

The twisted saga of the jilted “ex”: Tackling Revenge Porn cases and privacy invasion on cyberspace in India

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Abstract: *The year 2017 saw an unprecedented rise in cases of revenge porn being reported in national dailies.¹ Revenge porn involves sharing of private and intimate – most often sexually explicit pictures – of a person without their consent. Typically such images are shared by jilted lovers or former partners as a way to seek revenge.² There are an estimated 3000 revenge porn websites worldwide. A 2016 survey conducted by Cyber & Law Foundation, an NGO in India points out that 27% of internet users aged 13 to 45 has been subjected to such situations.³ However, what is also somewhat heartening, is that in a first of its kind conviction, a 23-year man has recently been sentenced to 5 years imprisonment and a fine of Rs 9,000, by a court in Bengal's East Midnapore district, for sharing nude video of his 20-year-old girlfriend on a pornography website.⁴*

The main agenda behind publication of this private, intimate, yet explicit and, what may be labeled as obscene material, seems to be, to shame, blackmail or intimidate the person in the images, often to get sexual favours in return or get back in their life.⁵

Although there is no specific provision that speaks of revenge porn offences in Indian law, the 2008 amendment to the Information Technology Act, 2000 has inserted three important sections⁶ that can prove to be extremely useful in taking action against the perpetrator of any kind of online revenge porn by describing the transmission of private images as privacy invasion, and thereby outlaw-ing such invasions. However, unfortunately, cases of successful convictions remain few and far between. Further, while the Copyright and Right of Publicity laws in other countries have been put to use successfully against perpetrators of revenge porn, these areas of fruitful use by victims remain largely untapped.

This paper seeks to look at the nature of revenge porn cases in India and shall analyse the provisions of the IT Act as well as explore the remedies under the Copyright Act, the tort of passing off and Right of Publicity and the constitutional guarantee to the Right of Privacy to explore the available legal and policy framework to counter the menace as well as deter future offenders. The aim of the paper is to work out a comprehensive framework for potential victims to adequately seeks enforcement of their rights and also to guarantee a safer cyber-space experience when in a relationship, and more when out of it.

Index Terms: *Revenge, Porn, Voyeurism, Non Consensual Pornography, obscene material, privacy, IT Act, Publicity, copyright*

I. INTRODUCTION: IDENTIFYING THE OFFENCE

India is, highly unfortunately so, extremely skewed in its gender ratio.⁷ Thus, its reflection in India's ratio of internet users too should come as no surprise, as revealed by a report published in 2016.⁸ The report cites a study by GSMA, a global mobile association, that “in India, men are 62% more likely than women to be internet users, according to a recent report. Additionally, men are 25% more likely to own a SIM card than women. This makes India's digital divide more skewed in terms of gender than any other country surveyed by the GSMA.”⁹ Further, according to 2015 viewership data, India is at third place, after the US and the UK in terms of traffic on porn sites.¹⁰ With the advent of the smart phone era, and the ease of access to pornographic content websites and sharing media, a new form of non-consensual, sexual aggression- based violation of individual privacy is increasingly seen to have perpetrated on cyberspace – revenge porn, or more colloquially sextortion.¹¹ ‘Revenge porn’ is typically understood as the non-consensual distribution of private, sexual images by a malicious ex-partner, and is a pernicious and gendered form of sexual abuse.¹² In India, several incidents have come to be reported in the last few years. In Ahmedabad, a woman's ex-husband shared intimate pictures they had taken on their honeymoon on Facebook to get back at her for leaving him.¹³ In 2016, a man was arrested in Andhra Pradesh for posting intimate pictures of his former girlfriend—now married to another man—online and sending a CD to her in-laws. He was released on bail.¹⁴ Most recently, a 23-year man was sentenced to 5 years imprisonment and a fine of Rs 9,000, by a court in Bengal's East Midnapore district, for sharing nude video of his 20-year-old girlfriend on a pornography website.¹⁵ Thus, the term ‘revenge porn’ is used when scorned and vindictive partners post nude, explicit or private photos of the subject on websites without his/her consent in an attempt to humiliate them. However, according to Mary Anne Franks, “revenge porn” is a misnomer, instead, “non-consensual pornography” is the appropriate term¹⁶ She points out two reasons for the same:

- Usage of the term “revenge” suggests that perpetrators are primarily motivated by personal vengeance. However, the fact of the matter is that, perpetrators may be motivated by a range of factors, such as a desire for profit, notoriety, or entertainment, or for no particular reason at all. The constant feature is the lack of consent in distribution.
- The usage of the term “porn” too is somewhat misleading, because while creation of intimate and explicit videos and photographs in a private space in a consensual relationship may not be correctly labelled pornography, their non-consensual distribution and publication transforms them into sexual entertainment for public consumption, which is to be treated as pornography.¹⁷

In India, whilst revenge porn hasn't directly been addressed under any law, or defined, and thus remains a legal grey area of sorts, post the 2013 amendments to the criminal laws, several provisions of the Indian Penal Code (IPC) and the Information Technology Act (IT Act) can be used to bring perpetrators to justice. Thus, Revenge porn is both a form of sexual harassment as well as an encroachment upon the right to privacy enshrined in our IT laws.¹⁸ Further, the tort law claims of privacy and even to an extent - right of publicity may be used by victims, as very often, the pictures and videos published online are initially shot with consent of the victim. Another remedy that this paper seeks to explore, is the

opportunity that revenge porn offers copyright attorneys, to help victims, as well: the offending images are often selfies taken by the victim and thus covered by the victim's copyright.¹⁹

A definition of revenge porn, given the lack of the element of "revenge" as motive in our laws in India, has been attempted by Dr. Debarati Halder and Prof. K. Jaishankar in 2013, thus "It is an act whereby the perpetrator satisfies his anger and frustration for broken relationship through publicizing false, sexually provocative portrayal of his /her victim by misusing the information that he may have known naturally and that he may have stored in his computer, or may have conveyed to his electronic device by the victim herself, or may have been stored in device with the consent of the victim herself; and which may essentially have been done to publicly defame the victim."²⁰ Dr. Halder further differs from Prof. Franks, in that she draws a distinction between revenge porn and non-consensual pornography, thus – "Non-consensual pornography is a larger term which may include revenge porn, voyeurism or even sexual slavery including forcing the woman to be captured naked for some unethical gain. Hence, revenge porn needs a separate definition."²¹

II. THE INDIAN PENAL CODE REMEDY(S) – CRIMINALIZING REVENGE PORN

In the wake of the Nirbhaya gang rape, the Justice J.S. Verma committee was set up by the Parliament to suggest changes to the criminal laws in India, regarding rape and sexual assault. The changes proposed came to be enacted posthumously (after the unfortunate demise of Justice Verma) as the Criminal Law (Amendment) Act, 2013. The Act provides for amendment of the IPC, Indian Evidence Act, and Code of Criminal Procedure, 1973 on laws related to sexual offences.²²

The amendment inserted a new Section 354C into the IPC, that defines the offence of Voyeurism for the first time in India and prescribes its punishment. Voyeurism is the act of watching a person engaged in private activities. If a man watches a woman engaged in private activities, when the woman does not expect anyone to be watching, he has committed the offence of voyeurism.²³ Explanations to the section provide that a private act "includes an act of watching carried out in a place which, in the circumstances, would reasonably be expected to provide privacy and where the victim's genitals, posterior or breasts are exposed or covered only in underwear; or the victim is using a lavatory; or the victim is doing a sexual act that is not of a kind ordinarily done in public."²⁴ – thus criminalizing the breach of privacy of a woman. Further, the explanation also provides that where the capture of the images or act involved consent of the woman in question; however, the dissemination didn't, such dissemination is criminalized as voyeurism.²⁵ It is under the Explanation II that the description of the offence of revenge porn falls. Further, the newly inserted S.354D criminalises Stalking, a form of which as described under the Act, includes following of a woman by a man, or contacting or attempting to contact, such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman.²⁶ Therefore, the element of revenge porn, involving threats by an ex-lover for wanting to get back, and repeated efforts to establish contact with the victim, may qualify as stalking. Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.²⁷

Some authors and lawyers seem to also suggest the possibility of bringing a composite action under the aforementioned provisions, read with Ss.499-500 of the IPC – for the offence of defamation, and Ss. 503 and 506 for criminal intimidation.²⁸

However, while these provisions do exist, and may even be put to use meaningfully to an extent for cases of revenge porn, they may not provide for an adequate remedy for the actual offence of revenge porn. As explained by Dr. Halder – "as such, S.354C IPC has a very broad scope to penalise voyeurism and very narrow scope for regulating revenge porn. This is because (for example) revenge porn may also involve creation of fake avatar of the victim which may be accompanied by offensive texts."²⁹ This doesn't fall within either description of voyeurism or stalking. She further describes the inadequacy of the provisions, by using the following illustration – "Consider a perfectly normal simple formal photograph of a woman, which may have been 'shared' by the perpetrator with a caption "my sexy wife", while she is not actually the wife or the fiancé of the man who shared it. Where does a law for voyeurism or violation of bodily privacy come? Isn't it a form a crude revenge when the woman had probably rejected proposal for love and her family is arranging for her marriage elsewhere? Won't it create a threat in her for reputation damage?"³⁰ Further, no provision addresses the publication of morphed images, for gratification of an ex for revenge – the motivation for voyeurism to be revenge, is absent.³¹ Thus, in agreement with what Dr. Halder advocates, the need of the hour is an alternative, more comprehensive definition of the offence of revenge porn and its specific criminalization under the IPC. For the same, she suggests the insertion of a new S.354E thus³² -

"Revenge Porn:

1. Anyone, who in order to satisfy his anger and frustration for a broken relationship, takes revenge through publishing, transmitting, conveying, publicizing false and sexually provocative portrayal of his/her victim, by misusing the information that he may have known naturally and that he may have stored in his personal computer, or that which may have been conveyed to his electronic device by the victim herself, or may have been stored in the device with the consent of the victim herself; and which may have been done to publicly defame the victim essentially, commits the offence of revenge porn.
2. Whoever commits the offence of revenge porn, shall be punished in the first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine of not less than 1 lakh rupees and pay reasonable compensation to the victim for damaging his/her reputation in real life and online. If he be punished on a second or subsequent conviction, he shall be punished with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine of not less than 5 lakh Rupees and reasonable compensation to the victim.

Provided that the perpetrator must also be liable to remove the offensive image either original or morphed, irrespective of the fact whether the image was conveyed to him by the victim herself or not, from his own electronic device/s and from the websites and social media profiles where he may have uploaded the same for the purpose of taking revenge.

Provided further, that the investigating officer shall immediately after coming to know of the offence of revenge porn committed by the perpetrator as reported by the victim or anyone on behalf of the victim, contact the concerned website to remove such contents including any text accompanying the image/s which may falsely portray the victim.

Explanation: In Subsection 1, the words “publishing, transmitting, conveying, publicizing false and sexually provocative portrayal of his/her victim” shall include publishing, transmitting, conveying any image of woman whether nude, semi-nude or normal to anyone individual and/or to any website including social media, with an intention to take revenge on that said woman.”

The aforementioned definition is all-encompassing as regards the elements of revenge porn and thus would act as an effective counter to present day hesitation amongst enforcement officials when it comes to trying to fit the square peg of revenge porn cases into pre-defined, round statutory holes.

III. THE INFORMATION TECHNOLOGY ACT: OUTLAWING CYBER PORNOGRAPHY

As mentioned earlier, revenge porn seems more a gendered crime, though cases elsewhere in the world have been reported with men as victims³³. From sexual harassment to rape threats to gender-based hate speech, women face disproportionate levels of abuse online.³⁴ The Information Technology Act was first drawn up in 2000, and has been revised most recently 2008. The Information Technology (Amendment) Act 2008 (henceforth ‘ITAA 2008’) amended sections 43 (data protection), 66 (hacking), 67 (protection against unauthorised access to data), 69 (cyberterrorism), and 72 (privacy and confidentiality) of the Information Technology Act, 2000, which relate to computer/cybercrimes. The offence of revenge porn as explained, has been covered in India under the new Sections 66E, 67A and 67B and amended S.67 that deal with the broader out-lawing of cyber obscenity and privacy infringement on webspace.

S.66E provides for punishment for violation of privacy and in a fashion similar to the IPC criminalization of voyeurism, makes punishable the non-consensual transmission and/or publication of images of private parts of any person.³⁵ The good part about this provision is that it has been drafted in a gender neutral manner thus allowing for cases brought by male victims, and those belonging to marginalized communities like the lesbians, gay, bisexuals etc. to be brought under its ambit. This, read with erstwhile S.67³⁶ and, the new Section 67A³⁷ which specifically restricts the publication of sexually explicit or obscene material and section 67B³⁸ that prohibits child pornography, can be effectively put to use to detect, curb and penalize revenge porn to some extent. However, the drawback remains that Ss. 67A and 67B only criminalize the publication and transmission of sexually explicit or obscene material in an electronic form but viewing, downloading, possession etc. is not an offence as per the provisions of the Act.³⁹ Further, as pointed out by cyber law expert Mr. Pavan Duggal, technically, if the victim is the original sender of say, a nude picture or sexually explicit video to someone, the victim stands the risk of being booked alongside the offender who has shared it without consent. This is because the provisions as they currently stand, indicate that one is not really legally in the clear if they were the ones responsible for the first 'transmission' of any such content—the medium could be a Facebook message, WhatsApp or an email that was shared with a then partner.⁴⁰ Nonetheless, he is quoted to have said that as of June last year, “in India, the police haven't booked any victim of revenge porn under these sections. But the fact remains that the decision to book or not book a victim is the discretion of the police officer looking into the case and he may or may not choose to empathise with the victim.”⁴¹

On April 21, 2018, it came to be reported that a man had been arrested on allegations of revenge porn in Palghar, Maharashtra. A perusal of the report however seems to suggest that the accused in question, was booked for rape under IPC and the “relevant provisions of the IT Act”.⁴² He had uploaded an obscene video and had even superimposed the victim's name and residential address on the visuals. He also created a fake Facebook profile in the victim's name and uploaded the video on this profile as well. The police was further quoted as saying – “mapping cases of ‘revenge porn’ becomes difficult in the absence of a specific law to deal with it. Meanwhile, such cases are on the rise in recent years... Balsing Rajput, SP (Maharashtra Cyber Crime), said, “Revenge porn is classified as dissemination of pornographic material in electronic form under the IT Act and IPC sections, as applicable. For example, if it is only a case of uploading an obscene video, the IPC section for outraging a woman's modesty is added in the FIR, while if the obscene videos are used to extort money from the victim, the FIR includes the section for extortion.”⁴³

This is further privy to the conclusion that in the absence of a definitive legislation categorically explaining the essentials of the offence of revenge porn and outlining its consequences; the police is left with no option, but to pick and choose from the figurative salad bowl⁴⁴ of available provisions to charge the accused with and offer some semblance of justice to the victim. This may often also lead to a wrong or inappropriate mix being applied – as above, where it has come to be reported that a charge for rape amongst others was made.

IV. FINDING REMEDIES UNDER COMMON LAW: RIGHT OF PRIVACY, PUBLICITY AND BREACH OF CONFIDENCE

The right of publicity, most simply put, protects any individual's marketable image or persona. This formulation, however, has been most succinctly put forth by McCarthy in his seminal work as – “The right of publicity is not merely a legal right of the “celebrity”, but is a right inherent to everyone to control the commercial use of identity and persona and recover in court damages and the commercial value of an unpermitted taking.”⁴⁵ In India, the earliest judicial enunciation of a similar right's existence can be traced back to the apex court's formulation, like the USA⁴⁶, of the right to privacy in what is popularly known as the Auto Shankar's case.⁴⁷ The court opined that – “The right to privacy as an independent and distinctive concept originated in the field of Tort law, under which a new cause of action for damages resulting from unlawful invasion of privacy was recognised. This right has two aspects which are but two faces of the same coin (1) the general law of privacy which affords a tort action for damages resulting from an unlawful invasion of privacy and (2) the constitutional recognition given to the right to privacy which protects personal privacy against unlawful governmental invasion. **The first aspect of this right must be said to have been violated where, for example, a person's name or likeness is used, without his consent, for advertising or non-advertising purposes or for that matter, his life story is written whether laudatory or otherwise and published without his consent.**” In recent times... this right has acquired a constitutional status....Right to privacy is not enumerated as a fundamental right in our Constitution but has been inferred from Article 21.⁴⁸

Highly unfortunately, in the opinion of this researcher, the course taken for recognition of a right to publicity, post the Auto Shankar case in India, hasn't been as advanced as that in the USA, inspite of India being home to one of largest and oldest entertainment industries in the world. As mentioned, the case law development to give way to a right formulated in economic asset/property value preservation terms, has been sporadic and limited. There is no apex court decision recognising the common law right, and therefore, guidance is being sought from jurisprudence available from high court decisions, most of which is now being contributed to by the pro-active Delhi judiciary. One of the most important decisions in this regard, is the April 2012 single judge decision in Titan Industries Ltd.v M/s Ramkumar Jewellers.⁴⁹ Manmohan J, held thus "When the identity of a famous personality is used in advertising without their permission, the complaint is not that no one should not (sic) commercialize their identity but that the right to control when, where and how their identity is used should vest with the famous personality. The right to control commercial use of human identity is the right to publicity"⁵⁰ It is thus interesting to note that while formulations of the right to privacy seem to have been made in an all-encompassing manner, extending to both celebrities and non celebrities, alike; the right of publicity has been articulated in terms of famous personalities. This further cites and modifies the an earlier decision of the court in a mark-merchandising-passing-off matter, D.M. Entertainment Pvt. Ltd. v Baby Gift House and Ors.(hereinafter the 'Daler Mehndi matter'),⁵¹ wherein the single judge had observed that "The right of publicity can, in a jurisprudential sense, be located with the individual's right and autonomy to permit or not permit the commercial exploitation of his likeness or some attributes of his personality"⁵² Bhat J, also explained that "...to avail the right against the infringement of right to publicity, the plaintiff must be "identifiable" from defendant's unauthorized use...As a secondary consideration, it is necessary to show that the use must be sufficient, adequate or substantial to identify that the defendant is alleged to have appropriated the persona or some of its essential attributes."⁵³

On the 24th of August 2017, the Indian Supreme Court in the case of Justice K.S. Puttaswamy and Anr. v. Union of India and Ors.⁵⁴, finally declared the right to privacy to be a fundamental right. Unlike in earlier cases, the individual has been placed at the centre of the right to privacy. The judgment stated that privacy "allows each human being to be left alone in a core which is inviolable"⁵⁵ It upheld the "right to privacy" as a "decisional right"⁵⁶ over its other "institutional" and "spatial" forms. This was captured in the varying forms across the opinions rendered by all 9 judges out of which 6 opinions were concurring.⁵⁷ Justice Chandrachud's opinion is especially noteworthy, in that he talked of the heightened importance of the right of privacy for women. He opined that "that women have an inviolable interest in privacy...The challenge in this area is to enable the state to take the violation of the dignity of women in the domestic sphere seriously while at the same time protecting the privacy entitlements of women grounded in the identity of gender and liberty"⁵⁸

In light of the preceding discussion, the argument that can be formulated goes thus – since both actions for the privacy – misappropriation type tort and the right of publicity – misrepresentation and misappropriation type tort – are recognized in India, there exists a very real possibility for the tort actions to be effectively used by victims of revenge porn, whence the publication of the offending materials have been done even for gaining commercial advantage by the uploader. Similar regimes have been effectively put to use in the USA – more specifically in Texas⁵⁹ and Illinois⁶⁰ and California⁶¹, that have seen usage of the Right of Publicity and Privacy statutes to claim damages for non-consensual pornography. Further, while the First Amendment provides for a valid defence to publicity infringement, considering that there are criminal prohibitions also to revenge porn, courts have been less likely to subject publicity claims for revenge porn, to strict scrutiny. The same applies to right of publicity claims under the Indian law,⁶² however, defamation is an explicit reason for imposing reasonable restrictions,⁶³ such that claims may be legitimately entertained and seen to their logical end.

Another tort law claim that may be effectively used is the breach of confidence/breach of trust claim. Scholars have argued that "nonconsensual pornography does violence to essential social norms of trust at the core of social interaction. As such, the tort of breach of confidentiality, which focuses on remedying breaches of trust, should be deployed to help victims of "revenge porn" obtain justice"⁶⁴ While at first blush the right of privacy tort and the breach of confidence torts may seem similar; there lie succinct distinctions between the two, as explained recently by the Bombay HC in Recently, in 2009, the principles relating to breach of confidentiality under Indian law were very succinctly summarized by the Bombay High Court in the case of Urmi Juvekar Chiang v. Global Broadcasting News Limited⁶⁵ :

"8. The principles on which the action of breach of confidence can succeed, have been culled out as:

- i. The (Plaintiff) had to identify clearly what was the information he was relying on;
- ii. The (Plaintiff) had to show that it was handed over in the circumstances of confidence;
- iii. The (Plaintiff) had to show that it was information of the type which could be treated as confidential; and
- iv. (iv)The (Plaintiff) had to show that it was used without licence or there was threat to use it..... It is further noted that at interlocutory stage, the Plaintiff does not have to prove (iii) and (iv) referred to above, as he will at the trial. But the Plaintiff must address them and show that he has atleast seriously arguable case in relation to each of them."

Thus, there is the distinct possibility that courts can offer to a victim-plaintiff to bring an action for breach of explicit or implicit assurances of confidentiality in a revenge porn scenario, where the first image/video may have involved consent on the condition of utmost confidentiality.

V. COPYRIGHT CLAIMS AND REVENGE PORN: SELFIES AND POSSIBLE COPYRIGHT OVER BODY PARTS

Since copyright protects original expressions of ideas, fixed in some carrier media, technically one can obtain a common law copyright protection immediately upon creation of the work. This can apply therefore, to situations of explicit selfies/videos taken for the purpose of "sexting" - once the picture/video is taken, the common law protection applies and the person that clicked the selfie, is the owner of copyright that vests in the said image or video. A further recourse to get statutory protection however, involves filing for one. In India, an e-filing can be sought via the portal "http://copyright.gov.in/UserRegistration/frmLoginPage.aspx" ; which will require an application for registration to be made on Form XIV (Including Statement of Particulars and Statement of Further Particulars) as prescribed in the first schedule to the Copyright Rules, 2013. However, there's a catch – once someone does try to seek registration of otherwise private, explicit images, the procedure requires that 2 identical copies of the artistic work (identical in size/colour/design) which should be identical with the work attached with Search Certificate (TM-60), be deposited at the time of registration.⁶⁶ This means that the images wont remain completely private, and will be seen at the first instance, by the filing and examining staff at the Copyright office; and then, any member of the public can gain access once the image is

recorded in the files there. Thus, trying to seek statutory protection to deal with future non-consensual publication would require immense bravery and courage on part of the person seeking such protection.⁶⁷

Further, as explained by Prof. Bartow in the context of the American copyright and digital copyright laws (The Digital Millennium Copyright Act and its internet intermediary liability provisions), internet service providers are broadly immunized from liability for harms caused by online user-generated content that porn websites host, and these companies do not generally have any legal obligation to assist parties injured by online content, except for following the “notice and take down provisions”.⁶⁸ She further suggests that – “The economic incentives fall in favor of allowing customers to upload and circulate anything they like, as broadly as they choose... at the very least copyright law could be reconfigured so that it does not provide financial incentives for the commercial exploitation of revenge pornography. One alternative to denying copyright protections to works of revenge pornography would be to permit revenge porn copyrights to be recognized and even registered, but then to vest ownership of the copyrights in the victims, so that they could use the notice and takedown provisions of the DMCA to try to reign in the online distribution of works of revenge pornography”⁶⁹

In India, the DMCA-Like provisions are present under Ss. 52(1)(b) and 52(1)(c) of the Copyright Act, inserted vide the 2012 Amendment and ISP liability provisions are present in Ss.79 and 81 of the IT Act 2000 and the Information and Technology (Intermediaries Guidelines) Rules 2011. What is interesting is that S. 79 of the IT Act provides immunity to the ISPs in certain cases of internet wrongs even if committed through their networks provided they follow the due diligence guidelines, under the 2011 Rules, and expediently remove/disable access in case of any actual knowledge of unlawful act or on receipt of government notification to that effect. This immunity from liability, however, does not apply when the unlawful act concerns copyright or patent infringement, both of which have been specifically excluded by way of proviso to S.81 of the IT Act.⁷⁰ The 2012 amendments to the Copyright Act introduced, for the first time safe harbour provisions, for the benefit of intermediaries, into the Indian Copyright Act, 1957. Under these Sections, the transient or incidental storage of a work or performance would not amount to copyright infringement if it was:

- It was ‘purely in the technical process of electronic transmission or communication to the public’ under Section 52(1)(b); or
- For the purpose of providing not explicitly unauthorised electronic links, access or integration, unless the person responsible (presumably for the storage) were aware or had reasonable grounds to believe that the storage was of an infringing copy under Section 52(1)(c).⁷¹

However, Rule 75 of the Copyright Rules, expects the intermediary to exercise a certain level of discretion.⁷² This seems to suggest, that there is a clear contradiction between the Rules and Section 52(c), as the section itself does not provide any discretion to the intermediary. The hierarchy of laws requires that the primary legislation should override subordinate legislation. Therefore, technically S.52(c) should override Rule 75.⁷³ Further, the obligation of immediate removal is not in effect for long, as the complainant is required to secure a court order within 21 days.⁷⁴ In case a complainant fails to secure a court order for taking down the content, the intermediary can restore the content after 21 days. Further, it need not remove the content thereafter, irrespective of another complaint filed by the copyright holder.⁷⁵ Only the owner of a copyright can file this complaint. These provisions seek to prevent abuse of notice and takedown procedures, so that copyright holders cannot keep sending repetitive notices without approaching a court.⁷⁶

Thus, while onerous, there is a possibility, either with, or without registration, for the victim to bring an action for copyright infringement – for which there are civil, criminal and administrative remedies under the law⁷⁷, as well as, seek the taking down of the offending materials, in the bundle of options available, to claim a remedy for revenge porn. However this is possible only in the limited circumstance wherein the material was created by the victim itself and thus the common law copyright vests in the victim.

VI. CONCLUDING OBSERVATIONS : A CASE OF WATER-WATER EVERYWHERE, BUT NOT A DROP TO DRINK?

The foregoing sections point to one logical conclusion – that the offence of revenge porn, though undefined specifically, can be dealt with under various provisions of the criminal law and statutory civil law as well as common law in India. There’s myriad options available for the victim to bring the perpetrator to justice. However, the existence of these varied options doesn’t categorically guarantee a satisfactory remedy for the gravity attached to the offence, as argued effectively by Dr. Halder. However, unlike what Dr. Halder claims, the situation isn’t so bleak – it doesn’t seem like a case of water-water everywhere; but not a drop to drink – in that there is efficacy in each of the measures that currently stand as available. The problem arises when provisions that don’t apply together, are bundled to make the charge seem substantive. Whereas, ideally what is required is an amendment to the IPC to criminally outlaw revenge porn – the provision not only defining the elements that constitute the offence; but also its various possible versions and corresponding penalties. The best current proposal in this regard seems to be the definition suggested by Dr. Halder as pointed out earlier. Further. This amendment should be accompanied by a corresponding amendment to the IT Act provisions, taking into account the lacuna wherein currently there may also lie blame on the victim itself for having made the first transmission of the allegedly obscene material. Moreover the IT Act provisions may be suitable modified to also include the revenge as motive element and also include circumstances of morphed images, etc. Further, in the absence of an explicit legislative provision, it is suggested that the victim be encouraged to bring civil action for exemplary damages claiming breach of confidence coupled with a right of publicity breach; in case of a commercial misappropriation of images/videos that were first shared with consent. These tort law remedies have proven to be effective elsewhere and there is a strong potential for their beneficial use in India.

Further, since the incidences of revenge porn via social networking portals have increased manifold in the last few years, it should come as somewhat welcome news that Facebook, in a pilot project began from Australia in November last year, has developed a face mapping app that claims to detect and prevent revenge porn.⁷⁸ The project is described thus – “By uploading the images or videos you fear may be shared in the future in an attempt to shame or harass you online, Facebook can digitally “hash” the media, effectively giving it a digital footprint. This allows the social network to track the media using the same artificial intelligence-based technologies it uses in its photo and face matching algorithms, and then prevent it from being uploaded and shared in the future. This works only if you’re in possession of the original file, but it would seem to bypass any attempts from a malicious third party to alter the metadata by analyzing and tagging the actual content of the image or video.”⁷⁹ Thus, if this proves effective, it may be implemented for India based-users as well.

Another measure has been put in place via Google's efforts – while the concept has been around for a while, Google's begun to implement it as a policy to detect and tackle user-generated revenge porn – the right to be forgotten. A recent Google Spain European Court of Justice case,⁸⁰ has held that a person has the right to have a link relating to their name which is inaccurate, misleading or distressing removed from the search engine – the so-called “right to be forgotten”⁸¹. This if used effectively elsewhere in the world, can provide an opportunity for victims of revenge porn to obtain quick relief in the nature of removal from the search engines itself – thereby cutting the very access to the image – thereby alleviating free speech concerns as there will be no actual take-down. As mentioned – “Such a right would (also) be a welcome addition to the legal framework around revenge porn.”⁸²

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23 S.354C Voyeurism “Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.”

24 Explanation I to S.345C.

25 Explanation II to S.354C.

26 S.354D “1. Any man who—

(i) follows a woman and contacts, or attempts, to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman;”

27 S.354(2).

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35 S.66 E Punishment for violation of privacy

Whoever, intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished with imprisonment which may extend to three years or with fine not exceeding two lakh rupees, or with both

Explanation - For the purposes of this section--

“transmit” means to electronically send a visual image with the intent that it be viewed by a person or persons;

“capture”, with respect to an image, means to videotape, photograph, film or record by any means;

“private area” means the naked or undergarment clad genitals, pubic area, buttocks or female breast;

“publishes” means reproduction in the printed or electronic form and making it available for public;

“under circumstances violating privacy” means circumstances in which a person can have a reasonable expectation that:

(i) he or she could disrobe in privacy, without being concerned that an image of his private area was being captured; or

(ii) any part of his or her private area would not be visible to the public, regardless of whether that person is in a public or private place

36 S.67: If a person publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect 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.

37 S.67A Punishment for publishing or transmitting of material containing sexually explicit act, etc. in electronic form

Whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees.

Exception: This section and section 67 does not extend to any book, pamphlet, paper, writing, drawing, painting, representation or figure in electronic form-

the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art, or learning or other objects of general concern; or which is kept or used bona fide for religious purposes.

38S.67B Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc. in electronic form:

Whoever,-

- (a) publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct or
- (b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner or
- (c) cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resource or
- (d) facilitates abusing children online or
- (e) records in any electronic form own abuse or that of others pertaining to sexually explicit act with children, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with a fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees:

Provided that the provisions of section 67, section 67A and this section does not extend to any book, pamphlet, paper, writing, drawing, painting, representation or figure in electronic form-

- (i) The publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or
- (ii) which is kept or used for bonafide heritage or religious purposes

Explanation: For the purposes of this section, "children" means a person who has not completed the age of 18 years.

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On receipt of written complaint, the person responsible for the storage of the copy, if satisfied from the details provided in the complaint that the copy of the work is an infringed copy, within thirty-six hours, take measures to refrain from facilitating such access for a period of twenty-one days from the date of receipt of the complaint or till he receives an order from the competent court restraining him from facilitating access, whichever is earlier. [Emphasis added.]

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75 *Ibid*, rule 75(5):

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