SYRACUSE SCIENCE & TECHNOLOGY LAW REPORTER

VOLUME 21 FALL 2009 ARTICLE 1, PAGE 1

SEX, PRIVACY, AND WEBPAGES: CREATING A LEGAL REMEDY FOR VICTIMS OF PORN 2.0

Ariel Ronneburger*

I. INTRODUCTION

Cecilia Barnes' online profile included her name, workplace contact information, and nude photographs. The pictures, posted on a web page hosted by Yahoo! Inc., received so much attention that they motivated a number of men who did not know Ms. Barnes to find her at work.[1] Given her Internet exposure, Ms. Barnes probably should not have been surprised by these visits. However, Ms. Barnes never posted these photos herself—her ex-boyfriend did.[2] After Ms. Barnes informed Yahoo! that she had not consented to the online profile containing her nude photographs, the company still failed to remove the profile from its website. The Oregon District Court determined that Yahoo! was not liable for any harm caused by the dissemination of Ms. Barnes' photographs and personal information.[3] While the Ninth Circuit Court of Appeals later determined that Ms. Barnes had a cause of action against Yahoo!, this decision was based solely on the fact that the company had promised Ms. Barnes that it would

* J.D., Hofstra University School of Law, M.A., State University of New York at Stony Brook, B.S., Cornell University. The author wishes to thank Holning Lau, Associate Professor of Law at the University of North Carolina at Chapel Hill Law School, for all his help and encouragement in the writing of this Article.

[1] *Barnes v. Yahoo! Inc.*, No. Civ. 05-926-AA, 2005 WL 3005602, at *1 (D. Or. Nov. 8, 2005), *overruled by Barnes v. Yahoo! Inc.*, 570 F. 3d 1096 (9th Cir. 2009).

[2] *Id.*

[3] *Id.* at *4.

remove the pictures from its site.[4] The Ninth Circuit opinion is unfortunately under-protective because, based on its reasoning, services like Yahoo! can avoid liability simply by refraining from making any promises to assist victims like Ms. Barnes.[5]

Stories like Ms. Barnes' are not uncommon.[6] Moreover, the rise of so-called "Porn 2.0" will likely increase the online distribution of nude photographs featuring people who did not consent to the images' circulation.[7] Derived from the term "Web 2.0," which is used to define Internet-based interactive communities,[8] the term Porn 2.0 describes websites that allow users to post pornography that they themselves have created.[9] With Porn 2.0, it is increasingly easy for Internet users to post pornographic images or videos of people who did not consent to the materials' circulation.

---

[4] *Barnes*, 570 F. 3d at 1107-09.

[5] *Id.*

[6] *See, e.g.*, Carol Ann Alaimo, *Adultery Penalty, FBI Probe Dog Huachuca Chaplain*, ARIZ. DAILY STAR, Feb. 11, 2007, at A1, A1 (A married Army chaplain posted nude photographs of a woman on various sex sites. The woman, believing that she was the man's fiancée, had sent him the photos while he was overseas and did not intend for anyone else to see them); *Ex-Boyfriend Guilty in Extortion*, SEATTLE TIMES, Dec. 31, 1999, at B2, B2 (A man was convicted of extortion for threatening to post his ex-girlfriend's nude photos online. The man also claimed he had already posted some of the photographs online); *Teen Charged with Posting Ex-Girlfriend's Nude Photo on MySpace* (May 1, 2008), http://www.thedenverchannel.com/technology/ 16117242/detail.html? rss=den&psp=news (a Wisconsin teen broke into his ex-girlfriend's MySpace account and posted nude photos of her).

[7] Sunny Freeman, *Porn 2.0, and its Victims*, THE TYEE, July 6, 2007, http://thetyee.ca/Mediacheck/ 2007/ 07/06/Porn2-0/.

[8] Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 VAND. J. ENT. & TECH. L.799, 801 (2008).

[9] Jacqui Cheng, *Porn 2.0 is Stiff Competition for Pro-Pornographers*, ARS TECHNIA, June 6, 2007, http://arstechnica.com/news.ars/ post/20070606-porn-2-0-is-stiff-competition-for-pro-pronographers.html.

There is little that victims of the Porn 2.0 phenomenon can do. Such victims generally have no recourse against websites like Yahoo!, due to the Communications Decency Act ("CDA"), a federal statute that grants immunity to online service providers[10] for content uploaded by users.[11] In some places, victims like Ms. Barnes can sue their ex-boyfriends and ex-girlfriends for tort damages in state court; however, it is unlikely that monetary damages paid by the person who uploaded the pictures can adequately compensate for the effects of their actions—the potentially widespread dissemination of private images, which could permanently remain on the Internet for anyone to see.

Legal scholars have proposed various ways to prevent or regulate the posting of pornographic images of non-consenting individuals. These methods include conditioning copyright of pornographic videos and images on a showing of consent of the model or actor,[12] and imposing contract liability on ex-lovers who spread confidential information and photographs.[13] These methods, however, are inadequate. They do not provide victims with any way to have the photos removed from the website, nor do they impose any liability on service providers who ignore complaints that the provider is hosting videos or images of people who did

[10] A "service provider" is merely a source of third party information and media. The service provider does not create content itself, but allows for its third parties (users of the website) to upload and display their own content. An "information content provider," in contrast, plays an active role in the creation of material presented on its website. *See infra* notes 48-50.

[11] *Barnes v. Yahoo! Inc.*, No. Civ. 05-926-AA, 2005 WL 3005602, at *1 (D. Or. Nov. 8, 2005), *overruled by Barnes v. Yahoo! Inc.*, 570 F. 3d 1096 (9th Cir. 2009); *see also* Communications Decency Act of 1996, 47 U.S.C. § 230 (2006) (Section 230 of the Act provides broad immunity for third-party content to providers of Internet services).

[12] Bartow, *supra* note 8, at 834-38.

[13] Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality*, 74 U. CIN. L. REV. 887, 908-35 (2006).

not consent to their distribution. Further, the proposals do not address posters who do not seek copyright protection and who are not ex-lovers.

The problem of regulating the world of Porn 2.0 thus persists. This paper addresses this problem by proposing an amendment to the CDA, creating potential liability for service providers who fail to at least investigate claims of non-consented pornography. The proposed amendment is modeled on The Online Copyright Infringement Liability Limitation Act ("OCILLA") portion of the Digital Millennium Copyright Act ("DMCA"). If a service provider is on notice that it is hosting copyrighted material, OCILLA requires the service provider to remove the material from its servers in order to obtain safe harbor from copyright infringement charges.[14] Thus, service providers must act upon notice of hosting copyrighted material.[15] According to this Article's proposed amendment to the CDA, online service providers would have a similar duty to act upon notice that they are hosting nude images of unconsenting individuals.

The remainder of this Article unfolds in three parts. Part II discusses the rise of Porn 2.0 and the need to regulate the uploading and distribution of pornography depicting people who have not consented to its circulation. This Part also examines service provider immunity under the CDA and explains how this law bars claims against service providers that host non-consented pornography. Part III describes the different proposals made by legal scholars to both control the

[14] Online Copyright Infringement Liability Limitation Act ("OCILLA"), 17 U.S.C. § 512(c) (2006). The Digital Millennium Copyright Act ("DMCA") was passed in 1998 to create harsher penalties for copyright infringement on the Internet. Title II of the DMCA, referred to as "OCILLA", creates a safe harbor for online service providers who promptly act upon actual knowledge of copyrighted material that has been posted by a third-party user. If these procedures are followed, the service provider will not be held liable for the infringing activities of a third party. *See id.* § 512, 1201-05, 1301-32.

[15] *Id.*

spread of user-generated amateur pornography and protect its victims. Additionally, this Part explains why these solutions will not solve all the problems posed by the widespread popularity of Porn 2.0. Part IV discusses the DMCA, which imposes on service providers a duty to investigate claims of copyright infringement, and also requires service providers to remove copyrighted materials from their websites in order to obtain immunity from claims of contributory infringement.[16] This Part also makes a novel proposal, arguing for an amendment to the CDA. This amendment, modeled after the DMCA, would require service providers to investigate claims of hosting non-consented pornography and subsequently remove such images or videos, in order to obtain immunity in suits over third-party content. This Article then concludes that amending the CDA to extend potential liability to service providers is the best way to regulate Porn 2.0.

II. PORN 2.0, ITS VICTIMS, AND THE CDA

In the past decade, the popularity of interactive Internet sites has given rise to a number of websites that allow members to share personal pornographic materials.[17] This phenomenon, known as Porn 2.0, has provided a mechanism for users to post photos and videos not only of themselves, but also of people who have not consented to the online distribution of these images.[18] While victims of non-consented postings of pornography have attempted to sue the websites hosting the material, courts have found that the CDA grants service providers immunity

[16] 17 U.S.C. § 512(c).

[17] Freeman, *supra* note 6.

[18] *Id.*

from liability for third-party content.[19] Accordingly, Porn 2.0 sites have become instruments for revenge and humiliation, and the victims of these sites have been left with little legal remedy.[20]

A. *The Rise of Porn 2.0 and Its Consequences*

Interactive pornographic websites are part of what has become known as Web 2.0.[21] Web 2.0 consists of sites that promote the development and exchange of information between users, such as blogs, social networking sites like MySpace and Facebook, interactive projects like Wikipedia, and video-sharing sites such as YouTube.[22]

While Web 2.0 technologies have facilitated communication among people all over the world, and even played a large role in the 2008 presidential campaign,[23] they have also led to the development of Porn 2.0 sites.[24] Two of the most successful of these sites are YouPorn and PornoTube, both of which enable users to upload pornographic videos that are then searchable and viewable by anyone on the site.[25] These sites are extremely popular. The website Alexa, which tracks Internet traffic, shows that YouPorn is the fifty-second most visited site in the world.[26]

---

[19] *See Barnes v. Yahoo! Inc.*, No. Civ. 05-926-AA, 2005 WL 3005602, at *1 (D. Or. Nov. 8, 2005), *overruled by Barnes v. Yahoo! Inc*., 570 F. 3d 1096 (9th Cir. 2009).

[20] Freeman, *supra* note 7.

[21] Bartow, *supra* note 8, at 816.

[22] Ross D. Silverman, *Enhancing Public Health Law Communication Linkages*, 36 J.L. MED & ETHICS 29, 36-37 (2008).

[23] David Carr & Brian Stelter, *Campaigns in a Web 2.0 World*, N.Y. TIMES, Nov. 2, 2008, at B1.

[24] Freeman, *supra* note 7.

[25] *Id.*

The advent of Porn 2.0 raises serious questions over the issues of privacy and consent. A 2006 survey by *Cosmopolitan* magazine revealed that 15% of women admit to having made a sex tape, creating the possibility of these tapes being circulated on the Internet.[27] It has been reported that there are at least 250 YouPorn videos containing pornography of "ex-girlfriends," presumably women whose ex-lovers have now posted supposedly private sex tapes online seeking revenge through public humiliation.[28] The blog "Ex Girlfriend Pictures"[29] allows users to submit photos of ex-girlfriends for "revenge or bragging rights," and contains a plethora of pictures of nude women, lying on beds and spreading their legs underneath comments such as "I love her perky little tits and that little pink snatch is looking as sweet as nectar."[30] Additionally, a Google search for the term "ex girlfriend photos" yields some 2,480,000 results, mostly pages that cater to those who want to upload pornographic images of women they have dated.[31]

Fear of an ex-lover uploading private images and videos online is prevalent among people who have participated in the creation of homemade pornography. On Yahoo! Message Boards, there are threads started by young women asking other members what to do about ex-boyfriends who are currently threatening to post nude photos, and other threads by women

---

[26] YouPorn.com – Traffic Details from Alexa, http://www.alexa.com/siteinfo/youporn.com# (last visited Nov.12, 2009).

[27] Freeman, *supra* note 7.

[28] *Id.*

[29] Ex Girlfriend Pictures – Real Ex Girlfriends and Ex Wives Nude, http:www.exgfpics. com/blog (last visited Nov. 15, 2008).

[30] Ex Girlfriend Pictures – Spicy Ex Girlfriend Nude in Mirror, http://www.exgfpics. com/blog/index.php/2008/ 11/06/spicy-ex-girlfriend-nude-in-mirror/ (last visited Nov. 15, 2008).

[31] Ex-Girlfriend Photos – Google Search, http.www.google.com (search for "ex girlfriend photos") (last visited Nov. 15, 2008).

asking what to do now that their private photos have already been leaked online.[32] Indeed, posting these photos does seem to be a popular form of revenge, as many sites promote the sharing of pictures and videos of ex-boyfriends or girlfriends as a form of punishment for a bad break-up.[33]

Once uploaded, the material on these sites is available to anyone who logs on. Though sites like YouPorn have disclaimers that mandate the consent of all parties involved in a pornographic video.[34] According to pornography law expert Janine Benedet, many of these images are posted without authorization.[35] Benedet describes this as "a devastating attack. There is no legal mechanism for victims to get their pictures back once they're out there, despite the fact that there is lingering harm."[36]

It is the sexual nature of this attack that makes it so damaging. The Internet can be used to assault a person's reputation in a variety of ways, such as through the posting of defamatory comments.[37] However, posting sexual images of unconsenting individuals is particularly harmful. Both law and culture continue to distinguish between sexual expression and other forms of expression. Indeed, Supreme Court jurisprudence treats sexual expression as a category unto itself.[38] Likewise, society particularly condemns those whose sexual photographs have

---

[32] Posting of Bina to http://au.answers.yahoo.com/question/index?qid=20080320060501AA Fvp7Q (Mar. 2008); Posting of L ~ to http://answers.yahoo.com/question/index?qid= 20081002230322AArW1bc (Oct. 2008).

[33] *See, e.g.*, Ex Girlfriend Pictures – Real Ex Girlfriends and Ex Wives Nude, *supra* note 29.

[34] YouPorn.com – Terms of Service, http://youporn.com/terms (last visited Nov. 15, 2008).

[35] Freeman, *supra* note 7.

[36] *Id.*

[37] *See*, Zeran v. Am. Online, Inc., 129 F.3d 327, 329-330 (4th Cir. 1997).

been circulated online, whether by themselves or by others. For example, Arlington, Oregon mayor Carmen Kontur-Gronquist was forced to step down after she posted a photo of herself in a bra and underwear, taken years before she became mayor, on her private MySpace page.[39] Though the photo was hardly pornographic, many in Arlington felt that Kontur-Gronquist's decision to pose in this way was evidence that she was not fit to be mayor.[40] Similarly, an award-winning Texas high school teacher was fired after a co-worker discovered online photos of the teacher where her breasts were visible,[41] while a Texas probation officer was recently placed on administrative leave because nude photographs she took as a college student were found online.[42] Thus, it is the particular taboo that society places on sexual expression that makes the unauthorized posting of such images or videos so injurious. While the mere dissemination of pornographic images can be detrimental to one's reputation and career, the

[38] The Supreme Court has maintained different standards for the regulation of sexual material as opposed to other forms of speech. The Court held that the government may regulate sexual expression when a work appeals to a "prurient interest in sex," as defined by contemporary community standards, portrays sex in a patently offensive way, and lacks any literary, artistic, political, or scientific value. Miller v. California, 413 U.S. 15, 39 (1973). In contrast, the Supreme Court has been more protective of other forms of speech, even when such speech would likely be considered offensive by many members of the public. Cohen v. California, 403 U.S. 15, 21 (1971) (upholding a man's First Amendment right to wear a jacket that said "Fuck the Draft," in opposition to the Vietnam War).

[39] Mike Celizic, *Ousted Mayor Defends Racy MySpace Pics*, MSNBC, Mar. 3, 2008, http://today.msnbc.msn.com/id/23445683/.

[40] *Id.*

[41] Heather L. Carter et al., *Have You Googled Your Teachers Lately? Teachers' Use of Social Networking Sites*, 89 PHI DELTA KAPPAN 681, 683 (2008).

[42] *Texas Probation Officer Karla Escobar Fired for Nude Internet Photos. Is this Fair? Take our Poll*, GUANABEE, Oct. 14, 2008, http://guanabee.com/2008/10/texas-probation-office-karla-e.php.

people who participate in pornography of this sort lack a legal remedy when these materials are disseminated without their consent.[43]

Although some commentators might place the blame on individuals who took part in creating amateur pornography by claiming that they should have exercised more discretion by not posing nude for their partners in the first place, victims of Porn 2.0 should be protected nonetheless. They should be protected, because placing trust in one's intimate partner is understandable; and because our legal culture places a strong emphasis on principles of consent.

Trust is an inherent component to many, if not most, intimate relationships.[44] Because placing trust in one's intimate partner is so common, victims of Porn 2.0 should not be blamed for wrongly trusting their partners. In some regards, the law already protects individuals who misplace trust in their intimate partners, instead of blaming the individuals for trusting in the first place. For example, commentators have argued that one of the purposes of domestic violence laws is to protect individuals against their misplaced trust.[45] Protecting victims of Porn 2.0 would function in the same vein.

The law should also protect, rather than blame, victims of Porn 2.0, because the American legal system values consent; victims of Porn 2.0 are victims precisely because their

---

[43] *See* Freeman, *supra* note 7.

[44] *See* Orly Rachmilovitz, *Bringing Down the Bedroom Walls: Emphasizing Substance over Form in Personalized Abuse*, 14 WM. & MARY J. WOMEN & L. 495, 499-502, 539-42 (2008) (discussing dynamics of trust as a oft-cited justification for domestic violence policies and providing background on social science literature on trust). One of the reasons trust is often so strong between couples is because individuals' identities are often intertwined with that of their partners. *See id*. at 539 (discussing the relationship between trust and identity); Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CAL. L. REV. 1271 (2007) (discussing how coupled relationships influence the identity of individuals).

[45] *See* Rachmilovitz, *supra* note 44, at 500 (summarizing literature on domestic violence and trust).

images have been posted without their consent. Strong rape laws in the United States reflect the legal culture's emphasis on consent. For example, in order to prevent clouding fact-finders' assessments of consent in rape cases, the Federal Rules of Evidence generally bar the presentation of a rape victim's prior sexual conduct.[46] Such provisions serve to protect rape victims, based on principles of consent, rather than blame victims for their sexual history.[47] Similarly, creating a remedy for the victims of Porn 2.0 would value consent and not blame the victims for their sexual history.

B. *Service Provider Immunity Under the CDA*

Despite the fact that the online posting of pornographic images could be particularly damaging, there remains inadequate legal recourse for those who discover their supposedly private photos have been spread throughout the Internet. Victims of Porn 2.0 have no mechanism to have the material removed from the website, and the CDA provides immunity to service providers for third-party content, even when the people depicted in the photos or videos did not consent to their posting.

---

[46] *See* FED. R. EVID. 412 (barring evidence of rape victim's sexual history, unless it is being offered in a criminal case to show consent with the particular defendant or that another person was the perpetrator).

[47] It should be noted that unfortunately, in practice, judges and juries are sometimes still biased against rape victims, placing blame on the victims. *See* Christine Chambers Goodman, *Protecting the Party Girl: A New Approach for Evaluating Intoxicated Consent*, 2009 B.Y.U. L. REV. 57, 65, 76 (2009). As a result, legal scholars have been arguing, based on principles of consent, for even stronger rape protections. *See, e.g.*, *id* at 65 (proposing that, in determining whether sexual intercourse was consensual, the jury's focus should not be on whether there was a clear expression of dissent, but that only "some evidence of dissent, even mild evidence of dissent, should be adequate to put the defendant on notice that any continued action towards sexual intercourse may be non-consensual or forced."); Allison West, *Tougher Prosecution When the Rapist is Not a Stranger: Suggested Reform to the California Penal Code*, 24 GOLDEN GATE U. L. REV. 169, 195-98 (1994) (arguing that laws must be revised so that rapes involving two people who are well-acquainted with one another are not considered less serious than when the perpetrator is a stranger).

The CDA distinguishes, for purposes of liability, between service providers and information content providers. A service provider is a passive conduit for web pages and media that are entirely provided by its user; the service provider does not create the offending content itself. This content, created by website designers or uploaded to Web 2.0 sites by users, is considered third-party content.[48] In contrast, an information content provider is someone who is "responsible, in whole or in part, for the creation or development of" the content displayed on a website.[49] Websites may be both service providers, presenting images and videos that have been entirely created and posted by third parties, as well as information content providers, creating or contributing to some material.[50]

The CDA was passed in 1996 to "promote the continued development of Internet and other interactive computer services and other interactive media."[51] Because Congress felt that imposing liability for the actions of third parties on service providers would require websites to heavily regulate the actions of users and thus limit the development of online communities as a form of mass communication,[52] Section 230 of the CDA states that, "[n]o provider or user of an

---

[48] Communications Decency Act of 1996, 47 U.S.C. § 230(f)(3) (2002).

[49] *See*, *Fair Housing Council of San Fernando Valley, et al. v. Roommates.com, et al.*, 521 F.3d 1157,1162 (9th Cir. 2007).

[50] *Id.* An example of a service provider is a website that allows users to post messages to one another. The users of the site create the content, while the website itself provides only a passive means of communication. *See id.* at 1163; *Cubby, Inc. v. CompuServe, Inc*., 776 F. Supp. 135, 140 (S.D.N.Y. 1991). A content provider is any website whose owners create the content displayed on the website. For example, Roommates.com was held to be a content provider, because it had created the questions that users of the site were required to answer to register with the site. *Roommates.com*, 521 F.3d at 1164.

[51] Communications Decency Act of 1996, 47 U.S.C. § 230(b)(1) (2002).

[52] *Barnes v. Yahoo! Inc.*, 2005 U.S. Dist. LEXIS 28061 at *2 (2005), *overruled by Barnes v. Yahoo! Inc.*, 570 F. 3d 1096 (9th Cir. 2009).

interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[53] This section has been interpreted to mean that the CDA precludes claims that attempt to hold a service provider liable for the information that a third-party user has distributed through the service.[54]

A number of claims seeking to hold service providers liable for the acts of third parties have been dismissed due to the CDA.[55] Even when notice has been given to a service provider regarding pornographic third-party content that has been posted without the consent of all parties involved, service providers are still granted immunity under the CDA. In *Barnes v. Yahoo!*, Ms. Barnes, after discovering her ex-boyfriend had posted nude photos of her on a fake profile he had created, repeatedly sent letters to Yahoo!, telling the Internet company that she had not consented to the posting of the images or profile, and asking that they be removed. Yahoo! failed to respond to these letters, and it was only after Ms. Barnes threatened to go to a local news channel to do a story about the situation, that a Yahoo! representative contacted her and told her the profiles would be removed from the site.[56] When the company failed to remove the profile and

[53] 47 U.S.C. § 230(c)(1). Communications Decency Act of 1996, 47 U.S.C. § 230(c)(1) (2002).

[54] *See, Barnes, supra* note 52, at *5.

[55] *See, e.g., Carafano v. Metrosplash.com Inc*., 339 F.3d 1119, 1122-24 (9th Cir. 2003) (holding that, because of the Communications Decency Act ("CDA") an Internet dating service could not be held liable for defamation based upon a fake profile that had been created by a third-party user); *Zeran v. Am. Online, Inc*., 129 F.2d 327, 334-35 (4th Cir. 1997) (holding that the CDA precludes service providers from being liable for defamation based upon messages posted by a third-party); *Doe v. MySpace, Inc*., 474 F. Supp. 2d 843, 846-50 (W.D. Tex. 2007) (holding that the interactive website MySpace could not be held liable for negligence due to the CDA, when a minor was sexually assaulted by an adult she met through the site); *Barnes*, 2005 U.S. Dist. LEXIS 280614 (holding that the CDA barred Yahoo! from being held liable for nude photos a man had posted of his ex-girlfriend).

[56] *Barnes*, 2005 U.S. Dist. LEXIS 28061 at *1.

pictures, Ms. Barnes sued Yahoo!, alleging that it breached a duty it had assumed when its representative promised to have the material deleted.[57] The District Court of Oregon dismissed the suit, holding that, because Section 230 of the CDA prevented Yahoo! from being treated as the publisher of the photographs, it was immune from liability for the actions of Ms. Barnes' ex-boyfriend.[58]

While the Ninth Circuit ultimately held that Ms. Barnes had a cause of action against Yahoo!, the court based its decision on the theory of promissory estoppel.[59] A Yahoo! employee had told Ms. Barnes that her photos would be removed from the website, and the court determined that this promise was legally enforceable against the company.[60] The Ninth Circuit's decision thus offers little help to victims of Porn 2.0, as website employees will now be careful not make promises similar to the one Yahoo! made to Ms Barnes.

While the CDA does not always grant websites immunity, the situations in which the provision is inapplicable do not provide relief to the victims of user-generated pornography. The immunity clause of the CDA does not apply to service providers if the service provider is acting as an information content provider.[61] Since websites can be both passive service providers and active content providers, it is possible that a website may be granted immunity under the CDA for content generated by third parties, while the immunity clause will not apply to other materials

---

[57] *Barnes*, 2005 U.S. Dist. LEXIS 28061 at *2.

[58] *Id.* at *4.

[59] *Barnes*, 570 F. 3d at 1107-09.

[60] *Id.*

[61] 47 U.S.C. § 230(c)(1); Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008).

that the website played a role in creating.[62] However, this does little for Porn 2.0 victims like Ms. Barnes, whose photos were posted on Yahoo! by a third party user, her ex-boyfriend, while Yahoo! retained its CDA immunity by remaining a service provider only.

Recently, the Ninth Circuit Court of Appeals held that the immunity clause of the CDA did not apply to the website Roommates.com, and thus did not protect the site from a claim that it violated the Fair Housing Act ("FHA").[63] The website, which matches people looking for a place to live with people who have space to rent out, required users to fill out profiles describing their own sexual orientation, as well as their preference in a roommate's sex, sexual orientation, and whether they would bring children to the home.[64] Users provided answers to these questions using drop-down menus.[65] This information was then used to filter listings so that only those who met the described criteria would receive email notifications about available housing. For example, if person stated that she preferred her roommate be a straight female, a lesbian looking for housing would not receive an alert about this housing opportunity. This conduct was alleged to be a violation of the FHA because it ultimately made it more difficult for people to find housing based on discriminatory factors.[66] Roommates.com tried to argue it was immune from liability because it was not responsible for the content of users' profiles, and could not be

[62] 47 U.S.C. § 230(c)(1); Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008).

[63] *Fair Hous. Council of San Fernando Valley*, 521 F.3d at 1175-76.

[64] *Id.* at 1161-62.

[65] *Id.* at 1165.

[66] *Id.* at 1167.

considered a publisher of the content.[67] However, the Court held that, because Roommates.com created the questions and the drop-down menu, the website had in fact acted as an information content provider, and could not claim immunity under the CDA against charges of discriminatory filtering of housing opportunities.[68]

The *Roommates.com* holding does little to help those in Ms. Barnes' situation; sites like YouPorn and PornoTube do not contribute to the creation of the videos that they host; these sites act as service providers, passively hosting third-party content.[69] Thus, even though the effects of having unauthorized pornography posted online could be devastating, the CDA permits service providers to turn a blind eye to the fact that their Terms of Service are being violated, and their websites being used as tools for revenge and humiliation.

III. EXISTING PROPOSALS TO REGULATE PORN 2.0 AND PROPOSED REMEDIES FOR ITS VICTIMS

Legal scholars have attempted to develop ways to regulate the spread of amateur, user-generated pornography and, thereby, to protect the interests of those involved. One of these proposals is granting copyright protection to pornographic materials only if all of the people in the video or pictured have consented to its creation and circulation.[70] However, this fails to address situations in which the person spreading the pornography is not concerned with copyright protection, but rather with revenge or humiliation. Another proposal focuses on creating implied or express contracts of confidentiality between couples, where a cause of action arises should one member of the couple share private information about, and images of, the other

---

[67] *Fair Hous. Council of San Fernando Valley*, 521 F.3d at 1162.

[68] *Id.* at 1175-76.

[69] *See* Freeman, *supra* note 7.

[70] Bartow, *supra* note 8, at 834-38.

on the Internet.[71] This proposed regulation, however, does not protect those who have had images spread by either someone they never had a long-term relationship with or someone who they do not know.

A. *Copyright*

Recently, Professor Ann Bartow proposed a method of regulating Porn 2.0 focused on conditioning copyright registration and enforcement for pornography on a showing that all parties involved consent to both the creation and distribution.[72] Under Professor Bartow's regulation scheme, the creator of a pornographic video or image could never seek a copyright infringement claim against someone who allegedly copied her work, unless she could show that her original work was created with the consent of the persons featured in it.[73]

Professor Bartow points out that, under current copyright law, only the copyright holder has the ability to control the use of photos and videos. Since the copyright in an image or work of art is always granted to the creator rather than the subject of the work, only the creator has a legal right to control its use, while the subjects of the pornographic materials have no ownership rights. [74] Accordingly, the subjects of pornographic videos and images have no ability to control their distribution.[75] Copyright does play a role in pornography. Porn purveyors often search through sites like YouPorn and PornoTube to find content they themselves produced, and then

[71] *See* McClurg, *supra* note 13, at 908-35.

[72] Bartow, *supra* note 8, at 802.

[73] *Id.*

[74] *Id.* at 835.

[75] *Id.*

take action against the infringer.[76] By conditioning copyright protection on a showing of consent by all the parties involved, a pornographer will only be able to pursue such an infringement claim if she can make a showing that all the parties depicted in the photographs or videos consented to the creation of the material and its widespread circulation.[77] In proposing this regulation scheme, Bartow focuses only on creators of Porn 2.0 who are actually interested in obtaining a copyright in their work and would seek to enforce that right.[78]

The weakness of this proposal's ability to protect victims of Porn 2.0 is reflected in some of the examples provided by Professor Bartow. She tells the story of a student who recently discovered that nude photographs of her were taken, without her consent, in a university locker room and subsequently posted on the Internet, while the "legal system, as [the student] experiences it, offers her nothing."[79] It is unlikely that anyone would seek some kind of copyright protection in a photograph taken, presumably from a cell phone, of a girl changing into a bathing suit in a locker room. And because the copyright is owned by the creator of the image, the student herself could not exert any type of ownership over the photograph.[80] Thus, Professor Bartow's regulation scheme would provide no relief to this student.

Therefore, conditioning copyright registration and enforcement on a showing of consent of the subjects depicted would be unlikely to effectively regulate the Porn 2.0 industry and

---

[76] Bartow, *supra* note 8, at 834. Despite the efforts to remove copyrighted material on sites like YouPorn, copyrighted material of porn actress Jenna Jameson still remains on the site. *See also* Freeman, *supra* note 7.

[77] *See* Bartow, *supra* note 8, at 834-38.

[78] *Id.*

[79] *Id.* at 816.

[80] *Id.* at 836.

protect its victims. Someone seeking revenge on an ex-lover is probably not interested in obtaining a copyright, and a copyright would only protect the owner's right to an infringement claim. The subject of the pornographic material would still be left with little recourse after her image is distributed throughout the internet community.

B. *Implied and Express Contracts of Confidentiality*

Legal scholars have also analyzed contract law as a potential source of regulating user-generated Internet pornography. Professor Andrew McClurg proposed that implied or express contracts of confidentiality between partners may give rise to a cause of action if an ex-lover leaks private information or photographic images on the World Wide Web.[81] Courts have already allowed those whose private information is shared on the internet to file suit against their ex-lovers, claiming damages for "publicizing embarrassing personal details."[82]

Professor McClurg, arguing that this tort liability is not adequate protection, proposed that contracts of confidentiality arise between couples in "intimate relationships," which he defines as "a course of romantic dealing between two adults in which the parties intend to form or at least investigate the possibility of forming an ongoing, stable relationship."[83] Thus, intimate relationships do not include purely physical relationships, such as one-night stands.[84] In these relationships, "private, embarrassing information" is shared between the couple, which

[81] *See* McClurg, *supra* note 13, at 908-34.

[82] *Id.* at 892-96.

[83] *See id.* at 917.

[84] *Id.*

may include secrets that could be embarrassing if widely known, sexual information, as well as "sexy pictures."[85]

Contracts of confidentiality are formed between the couple and the information shared between the couple becomes part of this contract. The contract may be implied, inferred from the interactions between the couple while they are together.[86] An implied contract of confidentiality, as Professor McClurg would define it in this situation, only covers "the dissemination of private, embarrassing information through an instrument of mass communication."[87] Thus, breaches of this contract can only occur if one member of the couple uses some kind of widespread media, such as the Internet, to spread private information about the other. This distinction is based on the differences between person-to-person communication and mass communication—face-to-face conversations are fleeting and often quickly forgotten, while Internet postings can be permanent and easily circulated.[88]

Professor McClurg also proposes that parties could form an express contract, ensuring that each member of the relationship owes a duty to the other to keep information private.[89] An

[85] McClurg, *supra* note 13, at 923-28.

[86] *Id.* at 908-17.

[87] *Id.* at 924.

[88] *See id.* at 927.

[89] Professor McClurg proposes the following as a model express contract that could be signed by both parties to a relationship:

> The undersigned parties, for the valuable consideration of society, companionship and all of the other many services and benefits mutually conferred by intimate partners, enter into this agreement of confidentiality as part of an intimate relationship they have established. The parties agree . . . that private information and acts be shared and take place in an atmosphere of mutual trust in which each party can rely on the other not to disclose to third parties private, embarrassing

express contract would avoid the difficulties of ascertaining the terms of an implied contract, and the parties can also determine in advance the kind of damages that will be sought in the event there is a breach.[90]

While contract claims rarely give rise to emotional distress damages, in situations where a breach was "of such a kind that serious emotional disturbance was a particularly likely result," recovery for emotional distress may be allowed.[91] Professor McClurg asserts that the kind of emotional harm resulting from the breach of a contract of confidentiality is likely to meet this description, because intimate relationships are grounded in emotion. Under this theory, damages, determined on a case-by-case basis, could be awarded to a man or woman who is the victim of a breach of confidentiality by an ex-lover.[92]

The potential liability for damages that could occur if a contract of confidentiality between an intimate couple is breached might deter someone from spreading an ex-lover's private information or photographs, and it could help compensate the victim of the breach for humiliation he or she has suffered. However, implied contracts may be hard to prove in court and it may be difficult for a judge to discern whether the parties were ever in a serious

---

> information about the other acquired in the course of the relationship. . . . [Private, embarrassing information] includes information relating to mental and physical health, sexual activities, personal finances, quirks and eccentricities, indiscretions, and immodest or sexually oriented photographs or video in any format.
>
> McClurg, *supra* note 13, at 933 (internal citation omitted).

[90] *Id.* at 929, 936-37.

[91] *Id.* at 935 (citing RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981)).

[92] *Id.* at 935-36.

relationship.[93] Further, it is hard to imagine a couple actually sitting down and signing an express agreement that stipulates to what so many people expect out of a relationship—that private information will be kept between the couple. If one partner requested the other to sign this kind of contract, it could raise issues about trust and potentially damage the relationship.[94] Thus, it seems unlikely that express contracts of confidentiality would actually be utilized by couples.

Even if breach of a contract of confidentiality allows the victim to recover damages from an ex-boyfriend or girlfriend, the money he or she receives will not be able to compensate for what happens after the information is shared. For example, if a man posts nude photographs of his ex-girlfriend on the internet, she might be able to recover a substantial sum of money if she is successful in a breach of an implied contract of confidentiality claim.[95] However, these photos may have been downloaded by hundreds of people all over the world, and may be reposted to different internet sites.[96] The woman's nude images may still be viewed by anyone and could still effect her career and reputation, even years after she won the breach of contract lawsuit. It is the sharing of private information that is the real harm caused by a breach of an ex-lover's promise of confidentiality, and although monetary damages may be able to compensate

---

[93] *See* Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L.Q. 537, 549-50 (2007) (discussing the difficulty of proving implied contract claims with regard to property in relationships where the couple chose to live together in a marriage-like relationship but yet never made their relationship legally binding).

[94] Richard H. Singer, Jr., *A Primer on Preparing Premarital Agreements*, N.J. LAWYER, Aug. 2003, at 54, 55. Similar issues are raised by prenuptial agreements, which "can have a chilling effect on the parties' love for each other at a very critical time in their relationship."

[95] *See* McClurg, *supra* note 13, at 908.

[96] *Id.* at 927.

somewhat, they cannot erase the websites on which the private information or photographs have been shared or the minds of those people who have viewed it.

Professor McClurg's proposal would also offer no protection to the student described in Professor Bartow's article, as the student did not have any kind of relationship with the person who uploaded nude photos of her on the Internet—she did not even know who had taken the pictures.[97] Contracts of confidentiality thus offer no real way of regulating the unauthorized spread of pornographic images. They cannot provide adequate protection to all people who may be the victims of such acts.

IV. AMENDING THE CDA TO IMPOSE A DUTY TO ACT UPON NOTICE

While existing proposals for regulating Porn 2.0 provide inadequate relief to most people who find their supposedly-private images posted online, amending the CDA can provide a more significant remedy. The CDA should be amended to require service providers to act upon knowledge that it is hosting unauthorized pornography. The CDA currently grants immunity to interactive service providers for content posted by third-parties by preventing these providers from being treated as the publishers of this information.[98] However, these service providers may be liable for hosting copyrighted material posted by a third party without the permission of the owner.[99] The OCILLA requires service providers to act upon the knowledge that copyrighted material has been uploaded to its website in order to avoid liability.[100] Similarly, the CDA should be amended to require that service providers investigate claims of non-consented

---

[97] *See* Bartow, *supra* note 8, at 816.

[98] Communications Decency Act of 1996, 47 U.S.C. § 230(c)(1) (2006).

[99] *See* Online Copyright Infringement Liability Limitations Act, 17 U.S.C. § 512(c) (2006).

[100] *See id.*

pornography and subsequently remove it from its website. This change will provide better protection for victims of Porn 2.0.

A. *Safe Harbor for Online Service Providers under the DMCA*

The DMCA was signed into law by President Bill Clinton on October 28, 1998, in order to protect copyright holders against the threat of infringement that was beginning to grow as a result of the widespread use of the Internet.[101] The Act made criminal actions that "circumvent a technological measure that effectively controls access to a [copyrighted work]."[102] Thus, the production or dissemination of any technology that allows users to circumvent digital copyright protection is barred by the DMCA.[103] Further, the Act imposes civil or criminal liability on those who violate its provisions. A first offense is punishable by a fine of up to $500,000 or imprisonment of up to five years, or both.[104] Subsequent offenses are punishable by a fine of up to $1,000,000 or imprisonment of up to ten years, or both.[105]

The immunity granted to service providers under the CDA has "[n]o effect on intellectual property law," such as copyright law.[106] This provision suggests that service providers could potentially be liable for contributory copyright infringement. Contributory copyright

---

[101] Brandon Brown, Note, *Fortifying the Safe Harbors: Reevaluating the DMCA in a Web 2.0 World*, 23 BERKELEY TECH. L.J. 437, 443 (2008); U.S. Copyright Office, The Digital Millennium Copyright Act of 1998 (Dec. 1998), http://www.copyright.gov/legislation/dmca.pdf.

[102] Digital Millennium Copyright Act, 17 U.S.C. § 1201(a)(1)(A) (2006).

[103] Brown, *supra* note 101, at 443; Declan McCullagh, *Congress Readies Broad New Digital Copyright Bill*, CNET NEWS, Apr. 24, 2006, http://news.cnet.com/2100-1028_3-6064016.html.

[104] 17 U.S.C. § 1204(a)(1).

[105] *Id.* § 1204(a)(2).

[106] Communications Decency Act of 1996, 47 U.S.C.§ 230(e)(2) (2006).

infringement occurs when one party, with the knowledge that another party is committing copyright infringement, "induces, causes, or materially contributes to the infringing conduct of another."[107] This means that an online service provider might be considered a contributory infringer if it knowingly hosts copyrighted material posted by a third-party user. While the third party has committed direct copyright infringement by posting the material, the online service provider is a contributory infringer if it has actual knowledge of this infringement and continues to host the third-party content.[108]

However, the DMCA contains its own provision giving safe harbor to service providers, so that they may avoid claims of contributory copyright infringement for the acts of third parties.[109] Title II of the DMCA, known as OCILLA, creates immunity for online service providers for the copyright-infringing acts of third-party users if the service providers either do not know about the copyright infringement, or if they comply with the procedure set out in OCILLA after gaining knowledge of infringement.[110] The "notice and takedown" procedure described in OCILLA requires that a service provider, upon receiving "knowledge or awareness" of infringing material on its network, must "act[] expeditiously to remove, or disable access to,

[107] Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971).

[108] *See* Laura Rybka, ALS Scan, Inc. v. Remaro Communities, Inc.: *Notice and ISPS' Liability for Third Party Copyright Infringement*, 11 DEPAUL-LCA J. ART. & ENT. L. & POL'Y 479, 492 (2001).

[109] *See* 17 U.S.C. § 512 (c).

[110] *Id*; David Haskel, *A Good Value Chain Gone Bad: Indirect Copyright Liability in* Perfect 10 v. Visa, 23 BERKELEY TECH. L.J. 405, 415 (2008).

the material."[111] Additionally, to qualify for safe harbor, the service provider must designate an agent who receives all notifications of alleged copyright infringement.[112]

Adequate notification of copyright infringement under the DMCA includes a physical or electronic signature of someone authorized to act on behalf of the owner of the copyright, an identification of the copyrighted work allegedly being infringed, contact information for the complaining party, a statement of good faith belief that copyright infringement is occurring, and a statement that all the information in the notification is accurate under penalty of perjury.[113] After the designated agent receives the claim of copyright infringement, the agent must decide whether the notification meets the required standards, and determine whether the material should be removed.[114] Removing the material in a timely fashion will allow the service provider to avoid any contributory copyright infringement claim for the infringement committed by a third party.[115]

After the material is deleted from the site, the agent must notify the alleged infringer that the material has been removed.[116] The alleged infringer may then file a counter-notification, arguing a good faith belief that the material was mistakenly removed.[117] The service provider must then wait ten to fourteen days; if a copyright infringement suit is not filed within this time,

---

[111] OCILLA, 17 U.S.C. § 512(c)(1)(A)(iii) (2006).

[112] *Id.* § 512(c)(2).

[113] OCILLA, 17 U.S.C. § 512(c)(3)(A).

[114] *See id.* § 512(c).

[115] *See id.*

[116] *Id.* § 512(g)(2)(A).

[117] *Id.* § 512(g)(3).

the material may be placed back on the website.[118] However, if the service provider fails to act and copyright infringement has occurred, it may be liable for contributory infringement.[119]

Though the DMCA provides a way for copyright holders to protect their ownership rights, it only keeps such materials off of websites to the extent that an infringement suit ensues. Thus, only those with the means to pursue a lawsuit will be able to keep their copyrighted work from being infringed upon.[120]

Porn 2.0 sites such as YouPorn have DMCA disclaimers, providing information on whom to contact if material posted on the site is infringing a copyright, and what proper notification of this infringement must include.[121] These sites thus provide mechanisms for contacting the site about potential infringements, even giving the contact information of an agent who will investigate these claims.[122]

The DMCA has been subjected to some criticism on multiple fronts since it was enacted, and any new legislation modeled on its provisions should address those criticisms. Analysis of takedown notices received by online service providers has indicated a high percentage of flawed claims. Moreover, service providers have generally been quick to act on these claims, and more

[118] *See* OCILLA, 17 U.S.C. § 512(g)(C).

[119] Rybka, *supra* note 108, at 492.

[120] *See* Copyright Claim Dispute: Filing a Counter Notice, http://www.google.com/support/youtube/bin/answer.py?answer=59826 (last visited Dec. 18, 2008).

[121] YouPorn.com – DMCA Notice of Copyright Infringement, http://www.youporn.com/dmca (last visited Nov. 18, 2008).

[122] *See id.*

hesitant to put back material that may have been taken down in error.[123] However, other analyses have concluded that despite misuse of some DMCA provisions, the measure "has achieved some success in balancing its two principal goals: protection of the rights of copyright owners and limited liability of online service providers."[124] Despite some problems, the DMCA, with some modifications, is still a worthy model for an amendment to the CDA.

B. *Amending the CDA to Provide Notice and Takedown Measures Similar to the DMCA*

The CDA and the DMCA both provide immunity to service providers for the actions of third-party users.[125] However, the immunity provided for contributory copyright infringement under the DMCA is provisional; it is based upon the service providers' compliance with specific procedures, which include removing the allegedly copyrighted material from the website.[126] The CDA should be amended to include a similar provision, granting immunity to websites for third-party conduct only when these sites react to the notification that they are hosting unauthorized pornography.

A "notice and takedown" amendment to the CDA would function in a similar way to the DMCA provision with the same name. This amendment would require every website considered to be a Porn 2.0 site—that is, those that permit third parties to upload user-generated

---

[123] Jennifer M. Urban & Laura Quilter, *Efficient Process or "Chilling Effects"?Takedown Notices under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH L.J. 621, 681-83 (2006).

[124] Joshua Urist, Note, *Who's Feeling Lucky? Skewed Incentives, Lack of Transparency, and Manipulation of Google Search Results under the DMCA*, 1 BROOK. J. CORP. FIN. & COM. L. 209, 227 (2006).

[125] *See* Communications Decency Act of 1996, 47 U.S.C. § 230(c) (2006); 17 U.S.C. § 512(c).

[126] OCILLA, 17 U.S.C. § 512(c) (2006).

pornography—to have a link providing information on how to contact an agent regarding posts of unauthorized content. In providing such notification, the complaining party would be required to provide contact information, a description of the content allegedly posted without consent and information on how to locate the image or video on the website (for example, the direct web site link to the material), a good faith statement that this is a legitimate claim and that all the information provided is truthful.

After the agent receives a complaint of non-consented pornography, the agent would notify the poster that the material has been removed. Then the original poster would have ten days to reply; if the website does not receive a response within the ten day period, the material will not be restored to the site. If the original poster chooses to respond, he will have to provide evidence that all the people in the pornographic material that was removed had consented both to its production and its dissemination on the Internet. This proposal differs from the DMCA, in that the person who submits the complaint is not required to file a lawsuit in order to permanently remove the material.[127] Thus, people would be able to protect their privacy even if they do not have the time and resources to commit to a lawsuit.

If the website fails to provide visitors with adequate information regarding how to contact an agent regarding third-party postings, or its appointed agent ignores a claim of unauthorized pornography, the CDA would no longer provide a safe haven to online service providers, and they could face potential liability for hosting these unauthorized photos.

[127] *See* OCILLA, 17 U.S.C. § 512(g)(C).

An amendment to the CDA would open the door to claims such as Ms. Barnes' against Yahoo!.[128] This includes suits for negligently breaching a duty the service provider assumes when it receives notification of the unauthorized photos.[129] And, although the law is somewhat murky on exactly what remedy victims of Porn 2.0 have against the person who posted the photos,[130] courts have imposed fines,[131] and could potentially consider the action an invasion of privacy.[132] Under a "notice and takedown" provision of the CDA, services providers who violated the specified procedure after notification could potentially be liable for contributing to such an invasion, and also might be required to pay damages to the plaintiff. Service providers would thus be contributorily liable for whatever cause of action the plaintiff pursues against the poster.

Victims of Porn 2.0 require a mechanism to have their unauthorized pictures or videos removed from a website. This could be accomplished by creating a provision to the CDA that would grant online service providers immunity for the actions of third parties only after the service provider, on notice that it is hosting unauthorized postings of pornography, moves to take down such material. Not only would websites like YouPorn be required to post information on how people may contact the site about unauthorized postings, but service providers would have incentive to take such claims seriously.

---

[128] Barnes v. Yahoo! Inc., No. Civ. 05-926-AA, 2005 WL 3005602, at *2 (D. Or. Nov. 8, 2005), *overruled by* Barnes v. Yahoo! Inc., 570 F. 3d 1096 (9th Cir. 2009).

[129] *Id*.

[130] *See* McClurg, *supra* note 13, at 894.

[131] Lisa Sink & Jeanette Hurt, *Posting Nude Photos of Ex-Girlfriend Brings Fine: Man Also is Ordered to Serve One Year in Jail for Lying Under Oath During Case*, MILWAUKEE J. SENTINEL, May 22, 2001.

[132] *See* Bartow, *supra* note 8, at 816.

C. *Addressing Counterarguments*

There are several likely counterarguments against this proposed amendment to the CDA. This proposal would not be able to entirely prevent the spread of potentially damaging photos and videos on the Internet, since "notice and takedown" procedures would come into effect only after the images have already been disseminated and, most likely, viewed by many people. While the "notice and takedown" CDA amendment would still not be able to curb a website user's ability to download pictures off a Porn 2.0 site to their home computers, or prevent a user from uploading the image or video to yet another amateur pornography web page, it would at least provide victims of unauthorized postings with a way to begin to regain their privacy. If the victim knows of other sites hosting the material, he or she can notify all of these websites, which would then have a duty to investigate the claim and possibly remove the uploaded content. Though people will likely have viewed the content on the website before it is removed, the "notice and takedown" CDA amendment can help do away with the permanency that comes along with embarrassing Internet postings.[133]

There are also those who would argue that victims of pornography should not be granted special protections of this kind, or that existing recourses are sufficient. However, sexuality has often been treated as a special case in matters of law, subject to special protections and regulations.[134] Sexual assault is considered an especially grievous crime, and rape is one of the very rare cases when "deadly force" has been deemed justified as a defense against a non-lethal

[133] *See* McClurg, *supra* note 13, at 927.

[134] *See supra* note 37. *But see* Gayle S. Rubin, *Thinking Sex: Note for a Radical Theory of the Politics of Sexuality*, *in* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267, 274 (Carole S. Vance ed., 1984).

assault.[135] Moreover, consent is often a particularly important consideration when it comes to sex-based offenses. In criminal rape cases, consent is the focus of the trial—the defense often argues that the alleged victim consented to intercourse, while the prosecution must prove non-consent beyond a reasonable doubt.[136] Additionally, the crime of statutory rape is based on a minor's legal incapacity to consent to sex with an adult.[137] Thus, it makes sense to consider the consent of both parties when one partner posts sexually explicit photographs on the Internet.

Other arguments against this proposed amendment would likely address the potential chilling effect on speech of "notice and takedown" provisions. Such criticisms have already been leveled against the DMCA.[138] However, while immunity was granted to service providers under the CDA in order to "to promote the continued development of the Internet,"[139] this development must not be to the detriment of individual privacy. Because society often views those who take part in sexual expression with particular disdain, a breach of privacy through Porn 2.0 has particularly devastating consequences, often leading to the loss of both a person's career and reputation,[140] thus the victims of Porn 2.0 need a mechanism of protection. The Internet, and even amateur pornography websites, will still be able to flourish if pornographic websites remove unauthorized postings. The "notice and takedown" CDA amendment would

---

[135] Kimberly Kessler Ferzan, *Self Defense and the State*, 5 OHIO ST. J. CRIM. L. 449, 451 (2008).

[136] Corey Rayburn, *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 COLUM. J. GENDER & L. 437, 462 (2006).

[137] *See* Russell L. Christopher, *Should Being a Victim of a Crime be a Defense to the Same or a Different Crime?*, 28 PACE L. REV. 783, 791 (2008).

[138] *See* Urban & Quilter, *supra* note 123, at 681-83.

[139] Communications Decency Act of 1996, 47 U.S.C. § 230(b)(1) (2006).

[140] *See supra* notes 37-43 and accompanying text.

only force Porn 2.0 websites to ensure that users are actually complying with the site's Terms of Service, which typically require that all parties involved in pornographic material consented to its posting.[141]

A "notice and takedown" CDA amendment will thus provide a way for victims of Porn 2.0 to notify an online service provider that its Terms of Service are being broken, and have the unauthorized images taken off the website. This Amendment, by actually forcing service providers to remove material that has been posted by third-party users without the consent of the persons involved, regulates Porn 2.0 in a way that other proposals do not.[142] Removing the information from these sites will preclude people from viewing it in the future, and, accordingly, will limit the amount of harm caused by the unauthorized postings.

V. CONCLUSION

With the rising popularity of online interactive communities, Porn 2.0 has become a widespread phenomenon, with sites like YouPorn being ranked among the most-visited websites in the world.[143] By allowing users to upload their own homemade pornography, these sites open the doors for extreme violations of privacy. Much of the material posted on these sites has likely been uploaded without the consent of all the parties involved.[144] The victims of unauthorized

[141] *See* YouPorn.com – Terms of Service, *supra* note 34.

[142] *See supra* Section III.

[143] YouPorn.com – Traffic Details from Alexa, *supra* note 26.

[144] Freeman, *supra* note 7.

pornographic Internet postings have little legal recourse, as the CDA grants immunity to online service providers for the actions of third parties.[145]

Legal scholars have proposed different ways to control Porn 2.0 and provide relief to those who do not consent to being a part of these websites. Professor Ann Bartow believes that copyright protection for pornography should be conditioned on a showing of the consent of all parties involved.[146] However, this method assumes that people who make unauthorized postings of pornography actually want copyright protection for the pornographic material they post. This will not always be the case. It seems that one great motivation for such postings is revenge on an ex-lover.[147] Additionally, Professor Andrew McClurg has proposed implying a contract of confidentiality in intimate relationships that protects private, embarrassing information from being shared through forms of mass communication such as the Internet.[148] This would allow the ex-girlfriend or boyfriend of someone who has posted nude photographs or videos on the Internet to pursue a claim for damages.[149] This proposal, however, would provide no relief to Porn 2.0 victims who did not have an intimate relationship with the person who posted the photos, nor would it provide a mechanism for the removal of the pornographic materials.

An adequate remedy for Porn 2.0 victims can be modeled after the DMCA, which grants service provider immunity for contributory copyright infringement only if a service provider,

---

[145] *See* Barnes v. Yahoo! Inc., No. Civ. 05-926-AA, 2005 WL 3005602, at *1 (D. Or. Nov. 8, 2005), *overruled by* Barnes v. Yahoo! Inc., 570 F. 3d 1096 (9th Cir. 2009).

[146] Bartow, *supra* note 8, at 834-38.

[147] Bartow, *supra* note 8, at 813; Freeman, *supra* note 7.

[148] McClurg, *supra* note 13, at 908-35.

[149] *Id.* at 935-36.

after being informed of infringing activity on its servers, moves to take the material down.[150] Modeling an amendment to the CDA after the "notice and takedown" provision of the DMCA would require service providers to investigate claims of unauthorized pornography postings and remove materials that were posted without the consent of all parties involved, or else face potential liability for hosting this content. This would enable Porn 2.0 victims to put a halt to people viewing supposedly private videos and images that have now been posted on the Internet.

A "notice and takedown" amendment to the CDA would provide a protection for individual privacy in the context of a law that aids the development of the Internet. It would allow private moments to remain private, in an age where it has become increasingly easy to ruin careers and personal relationships through the digital world.

[150] OCILLA, 17 U.S.C. § 512(c) (2006).