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Producing and/or Distributing Intimate Images of a Person without its Consent

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Abstract

Modern times have created different types of new crimes unknowable to the criminal law doctrine before. One of these new crimes is unlawful distribution of intimate images of person in public without its consent, including distribution in Internet. In the world practice this action usually named as “nonconsensual porn”. Nowadays this type of unlawful actions is actively studied in foreign law systems, some of these recently criminalized it; however in the Russian law “nonconsensual porn” is not popular theme for researching in doctrine and also in practice, although the act itself exists. Dispositions of a number of articles of Chapters 19 and 25 of Special part of the Criminal Code of Russian Federation only partially cover the act mentioned; therefore, the need to change the law is already brewing due to the need of modernization of criminal legislation in connection with various ways of committing such a crime. Focusing on the ways of committing the researched act, authors identify and explore three ways of creating “nonconsensual porn”: its production by secret shooting, the production of intimate images of a person with the consent of the person himself and the production of “nonconsensual porn” by using computer technologies. Authors also made an attempt to differentiate the studied act with the already existing crimes of the Special Part of the Criminal Code (Articles 128.1, 137, 242, etc.). The subject of that research is “nonconsensual porn” as an unlawful act. The aim of the research is creating the complex model of offence of “nonconsensual porn” in Russian criminal law system and explanation of necessity of criminalization this act as an

independent crime. The need of protection of people's rights from "nonconsensual porn" especially by criminal law because of the danger of that act, differentiation "nonconsensual porn" from other crimes and need of criminalization of that act in the Russian criminal law is proving by authors. Present research provides significant thesis for developing of study of criminal law and formulate drafts in the Russian Criminal Code, what gives the practical meaning to the work.

Keywords

"nonconsensual porn"; privacy; violation of privacy; "nonconsensual distribution"; deepfakes; crimes in Internet .

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Introduction

Digitalization has become ubiquitous and has penetrated absolutely every sphere of human existence. Persons can broadcast their daily lives on the Internet in real time and can stay online 24 hours a day, showing their audiences their sports activities, shopping, cooking and eating, walking, meeting friends, etc. etc. etc. There are no taboo topics online anymore, and a number of people have been making their sex lives public for a long time. For example, in the last few years, the sex industry has been completely transformed by the Only Fans website that has become a major platform for people to display intimate material of themselves and monetise that display[1]. In the present case, where a person voluntarily and of their own free will produces and publishes their own pornographic material, there is no question of harm caused by such production in terms of their individual rights and freedoms, whereas from the point of view of public law this act should be unambiguously classified under Article 242 of the Criminal Code of the Russian Federation (hereinafter — the Criminal Code)[2]. In the case when such materials are published without the consent of the person depicted in them and against their will, the offence requires a different qualification.

[1] Only Fans is the site where porn is more intimate than ever. Available at: URL: https://www.dazeddigital.com/science-tech/article/38717/1/onlyfans-is-the-site-where-porn-is-more-intimate-than-ever (accessed: 07.12.2022)

[2] See: Criminal Code of the Russian Federation. 13.06.1996 No. 63-FZ // Corpus of Legislation of the Russian Federation. 17.06. 1996. No. 25. P. 2954.

1. Non-consensual Porn as a New Legal Category in Domestic Criminal Law

The phenomenon in question, when intimate materials are published without the consent of the person depicted in them, has received in doctrine the established name of "revenge porn" [Waldman A., 2017]; However, such pornographic material is not always disseminated out of a desire for revenge, hence in general we should speak not so much of a form of revenge but rather of a violation of privacy[3], that gives rise to a more precise term — "non-consensual porn". It should be noted that it is not always pornographic material that is to be disseminated, as the title with the word "porn" may imply: the main parameter is that the material must have a sexual context [Crofts T., 2020: 509].

In Russia, as opposed to a number of foreign countries, this topic does not have a special legal regulation. Thus, the topic in question is particularly relevant in the United States, where between 2013 and 2017 the number of states that criminalised the dissemination of intimate images of a person without their consent rose from three to thirty-four [4] [5]. An initiative to introduce a federal law criminalising the act in question is being discussed at a governmental level[6]; and lawyers specialising in sexual privacy have emerged in the legal profession[7]. A new chapter in the development of the topic is being written in the United Kingdom where in July 2022 the Law Commission made recommendations for improving the law to protect victims of sexual abuse in the form of the use of intimate images, including a recommendation to criminalise such acts, and in November 2022 the United Kingdom Government announced the approval of that recommendations[8].

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[3] Available at: URL: https://www.huffpost.com/entry/how-to-defeat-revenge-porn_b_7624900 (accessed: 07.12.2022)

[4] Ibid.

[5] It's Time For Congress To Protect Intimate Privacy / Available at: URL: https://www.huffpost.com/entry/revenge-porn-intimate-privacy-protection-act_b_11034998 (accessed: 07.12.2022)

[6] Available at: URL: https://speier.house.gov/press-releases?ID=FB99CA92-BFA3-4E6A-AA97-56AE155C46E3 (accessed: 12.12.2022)

[7] The Attorney Fighting Revenge Porn / Available at: URL: https://www.newyorker.com/magazine/2016/12/05/the-attorney-fighting-revenge-porn (accessed: 07.12.2022)

[8] Available at: URL: https://www.lawcom.gov.uk/law-commission-responds-to-government-reforms-to-protect-victims-of-intimate-image-abuse/ (accessed: 12.12.2022]

There have been many cases of "non-consensual" porn in Russia[9], and some of them have even been brought to the attention of the European Court of Human Rights[10], but for some reason neither the rather significant judicial practice, nor international experience leads the legislator to the conclusion that this phenomenon needs some attention — although such attention, in our opinion, is necessary due to the lack of an appropriate norm and the imperfection of legal components currently applied to such criminal cases. Thus, courts qualify such cases under Article 137 of the Criminal Code[11] (sometimes with additional qualification under its Article 242[12]), and in our opinion this is not quite correct. The act described in question deserves a separate legal qualification in criminal law due to its specificity.

"Non-consensual porn" can justifiably be considered the spawn of the age of digitalisation. Relations in the sphere under consideration deserve criminal law protection due to the specificity of the act: Firstly, the widespread use of various gadgets and the ubiquitous use of the Internet make such images publicly available without any barrier to access and instantly disseminate them to an audience of many millions, and secondly, once on the Internet, information cannot be deleted afterwards[13], as it may continue to be transmitted by copying, and "non-consensual porn" posted online could surface at any time in the future [Santiago A., 2020: 1274–1275], with the possibility of making the victim's life worse again.

The fact that the affected person is psychologically traumatised, driven to a depressed mood with possible suicidal thoughts [Said I., McNealey R.,

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[9] See, e.g.: Revenge porn and surveillance: how cheating and breakups are punished in Russia / Available at: URL: https://www.bbc.com/russian/features-48720689; Woman from Nizhny Novgorod unwillingly becomes a porn actress: her partner secretly filmed their meetings and uploaded them to a porn site / URL: https://www.youtube.com/watch?v=cb-JGnWCIVJA&t=62s (accessed: 07.12.2022)

[10] See: Case of Volodina v. Russia No. 2 / Available at: URL: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-211794%22]} (accessed: 07.12.2022)

[11] See, e.g.: Verdict of Judicial Precinct No. 7 of Rybinsk judicial district, Yaroslavl region, 15.01.2016 in case No. 1-5/2016 / Available at: URL: https://sudact.ru/magistrate/doc/CxHDPh9YVNYq/?ysclid=lbl30k1yft258956749 (accessed: 12.12.2022)

[12] See, e.g.: Cassation Ruling of the Supreme Court of the Russian Federation No. 18-UDP20-36-K4. 10.06.2020 / Available at: URL: http://vsrf.ru/stor_pdf.php?id=1893716 (accessed: 12.12.2022)

[13] See: Experts: Deleted online information never actually goes away /Available at: URL: https://www.chicagotribune.com/business/blue-sky/chi-deleted-online-information-never-goes-away-20150821-story.html (accessed: 11.12.2022)

2022] and deprived of the ability to trust people is significant, taking into account that trust is an important resource of human capital and its undermining hinders normal existence in society, and the building and maintenance of new relationships [Bates S., 2022: 23]. In many cases, "non-consensual porn" forces a person to make drastic life changes, changing not only their place of work and residence, but sometimes their name as well [Waldman A., 2017: 715–719]. Also, this act can be considered especially dangerous when, besides the images themselves, the perpetrator publishes data that can be used to identify the person depicted in the images: name, sometimes contact details, phone number, and social media profiles. In this case, the affected person may face an immediate risk to life and health, which includes both the real risks of harassment and rape and other risks of harm to the affected person due to "trampled public morals."

It should also be pointed out that it is illegal to use a citizen's image to create "non-consensual porn." However, protection of such images is provided in the Russia exclusively in the Civil Code[14], namely in the Article 152.1. Hence, currently a victim of "non-consensual porn" can hold the perpetrator civilly liable for illegal use of the person's image without consent. In addition, scholars note that tort law is one of the ways to combat "non-consensual porn" [Levendowski A., 2014: 433–437]. But: would all of this be truly fair to the victim of the act under consideration? The fact that the law protects the images of citizens confirms the importance of such protection, but in the context of the topic under review, civil liability alone, given the close relationship of the act with the violated privacy of private life, cannot be sufficient. Moreover, since "non-consensual porn" was created without the knowledge of the person whose image is being disseminated, the consequences of this dissemination (public reprobation and, as a result, loss of reputation, for an action that is completely human and natural) would be unjustified, since the creation of such materials occurred without the consent and without the knowledge of this person, which only increases the gravity of the act committed by the disseminator.

Thus, based on the fact that "non-consensual porn" features the signs of a crime (a socially dangerous act that infringes on the honour and dignity of a person), we do not think it is sufficient to ensure the protection of a citizen only by means of civil law.

[14] Civil Code of the Russian Federation (Part One) // Rossiyskaya Gazeta. 08.12.1994.

All this demonstrates that "non-consensual porn" is undoubtedly a serious illegal act, which needs attention in Russian law. To this end, we consider it possible to propose introducing a corresponding article in the Criminal Code. Author's suggestions on the formulation of the new norm are contained in the results of the study.

Speaking of acts related to the dissemination of intimate materials depicting a person without the latter's consent, we believe it would be correct to distinguish between cases in which the perpetrator created and disseminated such materials without the victim's consent or only disseminated them without such consent. It is also worth highlighting the purpose of the act: whether it was done for the purpose of making money and selling such material, or only for the purpose of revenge and/or reputational damage to the person affected by the act. The act can be classified in different ways depending on its purposes.

2. Ways of Making "Non-consensual Porn"

In our opinion, it is critically important to draw a line between making "non-consensual porn" and disseminating it. There are several reasons for it.

First, a mandatory element for the formulation of our proposed new offence is the dissemination of intimate photographic and/or video materials without the consent of the person depicted in them. These materials may be created either by the person who disseminates them or by the person depicted therein themselves, but it is the dissemination without consent that is the act directly violating the victim's rights. If a file with an intimate image of a person (no matter how the file was created) is stored on the user's devices for purely personal use, even if the file was created without the consent of the person depicted in the image, such an act cannot be considered an offence (similar to the case when downloading and storing a pornographic video on one's personal computer cannot be considered an offence under Article 242 of the Criminal Code, since they do not in themselves indicate an intent to disseminate it).[15]

Second, a photographic or video material that could later become "non-consensual porn" can be created either without the victim's consent or with

[15] See: Ruling of the Supreme Court of Russia No. 127-УД22-12-К4. 04.08.2022 /Available at: URL: https://www.vsrf.ru/stor_pdf.php?id=2146402&ysclid=ldknh18yzu284374747 (accessed: 31.01.2023)

the victim's consent. In this case, it must be taken into account that the victim was aware that the disseminating person has such materials, and the accused cannot be guilty of illegal creation of such materials, since the creation of photo or video materials of an intimate nature was carried out with the consent and knowledge of the victim.

In our opinion, we can distinguish three ways of creating "non-consensual porn": making it by secret filming, making intimate images of a person with the person's consent, and making "non-consensual porn" with the help of computer technology. We will reveal the specifics of each of these methods below.

2.1. Making "Non-consensual Porn" by Secret Filming

Secretly filming a person is the first way to make "non-consensual porn". We would like to point out from the outset that In this article we will not consider secret filming of the victim by an unauthorised person in the course of, for example, voyeurism, as this act may well be covered by the Criminal Code norms (Article 137), although even in this case there may be disputes about the need to criminalise voyeurism) [Sheveleva S.V., Teneneva I.V., 2021: 209-210]. We are interested in filming conducted directly by a person with whom the victim has a relationship of trust (a partner and/or a person under whom the actions depicted in the images may take place), or such a relationship is implied, as an illegal act, which, in the author's opinion, is not fully described by Article 137 of the Criminal Code. It is necessary to consider an example.

A. and B. have a close relationship. Some time after their breakup, A. receives an web-link in an electronic messenger, following which she discovers a pornographic video depicting her. In this way, A. finds out that during their intimate meetings B. secretly recorded their sexual intercourse or other actions of a sexual nature without notifying A.

Can this act be fully covered by the disposition of Article 137 of the Criminal Code as a breach of privacy? We don't think so.

As per Article 137, it is an offence to illegally collect or disseminate information about a person's private life that constitutes their personal or family secret without their consent, or to disseminate such information in a public speech, publicly displayed work or mass media. It should be noted here that the wording of the disposition of this article contains an such

evaluation category as "the private life of a person, which constitutes their personal or family secret." This wording requires additional interpretation.

The Russian Federation Supreme Court does not provide a definition of what may constitute such a secret, but at the same time it states that the accused person's intent to keep "information about the private life of a citizen ... secret" is a mandatory constructive feature of the Article 137.[16]

If a person is in intimate contact with the victim of "non-consensual porn", then this person automatically "receives access" to the secret in question, and their "intrusion" into the victim's private life is legal. This is the key difference between the act in question and the above-mentioned voyeurism, where the intrusion into the private space of a person is not authorised and, therefore, illegal; it constitutes a violation of a citizen's constitutional freedom and right to privacy; and such an act can be fully qualified under Article 137. However, it is the act of illegal penetration "inside" personal space, and possible collection of information about a person at an intimate moment of their life that can be qualified under this article rather than subsequent dissemination of the photo or video materials collected.

It is also important to point out that according to the disposition of Part 1 of Article 137, it is an offence to collect information about the private life of a person, which is understood as "intentional actions consisting in obtaining this information by any means, such as personal observation, eavesdropping, questioning of other persons, including with the recording of information by audio, video, photographic means, copying of documented information, as well as by stealing or otherwise acquiring it" (Item 3 of Ruling No. 46). However, the perpetrator who collects information about a person's private life has quite a concrete intent, namely to violate constitutional rights, that is not the case with the creation of "non-consensual porn."

According to the Dictionary of the Russian language, "information" can be understood as news, reports about something, knowledge in a certain field, awareness of something[17]. So, logical question would be to ask if a video record or a photograph is information? Confidential information?

16 Ruling of the Plenum of the Supreme Court of 25.12.2018 N 46 "On Issues of Judicial Practice in Cases of Offences against Constitutional Rights and Freedoms of Man and Citizen (Articles 137, 138, 138.1, 139, 144.1, 145, 145.1 of the Criminal Code; hereinafter Ruling No. 46) //Rossiyskaya Gazeta. No. 1.09. 01.2019.

17 See: Dictionary of the Russian Language. 4th ed. Moscow, 1999. Vol. 4. Pp. 38–39.

Or would it be more correct to say that the action recorded in such materials is confidential?

An intimate activity takes place between A. and B.; the intimate relationship between them is known information to both of them. In exceptional cases, A. may conceal the fact of their relationship and sexual intercourse with B. (stretching the situation in question, we can say that Romeo could be convicted under Article 137 of the Criminal Code if, being well aware that Juliette kept their intimate relationship secret due to "the feud between two equally respected families", he nevertheless disseminated this information); but in most cases, people do not hide the fact of relationships between them from society, and the existence of intimate relations between these people is implied without being stated openly only due to certain ethical principles.

Nor is the constitution of the female or male body a secret: only the display of a particular person's body is criminalised.

Ruling No. 46 permits the recording information constituting a personal or family secret by video and photographic means, but in the case of "non-consensual porn", the acts captured in photographs and videos are not secret (with few exceptions: e.g., the information that A. has intimate relations with B., or that A. has a tattoo in a place usually covered by clothing, or that the windows of A.'s room where the sexual intercourse took place overlook a recognisable object, which may indicate A.'s place of residence, etc., etc.). The key, however, is not the collection of any information, but the recording of a particular person in these materials (for personal use or further dissemination).

Neither do we consider the secret production of "non-consensual porn" by a person who participates in an intimate act (directly or as an authorised observer) to be a criminal offence if this material is created for personal purposes and the person did not disseminate them subsequently. There are two reasons for this: one, this act has no socially dangerous consequences, and two, the latency of this act is high, since the recorded material does not leave the hands of one person and does not come into "public domain."

Thus, Article 137 of the Criminal Code may apply to the production of "non-consensual porn" in secret from the person depicted in it, but only in the case of voyeurism and until the moment of dissemination, after which the classification of the offence should be based on the legal components of the crime that we proposed in the results of the study.

2.2. Creation of Intimate Pictures of a Person on the Person's Consent

The second way to obtain intimate images of a person that it seems right to highlight, is the obtaining of such images with the consent of the person themselves, and here it can be both the partner who makes the recording based on a voluntary consent, and the person in question who makes it themselves and sends these materials to the partner.

In the former case, we are talking about the same shooting conducted by the victim's partner themselves, but this time conducted openly, with the consent and voluntary participation of the person. At the same time, the person depicted in the materials does not give their consent to disseminate these materials. In these circumstances, it would be more appropriate to be talking of "non-consensual dissemination" as a component of non-consensual porn rather than non-consensual porn proper [Said I., McNealey R., 2022: 5430–5451]. In other words, in this case, as we classify the offence we can insist that the photographic and/or video materials were made in a legal manner, and only disseminating these materials will be a culpable act. Hence, this act cannot be fully classified under Article 137 of the Criminal Code, both on the grounds that we have outlined above in the case of secretly filming a partner and for other reasons, namely: the person filming is now committing an act that could be mistaken for the collection of personal information, but this collection is perfectly legal as the creator has the right to the material (but only for personal use). In such a case, only dissemination should be punished, although even here it would be absolutely logical to raise the question whether visual materials themselves are information within the meaning of Article 137 and whether this article can apply in view of the above arguments.

It can also be the person depicted on intimate images who creates such images. At present, 'sexting', or sending one's intimate photographs and videos to one's partner, has become popular. E.g., according to the latest reports, almost half of the population have been involved in sexting at least once [Greer & others, 2022: 1433]. During the COVID-19[18] pandemic, the number of people sending their intimate images to their partner grew significantly, so it would be quite safe to say this practice is widespread.

[18] Sexting: women reveal how they really feel and share their best sexts / Available at: URL: https://www.stylist.co.uk/relationships/dating-love/women-sexting/500263 (accessed: 15.12.2022)

Interestingly, under-age persons also practice sexting. E.g., about 14.8 per cent of 12 to 17 year olds have ever sent intimate images of themselves to a partner, and 27.4 per cent have received such images [Mori C. et al., 2020: 1103]. In some countries, there are restrictions on sexting. E.g., in the United Kingdom, it is illegal for anyone under 18 to take "nude selfies" unless they do not intend to share them with anyone and intend to keep them only on their phone [Rogers V., 2016: 23].

The legal system in the Russian Federation does not assess sexting process, which, in the author's opinion, is quite justified: firstly, otherwise the state would interfere in the intimate life of its citizens, which it should not do, and, secondly , it would be difficult to control the implementation of such a legislative ban since it is impossible to prohibit people from sexting.

At the same time, one can and should regulate negative consequences of this phenomenon and create legal conditions for preventing such consequences.

Where a person voluntarily sends their intimate images of themselves to a partner, it is as if they are giving the partner the right to use the images for as they like, but they are generally not consenting to the publication or other dissemination of the materials. These photo and/or video materials must be in the possession of only the person to whom they were sent. Otherwise, dissemination of such materials is prosecuted by law and should be qualified as an act of dissemination of "non-consensual porn", and we have given above the arguments about the inapplicability of Article 137 to such offences.

Moreover, in addition to violating the criminal law, the dissemination of sexting photos and/or videos also involves another interesting legal aspect, namely copyright law, because the offender actually publishes materials which, within the meaning of Article 1259 of the Civil Code, are the object of this law and, accordingly, the author of such materials is entitled to all copyright rights provided for in its Article 1255, including the exclusive right to the work (Subpara 1, Para 2, Article 1255) and right to inviolability of the work (Subpara 4, Para 2, Article 1255).

Clearly, while the consequences of copyright infringement in the case of "non-consensual porn" are not as bad compared to the above-described damaged reputation and possible threats to life and health, still this aspect should be taken into account because, firstly, under such an approach, the act in question may become a separate offence under Article 146 of the Crimi-

nal Code (for these purposes, "non-consensual porn" must become an item of commerce and there must be an intent on the part of the person to sell such material), and, secondly, this is a way of combating the spread of "non-consensual porn" on the Internet. In general, copyright law, in cases where there is no specific legal regulation to fully and effectively protect victims of "non-consensual porn", is a kind of "magic wand" that can protect them.

In the absence of specific criminal law regulation, including the absence of liability for the provider publishing such content and the absence of appropriate penalties for the dissemination of "non-consensual porn", copyright law is the only way to combat this phenomenon [Levendowski A., 2014: 425–426]. This is currently the most effective tool for victims to combat "non-consensual porn" [Lee H., 2019: 102] which allows one to proceed, if not against the offender, then against the web site or ISP that has posted pornographic material involving the victim without their consent. This allows action to be taken at least to remove the illegal content, but only if the victim proves that he/she owns the rights to the content in question and his/her exclusive right has been violated by the publication (which is easy enough when trying to remove sexting material, which is usually selfies). Let us point out here that the successful practice of such a struggle does exist[19], but, again, in the West.

Thus, the victim of such "non-consensual porn" is more protected by the law when they independently create intimate materials with their participation that subsequently enter the public domain.

2.3. Making "Non-consensual Porn"

Digitalization, development of computer software and availability of new technologies to consumers enables a wide range of individuals to commit crimes using information technologies. Some technologies that once seemed either sci-fi or that were only available to specialists in narrow fields of application, such as special effects in the cinema, are now part of our everyday lives. Deepfake technology is one of them.

Deepfake is a technology that produces "realistic face and voice replacement through the use of generative-adversarial neural networks" [Kiselev A., 2021: 56–57]. With its help, AI can replace one face with the

[19] See: Chrissy Chambers wins 'revenge porn' settlement / Available at: URL: https://www.5rb.com/news/chrissy-chambers-wins-revenge-porn-settlement/ (accessed: 07.03.2023)

face of another person in the images. That is, in fact, if there is a necessary photo or video fragment with the participation of one person, whom we will call the "recipient", and a photo of a person, whom we will call here the "donor", the face of the "recipient" in the photo can be replaced with the face of the "donor", thus making it look like the "donor" is present in the original materials. Deepfake is in fact a technology of creating fake information, which the perpetrators attempt to pass off as reality by ascribing a person functions that are not actually characteristic of him/her. E.g., such technology was used for political purposes in the election campaign of an Indian politician when deepfakes were used to create videos of him speaking in different languages to attract voters [Ivanov V.G., Ignatovsky Y.R., 2020: 379], that is a perfect example of its possible application.

The emergence and active dissemination of deepfake technology has led to its wide use. This has risen a great number of questions in the legal community: whether it is necessary to create a legal framework for the use of this technology, whether it should be banned at all, who should control its use, and whether copyright issues can arise?

One of the first uses of deepfakes was to create pornographic videos using the faces of celebrities [Meskys E. et al., 2020: 24, 27]; (Scarlett Johansson became one of the first and 'most popular' deepfake stars)[20]. A number of media outlets have highlighted the new problem, pointing out that anyone can be affected[21], and, e.g., state of Virginia has amended its "revenge porn" legislation to include the possibility of committing the act using the deepfake technology[22]. The possibility of making pornographic videos with any person using deepfakes has caused a wave of discussion and public reaction, but again in the West, while in Russia this fact is still not getting any attention — while "pornographic deepfakes" can be very well compared to real "non-consensual porn".

[20] Scarlett Johansson on fake AI-generated sex videos: 'Nothing can stop someone from cutting and pasting my image'/ Available at: URL: https://www.washingtonpost.com/technology/2018/12/31/scarlett-johansson-fake-ai-generated-sex-videos-nothing-can-stop-someone-cutting-pasting-my-image/ (accessed: 16.12.2022)

[21] See: Fake-porn videos are being weaponized to harass and humiliate women: 'Everybody is a potential target' / Available at: URL: https://www.washingtonpost.com/technology/2018/12/30/fake-porn-videos-are-being-weaponized-harass-humiliate-women-everybody-is-potential-target/ (accessed: 16.12.2022)

[22] See: Virginia's 'revenge porn' laws now officially cover deepfakes /Available at: URL: https://www.theverge.com/2019/7/1/20677800/virginia-revenge-porn-deepfakes-nonconsensual-photos-videos-ban-goes-into-effect (accessed: 16.12.2022)

Indeed, with new technologies, both a person who has been involved at some time in the creation of intimate images with their participation and a person who has never been involved in this can become a victim of "non-consensual porn" [Delfino, 2019: 896, 898]. This makes this way of committing a crime quite special: it is not covered by the norms of the Special Part of the Criminal Code, and therefore we can be talking about the need to give special legal protection to the victims of such criminal acts.

It should be noted that, similar to the production of "non-consensual porn", only the dissemination of "porn deepfakes" may be considered criminal, for the same reasons: the absence of public danger in the production without dissemination, and the high probability of latency of such an offence.

Also it is useful to point out the civil law aspect of "porn deepfake" related to copyright infringement. Here, in addition to a possible infringement of the copyright to the photograph of the victim used (unless the photograph was taken by the perpetrator himself, but then it is worth paying attention to the consent of the victim to receive such photographs), the copyright to the pornographic material used is infringed. When a perpetrator uses deepfake technology to place somebody else's fact in a pornographic photograph or video, this:

A) infringes the rights of the copyright holder to this material; and

B) infringes the rights of the person depicted in the original pornographic materials (violation of Article 1315).

Production of pornography is a criminally punishable act in the Russian Federation, so copyright protection of these materials is called into question; still, it makes sense to discuss the existence of such an offence from the proposed perspective as an exercise in theory. However, we still believe that the issue of copyright infringement in this case is only a "Plan B" in case there is no special regulation of the creation of "non-consensual porn" by means of deepfake technology, and that only for the purpose of restoring the victim's infringed rights.

Considering that it is often very difficult to distinguish between fake "non-consensual porn" and the real one, all of the consequences that follow the creation and dissemination of "non-consensual porn" as such also fully apply to the creation of pornographic material using the deepfake technology. Also, we should bear in mind that the committed act is no less serious and needs the corresponding legal assessment due to its great public danger. Thus, the influence and use of modern technologies in committing a

criminal act of creating and/or disseminating "non-consensual porn" must be taken into account separately in forming the elements of the offence.

3. Distinguishing Dissemination of "Non-consensual Porn" from other Offences Entrenched in the Criminal Code

The illegal act that, in author's opinion, should be punished under criminal law is the dissemination of "non-consensual porn", and the above-mentioned ways of obtaining such materials are qualifying factors.

In that part of study, we will provide arguments in favour of our argument that there is no norm in modern domestic criminal law that covers the act in question, and will distinguish it from the existing criminal corpus delicti. We believe it would be correct to distinguish them according to the subjective aspect of the offence, basing our position on the special intent of the subject of the offence.

Usually, "non-consensual porn" in domestic judicial practice is qualified on the basis of a combination of offences under Articles 137 and 242 of the Criminal Code or under its Articles 137 and 242.1.[23]

In our opinion, dissemination of "non-consensual porn" cannot be qualified under Article 137 in all cases. The arguments for our position are partially similar to the above arguments, which explain the impossibility of qualifying the creation of "non-consensual porn" under this Article. However, a different argument would be more valid.

To begin with, it is necessary to define the purposes of disseminating "non-consensual porn". There are two: one, "revenge porn" itself, i.e. the wish to harm the person depicted in intimate images, to cause them mental, moral and reputational damage, and, two, a wish to obtain material gain. In both cases, the intent in disseminating "non-consensual porn" is at the end directed at the reputation of the offence victim. Since the perpetrator pursues this very aim, the act of disseminating "non-consensual porn" is aimed at denigrating the honour and dignity of the person depicted there.

[23] See, e.g.: Verdict of the Motovilikhinsky District Court of Perm of 16.05.2019 in case No. 1-240/2019. Available at: URL: https://sudact.ru/regular/doc/q4zx5H5U0yxJ/?page=2&regular-court=&regular-date_from=&regular-case_doc=&regular-lawchunkinfo=Статья+137.+Нарушение+неприкосновенности+частной+жизни%28УК+РФ%29&regular-workflow_stage=&regular-date_to=&regular-area=&regular-txt=ст.+242+УК+РФ&_=1671196027884&regular-judge=&snippet_pos=172#snippet (accessed: 16.12.2022)

Then by its legal components, the act in question cannot be included in the chapter on crimes against constitutional rights and freedoms of citizens, because, based on the object of the crime, "non-consensual porn" should be included in Chapter 17 of the Criminal Code "Crimes against freedom, honour and dignity of a person."

Besides, in the case of dissemination of "non-consensual porn" created artificially with the use of deepfake technology, Article 137 cannot be applied to qualify the offence since the private life of the person has not been violated and all the disseminated materials are fake.

Furthermore, we do not consider it possible to qualify "non-consensual porn" separately under Article 242 or Article 242.1 of the Criminal Code. These norms protect public morality from the production and dissemination of pornography, but for some reason do not take into account that these pornographic materials may be created without the consent of the person depicted in them. In other words, the rights of a particular person are not protected in this area. At the same time, again based on the interpretation of Article 242, if pornographic materials can pose a public danger in the form of "grossly naturalistic and cynical depiction of sexual intercourse scenes contrary to the norms of morality"[24], and "the mental health of the population"[25] is an optional object in the dissemination of pornographic materials, then it would be logical to assume that the dissemination of such materials contrary to the desire and will of the person depicted therein can cause a separate mental and other harm to this person, from which this person must be protected. In this case, the relations under attack relate to the honour and dignity of a person as protected elements, but at the same time, alongside with their protection, public interest is also protected. If "non-consensual porn" is qualified under an independent criminal norm, competition of norms (Article 242 or Article 242.1 and the proposed components) will occur. Consequently, the proposed article would in fact be a special norm that "absorbs" simple illegal dissemination of pornography.

The existence of a concrete victim will also be an important element of "non-consensual porn", which distinguishes this act from the simple illegal dissemination of pornography.

Suppose, X. runs a website or a social media group specialising in the publication of pornographic content. Each time he meets a girl, X., with or

[24] Commentary to the Criminal Code of the Russian Federation in 4 vols. Vol. 3. Special part. Section IX. Moscow, 2023. P. 188.

[25] Ibid.

without her consent, creates intimate images with her participation, and subsequently constantly publishes this content on his resource. It does not matter whether X. meets girls exclusively for the purpose of obtaining these materials or not. In any case, obtaining these materials for the purpose of further publication may indicate that V. had a direct intent to produce and disseminate pornographic materials as a separate criminal act, even though the girl depicted in them did not give her consent to such publication — which also results in the need for a separate qualification of the act under the article providing for liability for "non-consensual porn." Such a case occurred in the USA, only in the owner of the web-site that specialised on "revenge porn" specifically hired hackers to break into the victim's personal Internet accounts [Sales J., Magaldi J., 2020: 1505-1506]. Although the dissemination of "non-consensual porn" occurs here for commercial purposes, the interests of a specific individual are violated, and the qualification of such a violation as a criminal offence covers the act of illegal production and dissemination of pornography.

Similarly, we do not consider it possible to classify "non-consensual porn" under Article 128.1 of the Criminal Code as calumny for the following reasons.

First, there is actually no constructive sign of calumny: calumny implies the dissemination of knowingly false information denigrating the honour and dignity of another person or undermining their reputation. In the case of "non-consensual porn", there is dissemination of information denigrating the honour and dignity of a person, but this information is not knowingly false, because what is happening in the photos or videos is a real action that has indeed occurred. Secondly, calumny implies the dissemination of information denigrating the honour and dignity of a person, i.e. the disseminated information itself must contain defamation of honour and dignity. In this case, although the actions of disseminating "non-consensual porn" imply denigrating the honour and dignity of a person, the disseminated materials themselves do not directly contain defamatory information, but the attitude (usually, negative) towards a person due to the disseminated information appears in the mind of the person receiving this information. So in effect, the person who disseminates "non-consensual porn" is not engaging in calumny per se.

Qualifying "pornographic deepfakes" under Article 128.1 will also be a controversial act. Although the information disseminated in this case is knowingly false and aimed at defaming the honour and dignity of a person,

its dissemination is not a direct evidence of a negative assessment of the person whose image is used in the creation of "non-consensual porn", and the attitude towards the depicted person together with possible defamation of their honour and dignity take place within the mental process of the person perceiving this information.

As for the possible combination of the article proposed for introduction into the Criminal Code with existing elements of the criminal offence, it can be applied, for example, in the case of dissemination of "non-consensual porn" for commercial purposes in the case of extortion.

Conclusions

At present victims of "non-consensual porn" in the Russian Federation are not protected sufficiently and the current components of criminal law do not cover this criminal act in full. This is a shortcoming of Russian law, given that such illegal acts are not unique, and, in the context of mass digitalisation, they are getting increasingly dangerous to society.

Upon attempting to give a legal assessment of the different ways of committing the illegal act of making and disseminating "non-consensual porn", we can propose changes to the Criminal Code. We deem it possible to consider the act of creating and disseminating "non-consensual porn" a special form of insult.

Insult as an independent criminal act was removed from the Criminal Code in 2011 and is now considered only an administrative offence (Article 5.61 of the Russian Federation Code of Administrative Offences). At the same time the Criminal Code currently includes four offences (Articles 148, 297, 319, 336) involving special forms of insult (e.g. insulting court or religious feelings of believers). In our opinion, the act of creating and disseminating "non-consensual porn" contains positive features of insult as an illegal act: there is humiliation of honour and dignity of another person expressed in an obscene or other form, which contradicts generally accepted norms of morality and ethics, and, furthermore, the form of committing the act in question can be called special due to its nature.

The above arguments suggest the need for a new norm. We propose to formulate its wording as follows:

Article 130.1. Creation and dissemination of intimate and (or) pornographic materials without the consent of the person depicted therein.

Dissemination of visual materials of intimate and/or pornographic nature without the consent of the person depicted in these visual materials.

Shall be punished by a penalty of up to five hundred thousand roubles or in the amount of the wages or other income of the convicted person over a period of up to 24 months, or an arrest for a term of up to six months, or penal custody for a term of up to two years with deprivation of the right to hold the certain posts or to engage in certain activities for a term of up to two years.

The same act, if the said visual materials of an intimate and/or pornographic nature have been created secretly from the person depicted therein and without their consent.

Shall be punished by a penalty of up to one million roubles or in the amount of the wages or other income of the convicted person over a period from 24 up to 30 months, or compulsory labour for up to five years with deprivation of the right to engage in certain activities for a term of up to six years or without such deprivation, or an arrest for the term of up to six months, or penal custody for a term of up to four years with deprivation of the right to hold the certain posts or to engage in certain activities for a term of up to four years.

The act provided for in para 1 of this Article, if the visual materials of an intimate and/or pornographic nature have been artificially created by means of computer technology.

Shall be punished by a penalty of up to one million roubles or in the amount of wages or other income of the convicted person over a period of up to 24 months, or compulsory labour for up to three years with deprivation of the right to hold certain posts or engage in certain activities for a term of up to four years or without such deprivation, or an arrest for a term of up to six months, or penal custody for a term of up to three years and six months with deprivation of the right to hold the certain posts or to engage in certain activities for a term of up to four years.

Acts provided for in para 1-3 of this Article committed against a minor.

Shall be punished by penal custody for a term from three up to eight years with deprivation of the right to hold the certain posts or to engage in certain activities for a term of up to fifteen years or without such deprivation.

Acts provided for in para 1-3 of this Article committed against a person under16 years of age.

Shall be punished by penal custody for a term from three up to 11 years with deprivation of the right to hold the certain posts or to engage in certain activities for a term of up to 15 years or without such deprivation, and with penal custody of for a term of up to two years or without such deprivation.

Dissemination of information about a person depicted in visual materials of intimate and/or pornographic nature, through which it is possible to identify this person, their personal, contact and other data, carried out in course of committing the acts provided for in para 1-5 of this Article.

Shall be punished by a penalty of up to one million roubles or in the amount of the wages or other income of the convicted person over a period of from 18 up to 30 months, or compulsory labour for up to 480 hours, or correctional labour for up to two years, with deprivation of the right to hold certain posts or engage in certain activities for a term of up to three years or without such deprivation, or an arrest for a term of up to four months, or penal custody for a term of up to two years with deprivation of the right to hold the certain posts or to engage in certain activities for a term of up to three years.

We also consider it correct to apply this article to persons who have reached the age of criminal responsibility of 16 years. We believe also it would be correct to classify Parts 1-3 and 6 of the proposed Article as cases of private-public prosecution (Part 3 of Article 20 of the Code of Criminal Procedure), and Parts 4 and 5 as cases of public prosecution, as they affect the rights of minors. The proposed regulation should fall under the jurisdiction of the Russian Federation Investigative Committee.

That regulation will be capable in the best possible way to protect victims of "non-consensual porn" with the help of criminal law, which we believe is quite fair and proportionate. In this case attempts to criminalise the dissemination of "non-consensual porn" are not just copying the experience of foreign legal systems, but a truly necessary measure that needs to be introduced into the Russian legal system. It will allow, on the one hand, to simultaneously protect the basic rights of citizens, as there is no proper legal protection of the rights in question in domestic legal regulation, and, on the other hand, to continue the modernisation of the Criminal Code with account of the challenges and threats of the new times.

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