



Rimedi civilistici nell'ambito del revenge porn in un'ottica comparata

Civil law remedies in the field of revenge porn in a comparative perspective

LUARA VALLE

Associate professor of Private Law, Free University of Bozen-Bolzano

LIVIA AULINO

Post doctoral Researcher fellow, University of Naples Federico II 

Abstract

Da tempo oramai è diffuso il fenomeno del cd. Revenge porn, ossia di quella condotta in cui uno dei due partner danneggia irreparabilmente la reputazione dell'altra persona diffondendo video o foto su internet.

Nel presente contributo, pur consapevoli dell'importanza e della necessità di una risposta di tipo penale, si intende analizzare i profili civilistici e risarcitori di tali profili, anche in un'ottica di diritto comparato, al fine di comprendere meglio le possibili tutele realmente attivabili a favore del soggetto offeso.

For some time now, the scourge of so-called. Revenge porn, i.e. that conduct in which one of the two partners irreparably damages the other person's reputation by spreading his or her sexual videos or photos on the Internet.

In this contribution, while being aware of the importance and the need for a criminal response, we intend to analyse the civil law and compensation profiles of such events, also from a comparative law perspective, in order to better understand the possible protections that can actually be activated in favour of the offended party.



Keywords: privacy; revenge porn; criminal law; civil law; comparative law.

Summary: 1. Constitutive elements of the phenomenon – 2. Non-consensual pornography in the national penal system. The long process for a specific protection – 3. Civil protection. Analysis and reflections. Remedies for the abusive use of sexually explicit images of others in the absence of the consent – 4. Comparative analysis. Experience in civil and Common Law countries.

1. Constitutive elements of the phenomenon

The phenomenon of Revenge Porn consists of the sharing of pornographic images and videos, often by an ex-partner, with the intention of defaming, ridiculing, and humiliating the victim, whether the content was stolen or not¹.

As highlighted by multiple studies, Revenge Porn represents a form of online abuse that disproportionately affects women, manifesting as a form of gender-based violence capable of causing a significant rupture in the victim's life.² This practice³, as described in national and international literature, is considered an escalation of another dangerous trend known as sexting, which involves the creation and exchange of nude or semi-nude images and videos using smartphones or other computer-mediated communication tools. Sexting is identified as a "risky form of deviant behavior (...) with negative health consequences and legal ramifications"⁴.

When the exchange of sexually explicit messages does not occur within a consensual context, sexting becomes connected to phenomena such as cyberbullying and revenge porn. In these cases, sexually explicit photos, videos, and chats can be used for extortion or blackmail (sextortion).

Furthermore, reference is made to a Supreme Criminal Court ruling⁵, which analyzed the case of a defendant who reacted violently to his partner's decision to end their relationship. He persecuted her for months through phone calls, stalking, and threats, including the act of publicly disclosing their sexual encounters and conversations on the social network YouTube.

According to some surveys, 17% of male respondents consider filming themselves during sexual intercourse a habitual and frequent practice, and

¹ A first definition of Revenge Porn configured the phenomenon as "*homemade porn uploaded by an ex-girlfriend or (usually) ex-boyfriend after particularly vicious break-up as a means of humiliating the ex or just for own amusement*" in *Urban Dictionary* (2007).

² *Revenge Porn by the numbers* (2014) e Mc Afee (2013) - AA.VV. *La dissoluzione della sessualità umana nell'era digitale*, a cura di CIPOLLA e CANESTRINI, Milano, 2018, p. 247.

³ In 2010, Hunter Moore founded the controversial revenge porn website "Is Anyone Up?" who shared thousands of sexual content without the consent of the people depicted who, on the contrary, were doxed, i.e. specifically identified by entering home streets and telephone numbers, until 2014 when Moore was arrested by the Federal Court of California.

⁴ HIGGINS, MARCUM, RICKETTS, WOLFE, Routine cell phone activity and exposure to text messages: extending the generality of routine activity theory and exploring the etiology of a risk teenage behavior, in *Crime & Delinquency*, vol. 62, 2016.

⁵ Cass., Sent. n. 50822/2016

even 44% of them have shared videos among friends and acquaintances⁶. As reported by Anti-Violence Centers, the dissemination of sexually explicit images often occurs within a broader context of violence. It is important not to think of the dissemination of sexually explicit images as an isolated and occasional conduct, perhaps carried out with extreme carelessness related to the irresponsible use of social media⁷. This is because the main characteristic of the Web, as defined by its inventor Tim Berners-Lee, is its "universality," which means that "a hypertext link can refer to any other informational unit, whether personal, local, or global, whether in draft form or perfectly refined." This element allows any content, such as images uploaded to the network, to be simultaneously interconnected with other content and potentially visible and accessible to millions of people in real-time and on a global level.

Another characteristic of the web is what Stefano Rodotà defined as the "relentless collective memory of the Internet, where the accumulation of every trace," whether in terms of searches or content uploads (photos, videos), can make us "prisoners of a past that is destined to never fade away⁸".

The porn revenger, therefore, benefits from the immediacy of online sharing, the anonymity of certain communication channels, and the perception of being relieved of responsibility for conduct carried out "only" online. They are also supported by other users who request and subsequently distribute those materials.

In many cases, the dissemination of such images occurs within contexts of oppression, physical and psychological violence, and in these contexts, women, as vulnerable subjects, are often blackmailed with the threat of video and/or image dissemination, which may have initially been captured with their consent⁹.

When the images are eventually leaked, the collaboration, even if forced, of service providers becomes crucial for their removal. However, the damage caused is considered indelible, with 80% of victims suffering from severe emotional stress and anxiety, and 47% having considered suicide at least once¹⁰.

⁶ See *Adolescenti a rischio tra vendette, minacce e ricatti a sfondo sessuale*, in *Adolescenza.it*, 29.11.2017, <https://www.adolescenza.it/social-web-tecnologia/adolescenti-a-rischio-tra-vendette-minacce-e-ricatti-a-sfondo-sessuale/>.

⁷ An aid is provided by the Creep Project (acronym of "Believe me, it's only for me"), a questionnaire available online developed by the Free University of Bolzano following tools that have also been validated at an international level: the University of Bolzano has, in fact, acted in synergy with scholars from the University of Cambridge, Innsbruck and Adelaide, with the support of the Postal Police of Trentino Alto Adige, the Anti-violence Center for women in situations of abuse of Trento, the Gea Association for female solidarity against violence and the Euregio Platform on Human Dignity and Human Rights (cfr. <https://creep.projects.unibz.it/it/home/>).

⁸ S. RODOTÀ, *Il mondo nella rete*, Bari, ed. Laterza, 2014, p. 41.

⁹ A similar and equally dangerous phenomenon is represented by the "Pull a pig", a practice in which a group of friends compete to be able to approach a girl, considered unattractive, with the aim of making believe they are interested in her, conquering her and then humiliate her, telling her that it was a joke, all through the irresponsible use of social networks (<https://www.ilvasodipandora.org/sexting-revenge-porn-pull-a-pig-grooming-la-sessualita-passa-per-la-rete-e-gli-adolescenti-ne-rimangono-intrappolati-intervista-alla-dott-ssa-maura-manca/>)

¹⁰ C. BARMORE, *Criminalization in Context: Involuntariness, Obscenity and First Amendment*, in *Stanford Law Review*, 2015, vol. 67, p. 465.

2. Non-consensual pornography in the national penal system. The long process for a specific protection.

In our legal system the serious offense caused by Revenge Porn justifies the repression of the act, but before formulating a new crime, it appeared necessary to bring the case within existing frameworks in national legislation.

The case to which non-consensual pornography was most frequently attributed was represented by the offense of defamation under Article 595¹¹ of the Criminal Code, as well as by the provision of Article 167 of the Privacy Code¹², modified in accordance with the Italian legislation's adaptation to the General Data Protection Regulation (GDPR). However, the violation of the latter is only a starting point for recognizing a much more penetrating offensive charge focused on individual integrity.

In some cases of revenge pornography, case law has also resorted to the offenses of stalking under Article 612-bis of the Criminal Code and private violence under Article 610 of the Criminal Code. These offenses, however, require additional constituent elements (threats, violence, repeated harassment) that rarely occur in cases of revenge porn in the strict sense.

It is also worth mentioning the provision of Article 617-septies, paragraph 1, of the Criminal Code and Article 1 of Legislative Decree No. 216 of December 29, 2017, which reforms the interception regulations. According to this provision, "whoever, with the aim of damaging the reputation or image of others, disseminates through any means fraudulently obtained audio or video recordings of private encounters or fraudulent recordings of conversations, including telephone or electronic communications, held in their presence or with their participation, shall be punished with imprisonment for up to four years."

However, the scope of this provision is limited to cases where the recording is "fraudulently obtained," and therefore, it seems that only cases of publishing images or videos without the consent of the depicted person can be attributed to it. The exclusive reference to audio or video recordings would exclude simple "photographs" from the criminal offense, thus making the provision of little applicability to non-consensual pornography.

Another possible application could be found in the second paragraph of Article 615-bis of the Criminal Code, which deals with illicit interference in private life. It also sanctions those who "reveal or disseminate, through any means of public information," the news or images obtained in the ways indicated in the first part of the article.

However, the specification in the first paragraph, which states that the images must be obtained "using visual recording instruments," excludes the

¹¹ App. Perugia, sez. Minori, 27.08.2004, in *Diritto di famiglia e delle persone*, 2005, n. 3, pp. 887 ff. with commentary by BASIRICÒ.

¹² M. BIANCHI, *I confini della repressione penale della pornografia minorile. La tutela dell'immagine sessuale del minore tra esigenze di protezione ed istanze di autonomia*, in *Itinerari di diritto penale*, Giappichelli, 2019, pp. 90 ss.: "The aggression is not aimed only at the honor and reputation of the individual but even before that set of values that refer to the trust that the subject has placed in the agent and which are to be found in confidentiality, intimacy, in the trust given".

possibility of prosecuting those who have disseminated them after obtaining them through other methods (consensual creation, passive sexting, sextortion, hacking).

A first specific response to the increasingly difficult task of distinguishing between the opportunities offered by the use of new technologies and the risks arising from the management of various and large amounts of personal information shared on social networking sites is represented, primarily, by the protection offered by Article 10 of Law No. 69 of July 19, 2019 (known as the "Codice Rosso" or "Red Code"), which introduced the offense described in Article 612-ter of the Criminal Code, classified as a crime against moral freedom.

Indeed, the aforementioned Law No. 69/2019 represents the latest piece of a long-standing legislative strategy for the specific protection of women. The fundamental steps of this strategy can be traced back to the modifications concerning sexual violence (Law No. 66/1996), the offense of stalking (Decree Law No. 11/2009 converted into Law No. 38/2009¹³), and the legislation on femicide (Decree Law No. 93/2013 converted into Law No. 119/2013¹⁴).

The law is also based on various supranational acts aimed at combating different forms of discrimination and gender-based violence.

On the international level, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)¹⁵ can be invoked. This convention was adopted in 1979 by the United Nations General Assembly and has been in force in Italy since July 1985 (Law No. 132/1985, ratifying and implementing the convention).

The national legislative intervention came in the wake of the case of Tiziana Cantone. After explicit videos in which she was the protagonist were circulated on the internet against her will, she became the target of severe and continuous offenses and attacks on her honor and reputation. These circumstances led her to take her own life on September 13, 2016, after unsuccessfully seeking judicial assistance to have the images and videos removed from websites and search engines.

Even in the initial draft of Bill No. 1076, submitted to the Presidency of the Senate on February 19, 2019, the legislative gap concerning the regulation of revenge porn was highlighted. Revenge porn had already been recognized as a crime in Germany, Israel, the United Kingdom, and 45 states in the USA¹⁶. The draft bill emphasized that the only recourse available to victims was to refer to legislation on defamation, extortion, privacy violation, and improper

¹³ MAUGERI A.M., *Lo Stalking tra necessità politico-criminale e promozione mediatica*, Torino, 2010; PULITANÒ D. (a cura di), *Diritto Penale. Parte speciale*, vol. I, *Tutela penale della persona*, Torino, 2019, p. 237 e ss.

¹⁴ Report by the Office of the Supervisor of the Supreme Court of Cassation (Rel. N. III/03/2013 – Rome, 10.16.2013) carried out by L. PISTORELLI, Prime notes on the law of conversion, with modifications, of the d.l. no. 93/2013, concerning inter alia "gender-based violence" and crimes involving minors (10.13.2013), in <https://archivioldpc.dirittopenaleuomo.org>.

¹⁵ CEDAW, acronym of *Convention on the Elimination of All Forms of Discrimination against women*, whose art. 1 says "for the purposes of this Convention, the term "discrimination against women" means any distinction, exclusion or limitation based on sex which has the effect, or purpose, of impairing or destroying the recognition, enjoyment or exercise by women, irrespective of their marital status, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field on an equal basis between men and women".

¹⁶ The Republic of the Philippines, a predominantly Catholic country, was the first nation to pass a law on the matter with the Anti-Photo and Video Voyeurism Act in 2009.

handling of personal data. However, these laws were insufficient to address the severity and specificity of the phenomenon.

The draft bill aimed to establish a specific offense to punish the perpetrators of the behaviors described above. It included not only those who publish private images or videos with explicit content but also those who distribute them. The draft bill also provided for aggravated circumstances based on the relationship between the author and the victim in cases where the publication and dissemination of the victim's image resulted in their death.

The proposed legislation aimed to address the phenomenon through an integrated approach, taking action on multiple fronts. In addition to punitive measures, it was necessary deemed to achieve a significant cultural shift by implementing preventive measures, particularly in schools and among young people. Activities and projects focused on raising awareness about the issue and promoting digital education were considered essential for promoting responsible and conscious use of the internet. The project also aimed to focus on rehabilitating offenders to reduce recidivism, as well as providing support for victims to prevent secondary victimization, where the victim experiences further violence and relives traumatic episodes.

Another key aspect of the proposal, inspired by German legislation, involved holding operators of telematic platforms accountable. It was proposed that foreign companies operating in Italy, managing and overseeing social media platforms and user-generated content, establish a legal domicile in Italy to which legal notices, complaints, and any other requests for the removal, blocking, or obscuring of offensive images, videos, and content could be addressed. Failure to comply within 24 hours of receiving a request would result in significant monetary sanctions for these companies.

The same bill also preserved the victim's right to seek the conviction of the offender and claim compensation for all damages suffered. Additionally, it aimed to tangibly hold platform and application managers responsible for the immediate removal of incriminating images in cases of revenge porn¹⁷.

Referring to the text of the provision, it states: "Unless the act constitutes a more serious offense, anyone who, after creating or obtaining them, sends, delivers, transfers, publishes, or disseminates sexually explicit images or videos intended to remain private without the consent of the person depicted shall be punished with imprisonment ranging from one to six years and a fine ranging from 5,000 to 15,000 euros. The same penalty applies to anyone who, having received or otherwise acquired the images or videos referred to in the first paragraph, sends, delivers, transfers, publishes, or disseminates them without the consent of the person depicted, with the intent to harm them."

¹⁷ Bill on the initiative of Senators Evangelista, Puglia, Vanin, Lanzi, Trentacoste, Riccardi, Botto, Piarulli, Pirro, Buccarella, Fenu, Nocerino, Leone, Accoto, Urraro, Lorefice, Romano, Castellone, Corbetta, Giarrusso, Di Piazza, De Lucia, Ortolani, D'Angelo, Angrisani, Dell'Olio, Anastasi, Lomuti, Lucidi, Di Micco, Moronese, Lannutti, Donno, Presutto, Gallicchio, Ortis Croatti, Vono, Fede, Morra, Bottici, Coltorti, Vaccaro, Turco, Ferrara, Martisciano, Gaudio, Campagna, Mininno, Maiorino, Perilli, Di Girolamo, Ricciardi, Dessi and Patuanelli, Introduction of article 612-ter of the penal code concerning the publication and dissemination of sexually explicit private images or videos without the consent of the person represented, communicated to the Presidency of the Senate on 02.19.2019.

The provision aims to punish the multi-offensive conduct of potential "sharers" of images disseminated by the perpetrator of the offense, i.e., the so-called "second distributors," who, after receiving the images from the first distributor or others, or having downloaded them from the internet ("having acquired them in any way"), contribute to making them go "viral." In this regard, it has been highlighted that the conduct specified in this provision can cover a large part of the cases in which revenge porn can materialize.

In general terms, the first set of behaviors (sending, delivering, transferring) seems to refer to cases of image transfer between two individuals. "Publication" could occur when photographs or videos are "posted" on pornographic websites, social networks, and other online platforms. "Dissemination" appears to involve the distribution without intermediaries to a large number of individuals. For example, the forwarding of videos or images in instant messaging chats or mailing lists¹⁸.

From the enumeration of these behaviors, it can be inferred that the legislator intends to also counteract the viral nature of the images. This also applies to the second paragraph of the provision, which considers the aforementioned phenomenon of sexting and provides for its punishment in cases of "dissemination" of "received" materials.

Once the incriminated actions have been described, the conditions for the applicability of the provision are as follows: a) the conduct must be carried out without the consent of the individuals depicted in the images or videos; b) the images or videos involved must be sexually explicit, although the legislator has not clarified the meaning of this expression, leaving it to jurisprudential interpretation; c) the creation of the images and/or videos must have taken place in a context of confidentiality ("intended to remain private").

The criminal offense, therefore, presupposes the prior explicit and unequivocal consent of the victim to the creation of sexually explicit material within a fiduciary relationship between two individuals. The absence of consent relates to a subsequent moment after the consensual creation of the images and concerns their publication or dissemination by the perpetrator. Hence, the subjective element of this common offense, punishing "anyone" responsible for the disclosure of images or videos, requires only general intent, as the agent acts with the knowledge and will to carry out the conduct described by the provision.

From this standpoint, it becomes evident that the use of the term "revenge porn" for a correct definition and identification of the conduct typified by Article 612-ter of the Penal Code is misleading and limiting because it is not specified therein that the agent's purpose is solely revenge. It is sufficient that there is an intention to carry out the unlawful conduct described.

The conduct is therefore sanctioned regardless of the pursuit of a specific purpose, encompassing multiple criminally relevant behaviors, transcending the specific retaliatory intention.

The second paragraph extends the liability to "second distributors," i.e., those who were not originally in possession of the material, as they did not create or physically obtain it, but collaborated in its disclosure. In this case,

¹⁸ G.M. CALETTI, *Revenge Porn. Prime considerazioni in vista dell'introduzione dell'art. 612-ter c.p.: una fattispecie "esemplare" ma davvero efficace?*, in www.penale.contemporaneo.it, 2019.

specific intent is relevant, as indicated by the phrase "with the aim of causing harm" to the victim.

Thus, the provision indicates the specific purpose pursued by the agent for the abstractly typified conduct to be fulfilled. Jurisprudence also clarifies that the "harm" consists of a "legally relevant prejudice of any nature, both economic and non-economic, caused both to the person to whom the unlawfully processed data refers and to third parties as a consequence of the unlawful conduct"¹⁹.

To ensure an appropriate penalty for the behaviors described in the provision, specifically addressing the social phenomenon of the dissemination of graphic material without the consent of the affected individual, the provision establishes a penalty of 1 to 6 years of imprisonment, if the conduct concerns a former spouse or a person with whom a stable relationship was established, or a pregnant woman, thus increasing the severity of the offense, especially considering the clear retaliatory intent.

On the other hand, the last paragraph was introduced to protect the victim, providing that the offense in question can be prosecuted upon the complaint of the victim. However, unlike other offenses against the person, in this case, the term for filing the complaint is six months (corresponding to the longest term prescribed for sexual offenses) and can only be filed in the course of legal proceedings, rather than three months from the commission of the offense.

In conclusion, it is important to emphasize that the practice introduced by the so-called "Red Code" to expedite criminal proceedings reveals its critical nature if mechanisms of "notice and take down"²⁰ are not imposed on service providers, which currently do not exist. Information flows originating and spreading without any control can only be stopped through the immediate intervention of providers, who should be obliged to act promptly upon receiving a report of revenge porn, following the mentioned "notice and take down" mechanism²¹.

However, the legislature has not yet established the same urgent procedure for revenge porn as it has for cyberbullying. In fact, in the case of a report for the removal of harmful content posted online against a minor, the anti-cyberbullying regulations require the responsible parties or owners to acknowledge the request within 24 hours of receiving it and to comply with the request within 48 hours. If they fail to do so, the complainant can turn to the Data Protection Authority, which must act within the following two days²².

¹⁹ Cass., III sez., 23.11.2016 n. 15221.

²⁰ The "notice and take down" procedure was introduced in 1998 in the context of online copyright protection, with the discipline dictated by the Digital Millennium Copyright Act (cf. DMCA). It is an articulated mechanism that is characterized by the determined activation times of the provider, attributing a meaningful role to the object of the dispute, to the guarantee of the adversarial process between the various interested parties and to the information content that must be published by the providers on their web pages, to ensure the transparency of the procedure for those who assume that they have been harmed (PETRUSO, R, *La responsabilità degli intermediari della rete telematica*, Torino, 2019, pp. 2 e ss e 48 e ss.)

²¹ P. CENDON, *Responsabilità Civile*, 2020.

²² Law 29.05.2017 n. 71, laying down Provisions for the protection of minors for the prevention and contrast of the phenomenon of cyberbullying, in G.U. GENERAL SERIES n. 127 of 06.03.2017.

3. Civil protection. Analysis and reflections. Remedies for the abusive use of sexually explicit images of others in the absence of the consent.

Given this brief representation of the criminal figure of the dissemination of sexually explicit images and/or videos for revenge purposes, it is worth noting that the offense in question also constitutes the crime of unlawful processing of personal data under Article 167 of Legislative Decree No. 196/2003, amended to comply with the GDPR EU Regulation 2016/679, which states that "unless the act constitutes a more serious offense, anyone who, in order to obtain a profit for themselves or others or to cause harm to the data subject, acts in violation of Articles 123, 126, and 130 or the order referred to in Article 129, causing harm to the data subject, shall be punished with imprisonment from six months to one year and six months," including all cases of revenge porn in the punishable conduct.

Alongside this provision contained in the GDPR, Article 13 of the Privacy Code provides that "anyone who causes harm to others as a result of the processing of personal data is obliged to compensate for the damage in accordance with Article 2050 of the Civil Code."

From this perspective, privacy protection appears strengthened, considering also that, against revenge porn, the Guarantor for the protection of personal data has made available on its website an emergency channel called the Pilot Program on Non-consensual Intimate Images, which allows victims to report when they believe their intimate images have been publicly disseminated without consent.

The preliminary reflection on this point starts from the analysis of the protection of privacy, which is correlated with the protection of the individual against illicit interference in their private sphere.

One form of protection against illicit interference in an individual's private sphere can be found in Articles 3 and 12 of the Universal Declaration of Human Rights of 1948, in our Constitutional Charter in Articles 2, 13, 14, 15, in Article 8 of the ECHR of 1950, ratified in Italy in 1955, in the Strasbourg Convention No. 108/1981, which specifically deals with the protection of individuals with regard to the automated processing of personal data, in Article 8 of the Charter of Fundamental Rights of the EU, as well as in the Treaty establishing a Constitution for Europe signed in Rome in 2004, which recognizes the right to the protection of personal data in Article 8.

Also relevant in this matter was the European Directive No. 95/46/EC, from which the various regulations adopted by EU Member States on the protection of personal data derive. It was the first EU piece on legislation on the protection of personal data, later succeeded by the actual GDPR, and made it possible to form an initial EU and transnational framework on the subject in question. It was, therefore, a milestone in the EU's evolutionary process and formed the backbone of the privacy regulatory system for a long time.

From the set of the aforementioned provisions, it can be understood that privacy is guaranteed in a private place, while in a public place or a place open

to the public, one can be subject to recordings, videos, or photographs, for example, due to the presence of security cameras.

This aspect may seem clear, as public space is accessible to everyone, where no one can claim their right to privacy.

However, it is also true that the publicity of a place should not become a reason for invading the freedom of others: an image captured in a public place that portrays a non-consenting or simply unaware subject cannot be uploaded to social networks or used improperly. Otherwise, it would constitute a violation of the right to one's image, namely the interest of that subject that their image not be disseminated without their consent²³.

The focus then shifts to the analysis of the private aspect of the right to privacy, specifically regarding the right to one's image. Initially, it was considered a species of the genus "personality rights" and, along with the right to honor, it was understood as an extension and expansion of the right to privacy of the individual. Today, it is protected as an independent right under the combined provisions of Article 10 of the Civil Code and Article 96 of Law No. 633/1941, as well as the aforementioned Personal Data Protection Code (Legislative Decree No. 196/2003, amended by Legislative Decree No. 101/2018), and Article 6, paragraph II, of Law No. 300/1970.

Article 10 of the Civil Code specifically regulates the abuse of another person's image by providing injunctive protection. It states that if an image is exhibited or published outside the cases permitted by law or to the detriment of a person's dignity or reputation, the judicial authority may order the cessation of the abuse upon the request of the interested party, while allowing for compensation for damages. The aforementioned Article 10 prohibits the abuse of another person's image and grants the interested party the possibility to request its cessation, while allowing for compensation for damages.

The fundamental principle in this matter is that a person's "portrait" cannot be disclosed without their consent (Article 96 of Law No. 633/1941). Not only is consent always considered revocable (in which case, the issue would primarily involve compensating those authorized to use the portrait for any resulting damages), but its effectiveness is limited to the time, spatial scope, purpose, forms, and methods of authorized dissemination²⁴.

This regulation must be read in conjunction with the law on copyright (Law No. 633/1941), which, in Article 96, requires the consent of the subject

²³ The Supreme Court of England and Wales, under a modern application of the tort of breach of confidentiality, ruled that the variables in determining what level of privacy and image rights should be expected concern "the attributes of the actor, the nature of the activity in which the actor is engaged, the place where the same action is taking place, the nature and purpose of the intrusion, the absence of consent and whether the effect on the actor is known or could be inferred together with the circumstances and purpose by which the information came into the hands of the author" (see *Murray vs. Express Newspapers Plc* (2008) ECDR, paragraph 36).

²⁴ Trib. Roma 07.10.1988, "*the effectiveness of the consent, since it relates to the subject of personality rights, must be contained within the rigorous subjective and objective limits in which the consent was given*" (it is thus excluded that the consent given by an actress at the beginning of her career to the dissemination of her photographs in which she was portrayed naked can be considered legitimizing the disclosure of the same after many years, when, that is, you no longer find correspondence in the evolution of her personality in society). An illegality of the publication of the image due to violation of the "disclosure methods", to which the owner of the right to the image made his consent to the publication itself conditional", was hypothesized because it did not take place "in internationally prestigious magazines" (Cass. civ. 01.09.2008 n. 21995).

portrayed as a prerequisite for the dissemination of photographic or multimedia material. Exceptions apply when the subjects portrayed are "famous or notorious" or hold public office, or when there are justified law enforcement or judicial needs, scientific, educational, cultural dissemination, or events of public interest (Article 97 of Law No. 633/1941).

Indeed, copyright law focuses on the commercial value of figurative works and allows those represented in a portrait that is improperly used for economic purposes to take legal action against both the violator and the intermediaries whose services were used to commit the infringement. Consequently, if an image is used without the consent of the subject portrayed, without the justifying causes listed in Article 97 of Law No. 633/1941, or if its use prejudices the dignity or reputation of the person portrayed, the person who carried out the act will be obliged to compensate the holder of the right to the image.

Consent, therefore, represents how the holder of the right agrees to the use of their image²⁵. In the absence of consent, the dissemination of images is lawful and legitimate only if it is justified by the protection of an overriding public interest (compared to the protection of the right to the image and the privacy of an individual), such as public information.

As remedies for cases of abusive use of another person's image, and therefore in the absence of the expression of the consent of the interested party, national legislation provides two instruments: an injunctive action and compensation for damages.

The injunctive action aims to obtain a form of protection that consists of the issuance by the judicial authority, following an assessment of the conduct for which intervention is requested, of a measure aimed at ceasing the harmful conduct and ordering its non-repetition.

This type of protection is specifically provided for some personality rights, notably the right to one's image as mentioned in Article 10 of the Civil Code. In addition to injunctive protection, it provides for the compensation of damages, which, however, may be difficult to quantify since it involves an intangible asset.

Regarding the methods of giving consent, reference is made to the ruling of the Supreme Court of Cassation of January 29, 2016, No. 1748, which observed that "consent to the publication of one's image constitutes a unilateral transaction, not concerning the right itself, which is highly personal and inalienable and cannot be the subject of negotiation, but only the exercise of such right. Therefore, this consent, although it may occasionally be included in a contract, remains distinct and independent from the agreement containing it, with the consequence that it is always revocable, regardless of the term indicated for the authorized publication, and irrespective of the agreement on compensation, which is not an element of the authorizing transaction in question, given the inalienable nature and, therefore, the inability to evaluate the right under discussion in economic terms²⁶". Such pronouncement only serves to evoke the European Court of Human Rights, which, with reference to Article 8 of the corresponding ECHR Convention,

²⁵ L. SAPONARO, *L'impatto processuale delle immagini: fotografie e videoriprese*, Cedam, 2021

²⁶ Cass. civ. n. 3014/2004.

observed that the notion of "private life" - as referred to in Article 8 - is a broad notion, not subject to an exhaustive definition, which includes the physical and moral integrity of a person and can therefore include numerous aspects of an individual's identity, such as name or elements related to the right to image, thus encompassing all personal information that an individual can legitimately expect not to be published without their consent²⁷.

The European Court concluded, therefore, that the publication of one or more photos, as it invades the private life of a specific person, even if it is a public figure, cannot be carried out without the consent of the person themselves²⁸.

Once the inhibitory action has been effectively exercised and the burden of proof has been discharged, which falls on the plaintiff as the injured party, it will be possible to obtain a measure to remove the harmful material (images, photos, videos) that has been published, even on the web. The judgment shall be advertised in accordance with Article 120 of the Code of Civil Procedure, through an excerpt of the decision published in newspapers, as well as a condemnation to non-pecuniary damages pursuant to Article 2059 of the Civil Code²⁹. Such damages cannot be considered as self-evident³⁰.

Referring, therefore, to the concepts of moral and existential damages, pursuant to Article 2059 of the Civil Code, regardless of the configurability of a crime, the law allows for compensation for damages, which must be assessed equitably based on the actual extent of the prejudice suffered and the seriousness of the subjective element of the perpetrator.

In addition, there are other components of non-pecuniary damages, represented by "biological damage" (i.e., harm to health), moral damage (consisting of subjective inner suffering on an emotional level), and dynamic-relational damage (otherwise defined as existential, consisting of the deterioration of daily living conditions and habits, both internally and externally, compensable in case the misconduct has violated fundamental rights of the individual), which lead to an overall assessment³¹.

In the case analyzed by the Court of Cagliari on 08/06/2016, in judgment no. 1801, where compensation for damages resulting from the publication of severely defamatory images on various pornographic websites was sought, the plaintiff obtained the defendant's conviction to compensate for damages resulting from the injurious event to her honor, reputation, and right to the image, with particular regard to the emotional distress suffered in relation to

²⁷ CEDU, 6.4.2010, n. 184/06, *Saaristo e altri c. Finlandia*.

²⁸ CEDU, 21.2.2002, n. 42409/98, *Schussel c. Austria*; CEDU, 24.6.2004, n. 59320/00, *Von Hannover c. Germania*; CEDU, 19.9.2013, n. 8772/10, *Von Hannover c. Germania*.

²⁹ Cass. sez. III, 13.10.2016, n. 20643, according to which "In the field of civil liability (...) compensation for non-pecuniary damage can be configured, to be identified with any prejudicial consequence of the injury ... of constitutionally protected personality rights, including that to the image, the prejudice of which, not constituting a mere damage-event, i.e. in re ipsa, must be the object of allegation and proof, even though simple presumptions".

³⁰ Cass. civ. sez. III, ord. 18.01.2018 n. 907; sez. I, 25.01.2017 n. 1931 according to which "non-pecuniary damage" from infringement of fundamental rights, "as a typical damage-consequence, does not coincide with the infringement of the interest (i.e. it is not in re ipsa) and, therefore, must be annexed and proved by the person requesting the relative compensation, even if, since it is a prejudice projected into the future, recourse to prognostic evaluations and presumptions is permitted on the basis of objective elements which it is the injured party's responsibility to provide".

³¹ Cass. civ. SS. UU. Sent. 11.11.2008 nn. 26972, 26973, 26974, 26975.

the context, social position, intensity of the psychological element, and dissemination of the news via the internet³².

Based on the procedural developments, the Court considered that the consequences of the defendant's wrongful conduct on the mental state of the victim could unequivocally be presumed from the objectively offensive nature of the publication of pornographic images, the decrease in the person's standing among fellow members in general or within specific sectors or categories with whom the plaintiff interacted. Thus, compensation for damages was awarded based on equitable criteria, taking into account "the extent of online dissemination of the images, their objectively and seriously offensive form, the resulting presumable negative impact on the plaintiff's reputation, including in professional and social spheres, the severity of the manipulative effect, and finally, the difficulty level of removing the harmful content from the internet."

Given the difficulty of removing material that has already been uploaded and disseminated on web platforms, it is desirable to proceed with mechanisms of "deindexing" as a preliminary step to the so-called right to be forgotten, a technique that is a corollary of the right to informational self-determination, allowing the data subject to request that the news, images, or videos become less easily accessible.

To this end, it is necessary to identify the parties responsible for the illicit act, considering that taking legal action against those who have physically published images online is often impossible in most cases.

An immediate solution to the problem has been the establishment of a form of liability for negligence on the part of internet site operators, the so-called hosting providers, who provide internet spaces for the creation and online posting of blogs, websites, and software, for violations committed by third-party users of the service.

In the case of Tiziana Cantone, her mother, who now stands in her place, approached the competent Court of Naples North to request urgent measures aimed at promptly removing materials containing sexually explicit content. Mrs. Giglio, in fact, through an urgent petition filed under Article 700 of the Civil Procedure Code, obtained a provisional order in which the Court instructed Facebook to "immediately cease and remove from the social networking platform any post or publication containing images (photos and/or videos) or comments specifically referring to the petitioner," while also setting a penalty of EUR 100.00 payable to the petitioner under Article 614-bis of the Civil Procedure Code for each violation or non-compliance with the order, as well as for each day of delay in executing the provision.

However, Facebook Ireland Ltd, the provider of the social network service³³, lodged an appeal against the aforementioned order, arguing, among other

³² In this sense also the Court of Ravenna, section I, 11.25.2019 n. 1085 which recognized the right of the victim to obtain compensation for non-pecuniary damage pursuant to art. 2059 of the civil code, suffered for the "serious violation of privacy, dignity, honor and public and social image, the social blame, shame and public pillory appearing well known for the victims of these crimes, brought in some cases even suicide, following the dissemination on the web or by computer of intimate and private images such as participation in a sexual relationship with the partner of the moment".

³³ Providers, ISPs (Internet Internet service providers), are internet service intermediaries that provide users with the means for online data transmission, connection, communication and storage. They are

things, that "the scope of the order issued by the lower court is in clear contrast with the provisions of Article 17 of the e-commerce decree, which imposes on Facebook Ireland Ltd a general obligation to monitor and remove any post or publication containing images (photos and/or videos) or comments specifically referring to the petitioner."

On this point, recognizing the absence of sector-specific legislation, the Court of Naples North highlighted the complexity of the issue of provider liability, which is unquestionable when the provider itself commits an offense (such as content providers), but more nuanced when third parties, exploiting services such as hosting, commit offenses, as in the present case.

When referring to provider liability, the Directive 2000/31/EC, transposed into national law by Legislative Decree no. 70/2003 on electronic commerce, comes into play. The legislation relieves ISPs of a surveillance and preventive control obligation, considering it excessively burdensome. However, in the event of investigations, providers are obliged to provide user data to the authorities when suspected of committing offenses on the web and to remove the contents involved upon request from the competent authorities to "put an end to the violations" (Article 16)³⁴.

In the event of non-compliance with these obligations, the provider is jointly liable for the offense committed by the user due to omission, although some scholars and case law suggest that it may be a form of connivance. For example, the offense of defamation, which initially partially encompassed revenge porn, is an instantaneous offense, consummated now of publishing the content online, making it difficult, in the absence of preventive control, to establish a form of complicity by omission.

In several judgments, it has been argued that imposing ex ante blocking of data on ISPs would constitute a serious violation of their freedom of enterprise, due to the excessive burden it places on providers. This would also infringe upon the right to freedom of information and communication of users and the principle of net neutrality³⁵.

On the contrary, the Court of Naples Nord, in the partial acceptance order of the appeal filed by Facebook Ireland Ltd against the precautionary order obtained by the successor of Tiziana Cantone, highlighted that the limitation of liability for ISPs was mainly aimed at avoiding the introduction of a new objectively defined responsibility or at least the hypothesis of participation by providers in illicit content disseminated by third parties using the connectivity service provided by them³⁶.

Despite the absence of a general obligation of surveillance or a general duty to actively search for facts or circumstances indicating the presence of

classified into services for: the mere transport of content on the net (mere conduit), the temporary or prolonged retention (caching) of data, for the sole access or provision of web spaces (hosting). In other words, all search engines, websites, social networks, email services and instant messaging systems are ISPs. See <https://www.cyberlaws.it/responsabilita-intermediari-online/>.

³⁴ Liability is excluded when the provider "is not aware" of the fact that an illegal activity has been carried out and about the compensatory actions, it remains exempt if "it is not aware of facts or circumstances which make the illegality manifest 'activity or information'. Just as the liability of mere conduit providers is excluded (art.14).

³⁵ App. Milano, N. 29/2015; Trib. Torino, sent. 07.04.2017 n. 1928; Cass. pen. Sez. V, 27.12.2016 n. 54946.

³⁶ Autorità Garante delle Comunicazioni, "il Diritto d'Autore sulle Reti di comunicazione elettronica" in <http://www.agicom.it>, 12.02.2010, p. 18.

illicit activities, the Court deemed that "responsibility for the information subject to durable storage or hosting" exists where, as in the present case, the provider actually becomes aware that the information is illicit but fails to take action to prevent its further dissemination, despite specific and detailed reports made by the complaining party.

In conclusion, although there is no obligation of preventive control of the content present nor a position of guarantee, there is a subsequent obligation to take action, and therefore the hosting provider's liability arises for failure to comply with a request (notice) to remove illicit content from the party claiming to be the rights holder or for non-compliance with an order from the competent authority, whether judicial or administrative, sought by the rights holder to achieve the same effect³⁷.

The Court acknowledged that "if no illicit conduct by the service provider arises from an omission resulting from a measure by the authority, the hosting provider's liability towards the third party harmed by the content inserted by a service recipient (excluding the liability of the latter) can only be established when the harmed party proves in court that the provider was nevertheless made aware of the illicit content of an activity or information to which it provided access, and despite this, failed to promptly notify the authority or prevent access to that specific content, using the self-regulation power it could have exercised based on the contract concluded with the service recipient"³⁸.

Following the aforementioned measure, the world's largest social network (Facebook) has launched a system called "Not without my consent"³⁹. Through artificial intelligence algorithms, machine learning, and the assistance of various organizations⁴⁰, it is capable of combating the spread of non-consensual pornography content with a new image recognition system. This system will prevent the publication of content identified as being posted without the alleged victim's consent, while also blocking the account of the porn revenger. The revenger can avail themselves of evidence of innocence to have their profile reactivated.

4. Comparative analysis. Experience in civil and Common Law countries

If in Italy the regulatory vacuum regarding the criminal offense of non-consensual disclosure of pornographic images or other intimate or sexual nature was only filled late with the "Codice Rosso," a better situation is not evident in European Union legislation, at least until the agreement on new rules to combat the dissemination of illegal online content and protect fundamental rights of individuals in the digital sphere, merged into the Digital

³⁷ The hypotheses of intervention by the provider following the notification of the violation by the owner of the right who claims to have been injured are also foreseen in ord. Court of Rome, section IX civ., section specialized in the field of industrial and intellectual property, 11.07.2011; Court of Turin, I section specialized in business matters, ord., 05.05.2014.

³⁸ Trib. Milano, sez. I civ., 03.10.2013.

³⁹ See: <https://www.facebook.com/safety/notwithoutmyconsent/>

⁴⁰ *Revenge Porn Helpline* nel Regno Unito, *Cyber Civil Rights Initiative* in U.S.A., *Digital Rights Foundation* in Pakistan, *SaferNet* in Brasile, *Professor Lee Ji-Yeon* in Corea del Sud.

Service Act (DSA) (Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC), which provides for a strengthening of responsibility for digital service providers.

The explanatory report presents the purposes and objectives according to which "after the adoption of Directive 2000/31/EC (the e-commerce directive), new and innovative (digital) services of the information society have emerged, which have changed the daily life of the Union's citizens by shaping and transforming their way of communicating, connecting, consuming, and conducting economic activities. These services have significantly contributed to the economic and social transformations that have occurred in the Union and the rest of the world. At the same time, new risks and challenges have arisen from the use of these services, which affect both society as a whole and individuals who use such services. This proposal is based on the fundamental principles established in the e-commerce directive, which remain valid today, and aims to ensure the best conditions for the provision of innovative digital services in the internal market, to contribute to online security and the protection of fundamental rights, and to establish a solid and lasting governance structure for effective oversight of intermediary service providers. The proposal defines clear competencies and responsibilities for intermediary service providers, particularly online platforms such as social media and online marketplaces. By setting clear obligations regarding due diligence for certain intermediary services, including notification and action procedures for illegal content and the possibility to challenge platform decisions regarding content moderation, the proposal aims to improve online user safety throughout the Union and protect their fundamental rights"⁴¹.

The approval of the Digital Service Act, therefore, represents a fundamental step in the path of accountability undertaken by European institutions in the field of digital services, introducing a moderation principle without, however, leading to prior control over the content.

To this end, an amendment to Article 24b had been proposed - albeit unsuccessfully - in order to require those who upload content to pornographic platforms to verify their account by providing a phone number and email address⁴².

The provision, through the suggested amendment, would have compelled companies managing the platforms to hire and train a larger number of

⁴¹ V. FRANCESCELLI, E.M. COTUGNO, *Diritto delle comunicazioni*, Key Ed. 2022. "Furthermore, the requirement for certain online platforms to acquire, store, partially verify and publish information about traders using their services will ensure a safer and more transparent online environment for consumers. Recognizing the particular impact of very large online platforms on our economy and society, the proposal sets higher standards of transparency and accountability in relation to how the providers of these platforms moderate content, advertising and algorithmic processes. Establishes risk assessment obligations arising from their systems, with the aim of developing appropriate risk management tools and protecting the integrity of services from the use of manipulation techniques".

⁴² Another proposed modification and/or integration to the DSA envisaged that hosting providers should set up notification mechanisms that are easy to access and use, such as to allow "any person or entity to notify them of the presence in their service of specific information that this person or entity deems to be illegal content". (A. BIONDI, *Digital Service Act, serve responsabilità e tutela del diritto d'autore*, in *Il Sole 24 Ore*, 13.04.2022, *Norme e Tributi*, p. 40).

moderators for sexual abuse based on images, forcing them to remove content reported by victims "without undue delay"⁴³.

Before the DSA was adopted, the European Union, sensitive to the evolution of individual rights, had initially acted through case law with the Google Spain judgment, issued by the Court of Justice of the EU on 13.05.2014, and then definitively established the right of the individual to be forgotten through Regulation No. 679/2016, introducing privacy regulations to modernize the now outdated Directive 95/46/EC, in line with Article 8 of the Charter of Fundamental Rights⁴⁴.

Analyzing the phenomenon from the perspective of the legislations of individual Member States, it is useful to mention brief notes on the French experience, recalling that France, as early as 2016, introduced Article 226 of the Penal Code, which punishes those who disseminate certain sensitive materials with penalties of up to two years imprisonment and fines of up to €60,000⁴⁵.

In Germany, the phenomenon is essentially managed through case law, as the local copyright law only provides civil protection. In this regard, the case of a couple from Hesse, in central Germany, analyzed by the Coblenz court, should be mentioned. The man, a professional photographer, had taken numerous erotic photos of his partner, with her consent. Once the relationship ended, the woman requested the ex-partner to remove and permanently delete the photographs informally. After receiving a refusal but an assurance that the images would not be publicly disseminated or shared, the woman turned to the German justice system to obtain an injunction to protect her right to privacy. The Coblenz court ordered the photographer to remove only the shots that depicted the former partner in intimate situations, explaining that "images taken in other contexts cannot cause such harm to the person depicted as to revoke the consent given at the time of the shooting. Consent can instead be revoked regarding images that could harm the reputation of the person photographed, who can request the removal of the photographs from the storage media, asserting the right to protect their image over the right to possession and copyright of the photos taken"⁴⁶.

In Spain, in 2015, Article 197 of the Penal Code ("Del descubrimiento y

⁴³ See *Compromise amendments – Regulation of the European Parliament and of the Council on a Single Market For Digital Services*, 2020/0361 (COD), https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/IMCO/DV/2021/12-13/DSACA9_EN.pdf.

⁴⁴ "everyone has the right to the protection of personal data concerning him. Such data must be processed fairly, for specific purposes and based on the consent of the data subject or another legitimate basis established by law. Every individual has the right to access the data collected concerning him and to obtain their rectification".

⁴⁵ Art. 226-2-1 *code penal*, introduced by the no. 2016-1321 of 07.10.2016, to fill the legal void left by the provisions of articles 226-1 and 226-2 pre-existing which punished the violation of private life, by fixing, capturing, recording or transmitting words spoken in private or confidential or images taken in a private place, so much so that the Court of Cassation had deduced that it was not a criminal offense the fact of disseminating, without their consent, the image of a person taken in a private place with their consent is punishable (Cass., 03.16.2016 n. 15-82676). On this point, see: <https://www.avibitton.com/droit-penal/delit-de-revenge-porn/>.

⁴⁶ See <https://www.theguardian.com/technology/2014/may/22/revenge-porn-victims-boost-german-court-ruling>.

revelación de secretos") was amended by adding paragraph 7⁴⁷.

In Common Law countries, on the other hand, legislators have intervened more strictly to address revenge porn by introducing specific criminal provisions⁴⁸. The United Kingdom, as a precursor in this field, included Section 33 titled "Disclosure of private sexual photographs and films with intent to cause distress"⁴⁹ in the Criminal Justice and Courts Act 2015 (CJCA 2015). This section criminalizes the disclosure of sexual and private photographs or videos without the consent of the person depicted, with the "intent to cause distress." Similar provisions have been introduced in Scotland in 2016 with the offense of "abusive behavior and sexual harm"⁵⁰ and in New Zealand⁵¹.

In Canada, sharing intimate images of another person without their consent is a criminal offense, defined in section 162.1 of the Criminal Code since 2014⁵². An individual who shares an intimate image of another person without their consent is guilty of a "hybrid" offense. This allows the Crown to proceed summarily or by indictment. If the Crown proceeds by indictment, there is no limitation period, and charges can be brought at any time after the alleged offense. There is a one-year limitation period for summary conviction, and if more than one year has passed since the incident, the Crown must proceed by indictment unless the accused waives the limitation period. In addition to potential imprisonment, the convicted person is prohibited from accessing the Internet for a period of time. Section 162.2 of the Canadian Code allows the court to issue an order prohibiting the offender from using the Internet or any other digital network unless they do so in accordance with the conditions prescribed by the court.

In civil matters, it should be noted that in recent years the Superior Court of Ontario has begun to recognize a new tort of "public disclosure of private facts." This occurs when an individual shares private information about another person without their consent. The Superior Court of Justice of Ontario has established that an individual can be held liable for this offense if two conditions are met: a) the publication must be highly offensive to a person, and b) the publication has no legitimate public interest.

In the United States, more than forty states have specifically criminalized non-consensual pornography, and there are ongoing discussions about creating a federal offense, echoing the retaliatory purpose and requiring the

⁴⁷ Art. 197 del *Código Penal*, par. 7: «Será castigado con una pena de prisión de tres meses a un año o multa de seis a doce meses el que, sin autorización de la persona afectada, difunda, revele o ceda a terceros imágenes o grabaciones audiovisuales de aquella que hubiera obtenido con su anuencia en un domicilio o en cualquier otro lugar fuera del alcance de la mirada de terceros, cuando la divulgación menoscabe gravemente la intimidad personal de esa persona. La pena se impondrá en su mitad superior cuando los hechos hubieran sido cometidos por el cónyuge o por persona que esté o haya estado unida a él por análoga relación de afectividad, aun sin convivencia, la víctima fuera menor de edad o una persona con discapacidad necesitada de especial protección, o los hechos se hubieran cometido con una finalidad lucrativa". A. COLAS TUREGANO, *Los delitos de genero entremenores en la Sociedad tecnologica: rasgos diferenciales*, Valencia, 2016; F. MORALES PRATS, *La intervencion penal en la red*, in *Derecho penal, sociedad y nuevas tecnologias*, 2016, p. 111-133 ss.

⁴⁸ "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".

⁴⁹ A. GILLESPIE, *Cybercrime. Key Issues and Debates*, Abingdon-New York 2016, p. 866 e ss.

⁵⁰ *Abusive Behaviour and Sexual Harm (Scotland) Act 2016*.

⁵¹ *Harmful Digital Communications Act (New Zealand) 2015 (HDCA)*.

⁵² *Protecting Canadians from online crimes. (Canada) Act 2014*.

equivalent of specific intent to cause severe distress to the victim.

Furthermore, scholars have suggested that non-consensual pornography should be considered a form of sexual abuse, even if it is not physical.

The first state to regulate this offense was New Jersey, with the first legislation dating back to 2004, making it the oldest worldwide. California followed suit in 2013⁵³.

Australia is also witnessing the progressive criminalization of non-consensual pornography, although the jurisdictions of South Australia and Victoria have already enacted laws to combat revenge porn. Specifically, laws regulating the dissemination of intimate images came into effect following the Criminal Law Amendment (Intimate Images) Act 2018 (WA) on April 15, 2019. This amendment introduced the offense of disseminating intimate images of a person without their consent, empowered the court to issue removal orders for the harmful image, and made the mere threat of dissemination or distribution of intimate images a separate offense⁵⁴.

In Japan, outside the English-speaking world, the offense of non-consensual⁵⁵, pornography has also been introduced. It criminalizes the disclosure of another person's private sexual image without their approval through a telecommunications medium to an unspecified number of people, with a maximum penalty of three years imprisonment. In the absence of specific legislation, defamation provisions apply exclusively⁵⁶.

This initiative, implemented through the introduction of a new offense, should be viewed in conjunction with educational programs and awareness campaigns to eradicate revenge porn and cyberbullying. It should also be noted that in Japan, the company Tone Mobile presented the Kakiyasu and Tone e20, a new smartphone equipped with a technical feature that blocks the phone when inappropriate nude images are attempted to be taken. It applies sensors and so-called anti-nude filters. The sensor analyzes the shots, verifying their lawfulness. If the technology within the device detects nudity during the scanning of photos, an error message is sent, and the image is automatically deleted from the device.

5. Conclusions

The phenomenon of revenge porn, now quite widespread, required a penal response due to its intrinsic odiousness that is shared by public opinion. Indeed, because punishment in the Italian national legal system has a simultaneous an educational, retributive, and deterrent function, this issue cannot be overshadowed.

However, this does not diminish the fundamental question that drives the debate about protections for victims of such conduct: is a predominantly penal approach sufficient, or is it necessary to accompany it with a parallel

⁵³ California Penal Code 647 (j) (4).

⁵⁴ See <https://www.andrewwilliamslawyer.com.au/intimate-images-revenge-porn-laws.html>.

⁵⁵ Revenge Porn Prevention Act (Act on Prevention of Damage by Provision of private Sexual Image Records), 2014.

⁵⁶ See <https://www.loc.gov/item/global-legal-monitor/2014-11-26/japan-new-revenge-porn-prevention-act/>.

and separate civil protection aimed at a quicker determination of responsibility for the removal of controversial multimedia content and to obtain adequate compensation?

In theory, the Italian criminal system allows a victim of a crime to seek civil protection by joining the proceedings as a civil party. However, the effectiveness of this approach is frustrated by both the lengthy nature of criminal justice and the possibility that the crime may become time-barred without establishing criminal liability for the purpose of civil protection. This can lead to an inability to decide on the civil aspects, especially during appellate proceedings, which currently creates jurisprudential conflicts⁵⁷.

In this scenario, the claims of the so-called "victim" would be frustrated, and a new proceeding - this time in civil court - would need to be initiated, further delaying the process and causing even greater harm to the victim.

For this reason, it becomes essential to theorize, to structure, and to establish a "summary procedure" in civil court aimed at protecting victims of revenge porn but ideally applicable to any situation involving reputational damage perpetrated through illicitly disseminated multimedia content on the internet.

Equally important is an analysis of foreign legal frameworks to draw inspiration from and conduct a preliminary assessment of the practical impact of legislation.

⁵⁷ The art. 578 c.p.p. highlights the need for a general sentence against the defendant even if the statute of limitations of the crime intervenes during the subsequent levels of judgement. However, the question arises as to whether this provision limits the possibility of ruling on civilian leaders in criminal proceedings in the event that, on the one hand, there are the conditions for declaring the statute of limitations to have occurred but at the same time those for pronouncing a full acquittal ex art. 129, co. 2 c.p.p., which would be the case in which proof of the damage and the causal link has been reached. See the very recent Cassation, Section V Pen., Sent. no. 1319/2023 on https://www.diritto.it/reato-e-prescrizione-risarcimento-del-danno/#_ftn1, which also highlights the importance of implementing the principle of cost-effectiveness of the action at the judiciary, highlighted by the SS. UU. Massaria of 2019.