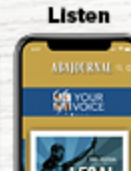


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Home / Law Scribbler / Use copyright law to battle mugshot extortion

LAW SCRIBBLER

Use copyright law to battle mugshot extortion

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Jason Tashea

for her LinkedIn and Facebook profiles.

Making matters worse, she did not find her photo on a newspaper or crime blotter website that reports local crime. Cantu found herself in the mugshot racket. Her photo was on Arrestmugshot.com, Mugshots.com and Tampacriminal.com—all of which demanded a fee to take down these photos (two

After her DUI charge was dropped, Julie Cantu thought her nightmare was over. Then, she went on a date.

Over dinner, Cantu's would-be-suitor was asking questions anyone asks on a first date. Then he asked about her criminal record. Caught off-guard by the question, she thought about the dropped charge. Her blood alcohol had been 0.021, well below the legal limit of 0.08, and she had no other contact with the law. How did her date know?

After getting home, the Florida resident and retired nurse went online and searched her name. Her mugshot, eyes puffy and red from crying, was displayed prominently between results

of these sites, arrestmugshot.com and tampacriminal.com, are no longer active, with the latter now redirecting to a lawyer's website).

After paying \$175 to one site to take down the photo, she found her mugshot pop up on another, which asked for even more money. An exploitative game of online whack-a-mole had begun.

Cantu says she worried that the photo was "going to be there the rest of my life."

From what we post online to what is posted about us, our internet profiles are defining. While there have been attempts to curb mugshot websites by state governments and tech companies, this extortion racket is alive and well. It is an ongoing, national problem that requires a new solution, bringing together police and communities against these nefarious websites. To fight back, law enforcement agencies must flex their legal ownership of mugshots to combat this destructive practice.

An estimated 70 million Americans have a criminal record, making this a national issue.

Yet having a criminal record does not mean a person was found guilty or even charged with a crime. At a bare minimum, it means a person was arrested and then let go. Regardless of the legal outcome of an arrest, there is likely a commemorative mugshot, which can find its way online. Even if the individual expunges their record and mugshot, the legal process of erasing a criminal record, the internet never forgets—in part due to mugshot websites.

The individual struggle against these websites is well-documented

(<https://www.nytimes.com/2017/06/03/opinion/sunday/innocent-until-your-mug-shot-is-on-the-internet.html>), affecting employment, housing and potential relationships (https://motherboard.vice.com/en_us/article/7xzn4x/dating-app-gatsby-doesnt-want-you-to-swipe-right-on-criminals). Seventy-seven percent of employers Google job applicants, according to the job-posting website Monster.com (<https://www.monster.com/career-advice/article/hr-googling-job-applicants>). And it is an unanswered question as to whether turning down tenants based on their criminal records violates the Fair Housing Act.

Hiring and renting policies like these are commonplace and uniquely hurt minority job candidates and renters. While black people are 13 percent of the U.S. population

(<https://www.census.gov/quickfacts/fact/table/US/PST045216>), they make up 33 percent of those in our prisons and jails. Similarly, Hispanics make up 18 percent of the country and 23 percent of the prison population, according to the Department of Justice (<https://www.bjs.gov/content/pub/pdf/p16.pdf>). About 95 percent of people in prison will re-enter society after their sentence.

Completing a sentence, however, does not mean the punishment is over. Those with a conviction have to disclose their record on job and loan applications, while other states limit the right to vote based on a criminal record. As for mugshots, they can follow people, with or without a conviction, like a scarlet letter into perpetuity.

For those like Cantu who have the tenacity to take on these websites, it can be an expensive and time-consuming endeavor. After paying the \$175, Cantu says another site asked for \$500 to take her mugshot down. Compounding this individual economic burden, by one account

(<http://cepr.net/documents/publications/ex-offenders-2010-11.pdf>), criminal records as a hurdle to employment could cost the U.S. economy up to \$65 billion a year.

All the while, the existence of these sites does not improve public safety.

States have attempted to rein in these websites with dubious impact. According to the PEW Charitable Trusts (<http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/12/11/fight-against-mugshot-sites-brings-little-success>), 18 states have passed laws to restrict mugshot websites, including a ban on charging money to take down photos, limiting private sector access to mugshots and requiring that mugshot sites are accurate and reflect official records.

Even when people take steps to expunge their criminal records, these websites have no interest in reflecting the updated and accurate records. As one prominent mugshot website states: “As you may be aware expungement and pardon only apply to certain government agencies’ databases, and not all of them. Certainly (sic) not to the private sector.”

Due to the industry’s response, PEW points out that the success of these laws is limited. Mugshot sites continue to extort residents in states with these regulations, including California, Georgia, Illinois and Texas.

Outside of government, Google attempted to ameliorate the problem by deindexing mugshot websites from their search results in 2013. However, Sarah Esther Lageson, an assistant professor at Rutgers University, writes in her forthcoming book, *Digital Punishment*, that mugshot websites worked around Google’s changes. As a subsequent, devastating consequence, many people reported that their mugshots proliferated on the search engine.

The internet’s seeming lawlessness and lack of jurisdiction can make this problem seem intractable. It is not.

Police departments around the country are in the unique position to serve and protect those like Cantu by using existing copyright law to support their community and fight back against the mugshot racket. Doing so provides a unique opportunity to combat online extortion and improve community-police relationships.

Mugshots hold an administrative purpose in the criminal justice system, so their existence will likely continue. This means that open records laws will continue to usher these photos online. (An exception to this rule is a 2016 ruling from the 6th U.S. Circuit Court of Appeals, which held (<http://www.opn.ca6.uscourts.gov/opinions.pdf/16a0164p-06.pdf>) that a federal agency can, on a case-by-case basis, decline a Freedom of Information Act request for a mugshot due to privacy concerns.)

This makes it easy for mugshot websites to collect photos and start the cycle of extortion. To this end, police departments have a responsibility, as the creators of these pictures, to mitigate their harm.

In the U.S., the default copyright holder of a photo is the person or organization that took the photo, not the person in the image. In the case of mugshots, this is most likely the law enforcement agency.

When someone without permission posts copyrighted material to the Internet, the owner of the copyright can use the Digital Millennium Copyright Act to send a takedown notice. If the site refuses, the unauthorized publishing of this material can cost a site up to \$150,000 in penalties per photo, as Amanda Lewendowski (<https://www.theatlantic.com/technology/archive/2014/02/our-best-weapon-against-revenge-porn-copyright-law/283564/>) wrote in 2014 regarding a similar argument made against revenge porn websites.

Because police departments will hold multiple copyrights to photos on these websites, they would be able to take down hundreds at a time. By using the DMCA for its intended purpose, police departments will help tens of thousands of people— from Baltimore to Oakland—and earn goodwill in their communities.

That said, using the DMCA in this manner is not a silver bullet.

First, some governments—such as the federal government—do not allow themselves to own copyrights. In the absence of a copyright, a DMCA takedown notice will not work. This is an impediment that each jurisdiction will have to consider. Depending on local laws, one potential solution is contracting a private, third-party vendor to take the photos and act as owner and party to the DMCA takedown notices.

Second, some of these websites do not use American servers, so they can be hard to reach legally. Nearly half of the world has signed the World Intellectual Property Organization Copyright Treaty—the basis for the DMCA—and it obliges each signatory to accept each other's takedown notices. So there is a mechanism to go after off-shore perpetrators.

However, enforcement is not uniform. Adding challenges, a country that did not sign the WIPO treaty could host a mugshot site, putting the site beyond reproach.

Third, an entrepreneurial police department undertaking this challenge would have to find the mugshots from their department spread across dozens on websites to send the appropriate takedown notices. To make this practice more efficient, police departments could keep a list of hash values—a unique, fixed identifier—associated with their mugshots.

This technology, like Microsoft's PhotoDNA, already exists and is being deployed to curtail the spread of child pornography online. Its use could streamline and largely automate the process to battle mugshot extortion.

These complications must be considered, but they do not foreclose on this novel approach that will help our family members, friends and neighbors with a record.

While the internet can challenge our notions of law and justice, the DMCA can be a powerful tool to help those who are victims of mugshot websites. The police, whether they know it or not, are uniquely positioned to help people like Julie Cantu.

After her arrest and the subsequent fallout, Cantu says it took her three years to have a glass of wine in public again. Having moved to a new city since the arrest, the experience still leaves her feeling “paranoid” and uneasy around the police.

“It's just one of those things that stays in the back of your mind,” she says.

Now, eight years and an expungement later, Cantu's mugshot can still be found online.

It is time that police departments take a leadership role to end this exploitative cycle. Allowing extortion to continue unabated is not an acceptable alternative.

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