

Policy Brief on Potential Remedies to Non-Consensual Disclosure of Intimate Images (NCDII) by Miranda Pinter, Pro Bono Students of Canada (May 2023)

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Potential Remedies to NCDII

What is NCDII?

The non-consensual disclosure of intimate images (NCDII) “refers to the sharing or online distribution of nude, near nude, or sexual photographs/videos without the consent of those in the images. It is a form of sexual violence and abuse, disproportionately affecting women, girls, and individuals who identify as LGBTQ2S+”.¹

Legal Responses to NCDII?

Criminal Law:

- The *Protecting Canadians from Online Crime Act*, S.C. 2014, c. 31 “amended the Canadian Criminal Code to include a new offence of non-consensual distribution of intimate images as well as complementary amendments to authorize the removal of such images from the Internet and the recovery of expenses incurred to obtain the removal of such images, the forfeiture of property used in the commission of the offence, a recognizance order to be issued to prevent the distribution of such images and the restriction of the use of a computer or the Internet by a convicted offender”.²

Civil Remedies:

- Various Canadian provinces have passed laws about NCDII.³
 - **Alberta** passed the *Protecting Victims of Non-Consensual Distribution of Intimate Images Act* in 2017. The Act created an NCDII tort, where victims/survivors of NCDII can sue perpetrators of NCDII and if successful receive damages, an injunction, or “any other order that the court considered just and reasonable in the circumstances”.⁴
 - **Manitoba** passed *The Intimate Image Protection Act* in 2015.⁵ The Act requires the province to provide assistance to victims/survivors of NCDII, including assisting with the return, removal, or destruction of the intimate image; offer

¹ See “Legislation review concerning non-consensual disclosure of intimate images” (March 7, 2023), online: BC Government Site <<https://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/current-reviews/non-consent>>

² Protecting Canadians from Online Crime Act, SC 2014, c. 31.

³ See Suzie Dunn, “Legal Resources” (March 13, 2023), online: Suzie Dunn <<https://www.suziedunn.com/legal-resources>>

⁴ Protecting Victims of Non-consensual Distribution of Intimate Images Act, RSA 2017, c P-26.9.

⁵ The Intimate Image Protection Act, CCSM c I87.



assistance to facilitate resolution between victim/survivor and perpetrators; and offer information on potential legal remedies to victims/survivors.⁶ In addition to mandating provincial support for victims/survivors, the statute also creates an NCDII tort.

- **Nova Scotia** passed the *Intimate Images and Cyber-protection Act* in 2017.⁷ Under the Act “[a]n individual whose intimate image was distributed without consent...may apply to the Court for an order”.⁸ The court may: prohibit the distribution of the image; prohibit the perpetrator from contacting the victim/survivor; order image to be taken down or disable access to it; refer the matter to dispute resolution; order information to be provided to the victim/survivor to assist in identifying the perpetrator; order damages to be paid.⁹
- **Newfoundland** passed the *Intimate Images Protection Act* in 2018.¹⁰ The Act creates an NCDII tort. The legislation explicitly includes a reverse onus provision stating “[w]here an action for the non-consensual distribution of an intimate image is commenced...it shall be presumed that the intimate image was distributed without the consent of the person depicted in the intimate image”.¹¹ Accordingly, the burden is placed on the defendant to “establish that he or she had reasonable grounds to believe that he or she had ongoing consent for distribution of that intimate image”.¹²
- **Saskatchewan** passed *The Privacy Amendment Act* in 2018.¹³ The Act creates an NCDII tort. The legislation also includes an explicit reverse onus provision that creates a presumption of non-consent by the plaintiff’s initiation of proceedings.¹⁴
- **British Columbia**: March 6, 2023, the Attorney General “introduced legislation aimed at addressing and preventing the non-consensual disclosure of intimate images (NCDII). Specifically, the Attorney General introduced legislation similar to a draft statute recently adopted by the Uniform Law Conference of Canada (ULCC)”.¹⁵ “The Intimate Images Protection Act will help people who have had their intimate images shared without their consent to get the images removed from the internet more quickly. This will also give people a more effective way to seek monetary damages”.¹⁶

⁶ *Ibid.*

⁷ Intimate Images and Cyber-protection Act, SNS 2017, c 7.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Intimate Images Protection Act, RSNL 2018, c I-22.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ The Privacy Amendment Act, 2018, SS 2018, c 28.

¹⁴ *Ibid.*

¹⁵ BC Government Site, *supra* note 1.

¹⁶ *Ibid.*



- “If passed, the legislation will create a new, expedited process resulting in legal decisions and orders designed specifically to stop the distribution of intimate images without consent.”¹⁷
- **The proposed legislation in BC has some important features:**¹⁸
 - A tribunal will be created in order to hear claims, with power to make declarations, orders, and decisions.
 - It separates applications for declaratory relief/orders and applications for damages, in order to offer an expedited process of getting content removed.
 - It includes the threat of distribution as a cause of action.
 - It explicitly includes a provision recognizing the right to revoke consent and makes it unlawful for a distributor to not make reasonable effort to remove the content after consent has been revoked.¹⁹
 - It provides power to the decision-maker to order internet intermediaries to remove, delete, destroy or de-index the content.
 - It establishes that the burden of proof lies with respondents to prove that the content was not an intimate image or that they had consent.
 - In applications for damages, respondents are able to rely on their honest but mistaken belief in the existence of consent as a defence.

Other Civil Remedies:

Are intimate images covered by Copyright?

Per section 2 of the *Copyright Act* RSC, 1985, c C-42, photographs are considered artistic works.²⁰ Making copies of a work available to the public count’s publication under the Act.²¹

- “Copyright applies to every original literary, dramatic, musical and artistic work where the author was at the date of the making of the work a citizen or subject of, or a person ordinarily resident in, Canada or some other treaty country”.²²
- “Copyright also applies when a work is first published in a treaty country even if the author was not a citizen or subject of, or a person ordinarily resident in, Canada or some other treaty country”.²³

¹⁷ Keri Bennett, “B.C. introduces new legislation: Intimate Images Protection Act” (March 13, 2023), online: DLA Piper <<https://www.dlapiper.com/en/insights/publications/2023/03/bc-intimate-images-protection-act>>

¹⁸ Bill 12, *Intimate Image Protection Act*, 4th Sess, 42nd Parl, 2023 (as proposed by Attorney General to the Legislative Assembly of BC, 6 March 2023), online (pdf): <https://www.leg.bc.ca/content/data%20-%20ldp/Pages/42nd4th/1st_read/PDF/gov12-1.pdf>

¹⁹ *Ibid.*

²⁰ Copyright Act, RSC, 1985, c C-42.

²¹ *Ibid.*

²² “A guide to copyright” (March 13, 2023), online: Government of Canada <<https://ised-isde.canada.ca/site/canadian-intellectual-property-office/en/guide-copyright#copyrightDefined>>

²³ *Ibid.*

Copyright Infringement:

“Copyright infringement occurs where a person wrongfully uses your work without your permission or does anything only an owner is allowed to do, as stated in the Copyright Act. Infringement may include acts such as copying, performing, selling/distributing, or posting your work on the internet without your permission”.²⁴

USA-based Remedies connected to Copyright Infringement:

DMCA 512.c.1.c requires service providers, upon notification of claimed infringement of copyright, to expeditiously remove or disable access to the material.²⁵

- “under section 512 of Title 17 of the United States Code, online service providers are provided with a limited safe harbour from liability under copyright law. In order to qualify for this safe harbour, service providers must comply with a ‘notice and takedown’ procedure under which copyright owners can send notices to service providers to have copyrighted content removed”.²⁶

Canada-based Remedies connected to Copyright Infringement:

“Notice and Notice is a regime set out in Canada's Copyright Act that requires Internet intermediaries—such as Internet Service Providers (ISPs)—to forward on notices from copyright owners to Internet subscribers, alerting them that their Internet accounts have been linked to alleged infringing activities”.²⁷

“The Notice and Notice regime do not impose any obligations on a subscriber who receives a notice, and it does not require the subscriber to contact the copyright owner or the intermediary”.²⁸

- “Under the Notice and Notice regime, ISPs must retain records of the identity of the subscribers who have been forwarded notices for a period of six months, or longer (up to one year) in cases where a copyright owner decides to take legal action. If ordered to do so by a court, the ISP would release your subscriber information to the copyright owner as part of a copyright infringement lawsuit.”²⁹
- “in order to qualify for limited immunity for infringement, intermediaries in Canada must comply with a ‘notice and notice’ process, under which they must forward notices of alleged infringement and retain customer data that would allow copyright owners to pursue the primary infringer. Beyond passing along the notice, intermediaries have

²⁴ *Ibid.*

²⁵ Congress.gov. "H.R.2281 - 105th Congress (1997-1998): Digital Millennium Copyright Act." October 28, 1998, online: <<https://www.congress.gov/bill/105th-congress/house-bill/2281>>

²⁶ Meghan Sali, “Intimate Images and Authors’ Rights: Non- Consensual Disclosure and the Copyright Disconnect” (2022) 19:2 CJLT 343 at 27-28, online (pdf): <<https://digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=1278&context=cjlt>>

²⁷ “Notices to Canadian Internet Subscribers” (March 13, 2023), online: Government of Canada <<https://ised-isde.canada.ca/site/office-consumer-affairs/en/connected-consumer/notices-canadian-internet-subscribers>>

²⁸ *Ibid.*

²⁹ *Ibid.*



limited obligations to remove or disable access to content. For search engines, this requirement is limited to situations in which the infringing content has already been removed from its original location or where an injunction has been issued by a court. Content hosts must remove content only after they become aware of a court order declaring it to be infringing”.³⁰

Does the DMCA Apply in Canada?

“Although the DMCA is an American law, Canadians can and do make use of this tool to have images removed from online platforms, particularly when the sites on which the images appear are based in the U.S. or have removal policies specifically designed to respond to DMCA notices”³¹

- “If, for example, a Canadian complainant found an intimate image to which she owned the copyright posted on Facebook, that person could send a notice to Facebook under the U.S. notice and takedown procedures and have the photo removed. Even sites operating in Canada that are not explicitly subject to the DMCA have been known to create policies to address the likelihood that they might be sent DMCA notices. Canadian ecommerce site Shopify and Canadian dating service Ashley Madison both have procedures for processing DMCA notices and removing content that has been flagged as infringing copyright, even though Canadian copyright law does not provide a notice and takedown framework”³²
- “Canadians’ use of the DMCA to remove copyrighted content is an option only to the extent that the websites hosting the content are governed by U.S. law or otherwise adopt policies and practices that reflect U.S. law”.³³

Are the DMCA or Notice-and-Notice processes effective as a response to NCDII?

These tools are ineffective solutions for a variety of reasons:

- Many “sites designed for the explicit purpose of posting abusive images are unlikely to be persuaded to remove the content by way of a notice, as operators know that the abusive images belong to individuals who cannot afford the cost — whether financial, emotional, reputational, or personal — of a lawsuit”.³⁴ Therefore, even if the company is under the DMCA (the stronger version of legislation requiring takedowns) companies may not comply.
- The notice regime in Canada is even more ineffective because “there is no obligation for intermediaries to remove or disable access to content upon the receipt of a notice — instead, the obligation is to pass along the notice to the content provider. In the case of

³⁰ Sali, *supra* note 30 at 29.

³¹ *Ibid* at 2.

³² *Ibid* at 28-29.

³³ *Ibid*.

³⁴ *Ibid* at 29-30.



NCDII, it is likely that the person posted the photo or video knowing there was no consent.”³⁵

Problems with relying on companies to self-regulate NCDII:

- “[A]n intermediary may not think that its terms of service have been violated. For example, if an image was initially posted with consent, but that consent was later withdrawn, Google will likely not de-index or remove it”.³⁶
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- “[I]ntermediaries do not always take down content alleged to be unlawful.”³⁷ Thus, even when a claimant argues that the NCDII is illegal, without a court order, companies may not remove the content.
- When companies do decide to remove NCDII, the removal only applies “to a particular intermediary – an individual cannot be ordered to remove a post or not to post elsewhere, nor does the process affect other intermediaries.”³⁸
- “[G]enerally little if any transparency, due process or right to appeal the decisions of intermediaries regarding the application of their terms of service”.³⁹

Is Copyright a Useful Remedy?

Since copyright is about protecting the original works of authors, it only applies as a potential remedy for NCDII victims/survivors when the person depicted in the content is the author of the work (e.g., they took the photo of themselves that was subsequently shared). Thus, copyright has limited potential as a remedy to NCDII. Furthermore, given the protection the law offers to authors, copyright may actually be an obstacle for removal of content when it is produced by someone other than the individual depicted—the author of the NCDII may receive copyright protection for their work. Accordingly, it has limited use as a remedy to NCDII.

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³⁵ *Ibid.*

³⁶ Hilary A N Young and Emily B Laidlaw, “Non-Consensual Disclosure of Intimate Images (NCDII) Tort” (2019) ULCC at para 10, online (pdf): <[https://www.ulcc-chlc.ca/ULCC/media/EN-Uniform-Acts/Uniform-Non-consensual-Disclosure-of-Intimate-Images-Report-\(2019\).pdf](https://www.ulcc-chlc.ca/ULCC/media/EN-Uniform-Acts/Uniform-Non-consensual-Disclosure-of-Intimate-Images-Report-(2019).pdf)>

³⁷ *Ibid* at para 11

³⁸ *Ibid* at para 10

³⁹ *Ibid.*



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