

August 25, 2015

“Revenge Porn” Banned in Texas as of September 1, 2015

By [Pierre Grosdidier](#)

On June 17, 2015, Texas joined 25 other states that have enacted so-called “Revenge Porn” laws when Governor Greg Abbott signed Senate Bill 1135, the Relationship Privacy Act (the “RPA”).¹ This new statute becomes effective September 1, 2015. “Revenge Porn” refers to the practice of posting sexually explicit pictures of other persons on Internet without their consent. Generally speaking, revenge porn occurs when someone obtains intimate pictures or videos of a person during the course of a personal relationship, and then posts the pictures online (or gives the pictures to another, who posts them) after the relationship ends.² The pictures are often posted to revenge porn websites, which are publicly accessible through Internet searches. In some instances, the poster, or a subsequent online commenter, might reveal the victim’s identity and other personal information, including their contact information and social media pages.

Revenge porn victims report being “threatened with sexual assault, harassed, stalked, fired from jobs, or forced to change schools. Some victims have even committed suicide.”³ As if to rub salt in the wound, some revenge porn websites refuse to take down the pictures unless the victim pays them an (often substantial) fee. To address this situation, many states have enacted laws that criminalize revenge porn and grant victims a civil cause of action.

The Texas RPA provides new relief for revenge porn victims and may help dissuade revenge pornographers’ mischief. Despite its strong language, however, this new law is not a panacea. The challenge in these cases, as in many Internet defamation cases, is to identify the wrongdoer. It may seem obvious to a victim that an ex-lover lurks behind offending Internet pictures, but the victim must prove the identity of the perpetrator with admissible evidence. Discovering the identity of a person who posts anonymously or under a pseudonym on an Internet website is not as easy as it might seem. Internet service providers routinely and successfully invoke § 230 of the Federal Communications Decency Act, 47 U.S.C. § 230 (the “CDA”) to resist discovery subpoenas.⁴ Additionally, as discussed below, the RPA’s broad jurisdictional reach over civil defendants might be in tension with existing case law.

The RPA creates a new offense for the disclosure or promotion of intimate visual material

The RPA amends Texas Penal Code Chapter 21 by adding § 21.16, which makes the “unlawful disclosure or promotion of intimate visual material” a Class A misdemeanor. Section 21.16(a) defines the term “visual material” broadly to include any physical or electronic picture or video, including negatives. This new section criminalizes three types of conduct.

Section 21.16(b) addresses the common revenge porn scenario wherein a jilted lover posts intimate pictures of his or her “ex” on Internet. Under § 21.16(b), “[a] person commits an offense if . . . without the effective consent of the depicted person, the person intentionally discloses visual material depicting another person with the person’s intimate parts exposed or engaged in sexual conduct.” The visual material must have been “obtained by the person or created under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private.” Moreover, the

disclosure must cause “harm to the depicted person,” and must reveal the depicted person’s identity but, importantly, the actionable disclosure of the person’s identity may be done directly or subsequently by a third-party. Although the RPA does not define the term “effective consent,” the fact that the victim “created or consented to the creation of the visual material” or “voluntarily transmitted the visual material to the actor” is not a defense.

Interestingly, the statutory language may be broad enough to also ensnare a person who merely shares intimate pictures of another with friends in a private setting, like sharing paper copies of intimate pictures or showing these pictures on a smart device—provided, to be actionable, the victim is identified and can show harm.

Section 21.16(c) also criminalizes threatening to disclose intimate visual material. Section 21.16(d) purports to create criminal liability for owners or operators of websites that post or promote offending material “on an Internet website or other forum for publication that is owned or operated by the person.” The RPA makes an exception for “interactive computer services” shielded by the CDA’s § 230, which protects Internet service providers from liability for tortious (usually defamatory) material posted on their websites by third-parties. In this regard, the RPA merely acknowledges the preemptive nature of the CDA’s § 230.

The RPA creates a civil cause of action for the disclosure or promotion of intimate visual material

The RPA also adds Chapter 98B to the Texas Civil Practice & Remedies Code, which grants revenge porn victims a civil cause of action for “unlawful disclosure or promotion of intimate visual material.” The civil claim elements in §§ 98B.002(a) and (b) essentially track the corresponding criminal elements in Texas Penal Code §§ 21.16(b) and (d). A defendant may be held liable for posting offending pictures or for promoting the pictures on a website that the defendant owns or operates. A prevailing plaintiff may recover actual damages, including damages for mental anguish, court costs, reasonable attorney’s fees, and exemplary damages. Moreover, a court may grant injunctive relief to prevent the disclosure of intimate material, and impose fines of \$1,000 for each willful or intentional violation of the court’s injunctive order.

Enforcement challenges

The RPA’s civil cause of action is broadly worded and must be “liberally construed and applied” to achieve its purpose, but exempts internet service providers protected by the CDA’s § 230.⁵ As noted, § 230 presents a challenge to plaintiffs who seek to identify Internet posters who hide behind pseudonyms.

Additionally, the RPA grants Texas courts broad jurisdiction over defendants. Courts have jurisdiction over defendants who reside in Texas, and over defendants if the plaintiff-victim resides in Texas, the offending “intimate visual material is stored on a server that is located in” Texas, or if the “intimate visual material is available for view in” Texas.⁶ The second, third, and fourth of these jurisdictional criteria are arguably in tension with existing Fifth Circuit case law.

In *Revell v. Lidov*, for example, Revell sued Lidov and Columbia University in Texas, where Revell resided, for allegedly defamatory statements made in an article posted on a website maintained by Columbia University’s School of Journalism.⁷ Lidov had no substantive connection to Texas at the time he posted his article and his article was not directed at Texas readers in particular. The Fifth Circuit Court of Appeals affirmed the district court’s dismissal of the case for lack of personal jurisdiction. The Court

held, *inter alia*, that the absence of references to Texas or reliance on Texas sources in the article “weighed heavily against finding the requisite minimum contacts” for exercising personal jurisdiction over the defendants.

Mere residency in Texas by the revenge porn plaintiff-victim, therefore, or mere visibility of the intimate material in Texas might not be sufficient to grant a court in this state specific personal jurisdiction over a foreign defendant. As the *Revell* Court held, “[t]he defendant must be chargeable with knowledge of the forum at which his conduct is directed in order to reasonably anticipate being haled into court in that forum.”⁸ In *Hawbecker v. Hall*, a Texas federal court exercised personal jurisdiction over a Colorado resident who allegedly defamed a Texas resident because the Colorado resident intentionally directed her comments toward Texas.⁹ Under these precedents, and in these two situations, it may be necessary to show that the defendant targeted the revenge porn toward Texas for a Texas court to exercise personal jurisdiction over the defendant.

Similarly, the mere fact that intimate pictures are hosted on a server located in Texas might also present a jurisdictional challenge. An out-of-state revenge pornographer would not likely know that the revenge porn website’s server used to post the intimate pictures is located in Texas. In this case, it might be hard to charge the pornographer with “knowledge of the forum at which his conduct is directed.”¹⁰

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¹ <http://www.legis.state.tx.us/tlodocs/84R/billtext/html/SB01135F.htm>.

² Anecdotal evidence suggests that revenge porn usually targets women. Intimate pictures can also be posted on Internet after a hacker breaks into the victims’ webmail or cell phone. See Pierre Grosdidier, *When Hacking An Email Account Doesn’t Violate The SCA*, Law360, Dec. 11, 2013.

³ See generally, <http://www.legis.state.tx.us/tlodocs/84R/analysis/html/SB01135H.htm>.

⁴ See, e.g., *Godaddy.com, LLC v. Toups*, 429 S.W.3d 752 (Tex. App.—Beaumont April 10, 2014, pet. denied) (holding that § 230 shielded GoDaddy, an interactive computer service provider, from liability despite having hosted revenge porn websites). Toups went on to “become a victims’ rights advocate and helped push for Senate Bill 1135.” See <http://www.texastribune.org/2015/08/21/texas-law-criminalizing-revenge-porn-goes-effect/>.

⁵ Tex. Civ. Prac. & Rem. Code § 98B.007.

⁶ *Id.* § 98B.006.

⁷ 317 F.3d 467 (5th Cir. 2002); see also Pierre Grosdidier, *When Internet Libel Lands you in an Out-Of-State Court*, Law360, April 24, 2015.

⁸ 317 F.3d at 475.

⁹ No. SA-14-CV-1010-XR, 2015 WL 737046, --- F. Supp. 3d --- (W.D. Tex. Feb. 19, 2015).

¹⁰ *Revell*, 317 F.3d at 475.