



## Mitigating the Legal Grey Area of Amateur Naked Picture Distribution in Canada

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### Executive Summary

The act of selling pornographic images is nothing new. Men and women all over the world have profited from reproductions of their naughty bits since the inception of visual technologies such as cameras; and with its seemingly boundless demand, this industry appears to be indestructible. However, with the abundance of professionally produced pornography, the industry of ‘amateur’ porn has emerged, where people with no professional experience in pornography sell their images and videos to others, mainly online (Paasonen, 2010). With an estimated 30.1 million people in Canada owning a mobile phone with a camera (Statista, 2015), it has become extremely simple to take and upload intimate pictures and videos of oneself online, whether that be over actual pornographic sites, forums like Reddit’s notorious r/gonewild, or even through social media platforms like SnapChat and Instagram. Unfortunately, with this facility of creation and distribution comes the ease of unauthorized redistribution and ‘revenge porn’, where someone maliciously submits previously consensual intimate images of their ex-partners online without their knowledge. Whether commercial or not, the ownership of these images is a gaping grey area in Canadian law, where it can be exceedingly difficult to reclaim images and get them removed from unauthorized websites. Ownership and property rights in this regard need better structure and reinforcement.

The policy actions that this brief will propose to remedy this issue are to:

- (1) Alter current Canadian copyright law to give any identifiable subject some rights to any intimate picture of themselves, unless stated otherwise in an agreement and/or contract.
- (2) Add and/or edit a section in Canadian criminal law to better encompass crimes of redistribution of this nature.



### Context or Scope of Problem

In a recent survey, nearly 53.3% of heterosexual respondents and 74.8% of LGBTQ+ (Lesbian, Gay, Bi-sexual, Transgender, Queer and Other) respondents said that they had shared a nude photo of themselves to another person. In another study, nearly 44% of teenage males claimed to have seen a nude picture of one of their female classmates. The National Campaign to Help Prevent Teen and Unplanned Pregnancy, in their survey, found that 33% of young adults between the ages of 20-26 have sent nude or semi-nude images of videos of themselves to another (Bambauer, 2014). A survey conducted to 133 Simon Fraser University students found that 45% of male and 76% of female respondents had sent a nude image of themselves to another person (Wagner, 2017). Young adults are no strangers to sending and receiving images of their naked bodies, yet very few understand how vulnerable they are to social repercussions.

Not explicitly defining the ownership rights of a woman who chooses to send someone a naked photo of herself leaves her vulnerable to whether or not that party chooses to redistribute the image. There are plenty of websites that thrive on anonymous submissions of these types of images, and in many cases women are unable to remove images of themselves. Along this vein, if a woman chooses to sell her image to another, it is difficult to stop the recipient from redistributing it themselves, taking away profits from the original subject. In order to protect the rights and privacy of someone who chooses to send explicit images of themselves to others, there should be better definitions on who owns the rights to their own naked images.

Because of the sensitive nature of these images and current social stigma, distributing without the senders permission can cause them undue humiliation and social segregation (Hasinoff, 2012). They could also face consequences in their employment, since content posted online that negatively represent current or potentially employees has been shown to sometimes insight dismissal (Bambauer, 2014). Family, friends, and coworkers could all be able to see these images, and it is unfair to place blame on the sender when such a phenomenon is so common, as shown by the statistics stated earlier. Even women who choose to sell their images should be privy to the same privacy; just because she agrees that one person can see the images does not mean that her images should be exposed to the world, especially with such social stigma attached to it.



Currently in Canadian law, under the Copyright Modernization Act of 2012, it is the photographer that owns the default rights to any image they have taken. This means that any selfie or image that a person takes of themselves is considered legally enforceable in court and one could sue for removal from any unauthorized mediums (CAPIC, 2016). For amateur pornographers this is good news and protects them, in theory. In practice, however, once an image is sent, it can be saved and copied thousands of times by the recipient without the owner's knowledge. Once that image is posted online it can be nearly impossible to delete every instance of its reproduction (Hasinoff, 2012). This has been exemplified in popular culture several times, where naked photos and videos of celebrities, like Jennifer Lawrence and Kim Kardashian, have been distributed so extensively that regardless of publicist or lawyer intervention, they are still quite easy to find with a quick Google search.

Also by this logic, if the photographer is a spouse or ex-partner, and the image was originally taken consensually, they would own the rights to the image, and therefore could reproduce and sell it as they see fit (CAPIC, 2016). This places numerous women in relationships in a place of vulnerability to their ex-partners, who may have such images and/or videos saved from the relationship. 'Revenge porn', then, is legal under this clause.

To remedy this, Canadian criminal law, which defines an intimate image as "a picture or video created in private circumstances that shows a person: who is naked or semi-naked; or who is engaged in sexual activity", amended a section of the criminal code in 2015 to protect women under 'voyeurism'. Voyeurism, however, is defined by law as "the practice of gaining sexual pleasure from watching others when they are naked or engaged in sexual activity". In order to fight this sort of situation in a criminal court, the defendant must prove "that the victim actually fear for their safety or the safety of someone known to them". However, "the result of this type of conduct is usually embarrassment or humiliation caused by the breach of privacy, but not necessarily a fear for one's safety" (Department of Justice, 2017).

For private use, where someone has privately paid for the images directly from the photographer, the customer cannot sell the image for commercial gain, but they are legally entitled to distribute as many copies of the image as they wish for free, including on the internet (CAPIC, 2016). This means that a woman who chooses to sell nude images of herself is technically protected if the customer chooses to resell them, if she is able to detect and prove this in court. However, again, she is not protected if they choose to redistribute them. She would also lose the potential profits that this image would generate had the



recipients of redistribution paid her for the images. In addition, since she is selling the images and cannot reasonably prove she fears for her safety or has been humiliated in court, she would not be protected under the criminal code as it is currently written. Even if she could, it is very hard to prove without any doubt to a jury that permission for redistribution was not given.

Therefore, regardless of the sensitive nature of nude images, current Canadian copyright and criminal laws do not properly protect women who fall victim to both ‘revenge porn’ and unauthorized redistribution of commercially sold images of herself.

### Policy Recommendations

Reiterating the policy recommendations suggested earlier, they are:

(1) Alter current Canadian copyright law to give any identifiable subject some rights to any intimate picture of themselves, unless stated otherwise in an agreement and/or contract.

(2) Add and/or edit a section in Canadian criminal law to better encompass crimes of redistribution of this nature.

(1) The first change that would be beneficial to address is the legal definition of ‘sexting’. Hasinoff suggests in her paper on teenage sexting that instead of considering it a different entity altogether, that it would be more socially beneficial to simply refer to it as “media production”. She states that “expanding the definition of media production to include sexting highlights the importance of privacy and consent for all authors of ephemeral social media content”. Since much of the stigma facing women, especially young girls, revolves around victim blaming, Hasinoff offers that by placing under the umbrella of “media production” would deal with concerns of anonymity, communication, and self-expression online by empowering girls to produce what they see fit, thus allowing for further sexual education, safety, and open conversation about consent. She states that by considering sexting as “media production” it can even address instances of its abuse by bringing “to light the typically obscured distinction between consensual and nonconsensual sexting”. She even offers that “thinking about consensual sexting as an act of media authorship asserts that people who create ephemeral



social media artifacts need not surrender all their privacy rights when they share this content selectively” (Hasinoff, 2012).

While Hasinoff’s argument that nude photos should be included under the umbrella of “media production” is valid, it would also be beneficial to acknowledge the sensitive nature of the images, since there still is stigma that may cause the victim damage. The current copyright law should have a section that addresses the nature of the image, and if it can be deemed to be of sexual nature, give the ownership to the subject. Allowing a change to this by a contract or legal agreement would still give pornographic producers and professional photographers the right to their own images. But, this extra step could serve to protect women who are easily identifiable in an image, as well as protect the distribution rights they possess, even if they are paid by a private party for the content.

(2) Currently, courts try to remove the images from offending websites, but due to the ease of redistribution, this does not fully remedy the issue. I recommend that federal criminal code should allow for the suing of perpetrators, allowing victims to gain financial damages. In this way offenders would be discouraged even further to not engage this behaviour, and women who are selling the images can regain the revenue they may have lost by having their property redistributed without their consent. This would also aid the women who are victims of revenge porn, just as if any other criminal offense had occurred.

### Policy Alternatives

The government in Newfoundland and Labrador is taking a different approach to address sexting abuse and distribution discrepancies. Andrew Parsons, the Justice Minister there, is working on a bill that would require perpetrators who have been shown in court to have shared non-consensual images of a sexual nature to pay monetary damages to the victims. He believes that while it is nearly impossible to remove the images online, as is customary in current Canadian courts, threatening perpetrators with being sued for financial damages may shift the ‘power dynamic’ between the subject of the image and the distributor. This is on top of the 5 years of jail time and \$5,000 fine that is current punishment (Bartlett, 2018).



As another alternative, women could explicitly state their intentions for the images before sending them, in order to secure their consent defense in court. There are currently two requirements for a case of this sort to be defensible:

“Firstly the accused must intentionally or knowingly distribute the images (i.e., not inadvertently). Secondly, the accused should have knowledge that the depicted person did not consent to the distribution of the image, or be reckless as to whether or not the person did not consent. In recommending the mental element of recklessness, the Working Group is relying on Supreme Court of Canada jurisprudence holding that recklessness is found where a person is subjectively aware that there is danger that his conduct could bring about the result prohibited by the criminal law, and nevertheless persists, despite the risk.” (Department of Justice, 2017)

In this way, perhaps women could include a disclaimer when sending the images or explicitly tell whoever they are sending them to that they are not meant for redistribution. This could serve to protect them in Canadian court, or at least serve to prove without a doubt that consent was not given for redistribution.

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## Appendix

The Criminal Code of Canada serves to codify what the government considers to be a criminal act, as well as what it can do when it occurs. It guides all governmental action in regard to criminal activity, and is the main indicator of procedure and guidelines that criminal courts in Canada follow. Amendments are made yearly to ensure that it stays current with technological, social, and economic changes.

### Current Canadian Criminal Law:

#### **Voyeurism**

- **162 (1)** Every one commits an offence who, surreptitiously, observes — including by mechanical or electronic means — or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if
  - **(a)** the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity;
  - **(b)** the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity; or
  - **(c)** the observation or recording is done for a sexual purpose.
- **Definition of visual recording**
- (2)** In this section, **visual recording** includes a photographic, film or video recording made by any means.
  - **Exemption**
- (3)** Paragraphs (1)(a) and (b) do not apply to a peace officer who, under the authority of a warrant issued under section 487.01, is carrying out any activity referred to in those paragraphs.
  - **Printing, publication, etc., of voyeuristic recordings**
- (4)** Every one commits an offence who, knowing that a recording was obtained by the commission of an offence under subsection (1), prints, copies, publishes, distributes, circulates, sells, advertises or makes available the recording, or has the recording in his or her possession for the purpose of printing, copying, publishing, distributing, circulating, selling or advertising it or making it available.
  - **Punishment**
- (5)** Every one who commits an offence under subsection (1) or (4)



- **(a)** is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
- **(b)** is guilty of an offence punishable on summary conviction.
- **Defence**
- (6)** No person shall be convicted of an offence under this section if the acts that are alleged to constitute the offence serve the public good and do not extend beyond what serves the public good.
- **Question of law, motives**
- (7)** For the purposes of subsection (6),
  - **(a)** it is a question of law whether an act serves the public good and whether there is evidence that the act alleged goes beyond what serves the public good, but it is a question of fact whether the act does or does not extend beyond what serves the public good; and
  - **(b)** the motives of an accused are irrelevant.
- R.S., 1985, c. C-46, s. 162; R.S., 1985, c. 19 (3rd Supp.), s. 4; 2005, c. 32, s. 6.

Copyright law in Canada serves to protect the intellectual rights an individual has to their creative work, whether that is a written work, photograph, painting, etc. It provides the guidelines on how this media can be copied, distributed, and sold and is enforceable legally in court. It essentially determines what is 'yours' and what that means you can or cannot do.