

Revenge Pornography in Nigeria: A Call for Legal Response and Cyber-Censorship of Content by Internet Service Providers

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Abstract

Revenge pornography is the online distribution of sexually uncensored images or videos of another person without consent and to cause embarrassment or torment. Victims of revenge pornography suffer significant harm, including losing jobs and, in extreme cases, committing suicide. The public blames the victim for the role they played. Rather than victim-blaming, victims deserve a takedown order and criminal liability for uploaders of such images. This study adopts a doctrinal approach; it examines key statutes and their interpretation by Nigerian courts while juxtaposing it with the law and practice in the United Kingdom. The United Kingdom was undertaken as a case study because it has a developed jurisprudence which can provide lessons for Nigeria. This study found that the current state of laws in Nigeria is ill-equipped to tackle the menace of revenge pornography. The objective of this study is to offer insights on the prevalence of revenge pornography in Nigeria and suggest legal solutions to address this phenomenon. It canvasses for a non-consensual pornography provision that would criminalise the act of revenge pornography in Nigeria. It also makes a case for cyber-censorship of contents by internet service providers and the need for third-party liability.

Keywords

revenge pornography – cyber laws – cybercrime – internet service providers – cyber-censorship – right to be forgotten

1 Introduction

Online anonymity, sophistication of technology and the expanding utilisation of the internet have resulted in the proliferation of revenge pornography (revenge porn). The act is not new; people have extorted, harassed, and tormented their victims with indecorous images since the invention of the handheld camera.¹ What is new is the platform used. The age of social media gives internet users cyber prowess; some become internet trolls, bullies, and engage in cyber-harassment such as revenge porn.

A review of academic literature on this subject shows that most authors concentrate on the call for legislation criminalising revenge porn.² This present study canvasses for that and goes further to provide recommendations that would enhance a safer cyberspace and mitigate the revenge porn phenomenon.

Revenge porn is a growing trend. The statistics around it continue to rise drastically. A McAfee study reveals that 10 per cent of ex-partners have threatened to expose photos of their former partner online, and 60 per cent have carried out their threats.³ As reported by the Cyber Civil Rights Initiative, as many

1 Casey Martinez, 'An Argument for States to Outlaw "Revenge Porn" and for Congress to Amend 47 USC s 230: How our Current Laws Do Little to Protect Victims' (2014) 14 U. Pitt. J. Tech. L. & Pol'y 236.

2 Danielle Keats Citron and Mary Anne Franks, 'Criminalizing Revenge Porn' (2014) 49 Wake Forest L. Rev. 345. The authors canvassed for the criminalisation of revenge porn. They stated that criminalising non-consensual pornography will convey the proper level of social condemnation for such behaviour. Taylor Linkous, 'It's Time for Revenge Porn to Get a Taste of its Own Medicine: An Argument for the Federal Criminalization of Revenge Porn' (2014) 20(4) Rich. J.L. & Tech. 14. The author opined that technology and pornography have lived symbiotically with each other for quite some time. The author added that the introduction of the internet made access to pornography easier and widened the audience. He stated that a carefully crafted federal law would protect victims, deter violators, and allow victims to go after the actual revenge porn sites themselves, without offending the First Amendment. Sarah Bloom, 'No Vengeance for 'Revenge Porn' Victims: Unravelling Why this Latest Female-Centric, Intimate-Partner Offense is Still Legal, and Why We Should Criminalize It' (2016) 42(1) Fordham Urb. L.J. 233. Adrienne N Kitchen, 'The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment' (2015) 90(1) Chi.-Kent L. Rev. 247.

3 Sarah Young, 'How to Protect Yourself against Revenge Porn' (24 August 2017) <<http://independent.co.uk>> accessed 19 February 2019.

as 90 per cent of revenge porn victims are women.⁴ A survey of 5000 adults conducted in 2012 by *Match.com* found that 57 per cent of men and 45 per cent of women had received an explicit photograph from their partners, and 38 per cent of men and 35 per cent of women admitted to sending their partners a graphic picture of themselves.⁵ 94 per cent of Americans believe that their intimate images are safe in possession of their current partners.⁶ These figures are alarming; it depicts that revenge porn is a significant societal problem that needs to be tackled with urgency.

Victims of revenge porn suffer incredible and continuous harm, including losing jobs, public shame, stigmatisation, mental health issues, humiliation and in extreme cases, victims commit suicide. The public condemns the victim with the general belief that she consented to the pictures taken. This paper observes that the victim-blaming myth targets the woman's behaviour rather than the perpetrator of the crime. There is a vast disconnect between what the public understands as revenge porn and the gravity of the act in addition to the harm suffered by victims of such practice. The objective of this study is to explore the epidemic of revenge porn in Nigeria, the grievous harm suffered by its victims, and to proffer recommendations to tackle the issue.

This paper is divided into five parts; the first part introduces the revenge porn phenomenon. The second part discusses the brief history of revenge porn and the difference between consent and context. It also discusses the harm suffered by victims of revenge porn. Part three analyses the position of the law in the United Kingdom and Nigeria. The author acknowledges that there are remedies available in other fields of law like constitutional and copyright law. However, this paper is written on the premise that criminalising revenge porn will strongly respond to the issue discussed. Part four focuses on the lessons for Nigeria and the need for cyber-censorship of contents by internet service providers. Section five provides concluding remarks.

2 Revenge Pornography

There is no generally accepted definition of revenge porn. It has been defined as 'a term for the posting of nude images of an un-consenting individual online, commonly by an ex-boyfriend. These photos are often linked to social media

4 Mudasir Kamal and William J Newman, 'Revenge Pornography: Mental Health Implications and Related Legislation' 44 *J. Am. Acad. Psychiatry L.* <<http://pdfs.semanticscholar.org>> accessed 19 June 2019.

5 Linkous (n 2).

6 Bloom (n 2).

profiles, the victim's home address, and employer'.⁷ It has also been defined as 'the sharing of private, sexual materials, either photos or videos, of another person without their consent and with the purpose of causing embarrassment or distress'.⁸ Scheller defines it as 'the online publication of sexually explicit photographs or videos posted without the consent or knowledge of the subject of the content'.⁹ Citron opines that in rare cases, men can be victims of revenge porn, but the overwhelming majority of victims are female.¹⁰

Based on the above definitions, it is evident that the act of revenge porn entails the online posting or distribution of explicit videos or pictures without the consent of the subject. The aim of the up-loader of such image or video is to embarrass or torment the victim. It is important to note that although the term revenge porn is used interchangeably with non-consensual pornography,¹¹ the two terms are not the same. Bates is of the view that non-consensual pornography (non-consensual porn) is a relatively new phenomenon. It entails the online posting of explicit images/videos without the subject's consent.¹² However, 'revenge porn occurs when a person uploads nude/semi-nude photos of someone online, often as revenge after a relationship has ended'.¹³ The author added that 'revenge porn is included under the umbrella of non-consensual pornography, but non-consensual pornography does not always include revenge porn'.¹⁴

This paper agrees with the author.¹⁵ The term non-consensual porn is an umbrella term. It includes the uploading of sexually explicit images or videos

7 Zak Franklin, 'Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites' (2014) 102(5) Calif. L. Rev. 1303, 1303.

8 Revenge Porn: The Facts <<https://www.gov.uk>>.

9 Samantha H Scheller, 'A Picture Is worth a Thousand Words: The Legal Implications of Revenge Porn' (2015) 93(5) N. C. L. Rev. 551, 558.

10 Danielle Keats Citron, 'Revenge Porn: A Pernicious Form of Cyber Gender Harassment' (*The Baltimore Sun*, 15 December 2013) <http://articles.baltimoresun.com/2013-12-15/news/bs-ed-cyber-gender-harassment-20131214_1_cyber-civil-rights-initiative-nude-images-harassment> accessed 24 March 2019.

11 By the public especially the media.

12 Samantha Bates, 'Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors' (2016) 12 *Feminist Criminology* 2 <<https://www.biscmi.org/wp-content/uploads/2016/08/Revenge-Porn-and-Mental-Health-A-Qualitative-Analysis-of-the-Mental-Health-Effects-of-Revenge-Porn-on-Female-Survivors.pdf>> accessed 24 March 2019.

13 *ibid.*

14 *ibid.*

15 However, the terms revenge porn and non-consensual pornography will be used interchangeably in this research paper.

without the subject's consent. The difference between non-consensual porn and revenge porn is usually the uploader and the intent of such uploader. In cases of revenge porn, the uploader is always an ex-lover or an ex-husband with the intent to harm, embarrass, or torment the victim. The concept of revenge porn is vengeance-driven. In cases of non-consensual porn, the uploader of such images is often a blogger or a website owner with intent to attract the attention of internet users and make monetary gains. In some instances, the uploader is a total stranger who might have hacked into the victim's phone or computer. Although the uploader may not have the direct intention to harm the subject. It is arguable that the intent to harm, embarrass, or torment the victim also applies to an uploader of non-consensual porn. It should be referred to as an implied intent to harm and humiliate the victim. Every reasonable thinking person would expect that the act of uploading, posting, or reposting such image would cause harm, embarrassment, or torment the victim. Third parties, bloggers and websites who host such photos should also be held strictly liable for acts of non-consensual pornography.

2.1 *Brief History of Revenge Porn*

The history of revenge pornography cannot be stated with exactitude.¹⁶ The modern phase of revenge porn started in the year 2000 when an Italian researcher discovered a new genre of pornography where explicit pictures of ex-girlfriends were shared in Usenet groups.¹⁷ In 2008, the first websites and blogs wholly dedicated to revenge porn started to spring up.¹⁸ In 2010, Hunter Moore created one of the most famous revenge porn sites named *IsAnyoneUp.com*.¹⁹ *MyEx.com*, *Texxxan.com*, and many other revenge porn sites also came into existence.

In November 2013, a Nigerian pop singer posted nude photographs of his ex-girlfriend on twitter.²⁰ In 2014, a jilted Nigerian, Franklyn Emuobor, leaked

16 A famous incident relating to non-consensual porn occurred in 1949 when the nude photographs of Marilyn Monroe surfaced in the newsstands. Many American celebrities have been victims of non-consensual pornography, from Kim Kardashian, Rihanna, Scarlet Johansson etcetera.

17 Alexa Tsoulis-Reay, 'A Brief History of Revenge Porn' [21 July 2013] *NY Magazine* <<https://nymag.com/news/features/sex/revenge-porn-2013-7/>> accessed 26 July 2019.

18 *ibid.*

19 Scott R Stroud, 'The Dark Side of the Online Self: A Pragmatist Critique of the Growing Plague of Revenge Porn' (2014) 29(3) *J. of Mass Media Ethics* <<http://doi.org/10.1080/08900523.2014.917976>> accessed 2 May 2019.

20 Ayomide O Tayo, 'Revenge Porn: What to do When This Happens to you' (13 July 2017) <<https://www.pulse.ng/gist/revenge-porn-what-to-do-when-this-happens-to-you/jjbqgtq>> accessed 22 February 2019.

naked pictures of a top Ugandan female singer, Desire Luzinda.²¹ He alleged that she was cheating on him and he intended to destroy her career by posting such photos.²² In another case of revenge porn in Nigeria, one Peter Ifedayo, posted nude photographs of his ex-lover, Olabomi Ojuade.²³ Ojuade alleged that Peter started demanding money. When it became excessive, she called off the relationship. He threatened to publish her nude pictures online, a threat he eventually carried out.²⁴ One of the most prominent instances of revenge porn in Nigeria is that of former Miss Anambra, Chidinma Okeke.²⁵ A video in which the ex-beauty queen engaged in lesbian sex acts was released without her consent. Okeke claimed the organisers of the beauty pageant in Anambra State lured her into producing the sex tape.²⁶ She alleged that Anambra Broadcasting Service (ABS), the organisers of the show blackmailed her repeatedly with the video and eventually carried out the threat.²⁷ Recently, Jeanine Anez, the interim president of Bolivia, resigned from office after her sex video leaked on social media platforms.²⁸

In Nigeria, occasionally, images/videos of non-consensual pornography appear online, especially on social media platforms. Bloggers and internet users are quick to upload and repost such images, thereby exposing the victim to more harm. It is vital to discuss at this juncture the harms suffered by victims of revenge porn to portray the seriousness of this act and the need to criminalise it in Nigeria.

2.2 *The Difference between Consent and Context*

In most cases, the victims of revenge porn take the pictures themselves or consent to their partners doing the same. Consensual sharing of intimate images is done with the implied or express understanding that such image will remain confidential between the parties only.²⁹ Nonetheless, the public is quick

21 Isaac Dachen, 'Jilted Lover: Nigerian Boyfriend Leaks Uganda Singer Desire Luzinda's Nude Photos' (10 November 2014) <<http://www.pulse.ng>> accessed 20 March 2019.

22 *ibid.*

23 Isaac Dachen, 'Wicked Love: Nigerian Man Post Nude Photos of Lover on Social Media' (11 December 2014) <<http://www.pulse.ng>> accessed 20 March 2019.

24 *ibid.*

25 Dokunola, 'Ex-Miss Anambra Breaks Silence, Reveals What Led to Controversial Sex Tape' <<http://www.naij.ng>> accessed 14 July 2019.

26 *ibid.*

27 *ibid.*

28 Taimur, 'Bolivia President Private Video Leaked: Jeanine Anez Video Leaked' (13 January 2020) <<https://www.newpakweb.com/bolivian-president-video-scandal-jeanine-anez-video-leaked/>> accessed 2 February 2020.

29 Citron and Franks (n 2).

to blame the victim for taking the picture in the first place and refuse to recognise the import of such implied confidences in a sexual context. Critics of the criminalisation of revenge porn argue that the consensual sharing in one context – a trusted relationship – translates into consent in other contexts – posting to the world.³⁰ This paper disagrees with such a position. A victim of revenge porn gives her consent based on the confidence she had in her partner. In some cases, the partners vow not to share such images with a third party or the public.

It is essential to distinguish between the separate acts of consent: the victim's permission to create the photo and the victim's consent to have the photo distributed to a third party outside the private relationship. Consent to share information in one context does not serve as consent to share this information in any other context.³¹ When a person drops off his/her baby in a crèche, he or she is not consenting to transfer parenthood to the crèche owner. When a person confides in his lawyer with sensitive information, he is not authorising that lawyer to share that information with the public. What lovers share privately is not equivalent to what they share with colleagues, acquaintances, or employers.³² Consent given in one context should not be mistaken as approval in all regards. The subject's consent should be obtained in every circumstance.

This argument is akin to contextual integrity which is a benchmark theory of privacy. Contextual integrity provides adequate protection for privacy to norms of specific contexts.³³ Owing to the challenges posed by information technologies, this framework is essential for evaluating the flow of personal information between agents.³⁴ It highlights why certain forms of information flow are acceptable in one context but perceived as problematic in another.³⁵ It demands that the process of collecting information and dissemination must comply with the governing standards of distribution and applicable to the specific context.

This paper observes that there is a vast difference between consent and context. The provision criminalising revenge porn should define these two terms.

30 *ibid.*

31 *ibid.*

32 Bloom (n 2).

33 Helen Nissenbaum, 'Privacy as Contextual Integrity' (2004) 79 Wash. L. Rev. 119.

34 To aid the applicance of contextual integrity, Nissenbaum provides a nine-step decision heuristic to evaluate the essential points departure created by a new process to determine if the new practice represents a potential violation of privacy.

35 Michael Zimmer, 'How Contextual Integrity can help us with Research Ethics in Pervasive Data' (*Medium*, 25 July 2018) <<https://medium.com/pervade-team/how-contextual-integrity-can-help-us-with-research-ethics-in-pervasive-data-ef633c974cc1>> accessed 20 January 2020.

Consent means giving permission or agreeing to do something. While context implies the condition(s) that shape the background for an event; when a victim of revenge porn consents to the pictures taken, that consent did not form the circumstance that it should be made public. Intimate images taken by the victim or her lover in a trusted relationship was done in confidence and with the victim's consent. The condition or circumstances surrounding that consent is the belief that it would not be taken out of context and disclosed to a third party or the public at large.

2.3 *The Harm Suffered by Victims of Revenge Pornography*

In most cases of revenge porn, the victim's personal information accompanies the image(s) posted online. As a result of this, 49 per cent of the victims of revenge porn have said they have been harassed or stalked online by internet users who saw their material.³⁶ Victims of revenge porn suffer several unimaginable harms. They have reportedly lost good-paying jobs, changed their names, and were forced to change their place of residence.³⁷ Tara Dozier, lost her job after her ex-boyfriend posted intimate photos of her on a website known as 'revenge porn' hub.³⁸ She claimed that paedophiles were invited to attack her children.³⁹ Victims have also been subjected to real-life stalking and sexual harassment because the viewers take such image/video as a sexual proposition.

Non-consensual pornography raises the risk of offline stalking and physical attack.⁴⁰ In a study of 1,244 individuals, over 50 per cent of victims reported that their naked photographs appeared next to their full names and social network profile. Over 20 per cent of victims narrated that their e-mail addresses and telephone numbers emerged next to their naked photographs.⁴¹ Posting nude images next to a person's contact information often encourages strangers to attack the subject offline. Hollie Toups, a thirty-three-year-old teacher's aide, explained that she was terrified to leave her home after someone posted

36 Natalie Webb, 'Revenge Porn by the Numbers, END REVENGE PORN' (3 January 2014) <<http://www.endrevengeporn.org/revenge-porn-infographic/>> accessed 27 July 2019. Taylor Linkous, 'It's Time for Revenge Porn to Get a Taste of Its Own Medicine: An Argument for the Federal Criminalization of Revenge Porn' (2014) 20 Rich. J.L. & Tech. 14.

37 Martinez (n 1).

38 Melissa Crowe, 'Revenge Porn can devastate Victims and their Employers' (*Puget Sound Business Journal*, 5 August 2016) <<https://www.bizjournals.com/seattle/blog/techflash/2016/08/revenge-porn-can-devastate-victims-and-their.html?j=>> accessed 19 January 2019.

39 *ibid.*

40 Citron and Franks (n 2).

41 Cyber Civil Rights Statistics on Revenge Porn, cited in Citron (n 10).

her nude photograph, home address, and Facebook profile on a porn site.⁴² Aside from traditional harms, revenge porn can also amount to a degrading form of sexual harassment.⁴³ It exposes victims sexuality in humiliating ways.⁴⁴ Victims' naked photos appear on slut-shaming⁴⁵ sites, such as *Cheaterville.com* and *MyEx.com*.⁴⁶ In some instances, once a victim's nude images are exposed, strangers send e-mail messages that threaten rape.⁴⁷

While non-consensual porn can affect both men and women, empirical evidence indicates that non-consensual pornography primarily affects women and girls.⁴⁸ As reported by Cyber Civil Rights Initiative,⁴⁹ 90 per cent of those victimised by revenge porn were female.⁵⁰ Non-consensual pornography, like sexual harassment, rape, and domestic violence belong to the category of abuse that violates legal and social commitments to equality.⁵¹ It denies women and girls control over their bodies and lives. In many cases, it inflicts severe and irreparable injury on individual victims, and it constitutes a vicious form of sex discrimination.⁵²

This paper agrees with the above argument. Women who are victims of revenge porn suffer more harm than their male counterparts. If a man's nude pictures appear online, the viewers often limit their comments to the size of his male organ.⁵³ They do not criticise or label the subject as a sexually

42 Callie Millne, 'Public Humiliation over Private Photos' (*SFGate*, 10 February 2013) <<http://www.sfg.com/opinion/article/Public-humiliation-over-private-photos-4264155.php+photo-4161587>>.

43 Citron and Franks (n 2).

44 *ibid.*

45 Slut-shaming is the practice of criticizing women and girls who are perceived to violate expectations of behaviour and appearance regarding issues related to sexuality. It is the experience of being labelled a sexually out-of-control girl/woman and being punished socially for possessing this identity.

46 Citron and Franks (n 2).

47 *ibid.*

48 *ibid.*

49 The Cyber Civil Rights Initiative is a non-profit organization aimed at raising awareness on non-consensual porn. It started as the End Revenge Porn Campaign in August 2012 by Dr Holly Jacobs. Jacobs was a victim of revenge porn. The End Revenge Porn Campaign was a campaign calling for the criminalisation of non-consensual porn which is popularly referred to as revenge porn.

50 Citron and Franks (n 2).

51 *ibid.*

52 *ibid.*

53 'Female Fans Reacts to Tekno's Big Cassava Photos' (4 November 2016) <<http://www.tooample.com/2016/11/04>> accessed 30 July 2019. Tekno a Nigerian singer posted his semi-nude pictures and the only comments were on the size of his male organ 'cassava' as he termed it.

out-of-control man; this would have been the plight of a female subject. When the victim is a woman or girl, she gets slut-shaming comments on such posts on social media.⁵⁴ She is stigmatised by her colleagues and, in some cases, by her relatives. In Nigeria, the societal values for girls are that girls are seen (in a decent way) and not heard. Nigerian parents and family members want their daughters to be portrayed as modest girls and possibly get married as virgins. Both the victim of revenge porn in Nigeria and her parents suffer stigmatisation.⁵⁵

In some instances, victims of revenge porn commit suicide like the case of Christina Fokona, a 19-year-old South African girl.⁵⁶ In 2010, a sex tape where Christiana and two boys were having sex leaked.⁵⁷ After the video went viral, Christina changed school twice because of the harassment she suffered by her fellow students. Fokona experienced shame, bullying, and name-calling and decided to commit suicide. She overdosed on her mother's medication for high blood pressure.⁵⁸ In another case, Tiziana Cantone, a 31-year-old from Naples, Italy, committed suicide after she was targeted by trolls when a private sex tape she made with her ex-boyfriend was published online.⁵⁹

The cases above show the gravity of harm suffered by victims of revenge porn. It also shows the critical importance of the issue of revenge porn and the severe consequences that warrant its criminalisation.

3 The State of Law in the United Kingdom

Some countries and jurisdictions have passed legislation to outlaw the act of revenge pornography.⁶⁰ There are laws in the UK that prohibit the distribution of indecent, grossly offensive, and obscene materials long before the

54 Miss Anambra, Chidinma Okeke, got a lot of slut-shaming comments when the intimate video of her was posted online.

55 Dokunola (n 25).

56 'Sad: Another Girl Commits Suicide after Sex Tape Leaked' (18 April 2015) <<http://www.ghanavibes.com>> accessed 2 August 2019.

57 *ibid.*

58 *ibid.*

59 Josie Tutty, 'Revenge Porn Victim Commits Suicide After Sex Tape is turned into a Meme' <<http://www.viralthread.com/Italian-revenge-porn>> accessed 2 August 2019.

60 Philippine is the first country to outlaw the practice of non-consensual porn. In Israel, instances of revenge porn or non-consensual porn is deemed as sexual harassment punishable by up to five years imprisonment. See New Jersey Code 2C: 14-9, California Penal Code s 647 (j)(4). Although twenty-six states in the United States have criminalised the act of revenge porn, there is no national legislation making the practice an offence. This

advent and popularity of social media and the internet. Further legislation was enacted to regulate the dissemination of such materials using any electronic medium or the internet. These laws are detailed below.

3.1 *Obscene Publication Act, 1959 and 1964*

In the United Kingdom (UK), there is a considerable number of legal regulations on obscene material, both from before and after the arrival of the internet.⁶¹ In England and Wales, the main pieces of general obscenity legislation are the Obscene Publications Acts 1959 and 1964, which makes it an offence to publish an obscene article or to have such article for publication or gain.⁶² It is important to note that the Act did not criminalise the mere private possession of obscene material, only its distribution.⁶³ An article is defined to include matter which may be looked at or read, as well as sound records and any film or other record of a picture or pictures.⁶⁴ In practice, the prosecution of paperback articles has been unsuccessful; the 1959 Act has rarely been used to prosecute books or textual matter.⁶⁵ It is used substantially to restrain the circulation of obscene pictures, films, and videos rather than the written word, and more particularly, the distribution of hard-core pornography.⁶⁶ The 1959 Act was amended to cover online/computer pornography so that an article included a computer disk and publication clearly included the electronic transmission of material from one computer to another.⁶⁷ Thus, the downloading

study will extensively review the UK laws because it is one of the distinct legal systems in Nigeria.

61 Lilian Edwards, 'Pornography, Censorship and the Internet' in Lilian Edwards and Charlotte Waelde (eds), *Law and the Internet* (3rd edn London Oxford: Hart Publishing Ltd 2009) 632.

62 Obscene Publication Act (OPA) 1959, s 2(1) and Obscene Publication Act (OPA) 1964, s 1(2). An article is deemed obscene if it tends to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see, or hear the matter contained or embodied in it. Byrne J in *R v Bradlaugh and Besant* defined depravity and corruption as: 'to deprave means to make morally bad, to pervert, to debase or corrupt morally. To corrupt means to render morally unsound or rotten, to destroy the moral purity or chastity, to pervert or run a good quality, to debase, to defile.'

63 Edwards (n 61).

64 1959 OPA, s 1(2).

65 Edwards (n 61). Ever since the Williams Committee (Committee on Obscenity and Film Censorship) reported on the operation of the Acts in 1976 following the unsuccessful prosecution of the paperback *Inside Linda Lovelace*, the 1959 Act has almost never been used to prosecute books or textual matter.

66 *ibid.*

67 *ibid* 633. See Criminal Justice and Public Order Act 1994, Sched 9, para 3.

of pornography from the internet to another medium, say, a laptop, without any physical medium as intermediary, such as a disk, is caught under the Act.⁶⁸

Non-consensual images/videos of a victim of revenge porn is grossly offensive and an obscene article that can be caught under the existing offence stipulated in the OPA 1964. In the case of *R v GS*,⁶⁹ the defendant was charged with publishing an obscene article contrary to section 2(1) of the OPA 1959, relating to an explicit internet relay chat with one other person. This conversation was about fantasy incestuous and sadistic paedophile sex acts on very young children. However, prosecutors in the UK are reluctant to prosecute where the subjects' consent to the behaviour.⁷⁰ In other words, ordinary images of consensual sexual acts are not considered obscene.⁷¹ This shows that the act of non-consensual pornography is not covered under the Obscene Publication Act.

3.2 *Malicious Communications Act (MCA) 1988*

Section 1 of the MCA, outlaws the sending of a message that is indecent, grossly offensive, false, or which the sender believes to be false and intending to cause distress or anxiety to the recipient.⁷² The heart of the offence is one of sending; there is no legal requirement for the communication to reach the recipient. Victims of revenge porn have relied on this legislation by successfully applying it in prosecuting offenders of revenge porn.⁷³

3.3 *Communications Act 2003*⁷⁴

Communications which are grossly offensive, indecent, and obscene will be caught under section 127 of the Communications Act (CA) 2003. The provision covers offensive and threatening messages sent over a public electronic communications network.⁷⁵ The case of *Contostavlos v Mendahun*⁷⁶ upheld this position. In this case, a singer Tulisa Contostavlos obtained an interim

68 *ibid.*

69 [2001] EWCA Crim 398.

70 'Social Media and the Law' <<http://www.publications.parliament.uk>> accessed 5 August 2019.

71 *ibid.*

72 1998 Malicious Communications Act, s 1.

73 Jocelyn Ledward and Jennifer Agate, 'Revenge Porn and Section 33: The Story So Far' <<https://www.footansteys.com/updates-a-publications/3473-revenge-porn-and-section-33-the-story-so-far>> accessed 1 July 2019.

74 The Communications Act 2003 is an Act of the Parliament of the UK. It came into force on 25 July 2003 and superseded the Telecommunications Act 1984.

75 2003 Communications Act, s 127.

76 [2012] EWHC 850 (QB).

injunction against the dissemination of a leaked sex tape that was available online. Justice Tugendhat commented that ‘details of a person’s sexual life have thus been recognised for very many years as high on the list of matters which may be protected ... it has also been recognised that photographs are more intrusive than a verbal or written description ...’⁷⁷ This decision shows that an individual can apply to the High Court in the UK for a privacy injunction to preclude or avert the publication of materials relating to a person’s sexual life. Images of a person, if they pertain to his/her sexual life, counts as sensitive personal data under the Data Protection Act 1988. Images of people and the information derived from such images are protected under the Act as personal data. A data controller is not allowed to process the data under his control in a manner that is causing or likely to cause substantial damage or substantial distress to him or another.

It must be established that a person charged under section 127 CA must be aware that the message was grossly offensive, indecent, or menacing.⁷⁸ This condition can be inferred from the terms of the message and/or from the defendant’s knowledge of the likely reaction of the recipient.⁷⁹ Scaife stated that ‘the knowledge of the recipient’s likely reaction is only relevant when making inferences about the defendant’s intention, and not as to whether the message itself was grossly offensive.’⁸⁰ The act of revenge porn can be caught under the provision of section 127 CA 2003. The UK CPS provided guidelines on prosecuting cases involving communications sent via social media.⁸¹

Based on the preceding, it is arguable that the act of revenge porn is covered under existing laws in the UK. However, there were specific gaps which needed to be filled. The Malicious Code Act and CA carried a very low penalty, which is six months imprisonment.⁸² The meeting point of these laws is that in order to prosecute, the case must satisfy the evidential stage in the Full Code Test of

77 *ibid.*

78 Laura Scaife, *Handbook of Social Media and the Law*, (New York: Routledge 2015) 131.

79 *ibid.*

80 *ibid.*

81 ‘Guidelines on Prosecuting Cases involving Communications Sent via Social Media’ <<http://cps.gov.uk>> accessed 29 December 2019. The guidelines stipulated the Director of Public Prosecutions guidelines for the application of the current statute law to prosecutions involving social media communications. The guidelines are structured by conduct, relating to different sorts of conducts to different potential offences, which includes: s 1, Malicious Communications Act 1988. S 127 Communications Act 2003; Protection from Harassment Act 1997, s 2; Sexual Offences Amendment Act 1992, s 5.

82 Criminal Justice and Courts Act (CJCA), s 32 raised the maximum sentence for MCA 1998 to two years’ imprisonment, the same as for the offence under s 33.

the Code for Crown Prosecutors and deemed to be in the public interest.⁸³ The threshold for criminal prosecution is particularly high and establishing that the matter is of public interest is often difficult. The public outcry on the inadequacy of existing laws in the UK birthed a new offence under the Criminal Justice and Courts Act 2015.

3.4 *Criminal Justice and Courts Act (CJCA) 2015*

The UK Safer Internet Centre identified between 20 and 30 websites displaying revenge porn available in the United Kingdom.⁸⁴ The House of Lords on 20th October 2014, debated a new offence, punishable with up to two years imprisonment, criminalising the release of photos or films which display people engaged in sexual activity or portrayed in a sexual way, where what is displayed would not usually be seen in public. For the act to amount to an offence, the disclosure must take place without the consent of at least one of those included in the picture, and the intent to cause the subject distress.⁸⁵ The CJCA 2015 introduced a new offence under the Act relating to revenge porn. Section 33 of the Act criminalises the disclosure of private sexual photographs and films (tackling 'revenge porn').⁸⁶ Section 33 CJCA provides thus:

- (1) it is an offence for a person to disclose a private sexual photograph or film if the disclosure is made –
 - (a) without the consent of an individual who appears in the photograph or film, and
 - (b) with the intention of causing that individual distress.

The two crucial concepts of this offence are disclosing and consent. Section 34(2) provides that 'A person "discloses" something if, by any means, he or she gives or shows it to the person or makes it available to the person.'⁸⁷ The Act states that whether it is disclosed for reward is irrelevant⁸⁸ as whether it has previously been given, shown, or made available.⁸⁹ In *R v Dooley*,⁹⁰ the use of Peer-to-Peer networks, where material is left in the 'my shared' folder in the context of indecent photographs of children, were held to constitute making

83 'New CPS Guidelines on Revenge Porn Prosecutions' (2014) <<https://www.scl.org/news/3208-new-cps-guidance-on-revenge-porn-prosecutions>> accessed 22 January 2020.

84 *ibid.*

85 *ibid.*

86 Alisdair A Gillespie, 'Trust Me, it's Only for Me: Revenge Porn and the Criminal Law' [2015] *Crim. L. Rev.* <https://eprints.lancs.ac.uk/id/eprint/75355/1/Revenge_Pornography_Pre_Publication_1_.pdf> accessed 2 August 2019.

87 Section 34 of the CJCA, 2015 stipulates the meaning of "disclose" and "photograph or film".

88 CJCA 2015, s 34(3).

89 CJCA 2015, s 34(3)(b).

90 [2006] 1 WLR 775; *Crim LR* 544.

available.⁹¹ It is only logical to say that uploading intimate sexual images onto the internet, on social network sites, or sharing it by email etcetera should constitute making available.

The consent of the other party is crucial to the disclosure of the image. When a party does not consent to such disclosure, it becomes an offence. The offence will cover anyone who re-tweets or forwards without consent, private sexual photographs or film if the purpose is to cause distress to the individual depicted in the picture or video. However, anyone who sends the message only because he or she thought it was funny would not be committing the offence. The labelling of the new offence created makes it easier for a victim to get justice. Between 2015 and 2016, 206 (two hundred and six) prosecutions commenced under the offence of revenge porn (section 33 CJCA).⁹² This provision is laudable. This study observes that the difference between the offence under the Criminal Justice Act is that it is an offence against a person and not a communications offence like what is provided under the MCA or the CA.

3.5 *The Position of Nigerian Legislation on Revenge Pornography*

In Nigeria, the menace of revenge pornography has been on the increase due to internet connectivity and sexting⁹³ among teens and young adults.⁹⁴ As stated in the introduction, victims of revenge porn can explore civil remedies. They are entitled to damages owing to the infringement of their privacy. Section 37 of the 1999 Constitution of the Federal Republic of Nigeria guarantees the right to privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications. Also, since victims, in most instances, take/make the picture/video themselves, they are arguably the copyright owners of the image or video. A victim can pursue the action for infringement of his copyright. The victim could choose from any of the reparatory awards available to restore him in his original position if the violation had not ensued.⁹⁵ These

91 Gillespie (n 86).

92 Agafe (n 73). On 16 May 2015, almost immediately after the offence was created, the section was applied to prosecute one Jason Asagba who pleaded guilty to the offence. In September 2015, Paige Mitchell became the first woman to be convicted for the offence after uploading explicit images of her girlfriend online.

93 Sexting is sending, receiving, or forwarding sexually explicit messages, photographs, or images via mobile phones, computers, or any other digital device.

94 Nnamdi G Ikpeze and Oyebanke Apará, 'The Rise of Non-Consensual Pornography in Nigerian Cyberspace: Imperatives for Statutory Criminalisation' [2019] AJLHR 3(2).

95 'Copyright Owners and Civil Remedies for Copyright Infringements in Nigeria: Sleep No More!' (25 September 2013) <<http://nigerianlawtoday.com/copyright-owners-and-civil-remedies-for-copyright-infringements-in-nigeria-sleep-no-more-2/>> accessed 1 February 2020.

civil remedies include damages, injunction, account of profits (if any), delivery up, and conversion right.⁹⁶ Although civil legal redress exists, it is arguable that criminalisation of the act of revenge porn is a better route to deter such conducts. This paper argues that crime is a stronger legal response. This section would analyse existing criminal laws in Nigeria and highlight its adequacy or otherwise to tackle the issue of revenge porn.

3.5.1 The Criminal Code 2004⁹⁷

The Criminal Code Act 2004 is one of the principal legislation governing criminal matters in the southern part of Nigeria. No provision in the Criminal Code defines or makes the act of revenge porn an offence in Nigeria. Researchers have argued that existing criminal laws are generally appropriate to deal with the practice of revenge porn.⁹⁸ Some of these laws are detailed below.

3.5.1.1 Section 233D Criminal Code 2004

Section 233D provides the following:

- (1) Subject to the provisions of this chapter, any person who, whether for gain or not, distributes or projects any article deemed to be obscene for the purposes of this chapter, commits an offence punishable on conviction by a fine not exceeding four hundred naira or by imprisonment for a term not exceeding three years or both.
- (2) A person shall not be convicted of an offence against this section of this code if he proves that he had not examined the article in respect of which he is charged and had no reasonable cause to suspect that it was such that his publication of it would make him liable to be convicted of an offence against this section of this code.

Section 233D Criminal code is similar to section 2 of the Obscene Publication Act of UK.⁹⁹ The definition of an article in section 233B of the Criminal Code is *in pari materia* with section 1(2) of the OPA. Section 233C sets out the test of obscenity, and it provides the following:

96 This is beyond the scope of this study.

97 The Criminal Code Act, Cap C38 Laws of the Federation of Nigeria 2004.

98 Precious Omeregbe, 'Revenge Porn and the Nigerian Law' <<https://www.manifield-solicitors.com/2018/12/12/revenge-porn-and-the-nigerian-law/>> accessed 1 June 2019. Cheluchi Onyemelukwe, 'Digital Technology, Social Media and Cyber-Enabled Gender-Based Violence and the Law in Nigeria' in Isaac O Agbebe Ayoyemi Arowolo (eds) (2017) 4 Babcock U. Essays on Contemporary L Issues <https://www.researchgate.net/publication/319442851_Digital_Technology_Social_Media_and_Cyber-Enabled_Gender-Based_Violence_and_the_Law_in_Nigeria/citations> accessed 22 July 2019.

99 It appears to be tailored after OPA, s 2.

- (1) An article shall be deemed to be obscene for the purposes of this Chapter if its effects taken as a whole is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

Arguably, the provisions of section 233 of the Criminal Code may prove problematic in some instances. In a situation where the defendant claims he did not examine the article in question, what is the yardstick to prove his assertion? This paper argues that the provision of section 233D(2) may be misused by defendants as an escape route to avoid prosecution. The provision of section 233 of the Criminal Code does not explicitly state its applicability to obscene publications through the cyber-media. This paper submits that the Act does not adequately cover acts of revenge porn.

3.5.1.2 *Section 376 Criminal Code 2004*

Onyemelukwe posits that section 376 of the Criminal Code might be helpful regarding revenge porn.¹⁰⁰ Section 376 of the Criminal Code provides for the offence of intent to extort. It provides thus:

Any person who publishes, or threatens to publish, or offers to abstain from publishing or offers to prevent the publication of defamatory matter, with intent to extort money or other property, or with intent to induce any person to give, confer, procure, or attempt to procure, to, upon, or for, any person, any property or benefit of any kind, is guilty of a felony and liable to imprisonment for seven years.

The author opines that the publication described in section 376 would cover publication or threat to publish sexual images online, thus referring to revenge porn to some extent.¹⁰¹ The author also stated that if the intent is to cause embarrassment or cause maximum damage, then there will be some issues applying the provision.

Section 376 of the Criminal Code does not adequately cover the offence of revenge porn. It would be difficult for the act of revenge porn to be caught under this provision. The intent of the offence stipulated in section 376 is the intent to extort, which is different from the intention of most perpetrators of revenge porn. The purpose of the act of revenge porn is to embarrass and cause

¹⁰⁰ Onyemelukwe (n 98).

¹⁰¹ See Kaine Agary, 'On Revenge Porn Again' (Punch, 16 November 2016) <<https://punchng.com/on-revenge-porn-again/>> accessed 21 February 2019.

distress to the victim. In rare cases, the perpetrator of revenge porn might have the intention to extort; only in such cases can this section apply.

3.5.2 Cybercrime (Prohibition Prevention Etc) Act, 2015

The Cybercrime Act is the cyber-specific law in Nigeria. No provision in the Act mentions explicitly or criminalises revenge porn. There is a perception that section 24 of the Act is relevant to managing acts of revenge porn.¹⁰² Section 24 of the Cybercrime Act covers cyberstalking. It provides the following:

- (1) A person who knowingly or intentionally sends a message or other matter by means of computer systems or network that –
 - (a) is grossly offensive, pornographic or of an indecent, obscene or menacing character or causes any such message or matter to be so sent; or
 - (b) he knows to be false, for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation; enmity, hatred, ill will or needless anxiety to another or causes such a message to be sent commits an offence under this Act and is liable on conviction to a fine of not more than N7,000,000.00 or imprisonment for a term of not more than 3 years or both.

One can argue that the above provision extends to revenge porn. One issue that may arise is if computer networks as anticipated by the Act include stalking on the web via smartphones.¹⁰³ Section 58 of the Act defines computers to include devices that can communicate with other devices and have a data storage facility. This definition comprises of typewriters and calculators which supports this view.¹⁰⁴

This study observes that section 24 of the Cybercrime Act does not adequately address revenge porn/non-consensual pornography. There are gaps in the provision that could serve as an escape route for an offender in a case of revenge porn. There should be a provision in the cybercrime criminalising the act of revenge porn owing to the refinement in technology and the ease of disseminating publications. For the avoidance of doubt, a provision on revenge porn must spell out the offence in clear words. Like the CJCA, such provision should make the consent of the other party vital to the disclosure of the image. The provision should define what conducts fall within revenge porn. Such a definition should be flexible to evolve with technological changes.

¹⁰² Onyemelukwe (n 98).

¹⁰³ *ibid.* In a case where a smartphone is employed for such purposes, would this be a contravention under section 24?

¹⁰⁴ *ibid.*

New offences committed with old methods crop up every day. The description must not be too specific but enveloping enough to address these offences. It should not strictly require malicious intent because any rational thinking person would be embarrassed and suffer severe pain if his/her nude image emerges online. The appropriate criminal sentence for revenge porn should be three years without an option of fine, owing to the severity of the act and the harm suffered by victims. A deterrent-worthy provision is fundamental to deter prospective offenders. The consequence of embarrassment and distress is expected as the probable result of posting non-consensual pornography images online. In essence, the law should hold third parties liable for reposting revenge porn images.

In 2018, Ayan Olabunmi, a married man with children posted on Facebook the nude pictures of his ex-lover, Monica Arare.¹⁰⁵ He had threatened to post Arare's nude pictures on social media when she informed him that she was no longer interested in the relationship. Arare pleaded with him not to carry out the threat. He demanded she gave him Two Hundred Thousand naira as inducement. He carried out the threat by posting the pictures on Facebook when she could not meet up with his demand. The court found Olabunmi guilty of violating section 24(1) of the Cybercrime Act. He was sentenced to two years imprisonment and a fine of Five Hundred Thousand Naira only.

Justice Taiwo, while delivering the judgement, categorised the act as sexual blackmail and described it as disgraceful, despicable, and barbaric. Additionally, the presiding judge charged the police to arrest anyone who harasses the victim or any of her relatives. He lamented that the lawmakers failed to make provisions for compensation for victims of sexual blackmail or cyberstalking. This decision is commendable, and the judge showed judicial activism by applying section 24 of the Cybercrime Act to the case. However, this paper observes that this is a case of revenge porn and not cyberstalking, which is the offence outlawed in that section. This paper agrees with the Judge's argument that victims of sexual attacks should be compensated adequately. Also, the judge's order that the police should arrest anyone who harasses the victim shows that third party liability is legally feasible. There is an urgent need for third parties who posts the images or videos of revenge porn victims to also be held liable for the act. It will limit the circulation of such photograph or video.

This paper also canvases for third party liability of internet service providers (ISPs) and the need for cyber censorship of contents. ISPs should be held liable for acts done under their watch. Hathaway describes ISPs as the internet stewards that plan and manage resources, providing reliable connectivity, and

105 *Attorney General Federation v Ayan Olabunmi*, suit no. FHC/AD/17c/2017.

ensuring delivery for traffic and services.¹⁰⁶ The author added that ISPs have unparalleled access into and view global networks which give them accurate tools to detect cyber intrusions and attacks as they are forming and transiting towards their targets.¹⁰⁷ This paper is aligned with the view of the author. Since ISPs have a broader knowledge of what goes on in the cyberspace, they should assume more responsibilities. ISPs should police the activities of internet users under their watch and take down revenge porn images immediately as it comes up in any platform. The menace of revenge porn will drastically reduce if this is a legal obligation for ISPs to carry out.

Section 38 of the Cybercrime Act 2015 provides the duties of ISPs in Nigeria. In summary, the Act mandates that service providers shall keep traffic data and subscriber information for two years, bearing in mind the individual's constitutional right to privacy, and employ due diligence to safeguard the confidentiality of the data retained, processed or retrieved. The duty to police the cyberspace should be a legal responsibility of ISPs in Nigeria. They should be schooled on the reputational benefit in assisting the victims by setting up mediums whereby internet users can report revenge porn. Once they get such a report, they take down such image immediately. If they do otherwise, they should be held liable for abetting the act of revenge porn.

This paper canvases that more awareness should be created regarding revenge porn. The civil society, female rights advocates should develop platforms for seminars and talks to encourage victims of revenge porn to press charges against their perpetrators. The Nigerian government should launch revenge porn helplines to assist victims in recovering from shock and managing stigmatisation that comes with the practice. Most victims of revenge porn choose to remain quiet for fear of stigmatisation and victim-blaming.¹⁰⁸ This paper submits that victims should be given anonymity protection to avoid stigmatisation.

4 Lessons for Nigeria

The non-consensual pornography provision in the CJCA is a good guideline for an effective implementation of a specific offence criminalising revenge

106 Melissa E Hathaway, 'Stewardship of Cyberspace: Duties for Internet Service Providers' (March 2012) <https://www.belfercenter.org/sites/default/files/legacy/files/cyberdia_logue2012_hathaway-savage.pdf> accessed 2 August 2019.

107 *ibid.*

108 Edwards (n 61).

porn in Nigeria. The crucial elements of the crime should be drafted in clear and straightforward words. The definition of revenge porn should be flexible enough to accommodate new crimes that may spring up in the future and which can be caught under the act. In the UK, the victim's names or personal details remain unknown to protect their privacy, except where they choose to.¹⁰⁹ Nigerian lawmakers should take a cue from the law and practice in the UK. Victims of revenge porn should have anonymity protection. Such protection will encourage them to come forward and press charges against their perpetrators. If perpetrators get appropriate punishment, it will serve as a deterrent to discourage prospective offenders from tolling that line.

4.1 *An Argument for Cyber-Censorship of Contents by Internet Service Providers*

This paper canvases for cyber-censorship of contents by ISPs. Censor means to formally inspect (especially a book or film) and expunge material(s) considered offensive. Cyber-censorship is the act whereby all contents intended to be posted online are censored or screened before it is hosted or distributed online. If found illegal or obscene, such material would not find its way online. Cyber-libertarians view such attempt by law or the state to regulate internet content as inappropriate censorship.¹¹⁰ An often-cited milestone in the assertion of national sovereignty over content, even on the internet, was *France v Yahoo!* case¹¹¹ which attracted global attention.¹¹²

In that case, French groups working against anti-Semitism protested at the existence of Nazi memorabilia in listings for sale on the Yahoo! auction sites in both France and the US. France has strict laws forbidding the glorification of the Holocaust and Nazi-associated items. The US, having extended constitutional protection of freedom of expression, has no such rules. Yahoo! France obeyed French regulations and did not allow listings of Nazi items on its site (*yahoo.fr*). However, French citizens could link to Yahoo! US (*yahoo.com*) via Yahoo! fr or directly buy such items from the yahoo.com site, which was physically hosted in the US and obeyed US rather than French law. The French groups sought an order to stop Yahoo! US supplying such items to French citizens.¹¹³ The French court found against both *Yahoo.fr* and *Yahoo.com* and

109 AE Arimoro, 'Applying the Law to Tackle the Menace of Revenge Porn in Nigeria' (2015) 20 J. of Humanities and Social Science 75.

110 Edwards (n 61).

111 *Licra et UEJF v Yahoo! Inc and Yahoo France* [2000] Tribunal de Grande Instance de Paris (Superior Court of Paris).

112 Edwards (n 61).

113 *ibid.*

ordered Yahoo! to restrict access to listings involving Nazi memorabilia to any French citizens. Yahoo! US claimed that the decision would be difficult to implement technically. At the time the French court made the order, it had an opinion prepared by a panel of technical experts that maintained that a reasonable majority of French citizens accessing *Yahoo.com* could be identified and blocked as desired. The experts added that this could be achieved using a combination of registration information provided by users, Internet Protocol (IP) address, and other cues such as the language of the browser.

This decision shows that it is legally feasible for ISPs, being the gatekeepers of the internet, to block access to illegal contents such as non-consensual pornography/revenge porn. Current international trends are moving towards compelling ISPs to block or censor undesirable content.¹¹⁴ Opponents of cyber censorship argue that it amounts to privatised censorship that restricts freedom of expression which is implemented in a non-transparent, non-democratic, and non-accountable way.¹¹⁵ A coalition of rights experts, including the UN special rapporteur on freedom of opinion and expression David Kaye, said in a joint declaration that any effort to restrict access to the internet 'can never be justified under human rights law'.¹¹⁶

The UK's Digital Economy Act 2017 imposes age verification¹¹⁷ and some censorship of pornographic websites.¹¹⁸ It regulates a range of issues relating to the internet and electronic records and also includes measures to increase data sharing between government departments and protect intellectual property.¹¹⁹ The steps to control pornography has sparked an outcry amid fears that they will create a database of internet users' sexual proclivities and roll back Britain's censorship regime to the pre-internet era.¹²⁰

114 Electronic Commerce Dir., Dir. 2000/31/EC, Art. 14(1)(b). If an ISP obtains knowledge or becomes aware that they are hosting any illegal content (like non-consensual porn images) they become liable if they do not remove that item expeditiously.

115 *ibid.*

116 Zack Whittaker, 'Internet Censorship, Kills Switches Violate Human Rights Law, say UN Experts' (4 May 2015) <<https://www.zdnet.com/article/internet-kill-switches-surveillance-violate-human-rights/>> accessed 4 January 2019.

117 Control over online pornography and child protection is the responsibility of the age verification regulator.

118 Section 14 of the Digital Economy Act 2017 requires that pornographic material is not made accessible on the internet on a commercial basis other than in a way which secures that, at any given time, the material is not typically available by those under the age of 18.

119 Damien Gayle, 'UN Free Speech Advocate Criticises UK Plan to Curb Access to Online Porn' (12 January 2017) <<https://www.theguardian.com/technology/2017/jan/12/un-free-speech-advocate-criticises-uk-plan-curb-access-online-porn>> accessed 4 July 2019.

120 *ibid.* Giles Bedloe, 'The Digital Economy Act 2017 – An Overview' (June 2017) <<https://drystone.com/files/3ef0c180c574c2030c35e557dfce0958.pdf>> accessed 21 January 2020.

In May 1998, a court in Bavaria, Germany found Felix Somm, the Chief Executive Officer of CompuServe Europe,¹²¹ guilty of distributing child pornography and other adult content. CompuServe, like most ISPs, had routinely circulated within Bavaria Usenet newsgroups some material that was perceived as illegal under Bavarian law. The pleas that CompuServe neither originated this content nor could exercise effective monitoring or control over it,¹²² failed to prevent the original prosecution from succeeding. However, an appeal in November 1999 (after Germany had enacted new legislation in the area) did eventually reverse the decision, to somewhat less publicity. This case indicates that ISPs can be held liable for contents that originated under their watch.

The Electronic Commerce Directive (ECD) made a vital provision on hosting for ISPs and illegal content in Article 14 of the ECD. It deals with where ISPs host or store content more than transiently. Article 14(1)(a) provides that ISPs are exempted from criminal liability provided that they do not have actual cognition of illegal activity or information. They are exempted from civil liability as long as they do not have genuine knowledge and are ignorant of facts and circumstances from which the illegal activity or information is apparent.¹²³ However, if an ISP does obtain knowledge or gain awareness of an illicit content, then under Article 14(1)(b) they become liable. They will be held responsible if they do not remove such item expeditiously. Article 14 of the Directive obligates EU member states to limit the liability of service providers acting as mere conduits or host of information as long as they do not have actual knowledge of illegal activity or information. This paper argues that the Directive failed to define 'actual knowledge' and this loophole does not promote legal certainty. However, Article 14(1)(b) is commendable, and the Nigerian legislature can learn lessons. There is an urgent need for a law obligating ISPs to remove non-consensual pornographic images expeditiously when notified of such information, and which they become liable for failing to do so.

This paper canvases for such laws in Nigeria to be implemented in the sphere of revenge porn. These measures would protect victims of revenge porn since the surveillance would restrain the viral spread of such image. It is important to note that the legislation this paper canvases for would uphold the privacy of internet users. The law would obligate ISPs not to breach the privacy of internet

121 CompuServe was the first major commercial online service provider in the United States.

122 Newsgroup feeds taken by ISPs usually run to millions of individual news items.

123 'The Role of Internet Intermediaries in Advancing Public Policy Objectives-OECD' (14 September 2011) <https://slidelegend.com/the-role-of-internet-intermediaries-in-advancing-public-oecdorg_59b3f131723ddf2725ef925.htm> accessed 22 January 2020.

users and elicit confidentiality of contents they come across when censoring. They will be held liable if they violate the confidentiality requirement.

Article 6(1)(e) of the Directive 95/46/EC of the European Parliament and the Council (the Directive) provides that Member States shall ensure that personal data be 'kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed ...' Article 12(b) of the Directive guarantees every data subject the right to obtain from the controller 'as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular, because of the incomplete or inaccurate nature of the data.' Arguably, the combination of Article 6(1)(e) and Article 12(b) of the Directive created the right to be forgotten.¹²⁴

The European Union Court of Justice's landmark ruling in *Google Spain v Agencia Espanola de Proteccion de Datos and Mario Costeja González (Google Spain)*¹²⁵ set a strong precedent on the viability of the right to be forgotten. It gave the right to be forgotten the widespread judicial acknowledgement it needed. The Court in its ruling on 13 May 2014, stated the following:

- (a) On the territoriality of EU rules: Even if the physical server of a company processing data is located outside Europe, EU rules apply to search engine operators if they have a branch or a subsidiary in a Member State.¹²⁶
- (b) On the applicability of EU data protection rules to a search engine: Search engines are controllers of personal data. Google can therefore not escape its responsibilities before European Law when handling personal data by saying it is a search engine. EU data protection law applies and so does the right to be forgotten.
- (c) On the "Right to be Forgotten": Individuals have the right – under certain conditions – to ask search engines to remove links with personal information about them. This applies where the information is inaccurate, inadequate, irrelevant or excessive for the purposes of the data processing (para 93 of the ruling).¹²⁷

¹²⁴ Eugenio Foco, 'The Codification of the Right to be Forgotten in the Digital Era: From Directive 95/46/EC to the General Data Protection Regulation' (17 November 2016) <<http://www.medialaws.eu/the-codification-of-the-right-to-be-forgotten-in-the-digital-era-from-directive-9546ec-to-the-general-data-protection-regulation/>> accessed 24 January 2020.

¹²⁵ ECLI:EU:C:2014:317.

¹²⁶ Although the processing of data occurred outside the EU territory, however the Court extended the territorial scope of application of Dir. 95/46/EC to Google Inc.

¹²⁷ 'Factsheet on the "Right to be Forgotten" Ruling' <https://www.inforights.im/media/1186/cl_eu_commission_factsheet_right_to_be-forgotten.pdf> accessed 24 January 2020.

The court found that European citizens have a right to request that commercial search firms, such as Google, remove links with personal information about them where the particular information is inaccurate, inadequate, irrelevant, or excessive. The court elucidated that the right to be forgotten is not absolute but will always need to be balanced against fundamental rights, such as freedom of expression and of the media.¹²⁸

Article 17 of the EU General Data Protection Regulation (EU-GDPR) provides for a 'a right to erasure' (right to be forgotten). It ensures that '[t]he data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have an obligation to erase personal data without undue delay ...' The right to erasure applies where the data is no longer needed: the data subject withdraws consent,¹²⁹ the data subject objects to the processing,¹³⁰ or the data has been unlawfully processed.¹³¹

In the Nigerian scene, Article 2.13.8 of the 2019 Nigerian Data Protection Regulation (NDPR) grants the data subject the right to request the Controller to delete personal data without delay. It provides thus:

2.13.8. The Data Subject shall have the right to request the Controller to delete personal data without delay, and the Controller shall delete personal data where one of the following grounds applies:

- (a) the personal data are no longer necessary in relation to the purposes for which they were collected or processed;
- (b) the Data Subject withdraws consent on which the processing is based;
- (c) the Data Subject objects to the processing and there are no overriding legitimate grounds for the processing;
- (d) the personal data have been unlawfully processed; and
- (e) the personal data have to be erased for compliance with a legal obligation in Nigeria.

This Regulation is a subsidiary legislation created by the National Information Technology Development Agency,¹³² the principal Act on 25 January 2019. Article 3 of the NDPR is tailored after Article 17 of the EU-GDPR. These

¹²⁸ *ibid.*

¹²⁹ Art. 17(1)(b).

¹³⁰ Art. 17(1)(c).

¹³¹ Art. 17(1)(d).

¹³² NITDA Act 2007. NITDA, s 32 bestows on the NITDA the responsibility of making 'regulations it deems necessary or expedient for giving full effect to the provisions of the NITDA Act and for effective administration of its provisions.'

provisions are laudable. A victim of revenge porn can request the Controller to delete the uncensored image or video posted online. The ruling on Google Spain,¹³³ the provisions of Article 17 EU-GDPR, and Article 3 NDPR provides the judicial and legal framework that victims of revenge porn can rely on to demand search engine companies like Google to take down unconsented images published online.

5 Conclusion

The increased use of the internet and smartphones have been fundamental in the growth of revenge porn. An embittered ex-lover usually perpetrates the practice to torment the victim by sharing or posting sexually explicit images of the victim. Technology advances at tremendous speed and our legal system struggle to catch up. Revenge porn and most cyber-enabled crimes are clear examples of technology outpacing the law in Nigeria and beyond. This paper undertook an analysis of the position of law relating to revenge porn in the UK and Nigeria. The study found that there are laws criminalising revenge porn in the UK. Nigeria seems to be lagging. There is no specific legal approach adopted by the Nigerian legal system to tackle the issue of revenge porn.

The non-consensual pornography law in the UK serves as guidelines for an effective implementation of such legislation in Nigeria. The study found that existing criminal laws in Nigeria, that is, sections 233D, 376 of the Criminal Code and Section 24 of the Cybercrime Act are inadequate to tackle the revenge porn phenomenon effectively. This paper proffered insights on the prevalence of revenge pornography in Nigeria and offered recommendations to address this phenomenon. It canvasses for the creation of a new offence titled non-consensual pornography under the Cybercrime Act. This provision would save victims from the mix and match of sampling existing laws to obtain relief. It should define what conducts fall within revenge porn. Such a definition should be flexible to evolve with technological changes. This study also canvasses for third party liability. The Federal High Court's decision in *Attorney-General Federation v Ayan Olabunmi*¹³⁴ shows that it is legally practicable to hold a third party liable for sharing non-consensual porn images. This study also canvasses for the cyber-censorship of contents by Internet Service Providers. ISPs being gatekeepers of the internet should assume more responsibilities by censoring and blocking (taking down) undesirable/illegal content

¹³³ *Google v Agencia Espanola de Proteccion de Datos*, (n 125).

¹³⁴ *Attorney General Federation* (n 105).

such as non-consensual porn. The Nigerian Legislature should amend the Cybercrime Act and extend the duties for service providers to include monitoring the activities of internet users under their watch. Such monitoring should be carried out confidentially without breaching the right to privacy of citizens. ISPs should synergise with law enforcement agencies in the investigation and prosecution of revenge porn cases. With adequate legislation criminalising revenge porn and deterrent-worthy penalty (of 3 years imprisonment without an option of fine) and the right to be forgotten, the fight against revenge porn will yield more significant results.