The Federal Lawyer in Cyberia

by Mike Tonsing

Pseudonymously Yours: A Brief Descent into a Cyberian Quagmire

Stay with me on this, Cyberian lawyers.

As of this writing, though in my view it ought to have more important matters in its sights, California's Legislature is debating a bill that would make it a misdemeanor to publish nude pictures online if one intends to thereby cause emotional distress. (And, no, the bill does not target former Southern California mayors or Eastern mayoral candidates who might someday decide to retire here.) It covers garden-variety naked or nearly naked images admittedly taken with consent but allegedly publicly posted without permission. (Somewhat curiously, and not particularly relevant here, a federal statute prohibits recording the private areas of individuals without their consent. However, the esoteric, "special maritime and territorial jurisdiction of the United States" makes it unlikely that the statute will often be of use.[1])

Under the proposed California law, a covered offense could be punished by up to a year in prison if the victim is a minor or if the offending individual has committed more than one offense. Predictably, the bill has divided proponents of free speech on the one hand and advocates of privacy rights and victims on the other.

Again predictably, the American Civil Liberties Union (ACLU) has come out against the measure, which has been passed by the state Senate,[2] at least in its present form. The ACLU is worried that such a law could be used to suppress otherwise protected speech.

Erica Johnstone, of the organization Without My Consent,[3] was quoted recently in the *San Francisco Chronicle* as saying that the bill's current language doesn't adequately address the fact that the content used in revenge porn is often created by the victim. "A lot of times the parties are in a long-distance relationship, and this is the way of establishing intimacy over long distance," she said. (Ms. Johnstone's knowledge of this modern phenomenon is way beyond my pay grade. I was born in an apparently bygone era where merely holding hands tended to induce sweaty palms.)

Other champions of victims' rights point out—a fact that is obvious to me—that strongly discouraging the creation of such images in the first place is critical, because once posted, such salacious material can quickly spread across the Internet, making its total removal near impossible. The threat of uploading intimate pictures and videos, or the promise of removing them, they point out, is reportedly sometimes used not for revenge but to blackmail unfortunately hapless victims for sex or money. More often, the gain that the perpetrator seeks is revenge following a nasty breakup of a relationship, hence the name, revenge porn.

According to a recent story in the *Chronicle,* websites now exist for the explicit purpose of publishing revenge porn—again, a topic way beyond my pay grade and the scope of what we tend to cover in this column. (The pending bill targets the initial uploader of the porn, not the host, in keeping with federal laws that have immunized websites from the arguably inappropriate actions of their users.)

The bill would make it a disorderly conduct offense if a person "photographs or records by any means the image of another, identifiable person with his or her consent who is in a state of full or partial undress in any area in which the person being photographed or recorded has a reasonable expectation of privacy, and subsequently distributes the image with the intent to cause serious emotional distress."

One might well ask why a criminal statute might seem worthy of consideration when, as it is, victims of despicable online publications may sue civilly for defamation, publication of private facts, breach of a confidence, or other similar claims. One obvious answer, according to Colette Vogele, co-founder of Without My Consent, is that the victim would have to be able to afford very significant legal fees to secure the issuance of a subpoena to an online company demanding the IP address that links the real-life perpetrator to the uploaded file, and thousands more to pursue a lawsuit, while a criminal action brought by a public prosecutor would have no such financial impediment.

Another reason proponents argue that such a statute is worthy of serious consideration is that it is often difficult for victims to protect their anonymity in a civil matter. Wouldn't pursuing a civil lawsuit be tantamount to burning your own house down? You'd have to reveal who you are. Your job and your sanity would both be jeopardized.

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Pseudonymity

It is this second, very important consideration that caught my eye since I am on the verge of filing an action in the U.S. District Court for the Northern District of California allowing my client to file his civil lawsuit under a pseudonymous name, like "John Doe," to protect him from ridicule and the loss of his business reputation in a rather different context. It was only when I began to look into the legal requirements for filing pseudonymously that I begin to appreciate the daunting obstacles that exist.

In federal court, a plaintiff who wants to proceed pseudonymously must first file a special motion. Few district courts have local rules that address the procedure for seeking such protection. Though the U.S. Supreme Court has implicitly endorsed the use of pseudonyms, as for example in the famous abortion case, *Roe v. Wade*,[4] the Fifth Circuit may have been the first appellate court to directly confront the question of how one might acquire a cloak of anonymity when it introduced a three-factor test in 1979 in *Southern Methodist University Ass'n of Women Law Students v. Wynne & Jaffe.*[5]

Though the law has evolved somewhat since that Fifth Circuit decision, in general, in the context of a motion, an anxious plaintiff must convince the court that his or her privacy interests outweigh the public's interest in knowing his or her identity. Achieving this might be likened to skiing uphill, since (1) a strong public policy favors the openness of court proceedings and eschews private trials; (2) there may be implications to be drawn from the fact that the practice of filing under pseudonyms is not specifically sanctioned by the Federal Rules of Civil Procedure (FRCP); and, (3) FRCP 10(a) provides that "[i]n the complaint the title of the action shall include the names of all the parties."

However, hope springs eternal, for a seminal case here in the Ninth Circuit, *Does I thru XXIII v. Advanced Textile Corporation*,[6] holds that the threat of deportation of foreign national garment-worker plaintiffs sufficiently outweighed any prejudice to the defendant companies and any right of the public to know the names of the potential deportees. (The Without My Consent website referenced above confronts the difficult issue of pseudonymity directly and provides valuable resources to Cyberian litigators who must wrestle with rather opaque standards for motions to establish anonymity for aggrieved clients.)

Conclusion

While my visceral reaction to the notion of a statute to protect

victims from the online publication of images they themselves created or acquiesced to is negative, my confrontation with the case law that deals with petitions for the right to proceed pseudonymously has given me pause. Perhaps the Judicial Conference, Congress, and our state legislatures would do better for Cyberian victims, and other victims as well, if they focused on providing advocates with clearer and more uniform standards for granting motions for pseudonymous status. ⊙

Endnotes

[1]*See* 18 U.S.C. §1801.

[2]S. B. No. 255, 2013–2014 Reg. Sess. (Cal. 2013).

[3]*Without My Consent,* www.withoutmyconsent.com (last visited Sept. 8, 2013).

[4]*Roe v. Wade,* 410 U.S. 113 (1973).

[5]*Southern Methodist University Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 712-13 (5th Cir. 1979).

[6]*Does I thru XXIII v. Advanced Textile Corporation*, 214 F.3d 1058 (9th Cir. 2000).

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own parents, it was a relatively small step from that point to explaining *why* the different states can have different laws yet all be "correct," provided they do not violate the terms of the federal Constitution.

I had not thought much about that event until recently, when the U.S. Supreme Court ruled that Congress had overstepped its bounds in enacting a statute (Defense of Marriage Act (DOMA)). This act would have prevented federal law from recognizing the legitimacy of same-sex marriages allowed by some of the states. Only a handful of states have laws allowing citizens of the same sex to marry each other, such that DOMA's nullification does not impact large swaths of the country. Understandably, however, the Court's decision that the states have the exclusive ability to define marriage evoked strong reactions from both sides of the political spectrum. Whatever one's position on the DOMA case, the decision reflects the federalism concept that lies at the heart of our system of governance. ⊙