NEW YORK DOES NOT HAVE A REVENGE PORN LAW . . . YET

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Some news sources, politicians, and even Governor Cuomo have erroneously claimed that a “revenge porn law” passed in New York State on August 1, 2014. This is untrue.

Now let’s get it straight. A law DID pass on August 1, 2014, but that law was not related to the nonconsensual distribution of nude or sexual photographs or videos (i.e. revenge porn). Rather, that law (Bill S1982C-2013 aka A2053C-2013) closed a much-needed loophole in our pre-existing criminal statute pertaining to unlawful surveillance. It amends Penal Laws 250.45, 250.55 and 250.60. The text is at the bottom of this blog.

This newly amended law applies to the surreptitious recording of sex and nudity. It applies only to situations in which the depicted person does not know or consent to being photographed/recorded. Think: nonconsensual amateur porn. The law amends one little, albeit important, thing. See, it already was criminal to record sex without a person’s permission. However, in order for it to be a crime, the victim’s nude body parts needed to be visible. So it didn’t cover scenarios when, say, a person was engaging in oral sex or semi-clothed or if the victim’s intimate parts were obscured by, say, somebody else’s intimate parts or the result of a poorly positioned secret camera.

With the amendment, it’s illegal so long as SOMEBODY’s intimate parts are exposed in the picture. This is a victory for women given the less protruding, and hence, less cinematographically capture-able nature of the female anatomy.

But make no mistake, the new law does NOT apply to situations when a person consented to the original capture of the image or video – or produced it themselves (i.e. selfies). It does NOT apply to times when a person shares a sexual selfie with their partner, who later posts it on Instagram, a revenge porn website, or, say, texts it to the school. The telltale feature of revenge porn is that DISTRIBUTION of the image is without consent. In the typical revenge porn case the original capture of the picture IS consensual.

The cause for the confusion relates to the “justification” text in the legislative Memo. It explains the genesis for the new law, stating that a victim complained to Clarkstown police that an image of her had been posted on the internet. The image showed her engaging in intimate sexual conduct, but none of her sexual or intimate parts were exposed. The text goes on to state that the current unlawful surveillance laws could not be applied because her nude parts weren’t showing. However, for her scenario to actually be covered by the new law, another fact must be present: the image needs to have been created without her consent or knowledge. (The bill’s justification text does not indicate whether the picture was with or without knowledge/consent.) So, assuming it was a classic case of revenge porn – picture taken with consent, distribution without – the poor Clarkstown lady’s fact pattern remains outside the scope of the very law it inspired.

The scenarios in which the newly amended law WOULD apply are those like the pending New York County case where the Wall Street financial advisor recorded himself having sex without his partners’ permission. If any of the multitudinous videos he created fail to show his partners’ intimate parts, those particular videos were not illegal prior the passage of this amendment. The law goes into effect on November 1, 2014 and lucky for him, it’s not
retroactive.

Hopefully this will clarify things for people such as the misguided upstate Assembly Member whose office confidently insisted that revenge porn is already illegal in New York State when a desperate client of mine contacted the office to push for legal reform. But, now would be a great time to make revenge porn illegal, New York. Other states are already passing SECOND versions of their revenge porn laws. As of yesterday, both houses in California voted in favor of **expanding their ALREADY existing laws** to include Selfies. Terrific job, California, on listening to the advice of The Cyber Civil Rights Initiative!

For a full and compulsively updated list of enacted revenge porn state laws please look [here](#).

To read the text of New York’s best proposed revenge porn law, click [here](#).

To read the text of the revenge porn law that passed in the NYS Senate, click [here](#).

One more thing: just because revenge porn may not technically be illegal, if certain other facts are present, it could trigger other penal laws and violate an order of protection. And, of course, there’s civil law. So hardly can this hole in our law be viewed as a license to engage in the pathetic and cowardly conduct.

The new unlawful surveillance law (new language is in caps):

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Subdivision 4 of section 250.45 of the penal law, as added by chapter 69 of the laws of 2003, is amended and a new subdivision 5 is added to read as follows:

4. Without the knowledge or consent of a person, he or she intentionally uses or installs, or permits the utilization or installation of an imaging device to surreptitiously view, broadcast or record, under the clothing being worn by such person, the sexual or other intimate parts of such person[.] OR

5. FOR HIS OR HER OWN, OR ANOTHER INDIVIDUAL'S AMUSEMENT, ENTERTAINMENT, PROFIT, SEXUAL AROUSAL OR GRATIFICATION, OR FOR THE PURPOSE OF DEGRADING OR ABUSING A PERSON, THE ACTOR INTENTIONALLY USES OR Installs OR PERMITS THE UTILIZATION OR INSTALLATION OF AN IMAGING DEVICE TO SURREPTITIOUSLY VIEW, BROADCAST, OR RECORD SUCH PERSON IN AN IDENTIFIABLE MANNER:

(A) ENGAGING IN SEXUAL CONDUCT, AS DEFINED IN SUBDIVISION TEN OF SECTION 130.00 OF THIS PART;

(B) IN THE SAME IMAGE WITH THE SEXUAL OR INTIMATE PART OF ANY OTHER PERSON; AND

(C) AT A PLACE AND TIME WHEN SUCH PERSON HAS A REASONABLE EXPECTATION OF PRIVACY, WITHOUT SUCH PERSON’S KNOWLEDGE OR CONSENT. S 2.
Section 250.55 of the penal law, as added by chapter 69 of the laws of 2003, is amended to read as follows: S 250.55
Dissemination of an unlawful surveillance image in the second degree. A person is guilty of dissemination of an unlawful surveillance image in the second degree when he or she, with knowledge of the unlawful conduct by which an image or images of the sexual or other intimate parts of another person or persons were obtained and such unlawful conduct would satisfy the essential elements of the crime of unlawful surveillance in the first or second degree, as defined, respectively, in section 250.50 or 250.45 of this article, intentionally disseminates such image or images. Dissemination of an unlawful surveillance image in the second degree is a class A misdemeanor. S 3. Subdivision 1 of section 250.60 of the penal law, as amended by chapter 157 of the laws of 2003, is amended to read as follows: 1. He or she, with knowledge of the unlawful conduct by which an image or images of the sexual or other intimate parts of another person or persons were obtained and such unlawful conduct would satisfy the essential elements of the crime of unlawful surveillance in the first or second degree, as defined, respectively, in section 250.50 or 250.45 of this article, sells or publishes such image or images; or S 4. This act shall take effect on the first of November next succeeding the date on which it shall have become a law.

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