Image Rights and Image Wrongs: Image Based Sexual Abuse and Online Takedown

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# INTRODUCTION

Image-Based Sexual Abuse (IBSA) is a spectrum of behaviours which centre on the practice of non-consensually creating and distributing private sexual images.[[2]](#footnote-2) ‘Revenge pornography’ typically occurs when an ex-partner shares private sexual images of their ex in order to seek retribution for the ending of a relationship.[[3]](#footnote-3) Although often referred to as this, the IBSA spectrum is far wider than this narrow conception. It can also involve images which were obtained through hacking of a storage device or software, videos or photos of sexual assault and rape, images obtained through voyeurism, in public (such as ‘upskirting’) or in private, and explicit images which have been manipulated through AI to resemble particular individuals (deepfakes), as well as the re-posting of these images once they have been made available online,[[4]](#footnote-4) the coerced obtaining of such images, and threats to distribute those images. This article discusses the legal mechanisms which are available to the subjects of private sexual images (PSI) that have been publicly shared without their consent to demand removal of their images from online. The article discusses the remedies available where images or videos that show or purport to show a person engaging in sexual activities or in a sexual context have been shared without the consent of the person depicted. It excludes images or videos made for a commercial purpose (such as works of commercial pornography) but includes images which are not necessarily nude – such as ‘upskirting’ or ‘downblousing’[[5]](#footnote-5) images – and images which have been manipulated to depict things which are not true (such as ‘deepfakes’). The article discusses the mechanisms currently available to victims of such image-sharing to request removal of their images from online, and the weaknesses of those systems, before suggesting that a continental-style image right would provide better protection with minimal need for new legislation.

The harms around taking, making, and sharing intimate images without consent are well-known,[[6]](#footnote-6) and there is a clear need for development of the law as it applies to this spectrum of behaviours. The appetite for this is visible in that Law Commission, the statutory body which reviews and suggests reforms to UK law, currently has an ongoing consultation, led by Professor David Ormerod, which launched in July 2019.[[7]](#footnote-7) This article suggests two changes which would expand the number of victims of IBSA who are able to take advantage of legal mechanisms which will assist them in requesting removal of their images from online.

This article focuses on how victims of online image-sharing can achieve takedown of their images, both through compelling the original uploader and compelling the website operator to act to remove or disable access to the image. This article refers only to images in which the subject is over the age of majority, as images where the subject is underage are covered by alternative legislation.[[8]](#footnote-8) The article discusses three legal mechanisms which can be related to PSI, and explains why none of them provide an adequate solution for victims of unauthorised image sharing to achieve removal of the images. The article then suggests that the incremental expansion of image rights is a viable and realistic solution to the weaknesses of the solutions discussed here, giving more victims of image-sharing a tool with which to demand removal of their images from online.

# CURRENT MECHANISMS

## Criminal law

Since 2015, the sharing of PSI with the intent to cause distress is a criminal offence.[[9]](#footnote-9) However, the criminalisation of the original sharing of images has several weaknesses.[[10]](#footnote-10) Section 33 offences have a specific intention requirement – the images must be shared with the intent to cause distress. While this will capture the publicly perceived stereotypical ‘revenge porn’ scenario, it fails to cover the full spectrum of internet users who may participate in unauthorised image sharing. Remedies through the criminal justice system further capture only the original uploader and would not cover reuploading and redistribution to other websites.[[11]](#footnote-11) The criminal offence also remains silent on removal of the images from online. While conviction may require the uploader to remove the images that they posted, the extended timescales of the criminal justice system makes this an inadequate remedy, as the picture will remain available online for the duration of the investigation and prosecution. Section 33 offences are categorised as a communications crime, not a sexual offence, which means that it does not bring with it anonymity – for the offender or the victim.[[12]](#footnote-12) More than a third of victims who complained to the police choose not to proceed with the complaint.[[13]](#footnote-13) A 2018 report by North Yorkshire police indicated that the police were not providing support with practical issues – including image removal.[[14]](#footnote-14) Thus, while the criminal offence of sharing PSI is crucial, its narrow focus makes it an undesirable avenue for removal of images from online. It is only suitable for situations where the uploader is known, and where the victim is willing to proceed with a complaint. There is a need for other mechanisms to achieve removal in situations outside of this specific, narrow, example of a known uploader.

## Privacy law

The implementation of the Human Rights Act 1998 strengthened the development of an avenue in tortious action for those whose privacy has been breached, an area previously lacking in English jurisprudence. *Campbell v MGN[[15]](#footnote-15)* confirmed that there are circumstances in which a reasonable expectation of privacy, combined with the European Convention on Human Rights Article 8 protection of the right to a private and family life,[[16]](#footnote-16) allow the court to issue an injunction preventing distribution of private or confidential information. This tort of Misuse of Private Information (MPI) developed to ensure that right is carefully balanced against the Article 10 right to free speech. Litigation between public figures and media groups has allowed the parameters of the balance to be outlined.[[17]](#footnote-17) However, for the private individual, there is little argument to be made for the distribution of pictures which were never meant to be public. Thus, it is almost inevitable that in a balancing act between Article 8 privacy rights and Article 10 freedom of expression rights concerning PSI, Article 8 will prevail.

Misuse of Private Information has its roots in Breach of Confidence, the classic test for which is from *CoCo v AN Clark[[18]](#footnote-18) –* that the information was confidential, that the recipient knew, or ought to have known, that the information was confidential, and that they distributed it in a way which caused damage to the claimant.[[19]](#footnote-19) The development of MPI, following *Campbell v MGN,* has modified this test to remove the damage element. The court must now consider ‘whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy’.[[20]](#footnote-20) The development of this tort is largely through litigation between public figures and the media, but it is not without precedent that it has been used to prevent unauthorised distribution of PSI. In *ABK v KDT and FGH*, which concerned images of a sexual nature,[[21]](#footnote-21) the Court made an order preventing KDT and FGH from distributing intimate photos of the claimant pending a full hearing. None of the parties involved were public figures. The order did not, as far as is ascertainable, compel retraction of the images sent prior to the case. This case concerned emailed images, rather than uploads to a website, and in these circumstances the ability to retract is more limited – on a website, one can delete a posting, but it is not generally possible to recall or delete an email.[[22]](#footnote-22)

YouTube vlogger Chrissy Chambers used MPI to sue her former partner. [[23]](#footnote-23) He had uploaded videos which depicted them having intercourse to a commercial pornography site named RedTube. By the time Chambers realised the videos existed, they had been online for 18 months, and were on 37 different sites. After trying and failing to have the videos removed, Chambers sought to sue her former partner for MPI, seeking damages. The case settled in January 2018[[24]](#footnote-24) with an agreement to pay damages and to transfer the copyright in the videos from the former partner to Chrissy Chambers herself. The fact that this was an out-of-court settlement means that the ability of the court to make orders on the terms of that settlement is yet untested.

Misuse of Private Information as a tool to demand removal of images from online has several strengths. It provides for injunctive and interim injunctive relief, meaning that the court can prevent distribution of images online. Furthermore, the court could make an order in line with the settlement Chrissy Chambers reached, requiring transfer of copyright in the images or videos to the victim, enabling them to use copyright takedown mechanisms against websites and image hosts.

Tortious privacy actions also have serious limitations in effectiveness. Civil action has very real cost implications. Many victims of unauthorised image sharing will require representation in order to obtain the injunctive relief available, and the costs of such representation can be a barrier to applicants. The costs of court fees can also act as a barrier – Chrissy Chambers had an upfront cost of £20,000, despite her solicitor acting on a no-win, no-fee basis.[[25]](#footnote-25) The timescales are unlikely to be immediate – permanent injunctive orders will not be made until the case has concluded. Interim injunctive relief is a temporary solution pending a full case, and the mental impact on a victim-survivor in such circumstances is likely to compound what is already often a deeply traumatic experience, akin to a sexual assault or violation.[[26]](#footnote-26) It is also possible that faked images, such as ‘deepfakes’ and ‘photoshops’ would fall not within a tortious privacy action, but a tortious defamation action. This distinction is unnecessary and burdensome.

As the Chambers case demonstrates, privacy is not a catch-all solution. Although the defendant in those circumstances paid substantial damages to his former partner, he could not and did not remove the video from the 37 sites it had spread and been reuploaded to. His transferring the copyright to Chambers meant that she was able to use copyright takedown mechanisms – as discussed in the following section – but the privacy settlement itself was not a solution. Related to this point, MPI actions tend to be taken against the original distributor of the private information (the ex-boyfriend,[[27]](#footnote-27) the affair partner’s wife,[[28]](#footnote-28) etc). This presents difficulties where, for example, the images have been obtained as a result of a hacking of an online storage system (as was the case for over 100 Hollywood actresses in 2014).[[29]](#footnote-29) The action can be taken against those who have access to the material, (as was the case in *Contostavlos v Mendahun[[30]](#footnote-30)*)but this neither removes the material from online, nor prevents others who are not named from spreading it further in the meantime. Thus, although MPI is frequently an appropriate action against the original uploader or distributor of private images, it is a less appropriate tool to use against websites which are hosting the material. There is a need for a further tool which will provide the ability to demand removal of images from online

## Copyright law

Copyright is a surprisingly effective tool for removal of non-consensual images from online.[[31]](#footnote-31) Where the subject of the image is also the photographer, the copyright which automatically arises is held by the subject,[[32]](#footnote-32) and thus the rights of distribution and reproduction which are inherent in copyright are also held by them.[[33]](#footnote-33) Asserting those rights gives the subject the ability to require the removal of an image from where it has been made available, or seek damages for that distribution. This also applies to websites and website operators. Once an information society service is made aware of a copyright infringement they must act expeditiously to remove or disable access to the material. If they do not do so, they can be made liable for infringement of copyright.[[34]](#footnote-34)

The question is to what proportion of IBSA images this provision applies. While specific numbers are difficult to quantify, studies have indicated that the vast majority of ‘revenge porn’ images are self-portraits (or ‘selfies’).[[35]](#footnote-35) The Cyber Civil Rights Initiative’s 2013 study suggested that 80% of images were selfies, and that statistic has been repeated multiple times. This would suggest that the proportion is likely still quite large, and thus copyright is an important tool for many victims of revenge porn. The spectrum of IBSA is wider than revenge porn alone, and other forms of IBSA are less likely to be self-taken. Pictures from instances of upskirting or downblousing, videos of rapes or sexual assaults, and voyeuristic images are largely excluded from using copyright mechanisms for removal.

The advantage of copyright as a solution to image removal lies in the system of notice and takedown. In order to avoid liability for copyright infringement, website operators are required to act ‘expeditiously’ to remove or disable access to infringing content once they are notified that it is infringing.[[36]](#footnote-36) There is a similar system in place in the United States, as described in the Online Copyright Infringement Liability Limitation Act.[[37]](#footnote-37) The US system specifies what detail must be included in a notice of copyright infringement, making the process accessible to almost anyone.

There are several strengths in using this as a mechanism to remove PSI. Notice and takedown is a relatively quick and easy process. Once a standard notice has been created with the details of the image concerned, it can be sent to websites which are hosting copies of the image without substantial difficulty. There is no need for legal representation, as takedown notices can be sent by the copyright holder, and templates and guidance can be found online.[[38]](#footnote-38) It has broad coverage of ‘revenge porn’ images, as a vast majority of them are indicated to be selfies. Further, it is reproducible at a relatively large scale, particularly for websites in the US, as there is a requirement for a nominated takedown contact to be made available on all websites.[[39]](#footnote-39) Copyright is also automatic and non-registrable, which means that selfie-takers need not deposit a copy of their intimate images with a central registry to obtain these protections – they arise once the image has been created. Thus, the protections are available as soon as the image comes into existence.[[40]](#footnote-40)

There are also some weaknesses to be considered for copyright as a solution. Copyright protection allowing for image takedown only applies to situations where the person depicted is the copyright holder. There are two scenarios where this is clearly the case – the first, where the subject of the image is the photographer (selfies), and the second, where the copyright has been transferred to the subject. This is seen in Chrissy Chambers’ situation – as part of their settlement, her former partner transferred the copyright in the videos concerned to Chambers, so that she could use notice and takedown to remove her likeness from online.[[41]](#footnote-41)

There is a potential third scenario where copyright could be claimed in a private sexual image which was not taken by the subject – that of joint authorship. Although the argument has not yet been made by victims of IBSA, similar points have been made by celebrities in claiming that a posed photograph attracts a joint authorship copyright credit, where the subject has had some input into pose, lighting, direction, framing, etc.[[42]](#footnote-42) The CDPA allows for joint authorship, but is silent as to what degree of collaboration is required, settling instead on a requirement that the contributions of authors be indistinct from one another.[[43]](#footnote-43) The Court of Appeal, in 2019, discussed in detail the specifics of joint authorship in the case of scriptwriting:

It is the skill and effort involved in creating, selecting or gathering together the detailed concepts or emotions which the words have fixed in writing which is protected in the case of a literary or dramatic work, whether the work is one of sole or joint authorship. Too much focus on who pushed the pen is likely to detract attention from what it is that is protected, and thus from who the authors are.[[44]](#footnote-44)

Applying this to sexual images and videos, there is certainly a compelling argument to be made that sexual images or videos could be subject to joint authorship claims, regardless of who pressed the shutter or began the recording. A video where the camera was in a fixed position which was mutually agreed, for example, or a photograph where the pose was chosen by the subject, not the photographer, or by the subject in conjunction with the photographer could all be works of joint authorship.[[45]](#footnote-45) It is not unprecedented that the subject of an image can claim copyright in the final product.[[46]](#footnote-46) There is also historical precedent that copyright can be held by the subject of a portrait,[[47]](#footnote-47) and the UK IPO acknowledges that the copyright can be held by a person other than the one pressing the camera shutter button.[[48]](#footnote-48) Thus, there is a distinct possibility that copyright could be jointly held by both the subject and the photographer in an intimate image or video. This would be situationally dependent, and would also require that the subject have some input into their depiction on screen.

This leads us neatly onto the biggest weakness of notice and takedown as a tool against IBSA – its lack of full coverage. Copyright is not a suitable tool for victims of IBSA who were not aware of or did not consent to being photographed or filmed. This means that it fails to cover upskirting, downblousing, covert recording, voyeurism, videos of sexual assaults and rapes, and other violations. Thus, although copyright is a good protection, and an efficient tool for removal of images from online for many victims, it is not suitable as the only tool for the removal of PSI from online.

Beyond the lack of coverage, notice and takedown does have other disadvantages. Compliance is not guaranteed. Failure to comply with a takedown request leaves the copyright holder needing to sue the website for copyright infringement.[[49]](#footnote-49) Hunter Moore, founder of one of the earliest revenge porn sites, made his unwillingness to comply with copyright law clear in his statement on ownership of images:

[B]ut when you take a picture of yourself in the mirror, it was intended for somebody else so, actually, the person you sent the picture to actually owns that picture, because it was intended as a gift. So whatever the—that person does with the picture, you don’t even own the nude picture of yourself anymore ... So that’s how I’m protected.[[50]](#footnote-50)

Similar responses can be seen from other sites designed to humiliate and shame the subjects of photos, and sending a notice can result in an escalation of abuse.[[51]](#footnote-51) Nonetheless, copyright remains a powerful tool for controlling the distribution and reproduction of images and videos, and gives many victims of IBSA a legal mechanism which allows them to control the spread of their likeness. Copyright’s greatest weakness is its lack of coverage across all types of image sharing. There is a need for a further tool to allow all victims of image sharing to require takedown of their images. That tool is image rights.

# IMAGE RIGHTS

Image rights as a term generally refers to the right of a person to control the publication of their image. This then gives them a right to control or prohibit the publication of photographs or videos of them, or depictions of them in other formats, such as video game adaptations, their face on a clothing, advertising, or similar. In the UK, there is not currently a single protectable image right. Neither has there been a protectable right of privacy,[[52]](#footnote-52) a fact which was changed by the implementation of the HRA 1998.[[53]](#footnote-53) The time is ripe for a single image right to be introduced which allows for control of one’s image, rather than the patchwork collection of strategies which are currently available.

Image rights, as a term, is often used synonymously with personality rights or and publicity rights.[[54]](#footnote-54) In this context, however, where it concerns the publication of private sexual images, the image right would more properly be described as a privacy right. In order to advocate for an image right in the UK, it is important to understand how they operate in other jurisdictions also.

## United States

In the US, personality rights are protected by a common law protection allowing for a tortious action against a person who infringes on a right of publicity.[[55]](#footnote-55) This right is commercially focused, [[56]](#footnote-56) and the case history demonstrates this.[[57]](#footnote-57) Although the scope and bounds of this right are ever developing,[[58]](#footnote-58) its commercial focus means that it is not a good basis on which to build a privacy-focused image right.

## Guernsey

Guernsey introduced image rights protection by statue in late 2012, becoming the first legislation focused on image rights.[[59]](#footnote-59) Again, commercially focused, the legislation allows the registration of natural persons and joint personalities, as well as fictional characters, and protects all images attributable to the personality.[[60]](#footnote-60) Infringement, however, only occurs when a party uses an image without consent ‘for a commercial purpose or a financial or economic benefit’, [[61]](#footnote-61) which is frequently not the case in IBSA scenarios, which means that it is also not a suitable example to build upon.

Commercially-focused rights are inadequate for privacy protection as they do not take into account circumstances where a website is not run for commercial purposes – websites which are developed or designed solely to humiliate, embarrass, or publicly shame the person depicted in the image arguably do not have a commercial focus, particularly if they do not run advertisements, and therefore would not fall under these commercial rights. This article will move on to consider closer, European jurisdictions which protect the individual’s privacy interests, rather than their commercial interests.

## Germany

In Germany, there is strong protection of personality rights. It has been recognised in the case law of the German Federal Court of Justice since 1954, and is constitutionally guaranteed by the Basic Law, Articles 1 and 2.[[62]](#footnote-62) This heavy protection includes the right to one’s image.[[63]](#footnote-63) Section 22 of the German Law on Copyright in works of Fine Art and Photography states that the consent of a person is needed to display their portrait.[[64]](#footnote-64) The following section places several restrictions on this, including incidental inclusion, and in the public interest and taking into account freedom of expression when dealing with public figures.[[65]](#footnote-65) Similarly to the section on privacy law above, it is unlikely that there are any circumstances in which the subject of an image’s right to privacy would not override a public interest or freedom of expression argument to share a private sexual image.

## France

France has strong protection of image rights. The ‘droit à l’image’ is a privacy protection which prevents the reproduction of an image without the consent of the subject. This derives from the privacy protections of Article 9 of the French Civil Code.[[66]](#footnote-66) This right allows for control over the distribution of one’s image.[[67]](#footnote-67) It was the basis on which Olivier Martinez, a French actor, based his CJEU action against the Sunday Mirror, an English paper, *Martinez.[[68]](#footnote-68)* The personality right in France is equally protective of the privacy of persons depicted, and allows for similar protections in requiring removal of images which breach that right.

## Belgium

Belgium protects the right to control the publication of one’s image, which is conceptualised as both the physical image and aspects of one’s personality and reputation. Hernández González describes the Belgian right as a hybrid personality and publicity right.[[69]](#footnote-69) Distinct from France and Germany, the Belgian right is not mentioned in the Constitution, but can be found in the Belgian Code of Economic Law:

Neither the author nor the owner of a portrait nor any other possessor or holder of a portrait shall have the right to reproduce such portrait or to communicate it to the public without the consent of the person portrayed or the consent of his successors in title during a period of 20 years as from his death.[[70]](#footnote-70)

The Belgian image right provides for consent in both the taking and the distributing of images and permits action for damages and removal of an image where it has been published without consent.[[71]](#footnote-71)

The European-style image right is far more appropriate for protecting private sexual images and controlling the distribution of images or videos which show or purport to show the subject engaging in a sexual act, or in a sexual context. The advantage of the image right is that it encompasses all depictions of a person, whether true or falsified – meaning that it will also cover deepfakes and other ‘photoshopped’ imagery. Further, it encompasses all forms of distribution to the public, and does not change depending on the motivation of the person sharing the image, whether to ‘punish’ the victim or for commercial reasons. However, the distinction between the UK’s approach to image rights and its continental European neighbours gives British victims of image distribution far less power to control or remove their image.

# IMAGE RIGHTS IN THE UK

In contrast to the fellow EU jurisdictions discussed above, the UK has a historical aversion to image rights. Although cases can be seen in the courts for more than a century and a half[[72]](#footnote-72) seeking a right to control the reproduction of images of oneself (and one’s children),[[73]](#footnote-73) the courts are still insistent, as recently as 2013, that a single image right or personality right does not exist: ‘there is today in England no such thing as a free standing general right by a famous person (or anyone else) to control the reproduction of their image.’[[74]](#footnote-74) There is instead a patchwork of legislative and common law provisions which allow people, especially public figures, to control the distribution of their image, including passing off, trade marks, breach of confidence, misuse of private information, advertising standards codes, copyright, and data protection.[[75]](#footnote-75)

A limited image right is acknowledged by courts in specific circumstances: the development of contracts reliant on image rights has created a situation where sportspeople’s image rights are tacitly acknowledged as an asset,[[76]](#footnote-76) and therefore must exist. Discussion of image rights is well-developed in the context of sportspeople.[[77]](#footnote-77) The taxable image right is distinct from the privacy right discussed above and protects the commercial interest in a person’s likeness.[[78]](#footnote-78) This image right is an unsatisfactory solution for victims of IBSA, and does not give them the right to remove their images from online. This is especially unsatisfactory when compared to other EU jurisdictions, like France and Germany, which have robust protections for a person’s image. The Advertising Standards Authority includes in its guidance that images of people should not be used without their consent,[[79]](#footnote-79) creating a situation where images shared without the consent of the subject cannot be used for advertising purposes, but again, this is too limited to cover situations of IBSA.

An image right is an appropriate and effective way to allow people whose privacy has been breached to request removal of the image from public view. This article argues that there is a need for the UK to establish a free-standing image right which allows people to control the publication of their image, where the distribution of that image is a violation of their right to a private and family life, and request removal by a website operator or ISS of an image which has been published without their consent.

In arguing for a freestanding image right, it is important also to consider the obligations of the UK in implementing the ECHR. Discussing the Article 8 right to a private and family life in the context of taking and publishing photos of Princess Caroline of Monaco, the European Court of Human Rights in *von Hannover v Germany (No 2)* stated:

Regarding photos, the Court has stated that a person’s image constitutes one of the chief attributes of his or her personality, as it reveals the person’s unique characteristics and distinguishes the person from his or her peers. The right to the protection of one’s image is thus one of the essential components of personal development. It mainly presupposes the individual’s right to control the use of that image, including the right to refuse publication thereof.[[80]](#footnote-80)

A tacit acknowledgement of image rights as a commercial asset, combined with a variety of potential avenues to protect that image right, leads to a situation where some victims of image-sharing are given an entire arsenal of tools with which they can fight the spread of their private sexual image, while others are left defenceless. A celebrity who is the victim of a deepfake, for example, could make use of passing off, as well as breach of confidence and misuse of private information, or attempt to protect their commercial image rights. By contrast, a private person who is the subject of a deepfake may not be able to make use of many of these tools, as they rest on commercial interests This imbalance means that celebrities, whose livelihood may be based on sharing their lives and image, have more protection than a private person who chooses to share nothing with the public in general. This violates the ethos of the statements of the ECtHR, an institution with which the UK has a generally compliant relationship.[[81]](#footnote-81) Deepfakes in particular present a pressing problem for existing structures of image and video control. A 2019 study into deepfakes available online found that of the roughly 15,000 examples studied, 96% were pornographic in nature.[[82]](#footnote-82) The nature of deepfakes emphasise the serious weaknesses of existing regimes – the person depicted was not involved in creating the video, and will have no copyright claim. The video is not true, and therefore would not necessarily be covered by the privacy right. Given that the same report indicates that the majority of those pornographic deepfakes concern celebrities,[[83]](#footnote-83) these may not be covered by the criminal law as the intention to cause distress is likely not fulfilled. The existence of large numbers of manufactured pornographic videos outlines serious difficulties with the current legal structure surrounding private sexual imagery. The recognition of an image right would ameliorate this difficulty. Thus, a freestanding image right should be introduced and acknowledged, to protect the private interests of all persons, and allow them to control the sharing of their own image. This image right would be more limited than the general personality right which is in place in Germany, France, and Belgium, as it would be limited specifically to situations where the publication of the image infringes on the right of the person depicted to a private and family life. Thus, it might more accurately be conceptualised as a *lex specialis* image right, or a privacy image right.

In line with the discussion of misuse of private information, above, and of the personality right in Germany, this privacy image right would have to be limited by virtue of ECHR Article 10 Freedom of Expression. It could also be limited by statute, similarly to the German KUG, to clarify situations in which the image right cannot be exercised.[[84]](#footnote-84) The bounds of this limitation would be the prerogative of Parliament, but a suggested limitation is to the bounds of private life, balanced against the Article 10 right to freedom of expression. This would then cover all private sexual images of persons who are not in the public eye, and greatly strengthen their ability to prevent further distribution of their image, and further provide protections to persons in the public eye unless there is a compelling freedom of expression reason to counterbalance the invasion of their privacy.

There are several strengths to incrementally expanding the implementation of image rights to cover private sexual images. This increment would be in line with the development of image rights in the UK thus far. The concerns of image protection are not unfamiliar ground. From prevention of publication of private images,[[85]](#footnote-85) to ensuring that images are shared only in the context for which they were created,[[86]](#footnote-86) the examples of cases of the past cover familiar ground to the concerns of ‘revenge porn’ that are visible today.[[87]](#footnote-87) Although alternative avenues of redress were available for those cases (such as breach of confidence in the case of *Strange)*, the increase in the frequency and severity of image sharing requires that a better solution be found now. The ease with which an image can be distributed and reproduced means that a quicker system is needed – and acknowledging a freestanding image right would do that, by bringing PSI within the scope of the E-Commerce Directive. Much like the increase in paparazzi photography resulted in extra protections for celebrities,[[88]](#footnote-88) the increase in quantity of IBSA requires a similar action in expanding the protections offered by the law. An image right which acknowledges the necessity of being able to control the distribution of images of oneself in their most private moments would be an appropriate expansion.

This article argues that the introduction of a statutory image right would then bring the distribution of private sexual images without the consent of the person depicted within the bounds of the E-Commerce Directive and the notice and takedown regime. This is specifically related to the wording of the Directive – the phrasing used does not refer specifically to copyright infringement, but rather to ‘illegal activity or information’.[[89]](#footnote-89) A statutory image right would then bring the non-consensual distribution of PSI (regardless of motive, in contrast to the criminal law discussed above), within the bounds of the notice and takedown system envisaged in the Directive. Thus, where an ISS is notified that they are hosting an image which is in violation of an image right, they would be required to act expeditiously to remove, or disable access to, that image.[[90]](#footnote-90) The advantage of granting image rights would also be that they would apply to any depiction of the person, regardless of whether it is a true image or artificially created (such as deepfakes or photoshops), and regardless of whether the image was captured by the subject, or by another party, avoiding the difficulties posed above by privacy as a solution and copyright as a solution. Notice and takedown is the most efficient, most affordable, and most accessible route to removal of images from online, and private image rights present a route which allows all victims of IBSA to utilise an existing system to control the distribution of their images. While private image rights would also potentially create an additional avenue of redress for the victim of image-sharing against the original image uploader, and may have a chilling effect reducing the number of images uploaded, consideration of these effects are outside the scope of this article. As discussed in the section ‘Criminal Law’ above, where uploaders cannot be identified, an additional form of action is required to remove images.

There are, of course, concerns which would come attached to an expansion of image rights. In line with the discussion above, one of these would be the balance between the Article 8 privacy right and the Article 10 freedom of expression right. In circumstances of IBSA, it is unlikely that freedom of expression would override the right to a private life in most, if not all, circumstances. The lack of private persons’ image as a commercial asset would by nature limit the number of potential cases in image rights which would be taken. Once the assertion has been made that an image right exists in PSI, it is likely that websites would comply with E-Commerce Directive notices, in order to avoid the potential liability that not removing the image would open them up to, although this is not guaranteed. Where an ISS believes they are not hosting illegal content, they can refuse to comply with the notice.[[91]](#footnote-91) There is no automatic penalty for failure to comply, but this does open the ISS to liability for suit.[[92]](#footnote-92) This would require the person depicted in the image to sue the website for breach of image rights, and consequently would require that the person depicted prove that they are the person depicted, that the image was illegal, and that the ISS failed to comply with a valid takedown notice. This is not a feasible solution at scale, due to time, and financial constraints. Moreover, it may even be unfeasible to take suit against a single malicious ISS – a lawsuit about failing to remove an image from online is likely to result in the reappearance of that image online if the parties speak publicly about the suit. Equally, notice and takedown, even if complied with, can fail to provide a permanent solution to removing content from online, and reappearances of content must always be, if not expected, then certainly prepared for.[[93]](#footnote-93) While larger companies do generally comply with image removal requests – Twitter,[[94]](#footnote-94) Facebook,[[95]](#footnote-95) and Google[[96]](#footnote-96) all have facilities to request removal of non-consensually shared private sexual images – a legal basis for removal requests would strengthen the position of victims, and prevent their ability to request removal of their images being denied by a change of website policy, or by the fact that the victim does not have an account on that website.[[97]](#footnote-97)

The advantages of the expansion of image rights beyond the commercial image of public figures into the realm of private sexual images far outweigh the limitations of notice and takedown as a system. Introducing an image right bounded by the right to a private and family life would be a relatively simple and effective step to expand existing protections beyond the limited people currently able to take advantage of notice and takedown to remove their images from online, and encompass a greater part of the many people[[98]](#footnote-98) whose lives are adversely affected by sharing of PSI.

# CONCLUSION

This article has discussed the difficulty which a victim-survivor of IBSA may face in attempting to remove their private sexual images or videos from online. It is clear from the discussion above and the existing literature that IBSA as a spectrum of issues is inadequately dealt with in the legislature, and acknowledgement of this is also clear in the Law Commission review of the law around taking, making, and sharing sexual images. Victims of IBSA find themselves navigating a complex tangle of avenues for legal redress and removal of private sexual images and videos which are expensive, obscure, and impractical or sometimes even inapplicable. Victims of image-sharing, particularly image-sharing where the subject was not the author of the work, find themselves without adequate legal avenues to protect their privacy and request removal of images or videos from online. The expansion of image rights in English law would alleviate many of these difficulties and introduce a route to legal action which is affordable, accessible, and effective. The incremental expansion of image rights to create a general image right in images of persons in their private and family life would create a comprehensive avenue for victims of crime to prevent the further spread of their images.

Expanded image rights alone would not be a perfect solution – notice and takedown is less effective against peer-to-peer sharing of images and videos through, for example, email or messaging services, and while takedown is effective, staydown is less so.[[99]](#footnote-99) There are many facets to the spectrum of IBSA, and in some situations no action is the correct course.[[100]](#footnote-100) These weaknesses are not enough to outweigh the overall benefits of expanding private image rights to private persons. The introduction of a freestanding image right would open avenues of new redress to victims of IBSA, and provide a solution to private persons who are the victim of deepfakes. It would also reduce the confusing patchwork of solutions available to victims of image-sharing by bringing all forms of intimate image-sharing under a single, encompassing umbrella right, and empowering victims of IBSA to assert their rights and demand removal of their private images from online.

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2. Clare McGlynn, Erika Rackley, Ruth Houghton, ‘Beyond “Revenge Porn”: The Continuum of Image Based Sexual Abuse’ (2017) 25(1) Fem Legal Stud 25. [↑](#footnote-ref-2)
3. Andrew Koppelman, ‘Revenge Pornography and First Amendment Exceptions’ (2016) 65 Emory L J 661; Shenal Desai, ‘Smile for the Camera: The Revenge Pornography Dilemma, California’s Approach and Its Constitutionality’ (2016) 42 Hastings Const L 443; Cyber Civil Rights Initiative, ‘Infographic: The Anatomy Of An Effective Revenge Porn Law’ (23 January 2015, Cyber Civil Rights Initiative) <https://www.cybercivilrights.org/anatomy-effective-revenge-porn-law/> accessed 30 August 2019. [↑](#footnote-ref-3)
4. Jenna K Stokes, ‘The Indecent Internet: Resisting Unwarranted Internet Exceptionalism in Combating Revenge Porn’ (2014) 29 Berkeley Tech L J, 929; Clay Calvert, ‘Revenge Porn and Freedom of Expression: Legislative Pushback to an Online Weapon of Emotional and Reputational Destruction’ (2015) 24 Fordham Intell Prop Media & Ent L J 675. [↑](#footnote-ref-4)
5. Clare McGlynn, Erika Rackley, ‘Image-Based Sexual Abuse’ (2017) 37(3) Oxford Journal of Legal Studies 534, 542. [↑](#footnote-ref-5)
6. Samantha Bates, ‘Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors’ (2016) 12(1) Feminist Criminology 22, 38-40; McGlynn and Rackley (n 4), 546. [↑](#footnote-ref-6)
7. Law Commission, ‘Taking, making and sharing intimate images without consent’ (2019) <http://www.lawcom.gov.uk/project/taking-making-and-sharing-intimate-images-without-consent/> accessed 23 August 2019. [↑](#footnote-ref-7)
8. Protection of Children Act 1978, c. 37 (as amended). [↑](#footnote-ref-8)
9. Criminal Justice and Courts Act 2015 c 2, s 33. [↑](#footnote-ref-9)
10. Alex Dymock and Charlotte Van der Westhuizen, ‘**A dish served cold: targeting revenge in revenge pornography’ (2018) 39 Legal Studies 361.** [↑](#footnote-ref-10)
11. Ibid, 366. This point leads on from the first in that reuploaders or sharers of an image are unlikely to have the intention to cause distress as it becomes increasingly unlikely that they know the person depicted in the image. For motivations of image sharers, see Cyber Civil Rights Initiative (n 2). [↑](#footnote-ref-11)
12. Abby Young-Powell, ‘Revenge porn should be made sexual offence so victims can be granted anonymity, campaigners say’ (*Independent,* 23 May 2019). <https://www.independent.co.uk/news/uk/home-news/revenge-porn-sexual-offence-victims-anonymous-campaigners-say-a8920496.html> accessed 30 August 2019. [↑](#footnote-ref-12)
13. Ben Robinson and Nicola Dowling, ‘Revenge porn laws ‘not working’, says victims group’ (*BBC News,* 19 May 2019) <https://www.bbc.co.uk/news/uk-48309752> accessed 30 August 2019. [↑](#footnote-ref-13)
14. North Yorkshire Police, Fire and Crime Commissioner, ‘Suffering in Silence: Why revenge porn victims are afraid and unwilling to come forward because of a fear they’ll be named and shamed – and why that needs to change’ (2018) <http://www.nomorenaming.co.uk/wp-content/uploads/2018/11/Suffering-in-Silence-2018.pdf> accessed 30 August 2019. [↑](#footnote-ref-14)
15. [2004] UKHL 22. [↑](#footnote-ref-15)
16. European Convention on Human Rights (as amended), Article 8, implemented through the Human Rights Act 1998, c 42. [↑](#footnote-ref-16)
17. **See generally**, Geoffrey Gomery, ‘Whose autonomy matters? Reconciling the competing claims of privacy and freedom of expression; (2007) 27(3) Legal Studies 404. [↑](#footnote-ref-17)
18. *Coco v, AN Clark (Engineers) Ltd* [1969] RPC 41; [1968] FSR 415. [↑](#footnote-ref-18)
19. ibid, 47 Megarry J. [↑](#footnote-ref-19)
20. *Campbell* (n 14) 21. [↑](#footnote-ref-20)
21. [2013] EWHC 1192 (QB). [↑](#footnote-ref-21)
22. Peter Bentley, ‘Is It Possible to Delete a Sent Email?’ (Science Focus, no date) <https://www.sciencefocus.com/future-technology/is-it-possible-to-delete-a-sent-email/> accessed 30 August 2019. [↑](#footnote-ref-22)
23. Jenny Kleeman, ‘The YouTube star who fought back against revenge porn – and won’ (The Guardian, 18 January 2018) <https://www.theguardian.com/news/2018/jan/18/chrissy-chambers-youtube-revenge-porn-legal-victory> accessed 30 August 2019. [↑](#footnote-ref-23)
24. **Ibid**. [↑](#footnote-ref-24)
25. Ibid. [↑](#footnote-ref-25)
26. **Bates (n 5) 38-9**. [↑](#footnote-ref-26)
27. As was the case for Chambers: Kleeman (n 22). [↑](#footnote-ref-27)
28. As in *ABK* (n 20). [↑](#footnote-ref-28)
29. Mediareporting of the hacks dubbed it ‘celebgate’ or ‘the fappening’ (a portmanteau of happening and ‘fapping’, slang for masturbation): Kashmira Gander, ‘The Fappening: After the Third Wave of Leaked Celebrity Photos, Why Can’t We Stop It?’ (*Independent,* 29 September 2014) <https://www.independent.co.uk/life-style/gadgets-and-tech/news/the-fappening-after-the-third-wave-of-leaked-celebrity-photos-why-cant-we-stop-it-9763528.html> accessed 1 July 2019. [↑](#footnote-ref-29)
30. [2012] EWHC 850 (QB). [↑](#footnote-ref-30)
31. Amanda Levendowski, ‘Using Copyright to Combat Revenge Porn’ (2014) 3 NYU Journal of Intell Prop & Ent Law 441-442. [↑](#footnote-ref-31)
32. Copyright Designs and Patents Act 1988c. 48, s 9 [CDPA]. [↑](#footnote-ref-32)
33. s 16 CDPA (n 31). [↑](#footnote-ref-33)
34. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market OJ L 178 (E-Commerce Directive) Art 14 (1) (b) [E-Commerce Directive]. [↑](#footnote-ref-34)
35. Cyber Civil Rights Initiative, Proposed CA Bill Would Fail to Protect Up to 80% of Revenge Porn Victims (Press Release, 10 September 2013); Amanda Levendowski, ‘Our best Weapon Against Revenge Porn: Copyright Law?’ (4 February 2014, *The Atlantic)* <https://www.theatlantic.com/technology/archive/2014/02/our-best-weapon-against-revenge-porn-copyright-law/283564/> accessed 21 August 2019. [↑](#footnote-ref-35)
36. E-Commerce Directive (n 33). [↑](#footnote-ref-36)
37. Online Copyright Infringement Liability Limitation Act 1998, 17 USC § 512. [↑](#footnote-ref-37)
38. **There are many examples available online, which range from the generalist, such as IPWatchdog, one of the top 100 legal blogs in the US, to the specialised, which are designed for specific content types, such as SFF writing: Gene Quinn, ‘Sample DMCA Take Down Letter’ (6 July 2009, *IPWatchdog)*** [**https://www.ipwatchdog.com/2009/07/06/sample-dmca-take-down-letter/id=4501/**](https://www.ipwatchdog.com/2009/07/06/sample-dmca-take-down-letter/id%3D4501/) **accessed 1 October 2019; Science Fiction and Fantasy Writers of America, ‘Sample DMCA Generator for Authors’ (27 July 2010, *SWFA.org)*** [**https://www.sfwa.org/2010/07/sample-dmca-generator-for-authors/**](https://www.sfwa.org/2010/07/sample-dmca-generator-for-authors/) **accessed 1 October 2019; Sara F Hawkins, ‘How To File A DMCA Takedown Notice’ (4 October 2012, *Sara F Hawkins Attorney at Law)*** [**https://sarafhawkins.com/how-to-file-dmca-takedown/**](https://sarafhawkins.com/how-to-file-dmca-takedown/) **accessed 1 October 2019; Jay Lee, ‘Using the DMCA to Stop the Copyright Infringement of Your Photos’ (10 July 2013, *Peta Pixel)*** [**https://petapixel.com/2013/07/10/using-the-dmca-to-stop-the-copyright-infringement-of-your-photos/**](https://petapixel.com/2013/07/10/using-the-dmca-to-stop-the-copyright-infringement-of-your-photos/) **accessed 1 October 2019.** [↑](#footnote-ref-38)
39. Section 512(c)(2) 17 USC (n 36). [↑](#footnote-ref-39)
40. The Berne Convention forbids formalities on copyright grant (Berne Convention for the Protection of Literary and Artistic Works 1886, Article 5(2)), but in order to claim damages in copyright in the US, the work must be registered (17 USC § 412). However, notice and takedown applies regardless of copyright registration status. [↑](#footnote-ref-40)
41. Kleeman, (n 22). [↑](#footnote-ref-41)
42. An argument notably made by Gigi Hadid, the case was dismissed before the merits of the discussion could be heard: Hayleigh Bosher, ‘Gigi Hadid, Smile for the Copyright’ (The IPKat 1 July 2019) <http://ipkitten.blogspot.com/2019/07/gigi-hadid-smile-for-copyright.html>  accessed 16 August 2019, discussing *Xclusive-Lee, Inc. v. Hadid* (1:19-cv-00520) (2019 District Court, EDNY). However, given the quantity of supermodel cases pending, there is some likelihood that the argument may be made again before long: The Fashion Law ‘From Gigi Hadid and Nicki Minaj to Versace and Marc Jacobs: A Running List of Paparazzi Copyright Suits’ (13 August 2019, The Fashion Law) [http://www.thefashionlaw.com/home/from-ariana-grande-and-nicki-minaj-to-monse-and-marc-jacobs-a-look-at-the-boom-in-paparazzi-copyright-suits](http://www.thefashionlaw.com/home/from-ariana-grande-and-nicki-minaj-to-monse-and-marc-jacobs-a-look-at-the-boom-in-paparazzi-copyright-suits%20) accessed 21 August 2019. [↑](#footnote-ref-42)
43. CDPA (n31) s 10. [↑](#footnote-ref-43)
44. *Kogan v Martin and others* [2019] EWCA Civ 1645 at [41]. [↑](#footnote-ref-44)
45. *Slater v Wimmer* [2012] EWPCC states that where there is no express agreement to the contrary, the producer and principal director of a film are the joint holders of the copyright. In a sexual context, provided both parties are consenting and contributing to the direction or production of the film, the same assumption could be made. See Enrico Bonadio and Lorraine Lowell Neale, ‘Joint ownership of films in the absence of express terms’ (2012) 7(7) JIPLP 493. [↑](#footnote-ref-45)
46. Indeed, this was the argument made by PETA on behalf of the crested macaque in the ‘monkey selfie’ case, although they failed to convince the court that a monkey had standing to sue for copyright infringement: Aislinn O’Connell, ‘Monkeys do not have standing under US Copyright Act’ (2018) 13(8) JIPLP 607. [↑](#footnote-ref-46)
47. Elena Cooper, *Art and Modern Copyright: The Contested Image* (2018 CUP): See particularly chapter 5, Art, Copyright and the ‘Face’ 204. [↑](#footnote-ref-47)
48. Intellectual Property Office, ‘Copyright Notice: digital images, photographs and the internet’ (2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/481194/c-notice-201401.pdf> accessed 30 August 2019, 2. [↑](#footnote-ref-48)
49. This is not always entirely effective: Tobias Lauinger and others, ‘Clickonomics: Determining the Effect of Anti-Piracy Measures for One-Click Hosting’ (2013) Presented at 20th Annual Network and Distributed System Security Symposium (NDSS 2013). [↑](#footnote-ref-49)
50. Bob Garfield, ‘Revenge Porn’s Latest Frontier’ (6 December 2013, On the Media) <https://www.wnycstudios.org/story/revenge-porns-latest-frontier> accessed 21 August 2019. [↑](#footnote-ref-50)
51. Levendowski (n 30) 443-4. Further, a DMCA takedown notice requires that the sender of the notice include contact details, which can open them up to abuse. For this reason, online tools such as the Australian eSafety Commissioner recommends setting up an email address specifically for takedown requests and not using your full name: eSafety Commissioner, ‘Report to Unlisted Sites’ (Image-Based Abuse, no date) <https://www.esafety.gov.au/image-based-abuse/action/remove-images-video/report-to-social-media-service-website/how-to-report-to-unlisted-sites#beware accessed> 30 August 2019; Drawing attention to a thing which was previously unnoticed can lead to greater attention being placed on it – if a picture has not been widely shared or associated with a victim’s name, sending a takedown notice to a malicious site may result in a ‘Streisand Effect’ which actually worsens the problem: Sue Jansen and Brian Martin ‘The Streisand effect and censorship backfire’ (2015) 9 International Journal of Communication 656. [↑](#footnote-ref-51)
52. *Kaye v Robertson* [1991] FSR 62. [↑](#footnote-ref-52)
53. *Campbell* (n 14). [↑](#footnote-ref-53)
54. Jeremy Blum and Tom Ohta, ‘Personality Disorder: strategies for protecting celebrity names and images in the UK’ (2014) 9(2) JIPLP 137. [↑](#footnote-ref-54)
55. Blum and Ohta (n 53) 144. [↑](#footnote-ref-55)
56. Melville B Nimmer, ‘The Right of Publicity’ (1954) 19(2) Law and Contemporary Problems 203. [↑](#footnote-ref-56)
57. *Vanna White v Samsung Electronics America,* Inc 971 F. 2d 1395 (9th Cir. 1992) is perhaps the best example of this, which took the ‘get-up’ of a television show presenter to be capable of protection. [↑](#footnote-ref-57)
58. See generally Columbia Journal of Law and the Arts (2019) 42(3) – a special issue dedicated to the proceedings of the symposium ‘Owning Personality: The Expanding Right of Publicity’ which is filled with thoughtful commentary on the form and scope of the US Personality Right. [↑](#footnote-ref-58)
59. The Image Rights (Bailiwick of Guernsey) Ordinance, 2012. [↑](#footnote-ref-59)
60. David Evans and Jason Romer, ‘A Guide to Guernsey image rights’ (2013) 8(10) JIPLP 761. [↑](#footnote-ref-60)
61. Blum and Ohta (n 53) 144. [↑](#footnote-ref-61)
62. Corinna Coors, ‘Celebrity image rights versus public interest: striking the right balance under German law’ (2014) 9(10) JIPLP 835, 835. [↑](#footnote-ref-62)
63. BGH, 1 December 1999, I ZR 49/97 *Marlene Dietrich*—BGHZ 143, 214. [↑](#footnote-ref-63)
64. § 22, Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie <https://www.gesetze-im-internet.de/kunsturhg/__22.html> accessed 1 October 2019. [↑](#footnote-ref-64)
65. Coors (n 61) 836. [↑](#footnote-ref-65)
66. Code Civil (France) Article 9, <https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006419288&cidTexte=LEGITEXT000006070721>. [↑](#footnote-ref-66)
67. Elisabeth Logeais and Jean-Baptiste Schroeder, ‘The French Right of Image: An Ambiguous Concept Protecting the Human Persona’ (1998) 18 Loyola of Los Angeles Entertainment Law Review 511. [↑](#footnote-ref-67)
68. Joined Cases C-509/09 and C-161/10 *eDate Advertising GmbH v X* and *Olivier Martinez and Robert Martinez v MGN Limited* [2011] ECR I10269. [↑](#footnote-ref-68)
69. Lennin Hernández González, ‘Is a Selfie Worth a Thousand Words? The Right to Protection of One’s Image from a Belgian Perspective’ (2017) 28(1) Entertainment LR 3, 4. [↑](#footnote-ref-69)
70. Ibid, citing Belgian Code of Economic Law (BCEL) art.XI.174. [↑](#footnote-ref-70)
71. Ibid 7. [↑](#footnote-ref-71)
72. *Prince Albert v Strange* [1849] EWHC Ch J20 is sometimes referred to as the first privacy case. Further examples include *Pollard v Photographic Company* (1888) 40 Ch D 345, leading through to *Kaye v Robertson* [1991] FSR 62, and *Spencer v UK* (1998) 25 EHRR CD105, before culminating in *Campbell v Mirror Group Newspapers* (n 14) which, although it restricted the publication of images, did not grant an image right. [↑](#footnote-ref-72)
73. *Murray v Big Pictures Ltd* [2008] EWCA Civ 446 made a privacy argument for the restriction of the publication of images of author JK Rowling’s child but, again, was not on an image right basis, but on misuse of private information, as discussed above. [↑](#footnote-ref-73)
74. *Fenty v Arcadia* [2013] EWHC 2310 (Ch). [↑](#footnote-ref-74)
75. For more discussion on this patchwork of tools, see generally Blum and Ohta (n 53). [↑](#footnote-ref-75)
76. *Sports Club & Ors v HM Inspector of Taxes* (2000) Sp C 253, which discussed whether payments for use of a sportsperson’s image were a payment for an image right or a benefit in kind, and decided the former was the correct interpretation. [↑](#footnote-ref-76)
77. Richard Haynes, ‘Footballers’ Image Rights in the New Media Age’ (2008) 7(4) European Sport Management Quarterly 361. [↑](#footnote-ref-77)
78. Ian Blackshaw, 'Protecting Sports Image Rights in Europe' (2005) 6 Bus Law Int’l 270. [↑](#footnote-ref-78)
79. Advertising Standards Authority, The CAP Code: The UK Code of Non-broadcast Advertising and Direct and Traditional Marketing. (Edition 12), rule 6.1. [↑](#footnote-ref-79)
80. *von Hannover v Germany* (No.2) (40660/08 and 60641/08) [2012] 55 EHRR 15 at [96]. [↑](#footnote-ref-80)
81. Zoe Jay, ‘Keeping rights at home: British conceptions of rights and compliance with the European Court of Human Rights’ (2017) 19(4) The British Journal of Politics and International Relations 842. [↑](#footnote-ref-81)
82. **Henry Ajder, Giorgio Patrini, Francesco Cavalli & Laurence Cullen, ‘*The State of Deepfakes: Landscape, Threats, and Impact*’ (DeepTrace, 2019), 3.** [↑](#footnote-ref-82)
83. **Ibid, 7.** [↑](#footnote-ref-83)
84. Kunsturhebergesetz, § 23 lists several exceptions, including meetings and elevators, and incidental inclusion in images. [↑](#footnote-ref-84)
85. *Prince Albert v Strange* (n 71). [↑](#footnote-ref-85)
86. *Pollard* (n 71). [↑](#footnote-ref-86)
87. McGlynn, Rackley & Houghton (n 1). [↑](#footnote-ref-87)
88. Per *Campbell* (n 14). [↑](#footnote-ref-88)
89. E-Commerce Directive, Article 14**(1)(a)** (n 33). [↑](#footnote-ref-89)
90. E-Commerce Directive, Article 14 (n 33). [↑](#footnote-ref-90)
91. For a fuller discussion of notice and takedown, as well as counter-notice and abuses of notice and takedown, see Jeffrey Cobia, ‘The Digital Millennium Copyright Act Takedown Notice Procedure: Misuses, Abuses, and Shortcomings of the Process’ (2009-10) 10(1) Minn JL Sci and Tech 387. [↑](#footnote-ref-91)
92. E-Commerce Directive (n 33), Section 4, generally, clarifies that where an ISS complies with the specifics of the Directive, Member States must implement systems which do not render the ISS liable. The inverse is then presumably true – where an ISS does not comply, they can be rendered liable. [↑](#footnote-ref-92)
93. Lauinger and others (n 48), 3. [↑](#footnote-ref-93)
94. Google, ‘Removing Content From Google – Legal Help’ <https://support.google.com/legal/troubleshooter/1114905?hl=en-GB> accessed 4 October 2019. [↑](#footnote-ref-94)
95. Facebook, ‘Report a Privacy Violation’ <https://www.facebook.com/help/contact/144059062408922> accessed 4 October 2019. [↑](#footnote-ref-95)
96. Twitter, ‘Private Information Policy’ <https://help.twitter.com/en/rules-and-policies/personal-information> accessed 4 October 2019. [↑](#footnote-ref-96)
97. Facebook’s privacy violation reporting system only works when logged into a Facebook account. Thus, a victim of IBSA who does not use Facebook must create a profile before they can use the report feature, or request a friend to report the image on their behalf: Facebook (n 91). [↑](#footnote-ref-97)
98. For an assessment of the scope of image-based abuse, see section 6.3 The scope of the problem in Julia Davidson and others, ‘Adult Online Hate, Harassment and Abuse: A Rapid Evidence Assessment’ (2019, UK Council for Internet Safety). Available at : <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/811450/Adult_Online_Harms_Report_2019.pdf> accessed 23 August 2019. [↑](#footnote-ref-98)
99. Lauinger and others (n 48), **11**. [↑](#footnote-ref-99)
100. See generally Margaret Talbot, ‘The Attorney Fighting Revenge Porn’ (27 November 2016, *The New Yorker)* <https://www.newyorker.com/magazine/2016/12/05/the-attorney-fighting-revenge-porn> accessed 4 October 2019. [↑](#footnote-ref-100)