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PRACTICE FOCUS / PRIVACY LAW

Erin Andrews Is Good Example of Fighting Back

Commentary by Elisa D'Amico


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A jury just awarded Erin Andrews $55 million against the man that filmed her without permission through the peephole of her hotel room and the hotel where they both stayed.

The videos of a nude Andrews that were distributed and disseminated online without her permission were not particularly lengthy. But those clips have been circulating online for just over six and a half years, and in that time they have been viewed almost 17 million times. Even worse, on the day the jury returned the verdict, the top search trending online was "erin andrews," along with "erin andrews nude," "erin andrews video" and "erin andrews nude video".

The nature of the Internet allows for victims of online harassment to be shamed in ways that often are anonymous, repeated and even perpetual. And the effects of online harassment, whether sexual cyberharassment or defamation, last forever. But victims should and must stand up and fight back to reclaim their reputations and their lives — both on and off the Internet.

When a victim of online harassment cannot identify the harasser, the victimization feels omnipresent. In some cases, a perpetrator's advanced technical knowledge allows them to evade detection. For example, harassers often use virtual private networks to hide their Internet protocol, or IP, address. This allows them to upload offending media and copy without a trace.

Repeated victimization occurs when a third party views the offending material, copies it and reposts it. In any case of repeated victimization, the offending material resurfaces online, and the victim is forced to start at square one and begin the entire "cleanup and heal" process once again, sometimes 10 years after the original online posting.

It often is hard to comprehend why and how people can be so cruel as to shame, humiliate and torture other people because that is precisely what happens with online harassment.

But it happens. And it happens often. And it has led to suicides—many of them.

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ONLINE REMOVAL

There is no doubt that perpetrators act recklessly with no regard for how their actions affect victims. In some cases, perpetrators affirmatively indicate a desire for their victims to suffer.

When a victim's explicit images are uploaded to the Internet and disseminated online, the images often are accompanied by the victim's names and other personal identifying information. As a result, innocent web searches for their names result in links to pornographic web pages and cached sexual images.

Perpetrators often add details about the victim's employer, family, social-media contacts and the victim's personal life. This detail eliminates any uncertainty about the victim's identity. The resulting casualty to employment opportunities, family life and the victim's overall privacy are horrific.

To fight this and online harassment generally, search engines have empowered and enabled victims to report harassment via online portals. In cases where victims are unable to get material removed from the Internet, which is very often the case, removing (or de-indexing) the search result ensures that Internet users cannot reach the actual offending content without a direct link to that content.

For U.S.-based victims who cannot benefit from the EU's Right to Be Forgotten, which allows certain individuals to have certain information about themselves deleted from Internet records so the information cannot be found by search engines, de-indexing often is the fastest remedy with the best results.

SEEKING HELP

A victim's ability to pay for a lawyer should not dictate a victim's ability to receive quality legal services. This was one of the founding principles of the Cyber Civil Rights Legal Project when I co-founded it with my partner back in late 2014. But even when a victim has the financial means to pay and has access to a legal team, lawyers cannot guarantee a win in a courtroom, and they certainly cannot guarantee removal of the offending content from the Internet.

When private material, such as sexually explicit images or confidential documents, is first uploaded to the Internet, it often spreads like a virus. Hence, the often-used phrase "it went viral." Before long, the material can be found on tens, sometimes hundreds and even thousands of websites; some of the websites where this material resides are dedicated to shaming and harassing victims, whereas other websites are mainstream video-sharing or blogging platforms.

Individuals who discover they are the victim of any type of online harassment would be wise to put down the mouse and immediately pick up the phone and call a lawyer, a counselor, a police officer or all three. Because of the nature of the Internet space, time is of the essence. Seeking help is best although it involves describing the harassment to someone and sharing intimate videos or confidential information, which in turn requires reliving it and rehashing the painful details.

Once material finds its way online, Pandora's box has been opened, and not even $55 million can seal it shut. There is an ever-growing toolbox that victims of online harassment and their lawyers can use to repair and remediate these privacy violations.

Doing nothing ensures only that nothing will be done, that the offending content will remain online and that it will continue to replicate. Although what was done to Andrews cannot be undone, she stood up and fought back. You simply cannot win if you don't get in the game.

Elisa D'Amico is a partner in the Miami office K&L Gates. She is a commercial litigator with a focus on Internet privacy, online consumer deception and fraud, unfair and deceptive acts and practices, and affiliate marketing. In 2014, she co-founded the K&L Gates Cyber Civil Rights Legal Project.