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Patchwork quilt of state laws used to combat revenge porn

In recent weeks, a Texas woman — formerly the object of unwanted prurient online attention — made national headlines when she sued Facebook for the staggering sum of \$123 million for the social media giant's role in hosting "revenge porn."

Although the sum seems stratospheric, even delusional, the requested damages award has presumably achieved some of its calculated effect: to attract not only Facebook's attention but also to put the phenomenon of non-consensual pornography further in the spotlight.

The lawsuit alleges that Facebook permitted a user — one of the plaintiff's estranged friends — to establish a phony page hosting "doctored and Photoshopped photographs that depict the true face of plaintiff attached to false, phony, naked body shots," as well as at least one photo purporting to show the plaintiff in a sex act.

Despite the plaintiff's persistent efforts to have the page shut down, Facebook was unresponsive and allowed it to stay up for months. Only after the plaintiff enlisted the aid of Houston police to subpoena Facebook was the offensive page deactivated.

Although the Texas lawsuit is perhaps most notable for taking on Facebook and seeking an eye-popping sum (calculated, rather arbitrarily, as 10 cents per Facebook user, worldwide), the plaintiff is by no means unique in her emotional injury.

So-called revenge porn — the posting of sexually explicit photos and videos of a person (usually a woman) without her consent — occurs with disturbing frequency, subjecting its victims not only to humiliation but often to physical threats and reputational harm with both personal and professional consequences.

Should Mark Zuckerberg be worried?

At first blush, the plaintiff's decision to take on Facebook seems fated for perfunctory dismissal. Service providers such as

Facebook are generally insulated from liability for user-created content under section 230 of the Communications Decency Act.

"No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another content provider," the section states. This section routinely has been held to exempt online content hosts, including social media networks and bloggers, from liability for material posted on their websites by users and commenters.

The theory is that service providers cannot be held responsible for offensive material posted by third parties; requiring otherwise would place a site like Facebook in the business of monitoring every post and making constant judgments as to the suitability of users' material, an onerous burden that could be prohibitively resource-intensive as well as having a chilling effect on speech.

(Section 230 does not immunize providers from intellectual property violations, but the Digital Millennium Copyright Act separately addresses providers' responsibilities vis-a-vis third-party copyright infringement.)

It's a complicated problem, and the question of which legal remedy might be most effective in deterring the problem remains unresolved.

The plaintiff has included a claim for breach of contract, which conceivably could have legs if Facebook violated the terms of its user agreement, but even that claim is tenuous at best.

Strategies to combat revenge porn

Given the nearly impenetrable shield of Section 230, the plaintiff's case against Facebook is unlikely to get very far. Revenge porn is, however, a growing problem and one that can have devastating effects on its victims,



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who often lack any realistic prospect of remedy.

It's a complicated problem, and the question of which legal remedy might be most effective in deterring the problem remains unresolved. However, with growing awareness among the public and lawmakers, there has been a flurry of legislative activity in the states — and a number of states have already passed legislation outlawing revenge porn.

Primarily, there are two routes (by no means mutually exclusive) for redressing incidents of revenge porn: civil liability and

criminalization.

On the civil side, there are a variety of tort theories that may be available for malicious and harassing conduct that violates an individual's privacy. Revenge porn victims may sue for false light, intentional infliction of emotional distress and defamation, as well as a host of related theories. A number of these civil cases are making their way through the courts; in February, a Texas jury awarded \$500,000 in emotional distress damages, following an award of \$250,000

by a California jury.

Although a civil suit may seem the obvious vehicle for addressing an injurious and harassing privacy violation, there are significant drawbacks to this approach. A victim, who has already suffered the shame and humiliation of having intimate photos or videos disseminated, often lacks the resources to bring suit. Many victims are relatively young, and posters of the harmful material (usually the victim's ex) are frequently judgment-proof.

Victims also may be deterred by the prospect of public filings, discovery and possibly the ordeal of a trial. Even beyond these obstacles, establishing liability is far from a given: intentional infliction of emotional distress is notoriously difficult to prove, and a plaintiff generally must establish the identity and intent of the poster.

Given the insufficiency of civil remedies, states are increasingly moving to enact laws that would criminalize revenge porn directly.

While existing laws may provide grounds for prosecuting posters of the harassing material, as well as owners of websites that host the material in a scheme to extort money from victims who pay to have the material removed, a number of states, including New Jersey, New York and California, have passed legislation in hopes of expanding any existing protections against revenge porn. In Illinois, several bills have been introduced and achieved broad support, so it appears that an enactment here is just a matter of time.

As is often the case with a patchwork approach, the states' laws vary in terms of their severity and scope. Despite this flurry of legislative activity, it remains to be seen whether the laws will achieve the desired deterrent effect and appropriate balance between prosecuting truly malicious, criminal activity and criminalizing more benign lapses of judgment.