photos online after working on her computer'" *The Guardian* (13 August 2013).

of Amanda Todd.¹³ They are usually taken by the person's sexual partner while they are engaging in consensual sexual activity and are not aware they are being recorded,¹⁴ but can also be taken by strangers. Spy cams in public places have also been used to record women in private places such as bathrooms, hotel rooms, and change rooms, then shared online.¹⁵

Documenting sexual assault

In these cases, the images document a sexual assault of the individual and are then published online or livestreamed.¹⁶ One of the most well-known Canadian cases of non-consensual distribution of intimate images was the case of Nova Scotian teenager Rethaeh Parsons, whose image was taken during an alleged sexual assault and then distributed among her classmates. She was relentlessly harassed about the images and later died by suicide.¹⁷

Databases and websites

In these cases, a group of individuals actively collect intimate images of women to house in a shared database or share on websites dedicated to distributing non-consensual intimate images, such as the case with Hunter Moore (see above).¹⁸ The practice of collecting intimate images has been documented in criminal cases in Canada, including a case where a group of six high-school boys had pressured girls for nude images and then saved them to a Dropbox folder they all had access to, unbeknownst to the girls.¹⁹ In the United States, the "Marines United" Facebook group collected and published nude photos of female services members without their knowledge or consent, along with degrading and violent commentary. The publication of their images led to some of the women being stalked by men who had seen the images on the Facebook page.²⁰

Deepfakes and photoshop

In these cases, the woman's face has been digitally superimposed on a pornographic image and then released online.²¹ With advances in technology, it can be difficult to tell the difference between a fake image and a real one, and the release of a fake image can have equally damaging

¹³ A Wayne MacKay, CM, QC, "Law as an Ally or Enemy in the War on Cyberbullying: Exploring the Contested Terrain of Privacy and Other Legal Concepts in the Age of Technology and Social Media", (2015) 66 UNB LJ 3(49).

¹⁴ For criminal examples of this see: *R v Verner*, 2017 ONCJ 415; *R v BH*, [2016] OJ No 7080 (ONCJ); *R v Ly*, [2016] OJ No 7196 (ONCJ); *R v Trinchi*, 2016 ONSC 6585.

¹⁵ In South Korea the use of hidden cameras to secretly film and publish intimate images of women has become rampant. Crystal Tai, "My Life is Not Your Porn: South Korean Women Fight Back against Hidden-Camera Sex Crimes" *South China Morning Post* (13 October 2018).

¹⁶ Emanuella Grinberg & Samira Said, "Police: At Least 40 People Watched Teen's Sexual Assault on Facebook Live" CNN (22 March 2017).

¹⁷ Alexa Dodge, "Digitizing Rape Culture: Online Sexual Violence and the Power of the Digital Photograph" (2016) 12:1 Crime Media Culture 65.

¹⁸ Websites can be dedicated to this type of sharing or can be mainstream websites that have sections dedicated to this type of sharing.

¹⁹ *R v MM*, 2017 NSPC 12 (Youth Court).

²⁰ Shawn Snow, "Seven Marines Court-Martialed in Wake of Marines United Scandal" *Marine Corps Time* (1 March 2018).

²¹ For example, see Noelle Martin's experience of having her images photoshopped to appear pornographic: <https://www.youtube.com/watch?v=PctUS31px40>.

consequences. For example, deepfake technology is a form of facial recognition and artificial intelligence that allows users to swap the faces of pornography actors with the faces of another woman, making it appear as though that woman is engaging in explicit pornography.²²

Extortion/threats

In these cases, intimate images have been used to extort the person in the images.²³ Threats to disclose have allowed abusive individuals, often previous sexual partners, to control and manipulate the person in the image, including soliciting more intimate images or unwanted sexual interaction, among other things.²⁴

PART TWO: CIVIL REMEDIES

At present, there have been few civil cases decided in Canada that address the non-consensual distribution of intimate images.²⁵ Most reported cases involving non-consensual distribution of intimate images have been managed by the criminal courts.²⁶ However, we expect this trend to change in the near future. In the United States, individuals are increasingly seeking remedies through the civil courts with significant success.²⁷ While this remains an emerging area of law in Canada, there are several civil remedies available if your client has had intimate images posted online. Part two of this paper will review a sampling of some civil remedies available to your clients.

TORTS

Appropriation of likeness

Individuals in Ontario have a common law right to control the use of their persona and commercially exploit their personality.²⁸ If their image is used in a commercial context without their consent they can sue for the wrongful appropriation of their personality. For example, in *Vanderveen v Waterbridge Media Inc.*,²⁹ a company developing promotional material in a

²²Robert Chesney & Danielle Keats Citron, "Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security" (2019, forthcoming) 107 California Law Review.

²³ For examples of extortion in the criminal context see: *R v McFarlane*, 2018 MBCA 48; *R v SS*, 2018 2299.

²⁴ Sarah Bloom, "No Vengeance for 'Revenge Porn' Victims: Unraveling Why this Latest Female Centric, Intimate-Partner Offense is Still Legal, and Why we Should Criminalize it" (2016) 42:1 Fordham Urban Law Journal 234.

²⁵ For example see: *Jane Doe 725111 v Morgan*, 2018 ONSC 6607; *Jane Doe 464533 v ND*, 2016 ONSC 541; *Zigomanis v 2156775 Ontario Inc. (D'Angelo Brands)*, 2016 ONSC 7053, upheld on appeal 2018 ONCA 116; *TKL v TMP*, 2016 BCSC 789; Torys LPP has brought a statement of claim against an individual as well as a pornography website, see: *Jane Doe v 9219-1568 Quebec Inc (c.o.b. Mindgeek Canada) and Adam Dabrowski*, Court File No CV-17-575704; Wadell Phillips has brought a class action against a Winnipeg Ballet photographer who allegedly coerced students into taking nude photos which he later sold online, see: <http://waddellphillips.ca/class-actions/royal-winnipeg-ballet-class-action/>; there is an ongoing civil case in Manitoba: Sarah Krichel, "Two Cops, Two Others Involved in First Test of Manitoba's New Law to Combat Revenge Porn" *National Post* (13 June 2018).

²⁶ See Appendix for list of cases reported under the criminal provision, also see: <http://www.equalityproject.ca/cyberviolence-criminal-case-law/>.

²⁷ Chritine Hauser, "\$6.4 Million Judgment in Revenge Porn Case is Among Largest Ever" *The New York Times* (11 April 2018).

²⁸ *Krouse v Chrysler Canada Ltd*, (1973) 1 OR (2d) 225 (ONCA).

²⁹ [2017] 287 ACWS (3d) 789 (ONCJ).

particular neighbourhood filmed who was jogging and unaware she was being filmed. The footage was later used in a commercial video to promote a condominium and the woman brought a suit for the wrongful appropriation of her likeness. The court awarded her damages for the wrongful appropriation of her personality.³⁰

In the case of the non-consensual distribution of intimate images, if the plaintiff's intimate image was posted on a website that gained profits from the publication of the image or used in some other commercial context, she could sue for the wrongful appropriation of personality.³¹ The publication of her images on a profitable website could be considered an intentional appropriation of her personality for the defendant's gain.

Breach of confidence

In *Jane Doe 464533 v ND*, which involved the non-consensual distribution of an intimate video, Justice Stinson set out the three elements to the tort of breach of confidence:

- a) the information must have the necessary quality of confidence about it;
- b) the information must have been imparted in circumstances importing an obligation of confidence; and,
- c) there must be unauthorized use of that information to the detriment of the party communicating it.³²

Justice Stinson found that the plaintiff satisfied the first element of the test – the video the plaintiff made was clearly meant to be private. The second element was also easily met – the plaintiff created and shared the video with the defendant on the express understanding that he would keep the video confidential.

With respect to the third element of the tort, the use of the information to the detriment of the party communicating it, Justice Stinson acknowledged that this ordinarily constituted economic harm sustained by the sender of confidential information when the recipient misuses the information for commercial advantage.³³ Justice Stinson found that there was no rational basis to distinguish between economic harm and emotional, psychological and physical harm.³⁴ In addition, the possibility of future economic harm to the plaintiff's career and employment prospects were deemed sufficient to satisfy the third element of the tort.

³⁰ The damages award for appropriation of personality was \$100 and damages for this tort have an upper limit of \$20,000, however the Plaintiff was awarded \$4,000 for the breach of privacy.

³¹ For an example of a criminal case where the images were posted on a website dedicated to revenge porn see: *R v AC*, 2017 ONCJ 317.

³² *Doe v ND*, note 3 at para 20-21.

³³ *Ibid* at para 24.

³⁴ *Ibid*.

Breach of fiduciary duty

If the person who shared the photo has a fiduciary duty to the person in the images, such as a parent, the plaintiff can claim a breach of fiduciary duty.³⁵ In a British Columbia case, *TKL v TMP*,³⁶ the court found that a step-parent who had secretly recorded his step-daughter naked in the shower had breached his fiduciary duty to his step-daughter. The court noted two Supreme Court Cases that were important for this analysis: *KM v HM*, [1992] 3 SCR 6, which addressed a parent's fiduciary duty to his child in relation to sexual abuse, and *KLB v British Columbia*, 2003 SCC 51, which addressed foster parents' fiduciary duty to the children in their care in relation to sexual abuse.

As the courts have recognized that behaving in a sexually abusive manner with a child can be a breach of fiduciary duty, it could be argued that if a parent released an intimate image of their child without consent, it would breach this duty. Further, voyeuristic images such as the ones mentioned above have been released online without consent. It is not a stretch to argue that the non-consensual distribution of this type of image by a parent would contribute to the breach of fiduciary duty.

Teachers and educational institutions can also breach this duty. In *Doucet v Royal Winnipeg Ballet*,³⁷ the court certified a class action in which the Statement of Claim pleads that a ballet teacher and photographer breached his fiduciary duty to his students by allegedly coercing ballet students to pose nude or semi-nude so he could photograph them and later distributed those images online. The class members also allege that the ballet school had breached its fiduciary duty for failing to prevent the teacher's harmful actions.

Copyright

If the intimate image is a "selfie" or was taken by the person in the image, she will retain authorship of the image and can find a remedy in copyright law. According to American scholar, Amanda Levendowski, 80 percent of non-consensually distributed intimate images were originally taken by the person in them and she has advocated that copyright can act as an effective legal tool in many of these cases.³⁸

In Canada, plaintiffs can claim statutory damages under the *Copyright Act*³⁹ of between \$500 and \$20,000 for each work infringed in the commercial context, and between \$100 and \$5,000 when infringed in a non-commercial context.⁴⁰ There are some exceptions for these awards. Because these images are shared across personal networks, but also on pornography websites that profit from the publication of these types of images, both the commercial and the non-commercial context could apply to the non-consensual distribution of intimate images.

³⁵ *Alberta v Elders Advocates of Alberta Society*, 2011 SCC 24 lays out the law with respect to a breach of fiduciary duty. For examples of a parent sharing an intimate image see: *R c DG*, 2016 QCCQ 6167.

³⁶ 2016 BCSC 789.

³⁷ *Winnipeg Ballet* note 3. Also note that the Plaintiff plead unjust enrichment for the benefits the photographer gained from selling the images.

³⁸ Amanda Levendowski, "Using copyright to combat revenge porn" (2014) 3-2 New York University Journal of Intellectual Property and Entertainment Law 422.

³⁹ RSC 1985, c C-42.

⁴⁰ *Ibid* ss 38.1(1)(a)&(b).

Canada also has a notice-and-notice system where Canadian Internet service providers are required by law to forward copyright notifications to the subscribers who have infringed copyright.⁴¹ These notices could be forwarded when the breach of copyright is from the publication of an intimate image.

Further, websites that are dedicated to the non-consensual distribution of intimate images may be violating the *Copyright Act*, which forbids the provision of an Internet service that enables acts of copyright infringement.⁴² As most intimate images are selfies, it could be argued that sites that are enabling the sharing these images are violating this section.

The *American Digital Millennium Copy Right Act*⁴³ has been an effective tool to remove non-consensually distributed images from the Internet, even for Canadians as most platforms have a US presence and abide by US laws, the *DMCA* has been a useful tool in getting copy-righted images removed. The “notice and take-down” procedures allow copyright owners to report infringements and ISPs are then expected to promptly remove the infringing images. Canadian victims of the non-consensual distribution of intimate images have used this system and there are commercial services that can assist in reporting the infringing images.⁴⁴

Defamation

There is currently not much case law on defamation actions involving the online publication of intimate images; there is a growing collection of case law wherein the courts are finding that online commentary constitutes defamation and awarding damages accordingly. Future cases involving the publication of online imagines could likely rely upon the concepts in the online commentary defamation cases.

In *Rutman v. Rabinowitz*, 2018 ONCA 80, the Court of Appeal upheld a \$700,000.00 damages award for Internet defamation, including an award for punitive damages in the amount of \$50,000.00. Defamation is established where the words complained of:

- a) are defamatory, in that they would tend to lower a person’s reputation in the estimation of reasonable people;
- b) are about the plaintiff; and,
- c) have been published to a third party.⁴⁵

To determine whether the words complained of are defamatory, the plaintiff must show the main thrust, or “defamatory sting,” of those words.⁴⁶ In *Rutman*, the Court of Appeal found that the defendants were engaged in a concerted effort to destroy the plaintiff’s reputation by sending emails that he was dishonest, committed fraud, and was otherwise untrustworthy. The plaintiff was

⁴¹ *Ibid* s 41.25.

⁴² *Ibid* ss 27 (2.3), (2.4), (3.3).

⁴³ Public Law 105-304, 112 Stat. 2860.

⁴⁴ For example, DMCA Defenders offers a special rate to victims of the non-consensual distribution of intimate images. See: <http://dmcadefender.com/dmca-takedown-service-notice/>

⁴⁵ *Rutman v Rabinowitz*, 2016 ONSC 5864 at para 133.

⁴⁶ *Ibid*.

an accountant and the defendants also aired their views on a professional review website. The court concluded, and the Court of Appeal upheld, that the defendants had defamed the plaintiff.

Rutman is useful for its commentary on internet defamation and how it is distinct from defamation in other mediums. The instantaneous dissemination of information and images over the internet creates a new consideration when awarded damages because of the speed with which the information or images spread and the vitriol they frequently attract due to the anonymity afforded by the internet.

When an intimate image is shared without consent, it can damage a person's reputation. This is particularly true when the images are shared with additional commentary or posted on a website that suggests the people in the images are "bad" people, such as websites dedicated to posting images of supposedly unfaithful partners. Websites dedicated to "revenge porn" encourage the person posting the image to share additional information about the individual in the image, often accusing them of being sexually unfaithful, sexually promiscuous, or a unreliable romantic partner. They often include derogatory and untrue comments about the individual. In cases where defamatory content is shared along with the image, the Plaintiff may have a claim under defamation. Due to the defence of truth, it may be more challenging to argue defamation when the image has been shared in a different context or without additional commentary, but this has yet to be determined by the courts.

Extortion/Intimidation

Intimate images can be used to extort or intimidate the person in them. As such, the person whose images have been used to extort or intimidate them may find a claim in the tort of intimidation. There have been several criminal cases where individuals have been compelled to share additional intimate images or engage in sexual acts that they did not want to.⁴⁷

The tort of intimidation is laid out in a UK case, *Rookes v Barnard*,⁴⁸ where the court states:

Although there seems to be no authority on the point, it cannot be doubted that it is an actionable wrong intentionally to compel a person, by means of threat of an illegal act, to do some act whereby loss accrues to him.

It was adopted in Canada in at the Supreme Court in the cases *Roman Corp Ltd v Hudson's Bay Oil & Gas Co*,⁴⁹ as well as *Central Canada Potash Co v Saskatchewan (Attorney General)*.⁵⁰ *Grand Financial Management Inc. v Solemio Transportation Inc.*,⁵¹ states that the element of this tort are:

- a) A threat;
- b) Intent to injure;

⁴⁷ For example see: *R c Davis*, [1999] 3 RCS 759; *R v Groves*, 2015 ONSC 2590; *R v Mackie*, 2013 ABPC 116.

⁴⁸ [1964] 1 All ER 367 (UKHL) at p 397.

⁴⁹ [1973] 36 DLR (3d) 413 (SCC) at p 420.

⁵⁰ [1979] 1 SCR 42 (SCC) at para 71.

⁵¹ 2016 ONCA.

- c) Some act taken or forgone as a result of the threat; and
- d) Resulting damages.

The non-consensual distribution of intimate images has been recognized as both a civil wrong and a criminal offence. Distributing these images without consent is an illegal act. It could be argued that threatening to distribute a person's intimate image in order to compel them do something constitutes the tort of intimidation.

Harassment

The non-consensual sharing of intimate images is often done with the intent to cause distress and harass the individual in the image. Sexual harassment is not recognized as an independent tort in Ontario,⁵² but the tort of harassment has been recognized in several cases.⁵³

In *McHale v Ontario*, the court laid out the test for the tort. It stated that in an action for harassment, a plaintiff must establish:

- a) outrageous conduct by the defendant;
- b) the defendant's intention of causing or reckless disregard of causing emotional distress;
- c) the plaintiff suffered severe or extreme emotional distress; and
- d) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.⁵⁴

Considering the language used in the criminal courts, it is likely that the non-consensual distribution of intimate images would be considered harassing in many cases. In multiple criminal cases, the court has recognized the gravity of this offence, the severe emotional distress caused by the sharing of these types of images, and the need to denounce this behaviour.⁵⁵

Intentional infliction of mental suffering

The test for intentional infliction of mental distress is set out in *Prinzo v Baycrest Centre for Geriatric Care* and requires:

- a) conduct that is flagrant and outrageous;
- b) calculated to produce harm; and,
- c) resulting in visible and provable injury.⁵⁶

⁵² *Lorion v 1163957799 Quebec Inc* (2015), 2015 CarswellOnt 5261 (ONSC) held that it did not have the jurisdiction to address the claim for sexual harassment, and it should instead be addressed via the *Ontario Human Rights Code*.

⁵³ Also see: *Merrifield v Canada (Attorney General)*, 2017 ONSC 133; *McIntomney v Evangelista Estate*, 2015 ONSC 1419

⁵⁴ *McHale v Ontario*, 2014 ONSC 5179 at para 44.

⁵⁵ For example see: *R v JTB*, 2018 ONSC 2422 at 97; *R v AC*, 2017 ONCJ 129 at 84; *R v PSD*, 2016 BCPC 400 at para 9.

⁵⁶ *Doe, supra* at para 26.

A malicious purpose is not required in order to establish this tort. In *Doe v ND*, Justice Stinson found that the defendant's actions were flagrant and outrageous. The defendant clearly violated the promise he made to the plaintiff in encouraging her to share intimate photos of herself.

Justice Stinson held that it is entirely foreseeable that posting intimate images of a woman, who had shared the images with the expectation that it would remain private, on a public website would cause understandable feelings of betrayal, emotional upset and psychological distress.⁵⁷

Justice Stinson found that the defendant's actions caused the plaintiff extensive psychological harm and that she sustained a visible and provable illness as a result of his actions.⁵⁸ The plaintiff thus satisfied her claim for intentional infliction of mental distress.

Intrusion upon seclusion

In 2012, the Ontario Court of Appeal recognized the tort of intrusion upon seclusion in *Jones v Tsige*.⁵⁹ The key features of this cause of action are:

- a) the defendant's conduct must be intentional, which includes reckless;
- b) the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and,
- c) a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish.⁶⁰

The Court of Appeal was clear that a claim for intrusion upon seclusion will arise only for deliberate and significant invasions of personal privacy. The tort is intended to protect intrusions into a person's financial or health records, sexual practises and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive.⁶¹

In *Tsige*, the Court discusses that the intrusion into a person's personal affairs must be intentional and unauthorized.⁶² In *Tsige*, the defendant had accessed the plaintiff's bank records without permission. This tort will be useful if a defendant obtains unauthorized private images, such as computer technicians stealing intimate images from the Plaintiff's computers or surreptitiously taken images, however, it may be of limited assistance if the intimate images were willingly shared with the person who publishes them online.

⁵⁷ *Ibid* at para 30.

⁵⁸ *Ibid* at paras 31-32.

⁵⁹ 2012 ONCA 32 at para 34.

⁶⁰ *Ibid* at para 71.

⁶¹ *Ibid* at para 72.

⁶² *Ibid* at para 55-56.

Publication of embarrassing or private facts

In *Doe v ND*, Justice Stinson granted default judgment for damages based on the posting of an intimate video on a pornography website without the plaintiff's knowledge or consent. He found the defendant liable on three alternative causes of action: breach of confidence, intentional infliction of mental distress, and invasion of privacy, which included the tort of publication of embarrassing facts. After the decision was released, the defendant moved successfully to set it aside, on the basis that the defendant had an arguable defence on the merits.⁶³ However, appellate courts have not interfered with the recognition of the new tort. Recently, Justice Gomery in *Jane Doe 72511 v Morgan* [*Doe v Morgan*] also recognized this tort and adopted the reasoning from *Doe v ND*.

In cases where intimate images are disseminated online, counsel can plead the public disclosure of private facts in. As these cases are argued in the future, important issues will need to be addressed by the court. Justice Stinson was clear that the disclosure of the private facts must be a public disclosure - to the public at large, as opposed to a private disclosure to a small group. The courts will need to address how many people need to view an image for the disclosure to be considered "public".

It will be important to follow the soon to be released Supreme Court decision of *R v Jarvis*,⁶⁴ which will be determining what is meant by a "reasonable expectation of privacy" and will influence future decisions of what is considered private.

In *Doe v Morgan*, Justice Gomery adopted the tort of public disclosure of private facts in order to fashion a civil remedy for the online publication of an intimate video.⁶⁵ Justice Gomery held that "[f]ailing to develop the legal tools to guard against the intentional, unauthorized distribution of intimate images and recordings on the internet would have a profound negative significance for public order as well as the personal wellbeing and freedom of individuals."⁶⁶

In *Doe v Morgan* stated that to establish liability, the plaintiff must prove that:

- a) the defendant publicized an aspect of the plaintiff's private life;
- b) the plaintiff did not consent to the publication;
- c) the matter publicized or its publication would be highly offensive to a reasonable person; and
- d) the publication was not of legitimate concern to the public.

While there are still questions to be answered and issues to be tried regarding this new tort, its establishment in the Ontario jurisprudence will assist individuals whose intimate images and information have been disseminated without their consent.

⁶³ *Jane Doe 464533 v ND*, 2017 ONSC 127.

⁶⁴ [2017] SCCA No 440.

⁶⁵ *Jane Doe 72511 v Morgan*, 2018 ONSC 6607 at para 86.

⁶⁶ *Ibid* at para 88.

CLASS ACTION

In a 2018 decision, *Doucet v The Royal Winnipeg Ballet*, Justice Perell certified a class action of former students of the Royal Winnipeg Ballet School.⁶⁷

The defendant, Bruce Monk, was employed as a member of the dance company as an instructor/teacher, and also as a photographer at the ballet school. The class members allege that between 1984 and 2015, Mr. Monk photographed students of the school in private settings, which included photographs in which the students were semi-nude, nude and in pornographic poses.⁶⁸ The students also allege that Mr. Monk disseminated and sold the intimate photographs of the students, including online dissemination, in breach of various statutory and common-law privacy and confidentiality torts.⁶⁹

Justice Perell found that all five-part test for certifying a class action have been met:

- a) the pleadings disclose a cause of action;
- b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;
- c) the claims of the class members raise common issues;
- d) a class proceeding would be a preferable procedure for the resolution of the common issues; and,
- e) there is a representative plaintiff.⁷⁰

In discussing the common issues criterion, Justice Perell accepted breach of confidence, intrusion upon seclusion and public disclosure of common facts, among others, as common issues among the class members.⁷¹ An important defining characteristic of the class members is the institutional association that brought Mr. Monk and the class members together.⁷² This institutional association was also a factor in Justice Perell's finding that vicarious liability was a common issue among the class members.⁷³

As the collection and distribution of intimate images amongst individuals or groups is a common aspect of the non-consensual distribution of intimate images, class actions may of particular use in non-consensual distribution cases. Cases such as this, as well as the case of *Marine United* or *Hunter Moore* (see above) may be well suited for class actions.

BREACH OF CONTRACT

If your client faces a terminated contract as a result of the unwanted publication of intimate images, it will be important to verify whether the contract contains a morality clause, and if so, to determine whether it covers past and future behaviour. Even if the contract contains an expansive morality

⁶⁷ 2018 ONSC 4008.

⁶⁸ *Ibid* at para 2.

⁶⁹ *Ibid* at para 3.

⁷⁰ *Ibid* at para 157.

⁷¹ *Ibid* at paras 97-99.

⁷² *Ibid* at para 114-116.

⁷³ *Ibid* at para 105.

clause, your client's reasonable expectation privacy and the sharing of intimate photographs between two consenting adults should not breach a contract's morality clause. This was demonstrated in the Ontario case, *Zigomanis v 2156775 Ontario Inc. (D'Angelo Brands)*.⁷⁴

In this case the plaintiff, a professional hockey player commenced an action for breach of contract when the defendant terminated a two-way promotional contract when nude photos of the plaintiff appeared on the Internet. The plaintiff had entered into a promotional contract in May 2011 with the defendant, D'Angelo Brands, in connection with the marketing and promotion of an energy drink brand known as Cheetah Power Surge. The contract contained a "morality" clause which stipulated that D'Angelo Brands was entitled to terminate the contract if the athlete "...commits any act which shocks, insults, or offends the community, or which has the effect of ridiculing public morals and decency."⁷⁵

The plaintiff had consensually shared nude images of himself with his then-girlfriend.⁷⁶ The photos were later shared publicly without the plaintiff's consent. D'Angelo Brands terminated the contract, in part, due to his "nude photo scandal" had caused a "... loss of cache for the Cheetah Blueberry product."⁷⁷

The trial judge found that sending an intimate photograph to another consenting adult by electronic means would not likely shock, insult, or offend the community or ridicule public morals and decency, and thus did not breach the contract's "morality" clause.⁷⁸ Importantly, the trial judge found that while the plaintiff had taken the nude photographs, they were posted on the internet without his knowledge or consent.⁷⁹ The photographs were taken well before the contract was signed and the "morality" clause did not have retrospective effect.⁸⁰ The trial judge held that even if the morality clause had applied to the plaintiff's past actions, the private communication of intimate information between two consenting adults is not a new phenomenon, and is done with the expectation that they would remain private between the sender and the recipient.⁸¹ This expectation of privacy has been codified in the *Criminal Code* and Manitoba's *The Intimate Image Protection Act*, C.C.S.M. c. 187, s. 11. All of these factors lead to the trial judge's conclusion that sending an intimate photograph to another consenting adult by electronic means did not breach the contract's morality clause.⁸²

The trial judge ultimately found that D'Angelo Brands wrongfully terminated the contract and ordered that they pay the plaintiff \$162,500.00 in damages.⁸³ The Ontario Court of Appeal upheld the trial judge's finding that the community conscience would not be shocked by the sharing of intimate information between two persons in a relationship, the inherent expectation of privacy

⁷⁴ 2016 ONSC 7053, upheld on appeal 2018 ONCA 116.

⁷⁵ *Ibid* at para 10.

⁷⁶ *Ibid* at para 17.

⁷⁷ *Ibid* at para 20.

⁷⁸ *Ibid* at para 58.

⁷⁹ *Ibid* at para 51.

⁸⁰ *Ibid* at para 52-53.

⁸¹ *Ibid* at para 56.

⁸² *Ibid* at para 58.

⁸³ *Ibid* at para 63.

when doing so, and the public policy reflected in legislation protection the privacy of such communications in the internet age.⁸⁴

The online publication of intimate images can have a lasting impact on an individual's careers and could impact any kind of agreement that contains a "morality" clause. Of note in *Zigomanis*, the morality clause did not extend to past behaviour, a factor considered by the trial judge in concluding that Mr. Zigomanis had not breached the contract. However, if an agreement contained a more exacting or expansive morality clause, the online distribution of intimate images may very well impact the contract, particularly, as in this case, the party to the contract was the individual who took the photos (even if they did so with the full intention of keeping those photographs private).

PART THREE: REMEDIES AND RELIEF

Use of Pseudonyms

In *Doe v Morgan*, the court amended the title of the proceeding so the Plaintiff's name would appear as "Jane Doe" rather than her legal name.⁸⁵ It is likely that most plaintiffs in cases involving the online publication and dissemination of intimate images will want their privacy protected as much as possible in public court documents.

When a plaintiff requests the use a pseudonym, the court must also address the strong presumption that exists in favour of the openness of the courts.

A person seeking to use a pseudonym must first establish there is a serious issue to be tried; second, that absent a pseudonym he or she is likely to suffer irreparable harm; and third, that the balance of convenience favours the use of a pseudonym.

There is a low threshold to establish a serious issue to be tried. Allegations of the dissemination of intimate images without consent would likely meet this threshold. In order to satisfy the second criterion, a plaintiff must provide objective and compelling evidence that they will suffer irreparable harm if their identity is not protected – the courts will not protect against mere embarrassment. Overcoming the presumption of openness requires clear and compelling evidence, and courts have requested psychological or medical evidence regarding the harm the plaintiff may suffer if required to proceed with an action in their own name.⁸⁶ The third criterion requires that the plaintiff demonstrate that the balance of convenience favours using a pseudonym. It is at this stage of the test that the plaintiff must provide evidence that their individual privacy interests outweigh the Canadian courts' commitment to openness.

In cases involving the online distribution of intimate images, there is a strong argument that the individual privacy interests at stake and the ongoing harm to the plaintiff would outweigh the need to identify the plaintiff in the action. In *Doe v Morgan*, Justice Gomery held that "[i]t is difficult

⁸⁴ 2018 ONCA 116 at para 9.

⁸⁵ *Jane Doe 72511 v Morgan*, 2018 ONSC 6607.

⁸⁶ *Jane Doe v D'Amelio* (2009), 98 OR (3d) 387 at para 20-21.

*to conceive of a privacy interest more fundamental than the interest that every person has in choosing whether to share intimate or sexually explicit images and recordings of themselves. Every person should have the ability to control who sees images of their body.*⁸⁷

Similarly, in *AB v Bragg Communications Inc.*, the Supreme Court found that sexualized cyber bullying of minors causes objectively discernable harm, and the minor is not required to demonstrate specific harm.⁸⁸

There is a strong argument to be made that using a plaintiff's actual name in a case involving the publication of intimate images would cause irreparable harm and is not outweighed the commitment to the open court principle.

Injunctive relief

In the few cases dealing with the online distribution of intimate images, a portion of the relief sought has been both interlocutory and permanent injunctions, which order the party who has posted the information to remove it. While a permanent injunction is obviously the relief most individuals seek, it frequently requires a hearing on the merits. Given the current backlog of civil cases, this could take several years. How then can you get your client's online images taken down as soon as possible after they are discovered?

The obvious answer is an interlocutory injunction. In *R v Canadian Broadcasting Corp.*,⁸⁹ the Supreme Court of Canada clarified the test for mandatory interlocutory injunctions. A mandatory interlocutory injunction directs the defendant to undertake a positive course of action, such as removing online content or restoring the status quo.⁹⁰

In order to obtain a mandatory interlocutory injunction, a modified *RJR McDonald* test now applies:

- a) the applicant must demonstrate that there is a strong *prima facie* case, which means showing that there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.⁹¹
- b) the applicant must demonstrate that irreparable harm will result if the relief is not granted; and,
- c) the applicant must show that the balance of convenience favours granting the injunction.⁹²

Counsel who seek a mandatory interlocutory injunction must be aware of this new test and ensure that they are including sufficient evidence in their motion materials with respect to the online content, the probable source of that content, and the damages the content has caused the plaintiff.

⁸⁷ *Jane Doe 72511 v Morgan*, 2018 ONSC 6607 at para 80.

⁸⁸ 2012 SCC 46 at paras 15-17.

⁸⁹ 2018 SCC 5.

⁹⁰ *Ibid* at para 15.

⁹¹ *Ibid* para 17.

⁹² *Ibid*.

If counsel is able to obtain an interlocutory injunction and the defendant does not comply, the plaintiff can bring a motion for contempt.⁹³ A contempt motion is quasi-criminal in nature and the plaintiff has the burden of proving contempt beyond a reasonable doubt. The plaintiff must prove that the terms of the order are clear and unequivocal, that the defendant was aware of the terms of the order and that the order was disobeyed deliberately and wilfully.⁹⁴ There are several cases where parties have succeeded in obtaining a contempt order after a defendant fails to remove online content or comments after being ordered to do so by the court.

Ordering the destruction of images

Targets of this behaviour want assurance that their photos will not be shared again and are often interested in knowing that the images are no longer in the hands of the defendant. The court can order the destruction of the images. In *Doe v Morgan*, the court made an order that the defendant destroy “any and all nude photos, intimate images or sexually explicit recordings he may have of Jane, and prohibiting him from publishing, posting, sharing or otherwise disclosing in any fashion any nude, intimate or sexually images or recordings of Jane.”⁹⁵

Types of Damages

a. General

General damages compensate an individual for pain and suffering. In cases involving Internet defamation, the court will consider the following factors in determining general damages:

- a) the plaintiff’s position and standing;
- b) the nature and seriousness of the defamatory statements;
- c) the mode and extent of the publication;
- d) the absence or refusal to retract the libel or to apologize for it;
- e) the conduct and motive of the defendant; and,
- f) the presence of aggravating or mitigating circumstances.⁹⁶

Courts have recognized the distinguishing features of Internet defamation when quantifying a general damages award. In *Barrick Gold Corp. v Lopehandia*, the Court of Appeal held the internet defamation is distinguishable from defamation in other medium in that “*communication via the Internet is instantaneous, seamless, inter-active, blunt, borderless and far-reaching.*”⁹⁷ internet defamation is unique in terms of its potential to damage the reputation of individuals by “*...its interactive nature, its potential for being taken at face value, and its absolute and immediate worldwide ubiquity and accessibility.*”

⁹³ *Donohue v Pierce*, 2013 ONSC 4601 at paras 18-21.

⁹⁴ *College of Optometrists v SHS Optical Ltd.* (2008), 2008 ONCA 685.

⁹⁵ *Ibid* at 144.

⁹⁶ *Barrick Gold Corp. v Lopehandia* [2004], 71 OR (3d) 416 [“*Barrick Gold*”].

⁹⁷ *Ibid* at para 31.

The mode and extent of publication is therefore a particularly significant consideration in assessing damages in Internet defamation cases. These features of Internet defamation are also relevant to the online distribution of intimate images without the consent of the subject. The instantaneous and anonymous communication over the Internet creates increased risk to an individual's reputation if defamatory or sexually explicit images are distributed online.

In *Rutman*, the court held that the online comments were serious, ongoing, malicious and targeted directly at the communities where his reputation was most important.⁹⁸ The court considered the traditional factors when quantifying a general damages award in a defamation case. However, these factors were considered in light of the context of the comments.

In *Rutman*, the motion judge ordered a general damages award of \$200,000.00. The Court of Appeal upheld the award.⁹⁹

In *Doe v Morgan*, a case involving the non-consensual distribution of intimate images, the Plaintiff was awarded \$50,000 in general damages.¹⁰⁰

b. Special Damages

If your client has had to incur specific costs associated with the publication of intimate images, for example, having to move because their address and other contact information has been published alongside their intimate images, the moving costs could potentially be claimed as special damages.

c. Past and Future Medical Benefits

If your client's intimate images have been posted online, it would understandably cause psychological distress. If your client requires counselling or other medical treatment, the cost can be claimed under this head of damages.

d. Aggravated/Punitive Damages

Damages may be awarded where the damage to the plaintiff was aggravated by the manner in which the culpable act was committed. Punitive damages will be awarded if the misconduct of the defendant was so outrageous that punitive damages are rationally required to act as deterrence.¹⁰¹

In *Barrick Gold*, Justice Blair noted that given the communicative power of the , defamation may call for an award of punitive damages.¹⁰² In *Rutman*, the Court of Appeal upheld the punitive damages award of \$50,000.00.¹⁰³

⁹⁸ *Rutman, supra* at para 74.

⁹⁹ *Ibid* at 76.

¹⁰⁰ *Doe v Morgan*, note 3 at para 139.

¹⁰¹ *Ibid* at para 62.

¹⁰² *Barrick Gold, supra* at para 62.

¹⁰³ *Rutman, supra* at para 105.

In *Doe v Morgan*, Justice Gomery ordered that the defendant pay \$25,000.00 in punitive damages.¹⁰⁴ She held that “[p]unitive damages are necessary here to emphasize the seriousness of [the defendant’s] malicious actions and to deter others from similar behaviour. Revenge porn is an assault to the victim’s personal agency and sense of self-worth.”¹⁰⁵ As these matters proceed before the courts, there are more decisions that recognize that the publication of intimate images of another person without their consent deserves punishment, deterrence and denunciation, and awarding punitive damages.

The court in *Doe v Morgan* also awarded \$25,000.00 in aggravated damages. It noted that despite the requirement that the defendant’s conduct be “highly offensive”, aggravated damages will not be appropriate in every case. In the case of *Doe v Morgan*, the defendant had acted with malice, posted the video to a public website, listing it using a degrading title, shared it with friends, taunted the Plaintiff about the posting, and threatened to post more intimate images of her online, which allowed for aggravated damages.¹⁰⁶

PART FOUR: PRACTICE TIPS

Norwich Order

If you are unable to identify who posted the image and the website will not provide identifying information independently, you can seek a Norwich Order from the courts. This involves initiating a civil proceeding against a *Doe* and seeking third party discovery against the website that the image is posted on. It is a third-party discovery mechanism where you ask the court to order the website to provide information associated with the photo such as the IP address associated with the posting; the name, email or other identifying information related to the poster’s account, and other relevant identifying information they may have. You can request the identifying information as well as the associated metadata related to the image.

You will need to demonstrate:

- a) Whether the applicant has provided evidence sufficient to raise a valid bona fide or reasonable claim;
- b) Whether the applicant has established a relationship with the third party from whom the information is sought, such that it establishes that the third party is somehow involved in the acts involved;
- c) Whether the third party is the only practicable source of the information available;
- d) Whether the third party can be indemnified for costs to which the third party may be exposed due to the disclosure; and
- e) Whether the interests of justice favour obtaining the disclosure.¹⁰⁷

¹⁰⁴ *Jane Doe 725111 v Morgan, supra* at para 143.

¹⁰⁵ *Ibid* at para 142.

¹⁰⁶ At paras 137-138.

¹⁰⁷ *Olsen v Facebook Inc*, 2016 NSSC 155; *GA Group v Ventra Group*, 2009 ONCA 619; *1654776 Ontario Ltd v Stewart*, 2013 ONCA 184.

If this information is not sufficient to identify the poster, then additional steps may need to be taken. You may seek a Norwich order of the Internet service provider to provide identifying information associated with the IP address that the website provided.

Content of Statement of Claim

In *Doe v Morgan*, counsel argued that the court should recognize the defendant's liability for breach of confidence and/or intentional infliction of mental distress despite the torts not being pleaded in the statement of claim. However, the court found that the statement of claim did not provide an explanation for how the defendant gained access to the video. Without this information, a breach of confidence claim could not be met. Further, the statement of claim did not note any visible or provable injury to *Doe*, as such, this claim could also not be met.

To meet these types of claims, these details will need to be included in the statement of claim in order to meet these torts.

Take down requests and monitoring services

Some websites may remove content if requested. For example, PornHub, Facebook, and Twitter all have policies that prohibit the publication of intimate images without consent. There are mechanisms to flag the content for the company and have them take the content down, although they are not consistently responsive. For example, once an image has been flagged and noted as violating the company's policy, Facebook has the ability to create a digital signature related to the image and remove it from Facebook and its affiliated platforms including Messenger and Instagram. However, if the image has been altered or edited, their technology may not be able to detect it. Prior to its removal, you will want to ensure that the metadata related to the image is accessible for evidentiary purposes before the images are deleted from the Internet. Some websites may require a request by the police or a court order in order to take the content down. Other websites will be un-cooperative, even with a court order. Familiarizing yourself with these websites take down policies can be beneficial for your practice.

The *American Digital Millennium Copy Right Act*¹⁰⁸ has been an effective tool to remove non-consensually distributed images from the Internet. The "notice and take-down" procedures allow copyright owners to report infringements and ISPs are then able to promptly remove the infringing images. This system has been used by Canadian victims of the non-consensual distribution of intimate images and there are commercial services that can assist in reporting the infringing images.¹⁰⁹

Most clients will be interested in having their images removed from the Internet or where ever they have been shared as soon as possible. This is very important to stop the spread of the images and the related harms to the images staying online for a longer period. However, removing the images online can interfere with evidence gathering, so this process must be done thoughtfully. One option is to hire a professional company to locate, document, and attempt to remove the

¹⁰⁸ Public Law 105-304, 112 Stat. 2860.

¹⁰⁹ For example, DMCA Defenders offers a special rate to victims of the non-consensual distribution of intimate images. See: <http://dmcadefender.com/dmca-takedown-service-notice/>

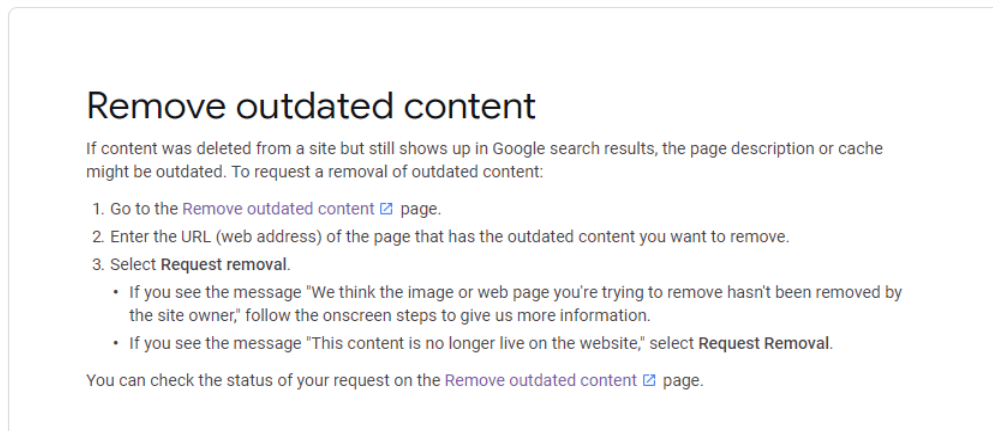
content from the Internet. It is particularly important that the company you work with collect the metadata, including the IP address associated with the posting of the image in order to maintain the important evidence about the posting.

While such a service may be costly for clients, there is potential to recoup the cost under special damages.¹¹⁰

De-indexing on Google

Once you have successfully removed your client's online content, it is possible that links to certain websites may still be visible when your client's name is typed into Google. If the website has been removed, you can request that the outdated content be removed by visiting the following webpage:

<https://support.google.com/websearch/answer/6349986?hl=en>



This can assist in disassociating your client's name with particular websites, especially if those websites are known for revenge porn.

CONCLUSION

The above summary is intended to provide a cursory view at the civil remedies that may be available to a client whose intimate images have been posted online without consent.

The potential remedies will depend on the individual facts of each case and the nature and distribution of the images. As the law develops in this area, it is likely that specific tests will also develop for the unlawful distribution of intimate images.

The distribution of intimate images is unlikely to stop anytime soon. However, it may be possible to protect clients and compensate them for their loss through the civil court process.

¹¹⁰ One such service is DMCA Defender: <http://dmcadefender.com/dmca-takedown-service-notice/>.

APPENDIX

Canadian organizations addressing the non-consensual distribution of intimate images

CyberScan

Phone: 902-424-6990 or toll-free at 855-702-8324

Website: <http://novascotia.ca/cyberscan>

Canadian Centre for Child Protection

Phone: 1-866-658-9022

Website: www.cybertip.ca

American organizations addressing non-consensual distribution of intimate images

Cyber Civil Rights Initiative

Phone: 1-844-878-2274 (Crisis hotline)

Website: <https://www.cybercivilrights.org/>

The BADASS Army

Website: <https://badassarmy.org/contact-us/>

Civil legislation in other jurisdictions

Alberta

Protecting Victims of Non-Consensual Distribution of Intimate Images Act, RSA 2017, c P-26.9.

Manitoba

Intimate Image Protection Act, CCSM 2015, 187.

Nova Scotia

Intimate Images and Cyber-protection Act, SNS 2017, c 7.

Saskatchewan

The Privacy Amendment Act, 2017, 2018 SS 201, c 28.

Provincial privacy acts may also be applicable to the non-consensual distribution of intimate images.

Alberta

Personal Information Protection Act, SA 2003, C P-6.5.

British Columbia

Personal Information Protection Act, SBC 2003, c 63.

Criminal Code provision and Criminal cases

Non-Consensual Distribution of Intimate Images

s 162.1 (1) Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, is guilty

(a) of an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) of an offence punishable on summary conviction.

Definition of intimate image

(2) In this section, intimate image means a visual recording of a person made by any means including a photographic, film or video recording,

(a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity;

(b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and

(c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the offence is committed.

Defence

(3) No person shall be convicted of an offence under this section if the conduct that forms the subject-matter of the charge serves the public good and does not extend beyond what serves the public good.

Question of fact and law, motives

(4) For the purposes of subsection (3),

(a) it is a question of law whether the conduct serves the public good and whether there is evidence that the conduct alleged goes beyond what serves the public good, but it is a question of fact whether the conduct does or does not extend beyond what serves the public good; and

(b) the motives of an accused are irrelevant.

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