

TEAM CROATIA

Ivana Živković, Valentina Čubrilo, Katarina Dujić

'Revenge Porn': An Exploration into Redefinition in the Interest of Changing  
Legislation

Tutor: Iva Gradiški Lovreček

'[It's] having this continuing threat that the images could be re-shared, or reemerge online, that new people could see these intimate images. ... And I think it's the unknowing; that not knowing aspect that you have to deal with every day.'<sup>1</sup>

## 1. Introduction

Internet based social media and messaging apps have become increasingly more popular. Thus, we can observe a spike in the sharing of private sexual images without consent, a phenomenon known as 'revenge porn'. This moniker came into popular usage in 2011 after nonconsensual sexual images of musicians and sportspeople, as well as private persons, were posted on the website IsAnyoneUp.com. The website's founder Hunter Moore was later arrested and charged with 15 counts including computer hacking, identity theft and conspiracy.<sup>2</sup> However, the term 'revenge porn' doesn't nearly encompass all possible forms of this type of abuse, as it only incorporates one particular form of sharing of private sexual images with one specific motive behind it.

In this paper we articulate why the label 'revenge porn' is insufficient, explaining its limitations as well as harms that might arise from using that term. We also present and analyze the definition of the preferred term 'image-based sexual abuse', describe its scope and justify the use of that term over the term 'revenge porn'. We then go on to explain different harms experienced by the victims of image-based sexual abuse, such as severe mental health issues and violation of dignity and privacy, all of which call for enactment of appropriate law and policy regulations. After delineating the harms of image-based sexual abuse, we present the legal approach taken by the European Union (hereinafter: the EU) in the form of the new Digital Services Act that poses obligations for platforms used for the dissemination of user-generated pornographic content. We also analyze the changes adopted by the Croatian legislation in 2021 when the criminal offence of 'abuse of sexually explicit footage' was introduced in the Croatian Criminal Code. In the final part of the paper we emphasize the importance of rejecting the term 'revenge porn' and adopting a broader definition of 'image-based sexual abuse', as well as the need of taking more legislative steps to protect the victims, both by the EU, as well as the Croatian criminal legislation.

---

<sup>1</sup> McGlynn *et al.*, 'It's Torture for the Soul: The Harms of Image-Based Sexual Abuse', 30 *Social & Legal Studies* (2021) 541, at 553.

<sup>2</sup> Amanda Holpuch, *FBI Arrest and Charge Revenge Porn Mogul Hunter Moore*, 23 January 2014, available at: <https://www.theguardian.com/culture/2014/jan/23/fbi-arrest-and-charge-revenge-porn-mogul-hunter-moore>.

## 2. Defining Image-Based Sexual Abuse

Terminology and precise use of language are vital for any legal system, and they're especially crucial to criminal law (where one of the main principles states that no one shall be tried or punished for something that previously wasn't explicitly defined as criminal offence). In that sense, it's important to define any legal term in a way that accurately transfers the meaning that the author intended to give it and it's even more important to choose the term that corresponds to the current needs of society.

Consequently, the following part of the paper is divided into two sections. The first section will explore why the term 'revenge porn' is inadequate to describe various forms of sexual violence that occur due to nonconsensual creating and sharing of private sexual images, while the second section will introduce reasons why that term should be replaced by the more appropriate moniker: image-based sexual abuse.

### *A. Why the Term 'Revenge Porn' is Insufficient*

While the term 'revenge porn' is widely used by the general public and accepted in the media, it's important to note it represents only one form of image-based sexual abuse: that which typically involves an ex-partner (usually a man) sharing private sexual pictures of their former partner (usually a woman) online without their consent in order to exact revenge after the relationship breaks down.<sup>3</sup> Consequently, this label doesn't delineate all possible forms of image-based sexual abuse like up-skirting, down-blousing or any other form of image-taking by strangers with or without victim's knowledge.<sup>4</sup> Furthermore, this term doesn't recognize that motives behind the nonconsensual sharing of private sexual images can vary and that revenge is not necessarily the motivating factor behind such behavior. Other motives can include social status building, monetary gain, sharing images for personal entertainment or simply to harass the victim.<sup>5</sup> In any case, we would argue that the perpetrator's motives are irrelevant in defining these types of behaviors and that the focus should instead be on their objective actions and the consequences their abuse has on the victims.

Moreover, by referring to this occurrence as 'pornography', a form of abuse is being linked to legal, commercial pornography (especially in the era of the increasing popularity of

---

<sup>3</sup> McGlynn and Rackley, 'Image-Based Sexual Abuse', 37 *Oxford Journal of Legal Studies* (2017) 534, at 537.

<sup>4</sup> See McGlynn, Rackley and Houghton, 'Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse', 25 *Feminist Legal Studies* (2017) 25, at 32.

<sup>5</sup> McGlynn and Rackley, *supra* note 3, at 539; also see Citron and Franks, 'Criminalizing Revenge Porn', 49 *Wake Forest Law Review* (2014) 345.

‘amateur porn’),<sup>6</sup> and could also then lead to the automatic assumption of consent to the image-taking, which is not always the case.<sup>7</sup> However, even if consent to create a certain image was given by the depicted person or even when that person themselves created the image, that doesn’t mean that their consent to distribution should be presupposed.

### ***B. Image-Based Sexual Abuse: Breaking Down the Definition***

In contrast to ‘revenge porn’, the term image-based sexual abuse, coined by Clare McGlynn and Erica Rackley, can be defined as ‘the creation and / or distribution of private sexual images without consent, including threats to share images and altered images.’<sup>8</sup> In this respect, it’s cardinal to accentuate that the use of ‘images’ in this paper should be understood as: referring to all types of pictures and videos, both physical and digital (although it will almost always be the case of digital images being shared on the Internet or via various electronic means of communication).

‘Private image’ could be defined as any image in regard to which it could reasonably be assumed that the depicted person didn’t intend and/or expect it to be shown to, sent to, shared with or in any way made accessible to another person(s), apart from the one they sent it or showed it to (if they did indeed do so).<sup>9</sup> Thus, a photograph taken for a pornographic magazine or a video filmed with clear intention to be published on a pornography site would not be considered private. Conversely, a ‘sext’ (a sexually explicit photo or video shared via text) sent via private means of communication such as WhatsApp to one’s partner should accordingly be treated as private.<sup>10</sup> What can be viewed and defined as ‘sexual image’ can differ, but this label would certainly encompass any images portraying sexual acts, people in positions usually considered sexual or clearly intended to be sexual in a given situation, as well as images depicting parts of body generally considered private and/or sexual (for example, genitalia and/or breasts). However, while it is often clear what is considered ‘sexual’ and ‘private’, we would still advocate for a broader approach and for these terms to be assessed depending on the circumstances of each individual case.

---

<sup>6</sup> N. Henry, A. Powell and A.L.G. Flynn, *Not Just 'Revenge Porn' : Australians' Experiences of image-Based Abuse: A Summary Report* (2017), at 3.

<sup>7</sup> Kirchengast and Crofts, 'The Legal and Policy Contexts of Revenge Porn Criminalisation: The Need for Multiple Approaches', 19 *Oxford University Commonwealth Law Journal* (2019) 1, at 3-4.

<sup>8</sup> See McGlynn and Rackley, *supra* note 3, at 534 and McGlynn *et al.*, *supra* note 1, at 543.

<sup>9</sup> See definitions from other authors in, e.g. McGlynn and Rackley, *supra* note 3, at 541-542 and Harper, Fido and Petronzi, 'Delineating Non-Consensual Sexual Image Offending: Towards an Empirical Approach', 58 *Aggression and Violent Behavior* (2021) 1, at 2.

<sup>10</sup> McGlynn and Rackley, *supra* note 3, at 541-542.

The term 'image-based sexual abuse' highlights the fact that nonconsensual sharing of private sexual images constitutes 'sexual abuse', thus accurately conveying serious harm experienced by victims and rightfully presenting it as a form of sexual violence.<sup>11</sup> The idea is that connecting this 'digital' sexual abuse to other, usually 'physical' forms of sexual abuse (such as rape) would trigger the appropriate and needed law and policy responses.<sup>12</sup> Furthermore, by including the word 'abuse', this moniker also covers 'sextortion' - threats to share private sexual images in order to force the victim to stay in a relationship, to engage in a sexual act, or for any other reason.<sup>13</sup> This practice is an inevitable part of the term 'image-based sexual abuse' since it directly involves using private sexual images to abuse the victim.

This definition also encompasses both nonconsensual creation and distribution of private sexual images, regardless of the perpetrator's motives or methods of doing so. That way it also includes nonconsensual creation of images by all forms of voyeurism, irrespective of the fact whether the images have been shared or not, as well as images collected by hacking.

Another form of abuse that falls within this label is one commonly known as 'deepfake pornography'.<sup>14</sup> 'Deepfakes' are images (usually videos) created with computer software that enables for one person's face to be imposed on another person's body, thus allowing the creator to make realistic videos depicting someone being involved in a sexual act they've never really been a part of.<sup>15</sup> The meaning of 'creation and distribution of private sexual images without consent' should also extend to the creation and distribution of 'deepfake' videos, since these are usually created without the victim's knowledge by taking nonsexual images (pictures of a person's face) and making them sexual, thus violating a

---

<sup>11</sup> *Ibid.*, at 536.

<sup>12</sup> McGlynn and Rackley, *supra* note 3, at 537.

<sup>13</sup> According to a survey conducted by McAfee Security, 1 in the 10 ex-partners threatened to post private sexual images of their former partners online, and 60% of these threats were carried out. See McAfee Canada, *Love, Relationships and Technology Survey: Pitfalls of Couples Sharing Personal Data & Passwords* (2013), available at <https://www.photoxels.com/mcafee-canada-2013-love-relationships-and-technology-survey-pitfalls-of-couples-sharing-personal-data-and-passwords/>.

<sup>14</sup> McGlynn and Rackley refer to this concept as 'sexualised photoshopping', see McGlynn and Rackley, 'More than 'Revenge Porn': Image-Based Sexual Abuse and the Reform of Irish Law' (2017) 38, at 41; also see, e.g., Kashmira Gender, *The People Who Photoshop Friends and Family onto Porn* (2016), available at: <https://www.independent.co.uk/life-style/love-sex/porn-photoshopping-4chan-family-friends-superimposed-into-sex-scenes-world-a7358706.html>.

<sup>15</sup> Tamsin Selbie and Craig Williams, *Deepfake Pornography Could Become an 'Epidemic', Expert Warns*, 27 May 2021, available at <https://www.bbc.com/news/uk-scotland-57254636>; Matt Burgess, *Deepfake Porn Is Now Mianstream. And the Major Sites Are Cashing In*, 27 August 2020, available at <https://www.wired.co.uk/article/deepfake-porn-websites-videos-law>. For more information see, for instance, Harris, 'Deepfakes: False Pornography Is Here and The Law Cannot Protect You', 17 *Duke Law and Technology Review* (2019) 99; Chesney and Citron, 'Deep Fakes: A Looming Challenge for Privacy, Democracy and National Security' 107 *California Law Review* (2019) 1753; Delfino, 'Pornographic Deepfakes – Revenge Porn's Next Tragic Act – The Case for Federal Criminalization', 88 *Fordham Law Review* (2019) 887.

plethora of personal rights and causing harm at the very least comparable to that suffered by the victims who had their ‘actual’ images shared.<sup>16</sup>

Finally, the concept of image-based sexual abuse also goes beyond initial ‘publication’ and incorporates all subsequent ‘distributions’, that way including not only ‘primary’ distributors (for example, ex-partner), but also ‘secondary’ distributors whose actions enable further online sharing of nonconsensual images, causing additional harm to the victim.<sup>17</sup> While they certainly wouldn’t be criminally liable in the same way as original posters, by enabling for the images to ‘go viral’, these ‘secondary’ distributors, as well as the platforms that allow such distribution, play a key role in the suffering of the victim.<sup>18</sup>

We move now to discuss various negative effects that image-based sexual abuse has on the victims, highlighting how it impacts their mental health and violates their dignity and privacy.

### **3. Impact on the Victims**

When we talk about image-based sexual abuse it's vital to recognize specific harms it causes that call for enactment of appropriate law and policy regulations.

First and foremost, it’s important to emphasize that image-based sexual abuse is a deeply gendered phenomenon where the victims are predominantly women. The persistence of sexual double standards facilitates the production of image-based sexual abuse and puts the stigma on the victims.<sup>19</sup> According to a survey conducted by Cyber Civil Rights Initiative (CCRI), women were 2,5 times as likely to be threatened to have 'sexually explicit images or videos' of them shared and 1,5 times as likely to report actually having been victims of such sharing.<sup>20</sup> These results match the findings that women are far more likely to be pressured to send sexual images in the first place.<sup>21</sup> Another study, conducted by law professor Danielle Citron at University of Maryland, estimates that 60-70% of 'revenge porn' victims are

---

<sup>16</sup> McGlynn and Rackley, *supra* note 14, at 41.

<sup>17</sup> McGlynn and Rackley, *supra* note 3, at 538.

<sup>18</sup> *Ibid.*, at 538-539.

<sup>19</sup> *Ibid.*, at 544.

<sup>20</sup> Asia A. Eaton, Dr. Holly Jacobs, and Yanet Ruvalcaba, 2017 Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration: A Summary Report Dr. (2017), available at <https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf>.

<sup>21</sup> 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', 42 *Fordham Urban Law Journal* (2014) 234, at 239.

women,<sup>22</sup> while one CCRI study conducted in the UK found that 90% of victims of 'nonconsensual porn' were female.<sup>23</sup>

### ***A. Impact on Victims' Mental Health***

Since image-based sexual abuse is inevitably connected to modern means of communication, the disseminated images are usually shared on the Internet with perpetrators often providing the victim's personal information, like links to their social media profiles and their full name and home address, alongside the images.<sup>24</sup> That way the victim's personal details can be and often are further used by other people to harass them, both online and offline, resulting in victims often dreading to leave their houses and fearing a physical assault. Adverse mental health impact is severe: according to a study conducted by the US CCRI, more than 80% of victims report experiencing severe emotional distress and anxiety.<sup>25</sup> In a study carried out by McGlynn *et al.*, the participants described the consequences of the abuse saying 'it impacts your sense of self on every level' (Margaret) and 'it transcends everything, it impacts you emotionally, psychologically, professionally, in dating and relationships, in bloody every single factor of your life' (Alana).<sup>26</sup> Having their private sexual images posted online can also have a negative effect on victims' professional life, with current employers terminating their contracts or future employers not wanting to hire them due to 'concerns regarding their lifestyle'.<sup>27</sup> This type of social exclusion will have further impacts on the victims, directly negatively influencing their sense of self, and therefore violating their dignity, what we additionally explain in the following section.

### ***B. Violation of Dignity***

The concept of dignity, as Jeremy Waldron argues, is about status—one's status as a member of society in good standing — and it generates demands for recognition and

---

<sup>22</sup> See Lorelei Laird, *Victims are Taking on 'Revenge Porn' Websites for Posting Photos they Didn't Consent To*, available at [https://www.abajournal.com/magazine/article/victims\\_websites\\_photos\\_consent](https://www.abajournal.com/magazine/article/victims_websites_photos_consent) (where Laird cites Danielle Citron).

<sup>23</sup> Michelle Gonzalez, *Power in Numbers*, 3 January 2014, available at <https://cybercivilrights.org/revenge-porn-infographic/>.

<sup>24</sup> In a study of 1,244 individuals, over 50% of victims reported that their full name and social media account details appeared next to their image and 20 % of victims reported having their e-mailaddress and telephone number posted alongside their image, cited in Citron and Franks, *supra* note 5, at 350.

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

<sup>26</sup> McGlynn *et al.*, *supra* note 1, at 550.

<sup>27</sup> *Ibid.*, at 551.

treatment that accord with that status.<sup>28</sup> A violation of a person's dignity happens when they are 'dishonored through a failure to show respect, through the treatment of others as less than creatures of inherent worth.'<sup>29</sup> Furthermore, it is said that dignity refers both to a set of empirical characteristics and to a moral quality of persons as such. When we think of dignity as an empirical matter, it incorporates various characteristics all of which depict a person who is a self-conscious being with a secure sense of worth and in command of their life.<sup>30</sup> To enjoy this sense of worth, a person must feel confidence in their identity as well as sense of belonging in society along with the ability to actually participate in society.<sup>31</sup> On the other hand, dignity as moral matter is ascribed to all individuals, simply as human beings, irrespective of their qualifications or accomplishments.<sup>32</sup>

In that regard, image-based sexual abuse infringes one's dignity because it leaves victims feeling powerless, doubting their belonging in society and their inherent worth as human beings, making them feel expelled from society, including even their family and friends.<sup>33</sup> One victim described their life after having their images published by saying "It was so isolating ... especially getting hate [online and] from 'friends' who don't want to associate with you ... because you're associated with something [they perceive to be] explicit and gross. Oftentimes I feel like the people you think would get it don't. ... It is so harmful and isolating." Another said "I cut myself off from all of my friends. I cut myself off from my family ... and just stayed at home in my room ... because I couldn't face the world."<sup>34</sup> Many victims end up closing their social media profiles, isolating themselves further from society, as they feel unsafe to be present on the Internet and fear potential re-traumatization.<sup>35</sup> These testimonies show a sever effect image-based sexual abuse has on one's sense of self and belonging, and therefore their dignity.

### ***C. Infringement of Privacy***

It's evident how nonconsensual creating and/or sharing of one's private sexual images would constitute a great violation of their right to privacy. Right to respect for private and

---

<sup>28</sup> Waldron, 'Dignity and Defamation: The Visibility of Hate' 123 *Harvard Law Review* (2010) 1596, at 1611–12.

<sup>29</sup> Reaume, 'Discrimination and Dignity' 63 *Louisiana Law Review* (2003) 645, at 676.

<sup>30</sup> *Ibid.*, at 674-675.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> See Bates, 'Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors', 12 *Feminist Criminology* (2017) 22.

<sup>34</sup> McGlynn *et. al.*, *supra* note 1, at 554.

<sup>35</sup> *Ibid.*



family life is protected under Article 8 of the European Convention on Human Rights. This provision states that ‘everyone has the right to respect for his private and family life, his home and his correspondence’. In the case of *K.U. v Finland*, the European Court of Human Rights (hereinafter: the Court) stated that, although the object of Article 8 is to protect the individual against arbitrary interference by the state, there may be positive obligations of the state which involve the adoption of measures designed to secure respect for private life even in the relations of individuals between themselves.<sup>36</sup>

In its recent judgment in the case of *Buturugă v. Romania*,<sup>37</sup> the Court explicitly recognized cyber-bullying as a form of gender-based violence. The proceedings in this case were instituted on the basis of an application lodged against Romania on 11 November 2015 by a Romanian national, Ms Gina-Aurelia Buturugă. In her request, in addition to allegations of domestic violence, the applicant also pointed out that her former husband had checked her electronic accounts, including her Facebook account, and made copies of her conversations, documents and photographs without her permission. In that respect, she complained that the national authorities refused to consider her complaints regarding her former husband's breach of confidentiality of her correspondence.

The Court held there had been violations of both Article 3 and 8, stating that cyber-bullying was currently a recognized aspect of violence against women and girls against women and girls, pointing out how it can 'take on a variety of forms, including cyber breaches of privacy, intrusion into the victim's computer and the capture, sharing and manipulation of data and images, including private data.'<sup>38</sup> In the context of domestic violence, cyber surveillance is often carried out by the person's partner, so the Court accepted that acts such as illicitly monitoring, accessing or saving one's partner's correspondence could be taken into account by national authorities when investigating cases of domestic violence.<sup>39</sup>

In the matter of image-based sexual abuse and violation of one's private life, even more important is the Court's judgment in the case of *Khadija Ismayilova v. Azerbaijan (No. 3)*.<sup>40</sup> The applicant in this case was an Azerbaijani radio reporter who had published a series of stories investigating corruption of the Azerbaijani government, which resulted in her

---

<sup>36</sup> ECtHR, *K.U. v. Finland*, Appl. no. 2872/02, Judgment of 2 December 2008, para. 43.

<sup>37</sup> ECtHR, *Buturugă v. Romania*, Apps. no. 56867/15, Judgment of 11 February 2020 (available only in French).

<sup>38</sup> See European Court of Human Rights, Registrar of the Court, *Romanian authorities failed to respond to a woman's complaints of domestic violence and cyberbullying by her former husband* (2020), available at [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22003-6635916-8811383%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22003-6635916-8811383%22]}).

<sup>39</sup> For more information see Council of Europe, Directorate General Human Rights and Rule of Law, *Case Law of the European Court of Human Rights Concerning the Protection of Personal Data*, page 360, available at [https://acresia.com/images/Aktuality\\_dokumenty/NEW\\_Caselaw\\_06\\_2021.pdf](https://acresia.com/images/Aktuality_dokumenty/NEW_Caselaw_06_2021.pdf).

<sup>40</sup> ECtHR, *Khadija Ismayilova v. Azerbaijan (No.3)*, Appl. no. 35283/14, Judgment of 7 May 2020.

getting threats by officials and pro-government media. In 2012 she received a threatening letter containing photos of her engaged in a sexual act with her then partner. After she reported the threats to the police, a video of the sexual act, taken by a camera hidden in her bedroom, was posted online.

In her application, Ismayilova complained about the invasion of her privacy, including the filming of videos of an intimate nature and their publication on the Internet.<sup>41</sup> In the judgment, the Court reiterated that the concept of 'private life' is a broad term that covers the physical and psychological integrity of a person, including their sexual life.<sup>42</sup> Article 8, thus, guarantees a right to lead a 'private social life', away from unwanted attention. This was then connected to the Court's standpoint expressed in its previous judgments that publication of a photo or a video may intrude upon a person's private life. Consequently, the Court found there had been a violation of Article 8, due to the authorities' failing to exercise their positive obligation and protect the sanctity of the applicant's private life by running an effective investigation into the interferences of her private life.<sup>43</sup>

#### **4. The EU Legal Framework – The Digital Services Act**

Although the victims of image-based sexual abuse in the EU could, at least theoretically, be protected under the provisions of GDPR, for the purposes of this paper, we chose to focus on a new proposal for a Digital Services Act ('DSA'),<sup>44</sup> since it's the first EU legal document that explicitly aims to regulate at least one form of image-based sexual abuse: the dissemination of user-generated pornographic content.

The proposal, brought before the European Parliament in December 2020, took into account the issues addressed in the European Parliament's resolutions, namely resolutions on the 'Digital Services Act – Improving the functioning of the Single Market', on the 'Digital Services Act: adapting commercial and civil law rules for commercial entities operating online', and on the 'Digital Services Act and fundamental rights issues posed'. All mentioned resolutions call for protection of fundamental rights in the online environment and for

---

<sup>41</sup> *Ibid.*, para. 31.

<sup>42</sup> *Ibid.*, para. See also ECtHR, Khadija Ismaylova v. Azerbaijan, Appl. nos. 65286/13 and 57270/14, Judgment of 10 January 2019, para. 106, and Peck v. the United Kingdom, Appl. no. 44647/98, Judgment of 28 January 2003, para 57.

<sup>43</sup> ECtHR, *supra* note 40, para. 131.

<sup>44</sup> Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and Amending Directive 2000/31/EC, available at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A825%3AFIN>

accountability of providers of digital services, as well as advocate for effective obligations to tackle illegal content online.<sup>45</sup>

### ***A. Article 24b – Dissemination of User-Generated Pornographic Content: The Analysis***

Although the final text is yet to be adopted, on 20 January 2022, the European Parliament adopted amendments on the proposed DSA, with Article 24b regulating the dissemination of user-generated pornographic content. This provision introduces additional obligations for platforms primarily used for the dissemination of user-generated pornographic content, requiring they take the necessary technical and organizational measures to ensure: (a) that users who disseminate content have verified themselves through a double opt-in e-mail and cell phone registration; (b) professional human content moderation, trained to identify image-based sexual abuse, including content having a high probability of being illegal; (c) the accessibility of a qualified notification procedure in the form that ... individuals may notify the platform with the claim that image material depicting them or purporting to be depicting them is being disseminated without their consent and supply the platform with prima facie evidence of their physical identity; content notified through this procedure is to be suspended without undue delay.

Since image-based sexual abuse is prevalent and thus normalized on mainstream pornography sites, a specific regulation of those sites is justified. By requiring a double opt-in e-mail and phone registration, Article 24b introduces friction and increases the likelihood of identifying those spreading nonconsensual material, while also deterring them from posting such material.<sup>46</sup> Moreover, trained human moderators are much more likely to spot image-based sexual abuse content and remove it, and if they fail to act on their own, victims can contact pornography sites through notifying systems those sites are obliged to establish and require the removal of nonconsensual material depicting or purporting to be depicting them. The platform shall suspend such content without undue delay, which is crucial, since the more time the content exists on the Internet, the more likely it is to be shared and forwarded, and the greater the damage for the victim.

#### *1. Suggestions for the Improvement*

---

<sup>45</sup> *Ibid.*, Point One

<sup>46</sup> See Clare McGlynn and Lorna Woods, *Image-Based Sexual Abuse, Pornography Platforms and the Digital Services Act: Expert Opinion*, page 2, available at <https://hateaid.org/wp-content/uploads/2022/01/ImageBasedAbuse-and-DSA-Expert-Opinion-McGlynn-and-Woods-17-Jan-2022.pdf>.

While a provision tackling the spread of image material without consent on pornography sites is much needed, there are still certain defects in the solution chosen by the EU.

Firstly, Article 24b regulates only pornography sites, leaving out all other platforms used for spreading image-based sexual abuse content, such as WhatsApp and especially Telegram. The latter is a messaging app that offers a possibility of creating groups with up to 200,000 members, as well as ‘channels’ which can have an unlimited number of subscribers and are used for broadcasting messages to large audiences. Additionally, on Telegram one can create a username and thus be found by anyone using the app, without them needing to have one’s phone number, which further allows for a greater number of connections between users. Similarly, one can send messages via Telegram without making their phone number visible which, in turn, offers greater anonymity.<sup>47</sup> In this respect, there have been numerous scandals all across the world involving massive Telegram group chats with thousands of participants where women’s sexual images, as well as their personal information including their names and addresses, have been shared without their consent.<sup>48</sup> Just in the Balkan region there have been multitudinous Telegram groups, with one gathering 36,000 people, mostly men, used for sharing intimate images and personal information of women and even underage girls.<sup>49</sup>

This goes to show how widespread image-based sexual abuse via this communication tool is and, considering the fact that group chats where such content is shared tend to be large, the consequences for the victims are equal to those of the same material being published without their consent on a pornography site. Additionally, we would argue that if a chat, a group, a platform or a site is being used exclusively for sharing sexual content (as some Telegram groups and surely some other sites are), such platforms are, regardless of their name or official definition, pornographic in their nature and should be treated accordingly.<sup>50</sup> Thus, the regulation intended for pornography sites in Article 24b should also be applicable for such platforms.

---

<sup>47</sup> For more information see *Telegram FAQ*, available at <https://telegram.org/faq> and Semezin and Bainotti, *The Use of Telegram for Non-Consensual Dissemination of Intimate Images: Gendered Affordances and the Construction of Masculinities*, 6 *Social Media + Society* (2020) 1

<sup>48</sup> Global Disinformation Team, *Telegram: Where Women’s Nudes Are Shared Without Consent*, 16 February 2022, available at <https://www.bbc.com/news/world-60303769>; Lorenzo Salamone, *What Are Telegram’s Responsibilities on Revenge Porn?*, 7 April 2020, available at <https://www.nssmag.com/en/pills/21669/telegram-revenge-porn>.

<sup>49</sup> Miljana Miletić, *Telegram Revenge Porn Scandal: Police Investigate as More than 50 000 Men Share Explicit Content of Women and Underaged Girls*, available at <https://politikapolitika.com/2021/03/17/telegram-revenge-porn-scandal-police-investigate-as-more-than-50-000-men-share-explicit-content-of-women-and-underaged-girls/>.

<sup>50</sup> See the definition of pornography on Merriam-Webster, available at <https://www.merriam-webster.com/dictionary/pornography>.

Moreover, in our opinion, dissemination of image-based sexual abuse content on any platform and in any case should fall within the scope of Article 24b. Even more so, the fact that one's private sexual images are being shared without their consent on a social media app like Facebook or Instagram could be even more upsetting since explicit content is not something usually seen on such platforms.<sup>51</sup>

Everything aforementioned is why the EU legislation should take steps towards expanding the scope of Article 24b to explicitly include any online platform where image-based sexual abuse content is being shared. That meaning that basically all online platforms where users are allowed to post and share images and videos should employ professionals trained to spot image-based sexual abuse as well as create accessible and easy to use notifying systems that would allow the victims to seek removal of private content disseminated without their consent.

Secondly, while the fact that those who wish to upload content onto pornography sites should provide their e-mails and phone numbers is a welcome step towards accountability of perpetrators and is certainly aimed at discouraging them from posting, we would argue that this measure is not enough.

Namely, it is increasingly common for a person to have access to more than one e-mail address; additionally, it is very easy to set up a new e-mail address providing false personal information. Moreover, a double opt-in system doesn't provide any additional security, nor does it evade possible anonymity of the poster. The system works in a way that, after one provides their e-mail address, an additional confirmation e-mail is sent to that address in order to validate the contact information. In other words, one just needs to log into their e-mail account and press the confirm button, which they can do even if the personal information they have provided is false.

Likewise, while a phone number can be a strong identifier, in 14 EU member states, Croatia included, an ID is not required to purchase a SIM card/phone number.<sup>52</sup> Apart from

---

<sup>51</sup> This problem was, for example, recognized by the UK'S Revenge Porn Helpline that has teamed up with Facebook and Instagram to create <https://stopncii.org/> - a free online tool that allows the victims of, as they call it, non-consensual intimate image abuse to report their case and for their images to be found and removed from Facebook or/and Instagram. However, this particular helpline only helps victims living in the UK. Furthermore, we do recognize the fact that posting of image-based sexual abuse content goes against these apps' community guidelines, however, a much greater protection would be offered through the binding EU legislation.

<sup>52</sup> GSMA, *Access to Mobile Services and Proof of Identity 2021: Revisiting SIM Registration and Know Your Customer (KYC) Contexts during COVID-19* (2021), page 60-61, available at [https://www.gsma.com/mobilefordevelopment/wp-content/uploads/2021/04/Digital-Identity-Access-to-Mobile-Services-and-Proof-of-Identity-2021\\_SPREADs.pdf](https://www.gsma.com/mobilefordevelopment/wp-content/uploads/2021/04/Digital-Identity-Access-to-Mobile-Services-and-Proof-of-Identity-2021_SPREADs.pdf).

The other countries are: Cyprus, Czech Republic, Denmark, Estonia, Finland, Ireland, Latvia, Lithuania, Malta, the Netherlands, Portugal, Romania and Sweden.

that, one can always use someone else's phone or even use a burner app to get a secret number. Still, there's great chance that the sole requirement to provide an e-mail and a phone number will deter those who intend to spread image-based sexual abuse content. However, we would still argue that there should be a greater level of identification, such as providing details of one's ID or driver's license, because we think that the aim should not be to just introduce friction, but also to identify the perpetrators.

In that regard, we do recognize how the requirement to provide one's phone number and/or ID details distorts their anonymity and how that could affect sex workers who use pornography platform. Sex workers already often feel stigmatized and marginalized and fear that these measures could lead to the leak of their personal information and threaten their offline security.<sup>53</sup> However, it's important to emphasize that current legislative solution does not require posters to provide their real names, nor will their e-mail/phone numbers be made public. Also, as mentioned, there are ways to avoid having e-mail addresses and phone numbers linked to actual posters.

However, bearing in mind how common image-based sexual abuse has become and its life shattering consequences, as well as the fact that the sense of online anonymity is often a motivating factor behind perpetrators' actions, we're of the opinion that the need for protection of potential victims' privacy and psychological well-being outweighs the right to anonymity.<sup>54</sup> Moreover, personal information like ID details (as proposed above) would be gathered and hopefully further used by relevant authorities to take appropriate and available measures against perpetrators of image-based sexual abuse, but would not otherwise be made public. Nonetheless, we think that there should be steps taken to de-stigmatize sex work and protect sex workers, while simultaneously offering protection for the victims of image-based sexual abuse through the requirement of stronger verification of posters.

Finally, it's important to emphasize that the notifying system envisaged in the section c of Article 24b should be accessible to the victims in the sense that the contact information

---

<sup>53</sup> See European Sex Workers Rights Alliance, *Letter of Concern Regarding Digital Services Act (DSA) amendment on Mandatory Phone Registration for Content Creators*, 11 January 2022, available at [https://www.eswalliance.org/letter\\_of\\_concern\\_regarding\\_digital\\_services\\_act\\_dsa\\_amendment\\_on\\_mandatory\\_phone\\_registration\\_for\\_content\\_creators](https://www.eswalliance.org/letter_of_concern_regarding_digital_services_act_dsa_amendment_on_mandatory_phone_registration_for_content_creators).

<sup>54</sup> See Clare McGlynn and Lorna Woods, *Image-Based Sexual Abuse, Pornography Platforms and the Digital Services Act: Expert Opinion*, page 9, available at <https://hateaid.org/wp-content/uploads/2022/01/ImageBasedAbuse-and-DSA-Expert-Opinion-McGlynn-and-Woods-17-Jan-2022.pdf>. You can see more about the effect that sense of anonymity has on image-based sexual abuse in Semezin and Bainotti Lucia, *supra* note 47. Salter and Crofts refer to the perpetrators as 'loosely affiliated networks of anonymous men who collectively mobilize to stalk, vilify and threaten', see Salter and Crofts, 'Responding to Revenge Porn: Challenging Online Legal Impunity' in L. Comella and S. Tarrant (eds), *New Views on Pornography: Sexuality, Politics and the Law* (2015) 233.

should be clearly highlighted and easy to navigate, since any additional trouble related to contacting a site could possibly further discourage the victim and put additional pressure on them in an already stressful situation.

## **5. The Croatian Legal Framework**

In July 2021 the changes to the Croatian Criminal Code were adopted introducing the criminal offence of ‘abuse of sexually explicit footage’ in Article 144.a.

Section One of Article 144.a reads as follows: Whoever abuses a relationship of trust and, without consent of the person depicted, makes accessible to a third party a sexually explicit footage taken with consent of the person depicted for personal use, and in that manner infringes the privacy of the person depicted in the footage, shall be punished by imprisonment of up to one year.<sup>55</sup>

A few factors play a role in this definition. Firstly, the perpetrator needs to abuse the victim’s trust. Therefore, the crime can only be committed by someone that the victim had or still has a close relationship with (for example, an ex-partner). This automatically eliminates prosecution of perpetrators unknown to the victim. So, if a complete stranger takes a sexual image of another person and shares it, they wouldn’t face prosecution. While it can be understood that there are instances of people voluntarily taking and sending their private sexual images to their partners/other people they trust who then violate that trust and share the content, there are also so many other types of image-based sexual abuse that unfortunately don’t fall within this definition.

Furthermore, the definition requires that the shared footage was taken with consent of the victim and for personal use. This requirement just further unnecessarily narrows an already narrow definition. Namely, even one’s partner, and let alone anyone else, could take their pictures/videos without consent, then go on and share them (also without consent) and, by this definition, that action wouldn’t constitute a criminal offence because the content wasn’t taken with consent and for personal use.

Just these two examples show how, by insisting on listed requirements, the Croatian legislature opted for a very narrow approach, incriminating only one small portion of image-based sexual abuse and leaving so many potential victims of unprotected. While we do agree

---

<sup>55</sup> Criminal Code of the Republic of Croatia, Narodne Novine - Official Gazette No. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/18, 84/21. Section Two criminalizes 'sexualized photoshopping' and Section Three criminalizes mass spread of un-consensual sexually explicit footage via computer systems/networks. However, for the purposes of this paper we opted to analyze the base definition of this criminal offence as described in Section One.

that any abuse of private sexual image needs to be criminalized, we would opt for a broader definition of this criminal offence that would be in accordance with the presented definition of image-based sexual abuse. Therefore, any type of nonconsensual creation and/or distribution of private sexual images, as defined in Part 2. B of this paper, should constitute a criminal offence, irrespective of the perpetrator's motives or their relation to the victim.

## **6. Conclusion**

Although sexual harassment is not a new phenomenon, the availability of electronic devices and an increase in online communication have led to the appearance of various new forms of cyber-harassment, including image-based sexual abuse. In this paper we have presented why it's crucial to describe this phenomenon as sexual abuse as well as attach it to the appropriate (broader) definition; application of the correct definition is the first step to accountability of the perpetrators and the protection of the victims. As shown, the harms experienced by the victims of image-based sexual abuse are severe and multitudinous, which constitutes one of the main reasons why the creation and dissemination of private sexual images should be defined in the way argued in this paper.

By adopting the amendments to the DSA and introducing specific obligations for platforms used for the dissemination of user-generated pornographic content, the EU legislation has demonstrated the recognition of the prevalence of this type of sexual violence as well as the severity of its harms. However, there is still room for improvement, as the relevant DSA provision (Article 24b) regulates only pornography sites, leaving out all the other existing platforms commonly used for nonconsensual distribution of private sexual images. Moreover, if the posters were required to provide their ID or driver's license details, as we propose in this paper, there would a greater chance of successfully identifying the perpetrators of image-based sexual abuse, since, in our opinion, that should be as equally important aim as preventing them from posting in the first place. It is also worth highlighting here that image-based sexual abuse does not and should not be categorized as a form of pornography.

In relation to the approach taken by the Croatian criminal legislation, it's crucial to emphasize that, while it's a step in the right direction, the definition of the criminal offence of 'abuse of sexually explicit footage' is too narrow, as it requires the occurrence of the abuse of trust, as well as poses a requirement for the footage to be taken with consent, but distributed without it. This way, the definition leaves out many forms of image-based sexual abuse, which makes it inappropriate for the protection of the potential victims.



To conclude, as argued in this paper, the term 'revenge porn' isn't appropriate to describe a growing, gender-based phenomenon of predominantly online sexual abuse, thus, more steps should be taken to protect the victims, both by the EU legislation, as well as the Croatian criminal legislation.

## BIBLIOGRAPHY

### A) JOURNAL ARTICLES

1. Bates, 'Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors', 12 *Feminist Criminology* (2017) 22
2. 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', 42 *Fordham Urban Law Journal* (2014) 234
3. Chesney and Citron, 'Deep Fakes: A Looming Challenge for Privacy, Democracy and National Security' 107 *California Law Review* (2019) 1753
4. Citron and Franks, 'Criminalizing Revenge Porn', 49 *Wake Forest Law Review* (2014) 345
1. Delfino, 'Pornographic Deepfakes – Revenge Porn's Next Tragic Act – The Case for Federal Criminalization' 88 *Fordham Law Review* (2019) 887
5. Kirchengast and Crofts, 'The Legal and Policy Contexts of Revenge Porn Criminalisation: The Need for Multiple Approaches', 19 *Oxford University Commonwealth Law Journal* (2019) 1
6. Harper, Fido and Petronzi, 'Delineating Non-Consensual Sexual Image Offending: Towards an Empirical Approach', 58 *Aggression and Violent Behavior* (2021) 1
7. McGlynn *et al.*, 'It's Torture for the Soul: The Harms of Image-Based Sexual Abuse', 30 *Social & Legal Studies* (2021) 541
8. McGlynn, Rackley and Houghton, 'Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse', 25 *Feminist Legal Studies* (2017) 25
9. McGlynn and Rackley, 'Image-Based Sexual Abuse', 37 *Oxford Journal of Legal Studies* (2017) 534
10. McGlynn and Rackley, 'More than 'Revenge Porn': Image-Based Sexual Abuse and the Reform of Irish Law', 14 *Irish Probation Journal* (2017) 38,
11. Harris, 'Deepfakes: False Pornography Is Here and the Law Cannot Protect You', 17 *Duke Law and Technology Review* (2019) 99,

12. Reaume, 'Discrimination and Dignity', 63 *Louisiana Law Review* (2003) 645
13. Waldron, 'Dignity and Defamation: The Visibility of Hate' 123 *Harvard Law Review* (2010) 1596

## B) INTERNET SOURCES

1. Amanda Holpuch, *FBI Arrest and Charge Revenge Porn Mogul Hunter Moore*, 23 January 2014, available at: <https://www.theguardian.com/culture/2014/jan/23/fbi-arrest-and-charge-revenge-porn-mogul-hunter-moore>
2. Council of Europe, Directorate General Human Rights and Rule of Law, *Case Law of the European Court of Human Right Concerning the Protection of Personal Data*, available at [https://acresia.com/images/Aktuality\\_dokumenty/NEW\\_Caselaw\\_06\\_2021.pdf](https://acresia.com/images/Aktuality_dokumenty/NEW_Caselaw_06_2021.pdf)
3. Clare McGlynn and Lorna Woods, *Image-Based Sexual Abuse, Pornography Platforms and the Digital Services Act: Expert Opinion*, available at <https://hateaid.org/wp-content/uploads/2022/01/ImageBasedAbuse-and-DSA-Expert-Opinion-McGlynn-and-Woods-17-Jan-2022.pdf>
4. Dr. Asia A. Eaton, Dr. Holly Jacobs, and Yanet Ruvalcaba, *2017 Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration: A Summary Report* (2017), <https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf>
5. European Court of Human Rights, Registrar of the Court, *Romanian authorities failed to respond to a woman's complaints of domestic violence and cyberbullying by her former husband* (2020), available at [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22003-6635916-8811383%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22003-6635916-8811383%22]})
6. European Sex Workers Rights Alliance, *Letter of Concern Regarding Digital Services Act (DSA) amendment on Mandatory Phone Registration for Content Creators*, 11 January 2022, [https://www.eswalliance.org/letter\\_of\\_concern\\_regarding\\_digital\\_services\\_act\\_dsa\\_amendment\\_on\\_mandatory\\_phone\\_registration\\_for\\_content\\_creators](https://www.eswalliance.org/letter_of_concern_regarding_digital_services_act_dsa_amendment_on_mandatory_phone_registration_for_content_creators)
7. Global Disinformation Team, *Telegram: Where Women's Nudes Are Shared Without Consent*, 16 February 2022, available at <https://www.bbc.com/news/world-60303769>
8. GSMA, *Access to Mobile Services and Proof of Identity 2021: Revisiting SIM Registration and Know Your Customer (KYC) Contexts during COVID-19* (2021),

available at [https://www.gsma.com/mobilefordevelopment/wp-content/uploads/2021/04/Digital-Identity-Access-to-Mobile-Services-and-Proof-of-Identity-2021\\_SPREADs.pdf](https://www.gsma.com/mobilefordevelopment/wp-content/uploads/2021/04/Digital-Identity-Access-to-Mobile-Services-and-Proof-of-Identity-2021_SPREADs.pdf)

9. Kashmira Gender, *The People Who Photoshop Friends and Family onto Porn* (2016), available at <https://www.independent.co.uk/life-style/love-sex/porn-photoshopping-4chan-family-friends-superimposed-into-sex-scenes-world-a7358706.html>
10. Lorelei Laird, *Victims are Taking on 'Revenge Porn' Websites For Posting Photos they Didn't Consent To*, available at [https://www.abajournal.com/magazine/article/victims\\_websites\\_photos\\_consent](https://www.abajournal.com/magazine/article/victims_websites_photos_consent)
11. Lorenzo Salamone, *What Are Telegram's Responsibilities on Revenge Porn?*, 7 April 2020, available at <https://www.nssmag.com/en/pills/21669/telegram-revenge-porn>
12. Matt Burgess, *Deepfake Porn Is Now Mainsream. And the Major Sites Are Cashing In*, 27 August 2020, available at <https://www.wired.co.uk/article/deepfake-porn-websites-videos-law>
13. Merriam-Webster definition of pornography, available at <https://www.merriam-webster.com/dictionary/pornography>
14. McAfee Canada, *Love, Relationships and Technology Survey: Pitfalls of Couples Sharing Personal Data & Passwords* (2013), available at <https://www.photoxels.com/mcafee-canada-2013-love-relationships-and-technology-survey-pitfalls-of-couples-sharing-personal-data-and-passwords/>
15. Michelle Gonzalez, *Power in Numbers*, 3 January 2014, available at <https://cybercivilrights.org/revenge-porn-infographic/>
16. Miljana Miletić, *Telegram Revenge Porn Scandal: Police Investigate as More than 50 000 Men Share Explicit Content of Women and Underaged Girls*, available at <https://politikapolitika.com/2021/03/17/telegram-revenge-porn-scandal-police-investigate-as-more-than-50-000-men-share-explicit-content-of-women-and-underaged-girls/>
17. Tamsin Selbie and Craig Williams, *Deepfake Pornography Could Become an 'Epidemic', Expert Warns*, 27 May 2021, available at: <https://www.bbc.com/news/uk-scotland-57254636>
18. *Telegram FAQ*, available at <https://telegram.org/faq>

### C) CASE LAW

1. ECtHR, *Buturugă v. Romania*, Apps. no. 56867/15, Judgment of 11 February 2020

2. ECtHR, *K.U. v. Finland*, Appl. no. 2872/02, Judgment of 2 December 2008
3. ECtHR, *Khadija Ismayilova v. Azerbaijan (No.3)*, Appl. no. 35283/14, Judgment of 7 May 2020
4. ECtHR, *Khadija Ismaylova v. Azerbaijan*, Appl. nos. 65286/13 and 57270/14, Judgment of 10 January 2019
5. *Peck v. the United Kingdom*, Appl. no. 44647/98, Judgment of 28 January 2003

#### D) OTHER SOURCES

1. Salter and Crofts, 'Responding to Revenge Porn: Challenging Online Legal Impunity' in L. Comella and S. Tarrant (eds), *New Views on Pornography: Sexuality, Politics and the Law* (2015) 233
2. N. Henry, A. Powell and A.L.G. Flynn, *Not Just 'Revenge Porn' : Australians' Experiences of Image-Based Abuse: A Summary Report* (2017)
3. Criminal Code of the Republic of Croatia, Narodne Novine - Official Gazette No. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/18, 84/21

#### Abstract

With advances in modern technologies, and especially due to the wide use of the Internet, we are witnessing an increase of a form of (predominantly) online sexual violence that we label as 'image-based sexual abuse'. It is a phenomenon defined as 'the creation and /or distribution of private sexual images without consent, including threats to share images and altered images'. In this paper we present and analyze the definition of image-based sexual abuse, justifying the use of this term over the commonly used term 'revenge porn' and delineate various serious harms experienced by the victims of this type of sexual violence. Furthermore, by analyzing the legal approaches taken by the European Union in the Digital Services Act and by the Croatian legislation in the Croatian Criminal Code, we recognize the benefits of each legislative solution, but also address their defects and offer suggestions for the improvement. To conclude, we argue that the term 'revenge porn' isn't appropriate to describe this type of sexual abuse, emphasizing that more steps should be taken to protect the victims.

Key words: revenge porn, image-based sexual abuse, sexual violence, the Digital Services Act, the Croatian Criminal Code, abuse of sexually explicit footage