

Publications

FTC Is Cracking Down On 'Revenge Porn'

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Whitney Gibson, the leader of the firm's internet defamation group, a Jordan Cohen, a member of the internet defamation group, authored an article for *Law360* titled "FTC Is Cracking Down On 'Revenge Porn.'"

The full text of the article is included below.

FTC Is Cracking Down On 'Revenge Porn'

On Jan. 29, the Federal Trade Commission announced that a Colorado man will be banned — subject to final approval — from distributing nude photos and videos without the subjects' consent. This comes following an FTC investigation that resulted in allegations of two FTC Act violations.

According to the FTC complaint, Craig Brittain operated a "revenge porn" website — *isanybodydown.com* — from November 2011 to April 2013, on which he distributed nude photos and shared personal contact information of the subjects of these photos.

Revenge porn generally refers to the online collection of nude photo (or video) submissions that typically come from ex-spouses or ex-significant others without the subjects' consent.

Based on a settlement with the FTC to resolve the allegations of the complaint, Brittain must delete all information and personal information he received, and he has been prohibited from misrepresenting use of personal information obtained online — this in addition to his essential ban from operating any other revenge porn websites.

According to the release, the FTC unanimously accepted the proposed consent order, and the consent agreement is subject to a 30-day public comment period. Should the FTC make the proposed consent order final on March 2, 2015, the consent order will "carr[y] the force of law with respect to future actions."

The Allegations

According to the FTC, Brittain's actions went beyond operating that website and a subsequent revenge porn website with similar content. As outlined in the press release and other FTC documents, he allegedly used deception to acquire the private photos, including through posing as a woman on Craigslist and offering to swap photos (supposedly of "herself") for theirs. He then posted the photos on his website without their knowledge.

Moreover, Brittain allegedly solicited nude photos with "sensitive personal information about the people in the photos" — such as name, hometown and contact info. The FTC also claims he operated a "bounty" program, requesting others find photos for specific individuals in exchange for money.

When many of the estimated 1,000-plus victims contacted his website asking for their nude images to be removed, the requests were either ignored or the requesting parties were told that they could be deleted through Brittain's "Takedown Hammer" and "Takedown Lawyer" services (branded as third-party affiliates) in exchange for payments of up to \$500.

Criminalization of Revenge Porn

The FTC's crackdown on this purported revenge porn operator comes on the heels of many U.S. states beginning to criminalize revenge porn, including California where a man was recently convicted under a law enacted in October.

On Dec. 1, 2014, a Los Angeles man was convicted in California after he posted a topless photo of his former girlfriend to her employer's Facebook page. After a jury found him guilty for violating this statute and a restraining order, he was sentenced to a year in jail and three years probation.

Back in January 2014, Israel became the first country to make posting revenge porn a sex crime, with punishment going as far as five years in jail. Other nations have also begun to crack down on revenge porn. In October, a British man was sentenced to 12 weeks in jail in November for posting photos of his ex-girlfriend on WhatsApp.

Potential Options to Remove Revenge Porn

Beyond the FTC or state or nationwide laws prohibiting revenge porn (or when there is no applicable law on the books in a particular jurisdiction), a victim of revenge porn might be able to initiate content removal based on copyright law. When a photo is posted on a third-party website, a copyright holder — generally the photographer — can utilize the Digital Millennium Copyright Act to send a "takedown notice," which is essentially a formal request to remove copyright-infringing content.

If the photo (or video) in question is not a selfie, the subject of a private photo should try to have the photographer assign the copyright interest to them. Once a copyright is legally transferred, the copyright holder can use the same DMCA takedown approach to try to get the content removed.

If a person is unable to obtain a copyright interest in a photo, there may be legal claims for invasion of privacy (as mentioned above, many revenge porn websites include personal information in postings) or

negligence per se. Moreover, if a website accepting user submissions refuses to take down an infringing photo (or video), it may be held liable for contributory copyright infringement.

Other Takeaways

Free speech advocates might argue that, not only did the First Amendment protect Brittain's right to behave in the way he did while operating his website, but also that the FTC cannot require websites containing nudity to have consent from all subjects of the photos.

However, what is notable about Brittain's website and many other revenge porn websites is that photos and videos were often accompanied by names, phone numbers and addresses or other location-related information. Undoubtedly, this can lead to even greater harm beyond just having a photo up on the Internet. Protecting these parties, in many cases the victims of actual criminal activity, does not infringe on Brittain's free speech rights — especially when some of his "speech" is very likely unprotected.

According to the FTC, Brittain — who made about \$12,000 on his website — could face up to a \$16,000 fine for any violation of the consent order if it is made final. Moreover, it is conceivable that the FTC could ask him to repay those parties who paid the "removal" fees in hopes of having their images deleted from isanybodydown.com.