

**LEGAL CONSTRUCTION AND IMPLICATIONS RELATED TO PROTECTION OF  
MAKING SEX TAPE WITH A COUPLE  
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**Abstract**

This study aims to analyze the Indonesian laws and regulations concerning the protection of intimate video makers. The research was conducted by analyzing the Pornography Law, the Information and Electronic Transaction Law, the Government Regulation on the Implementation of Electronic Transaction Systems, and the Regulation of the Minister of Information Communication on Personal Data Protection. This research found that data/documents that are made for oneself and for their own interests which are not prohibited by law and included to one of the privacy rights that must be protected by every human being and by the state. The making of this intimate video is included in the privacy rights to enjoy life and should not be contested. Activities contained in the video can range from holding hands, hugging, kissing to having sex with consent. Therefore, if there are those who oppose rights such as acquisition and distribution without consent, the owner of the personal data can file a lawsuit for damages and have a right to erase their electronic documents.

Keywords: intimate video; protection; sexual law

**Abstrak**

*Penelitian ini bertujuan untuk menganalisis peraturan perundang-undangan Indonesia yang memuat tentang perlindungan terhadap pembuat video mesra. Penelitian dilakukan dengan menganalisis Undang-Undang Pornografi, Undang-Undang Informasi dan Transaksi Elektronik, Peraturan Pemerintah tentang Penyelenggaraan Sistem Transaksi Elektronik serta Peraturan Menteri Komunikasi dan Informasi tentang Perlindungan Data Pribadi. Penelitian ini menemukan bahwa data/dokumen yang dibuat untuk diri sendiri dan kepentingan sendiri bukanlah hal yang dilarang oleh undang-undang dan justru harus dilindungi baik oleh tiap manusia maupun negara. Pembuatan video mesra ini termasuk dalam hak pribadi untuk menikmati hidup dan tidak boleh diganggu gugat. Aktivitas yang termuat dalam video tersebut bisa dari bergandengan tangan, berpelukan, berciuman hingga berhubungan badan yang dilakukan atas persetujuan. Oleh sebab itu jika terdapat pelanggaran terhadap hak seperti perolehan dan penyebarluasan tanpa persetujuan, pemilik data pribadi dapat mengajukan gugatan kerugian dan mengajukan permohonan untuk menghapus data tersebut.*

*Kata kunci: hukum seksual; perlindungan; video mesra*

**Introduction**

Can not be dennied that technological development in Indonesia has rapidly increased. Internet as one of the impacts of this technological development offers people to obtain information and process it faster. According to Indonesian Internet Service Providers Association (APJII)'s data that internet users constantly inscreas 25% every year.<sup>3</sup> Can be seen hrough their survey that the penetration of internet users in 2019-2020 (Q2) was 196.71 million internet users.<sup>4</sup> The data may show that there has been rapid progress in internet usage in Indonesia. This can mean that technology and the internet included in it can affect human activity. The ease of obtaining, accessing, managing and even deploying makes internet users grow. Human activity to disseminate this information is also related to personal data which is important to keep secret. As an internet user, it is clear that every human being is obliged to

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<sup>3</sup> daryanto Setiawan, 'Dampak Perkembangan Teknologi Informasi Dan Komunikasi Terhadap Budaya Impact of Information Technology Development and Communication On', *Jurnal Pendidikan*, 2017 <<https://doi.org/10.1155/2015/146250>>.

<sup>4</sup> Asosiasi Pengguna Jasa Internet Indonesia. "LAPORAN SURVEI INTERNET APJII 2019 - 2020 (Q2)"

protect the confidentiality of his/her personal data. Not only individuals, the state must also be present to protect the personal data of its citizens.

Indonesia as a legal country has an important role to protect personal data that is included in the rights of its citizens. The concept of protecting personal data as an individual's right and right to privacy is popular through the scientific journal "The Right to Privacy" by Samuel Warren and Louis Brandeis published by the Harvard Law Review. Warren and Brandeis argue that when technology develops, there will be an awareness that there is a right of a person to enjoy life. This right is the right of a person who should not be disturbed by others or by the state. The law must protect this right to privacy.<sup>5</sup> They argue that the rights of these individuals should also be protected by law as part of human rights issues.<sup>6</sup> This relates to the obligation of the state to protect, to respect and to fulfill. The state as a stakeholder must be able to fulfill its obligation to protect the rights of rights holders, namely individuals and community groups. Every human activity related to the internet must be protected, including those containing human private lives. Personal life with a partner among others must also be protected.

Life with a partner does not escape from capturing beautiful moments. There is no denying that there are many things that can be immortalized as a record of the journey of life between the couple. This will result in the desire to capture it through taking pictures or recording certain events. It is not difficult to do so let alone accompanied by the advancement of the times and technology. Not only capturing friendly things that are commonly done, but also friendly things that are more intimate with a partner. Commonly referred as pornography. Pornography itself based on a liberal approach supported by writers and artists is said to be fine because it is an aspect of each individual's actuality. In it is not only nudity, but also hugs and kisses that can cause lust.<sup>7</sup> The understanding relates to the terminology that is being discussed, namely friendly. Friendly is often associated with romantic relationships between couples. Friendly in English can be interpreted as intimate which according to the Cambridge Dictionary can have the meaning of 'very close and personal relationship' or 'sexual relationship'. This very close relationship can involve any activity, coupled with personal and sexual terminology. Holding hands, cuddling, kissing and having intercourse can fall into the friendly category.

In one of the rules in Indonesia, the Pornography Act states that it is forbidden to make pornography, but it is excluded if it is made for yourself and self-interest. From these two understandings it is obtained that pornography contains not only adult scenes but also hug and kiss scenes and if made or recorded for their own sake is not prohibited. With regard to the protection of personal data and human privacy rights, it is not in line with what is in reality in Indonesia. At the end of 2020, the case of Indonesian celebrity sex tape spread on social media. Both perpetrators of the syur video were ensnared by the Pornography Act. The video was massively distributed by two different perpetrators who were then ensnared in layered

<sup>5</sup> Sri Ayu Astuti, 'ERA DISRUPSI TEKNOLOGI 4.0 DAN ASPEK HUKUM PERLINDUNGAN DATA HAK PRIBADI', *PAJOUJL (Pakuan Justice Journal Of Law)*, 01 (2020).

<sup>6</sup> Sinta Dewi, 'KONSEP PERLINDUNGAN HUKUM ATAS PRIVASI DAN DATA PRIBADI DIKAITKAN DENGAN PENGGUNAAN CLOUD COMPUTING DI INDONESIA', *Yustisia Jurnal Hukum*, 5.1 (2016) <<https://doi.org/10.20961/yustisia.v5i1.8712>>.

<sup>7</sup> Topo Santoso, 'Pornografi Dan Hukum Pidana', *Jurnal Hukum & Pembangunan*, 26.6 (2017) <<https://doi.org/10.21143/jhp.vol26.no6.1080>>.

articles of the Information and Electronic Transactions Act (ITE) and the Pornography Act.<sup>8</sup> The video that was supposed to be the personal data of the recorder became a public spectacle because of its two massive spreaders. The leak of the personal data of these recorders caused harm to them when it should have been protected by the state. Unfortunately, so far Indonesia still does not have regulations that contain special protection of personal data. The regulation is still contained in general for example contained in the Information and Electronic Transactions Act, Telecommunications Law, Archival Law, Banking Law, Health Law, Corporate Documents Law and Population Administration Law.<sup>9</sup>

There are three originalities of the research, namely more often, they involve photographs or videos originally obtained with consent, usually within the context of private or confidential relationships. The most prevalent form entails putting these sexually graphic images on the Internet, or otherwise sharing the images among the public, after such relationships have turned sour. As its name indicates, perpetrators of revenge porn aim to humiliate their victims so as to seek "revenge" against them. The Internet provides a convenient channel for such purposes. Besides regular social media sites, many of which adopt a laissez-faire policy with regard to the content of users' postings, there are interactive pornographic websites, including YouPom, PomTube and XVideos, which invite users to post photos of themselves and others. In addition, special "revenge porn" websites have been set up, which "instruct [users] to submit photos of ex-partners to 'get revenge. Not only are existing criminal stalking and harassment laws inadequate for prosecuting perpetrators.<sup>10</sup>

Enforcement of laws and policies in these matters is weak in view of the (potentially) different laws to which social aspects on board might be submitted. This paper analyses the already existing mechanisms to combat sexual harassment from a socio-legal perspective and argues that a tailor-made approach to this damaging problem is necessary. The traditional reluctance of maritime professionals to report any issues on board is aggravated in the case of sexual harassment, thereby a zero-tolerance policy has to be strongly asserted in order to realize a work environment free from discrimination, and enhance the effective recruitment and retention of women seafarers.<sup>11</sup> Additional suits are likely in the coming months. This Article examines the role of corporate and securities law in regulating and remedying workplace sexual misconduct. We specify the conditions under which corporate fiduciaries can be held liable under state law for perpetrating sexual misconduct or allowing it to occur. We also discuss the circumstances under which federal securities law requires issuers to disclose allegations against top executives and to reveal settlements of sexual misconduct claims. After building a doctrinal framework for analyzing potential liability, we consider the

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<sup>8</sup> B Al Farisi, 'Perjalanan Kasus Video Syur, Awalnya Gisel Mengelak Hingga Jadi Tersangka' <[www.kompas.com](http://www.kompas.com)>.

<sup>9</sup> Sinta Dewi, 'Konsep Perlindungan Hukum Atas Privasi Dan Data Pribadi Dikaitkan Dengan Penggunaan Cloud Computing Di Indonesia', *Yustisia Jurnal Hukum*, 5.1 (2016).

<sup>10</sup> Amy Lai, 'Revenge Porn as Sexual Harassment: Legislation, Advocacies, and Implications', *The Journal of Gender, Race, and Justice*, 19.2 (2016).

<sup>11</sup> Laura Carballo Piñeiro and Momoko Kitada, 'Sexual Harassment and Women Seafarers: The Role of Laws and Policies to Ensure Occupational Safety & Health', *Marine Policy*, 117 (2020) <<https://doi.org/10.1016/j.marpol.2020.103938>>.

strategic and normative implications of using corporate and securities law to address workplace sexual misconduct. We conclude that corporate and securities law can publicize the scope and severity of sexual harassment, incentivize proactive and productive interventions by corporate fiduciaries, and punish individuals and entities that commit, conceal, and abet sexual misconduct in the workplace. But we also address the potential discursive and distributional implications of using laws designed to protect shareholders as tools to regulate sexual harassment. We end by emphasizing the promise-as well as the pitfalls-of using corporate law as a catalyst for organizational and social change.<sup>12</sup> The difference with this study is that it focuses on videos made aware of the legal implications.

Based on the background described, there are two research questions, namely how is the legal construction that can protect sex tape makers? And what are the legal implications in terms of the protection of sex tape makers?

### Research Method

The research method used is normative research method conducted by researching literature to obtain legal materials to be analyzed. The approach that will be used in this writing is statue approach done by researching the legislation.<sup>13</sup>

### Results And Discussion

#### Legal Construction To Protect Sex Tape Makers

What happens personally is everyone's privacy, including activities with a partner also their sexual lives. There is some explanation of data protection settings from Data Protection Art 1998. One of the research is about sensitive data which is personal data consisting of information related to a person's sexual life.<sup>14</sup> Activities such as taking photos and taking and storing videos between them will be the personal data of each couple that is private, unless it is required to be shared with the consent of both parties. However, these privacy restrictions are difficult to determine because the one who owns the privacy that will determine the limitations. These personal data is a privacy that has to be protected by law, both national and international construction. This privacy is mentioned in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

*"Article 12 of Universal Declaration of Human Rights*

*No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."*

*"Article 17 of International Covenant on Civil and Political Rights*

1. *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

2. *Everyone has the right to the protection of the law against such interference or attacks."*

Based on the sound of both article of international rules hints that the right to privacy has a strong position to be protected and strong also not to be disturbed and attacked/threatened. There is a reason behind this sex tape referred to a personal right according to the explanation

<sup>12</sup> Daniel Hemel and Dorothy S. Lund, 'Sexual Harassment and Corporate Law', *Columbia Law Review*, 118.6 (2018).

<sup>13</sup> Anna Piszcz and Halina Sierocka, 'The Role of Culture in Legal Languages, Legal Interpretation and Legal Translation', *International Journal for the Semiotics of Law*, 2020 <<https://doi.org/10.1007/s11196-020-09760-3>>.

<sup>14</sup> Lia Sautunnida, 'Urgensi Undang-Undang Perlindungan Data Pribadi Di Indonesia: Studi Perbandingan Hukum Inggris Dan Malaysia', *Kanun Jurnal Ilmu Hukum*, 20.2 (2018) <<https://doi.org/10.24815/kanun.v20i2.11159>>.

of Article 4 and Article 6 of the Pornography Act. It can be observed that in the Pornography Act Article 4 there is a rule that everyone is prohibited from making pornography and in Article 6 there is a rule that everyone is prohibited from owning or storing pornographic products. But further said in the explanatory chapter that Article 4 and Article 6 of the prohibition on making and possessing or storing such pornography are not included for himself or herself and his own interests. For itself and its own interests this may mean that such data is stored for personal gain and becomes a person's personal right. This is why sex tape made for their own purposes and self-interest are a person's personal right to be protected. The personal data of this couple is clearly in contact with technology, let alone the internet which is one of its developments. If it relates to technology users, it will intersect with Law No. 11 of 2008 on Information and Electronic Transactions (ITE Law) and Law No. 19 of 2016 on its amendments. However, the term 'personal data' has a general concept only and is not clearly defined in the ITE Act. The term 'personal data' can be found in Government Regulation No. 71 of 2019 on The Implementation of Electronic Systems and Transactions (PP PSTE) and Regulation of the Minister of Communication and Informatics No. 20 of 2016 on The Protection of Personal Data in Electronic Systems (Permen PDP). From these two regulations, it is obtained that personal data is individual data that can be identified separately or combined with other information either directly or indirectly through electronic or non-electronic systems that are stored, maintained, and maintained to the truth and protected by confidentiality.

Although the ITE Act and its amendments do not say clearly what the limits of 'personal data' are, in the details it hints at protecting personal data on any use of electronic media. This can be seen in Article 26 of the ITE Law which says when it comes to personal data must be done with the consent of the person concerned. And if anyone violates his rights can file a lawsuit for damages incurred. In this case it includes the protection of unauthorized use, the protection of electronic system operators and the protection of illegal access and interference. Personal data is referred to one of the privacy rights.<sup>15</sup> The personal rights mentioned in the ITE Act have 3 meanings: the right to enjoy a private life and free from all kinds of distractions, the right to be able to communicate with (others without the act of spying) and the right to supervise access to information about one's personal life and data. Can be seen from those explanations that to record events with someone is one of personal rights, namely enjoying a private life and free from any distractions.

In the PP PSTE and Permen Kominfo PDP said that the processing of this personal data must meet the provisions of the valid consent of the owner of the personal and this agreement is a statement in writing either manually or electronically. The processing of this personal data is intended as the acquisition and collection; processing and analysis; storage; fixes and updates; appearance, announcement, transfer, dissemination, or disclosure; or removal and destruction. When a person or spouse processes his/her personal data through electronic media must have the agreement and consent of both parties. If the data is distributed without the consent of either party or both parties then it no longer meets the terms of the agreement.

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<sup>15</sup> Malgorzata Magdziarczyk, 'EU GDPR', *6th SGEM International Multidisciplinary Scientific Conferences on SOCIAL SCIENCES and ARTS Proceedings, Modern Science*, 6 (2019).

There are many cases that describe the event of data leakage by other parties without the consent in question. In the ITE Law it has been said that if the right is violated then the party concerned can file a lawsuit for the losses incurred.

It is also said that Permen Kominfo PDP Chapter 2 on The Protection of Personal Data here is included in the process of obtaining and collecting; processing and analysis; storage; appearance, announcement, delivery, dissemination, or opening of access and destruction. It is further said in PP PSTE Article 15 that every electronic system operator is obliged to remove irrelevant electronic documents that are under his control at the request of the person concerned. This removal obligation consists of removal (right to erasure) and expenditure from the search engine list (right to delisting). Article 16 PP PSTE provides restrictions on the kinds of irrelevant electronic documents that are deleted, consisting of Personal Data obtained and processed without the consent of the owner of the Personal Data; its consent has been withdrawn by the owner of the Personal Data; obtained and processed in an unlawful manner; is not in accordance with the objectives of the agreement or the provisions of the laws and regulations; its use exceeds the time limit set forth in the agreement or legislation and is displayed by the electronic system operator which adversely affects the owner of the Personal Data. While the irrelevant expenditures made from the list of search engines are carried out based on the determination of the court.

In the case of rampant occurrence is in terms of acquisition and collection, appearance and dissemination without the consent in question. This would clearly violate the personal rights of the owner of such Personal Data. The owner of the personal data has the right to file a claim for loss and apply so that the data can be deleted but the application must contain the identity of the applicant; the identity of the electronic system operator or the address of the electronic system; irrelevant personal data as well as the reason for the request for deletion. In addition to the process between the owner and the organizer until it enters the scope of the court there is also the participation of other human beings, Permen Kominfo PDP Article 5 and Article 34 hints at preventive measures to avoid the occurrence of failures in the protection of personal data which at least includes activities to raise human awareness to provide protection of personal data as well as conducting failure prevention training and also personal data protection education.

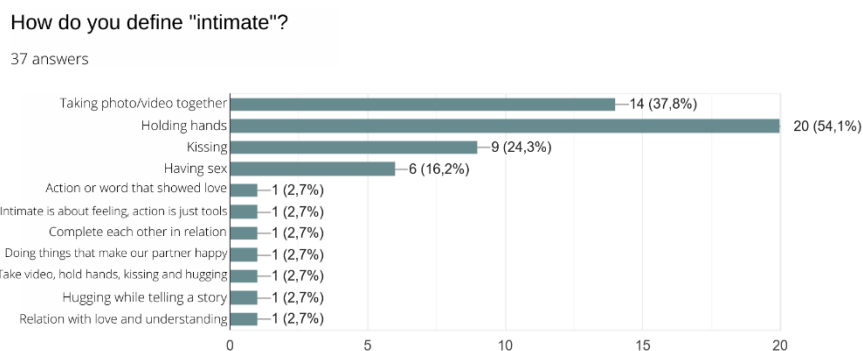
### **Legal Implications In Terms Of The Protection Of Sex Tape Makers**

Ubi societas ibi ius which means where there is a society then there is a law, this means that the law exists to regulate people's lives.<sup>16</sup> Similarly, in the life of the community that continues to develop, the law is also expected to go hand in hand with the development of society. The law must be dynamic because people's lives are growing fast. There is a mindset that will develop in the community and will produce an activity in the community. Activities can involve anything, including the use of technology that also has rules.

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<sup>16</sup> Ridwan Arifin, 'Legal Development and Globalization: Some Contemporary Issues in Indonesia and Global Context', *Journal of Law and Legal Reform*, 1.3 (2020) <<https://doi.org/10.15294/jllr.v1i3.38544>>.

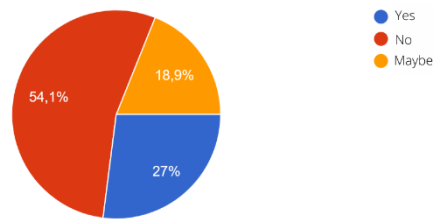
Through a survey of a total of 37 correspondents held in this series of studies on February 19<sup>th</sup> 2021 presented several questions related to sex tape. From an understanding of 'intimate', video making to the spread of consensualism has been presented. From this survey, the correspondent answered about the purpose of being intimate is to take pictures / record videos close together, holding hands, making out to have sex. They are saying that intimate is to do things that make a their partner happy and deeds or words that show affection. The meaning they provide in this survey is not out of bounds of the terminology being used. Such restrictions are given that friendly also covers all activities with a partner that are also related to the content of pornographic material, namely sexual intercourse.



Picture 1  
 Results of the "Intimate" Usage Survey

There are also 27% of people who have made sex tape, 54.1% of people who have never made and 18.9% who do not know that they are making sex tape. 29.7% of people answered that the video was for personal consumption and the remaining 70.3% answered the video storage as desired or intended. This means that it is possible that the creator of the video saves and distributes it. Thus it appears that what these couples have done relates to the Pornography Act in making pornographic products. Under the Pornography Act it is not prohibited to make or possess/store pornographic products for such purposes for themselves and their own interests.

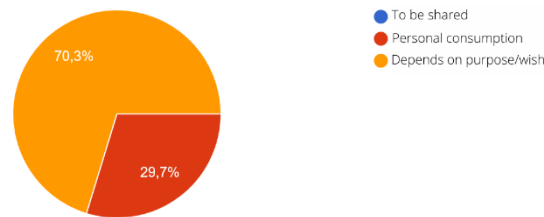
Have you ever made Intimate Video / Sex Tape?  
37 answers



Picture 2  
Survey Results Who Have Made Intimate Video/Sex Tape

This video that has been made is clearly a personal data, as mentioned earlier that one of the definitions of personal data is sensitive data which is personal data consisting of information related to a person's sexual life. This personal data must be protected because it is one of the privacy rights that is also a human right. Personal data used through electronic media as mentioned in the ITE Act must be done with the consent of the person concerned. But it turns out that not all activities through electronic media are carried out with approval.

Is the video to be shared on social media or for personal consumption?  
37 answers

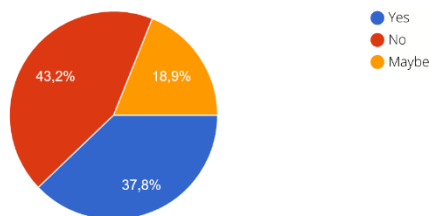


Picture 3  
Survey Results Purpose of Making Intimate Video/Sex Tape

The questionnaire found that 43.2% of people did not make videos of their own volition that in other words did without consent. This percentage is bigger than the percentage of people who do of their own volition. Judging from the acquisition of this survey it is clear that doing such activities without the will of others will violate the rights and privacy of the person. Whereas if seen in the legislation it says all processes related to electronic media must meet the valid approval. It is stated in PP PSTE and Permen Kominfo PDP that the processing of this personal data must meet the provisions of the valid consent of the owner of the person and this agreement is a statement in writing either manually or electronically.



Do you make the videos of your own will?  
37 answers



Picture 4  
Survey Results Willing to Make Intimate Video/Sex Tape

Sudargo Gautama said that one can be said to agree if he does want what has been agreed.<sup>17</sup> In PP PSTE and Permen Kominfo PDP are mentioned that the valid purpose is written approval. But one's personal life is a relationship between people and people commonly known as private law. Within the scope of private law there are valid terms of agreement including the agreement of those who bind themselves, the ability to make agreements, a certain thing and a lawful reason. This agreement is marked by the offer and acceptance by written, oral, discreet or certain symbols. This shows that oral agreements are valid agreements because they meet the elements of the word agreement.<sup>18</sup> If done in writing, it will be easy to be used as evidence if something happens that violates the rights of others. But it will be difficult if it is done orally because it has no evidence either there is consent or no consent. It could be that the consent is manipulated by a person or other reason. Although in the scope of private law evidence can be in the form of confessions and oaths and it can be proven, the law in Indonesia still does not have specific regulations related to consent that are only done by oral or without consent. However, any person who violates his/her rights can still file a lawsuit for damages incurred as stated in the ITE Law.

Indonesia can make regulations such as those in EU countries that apply special protections for sensitive information. This sensitive information can be related to the face or other body measurements of a person. But unfortunately awareness of consensual matters without valid consent has not increased. There are still many things done without approval or approval obtained incorrectly but the protection is still not strong enough.

### Conclusion

The activities carried out by a human being and his partner are personal lives that then produce a lot of personal data. This personal data must be protected even by the state because it is a right to privacy. This personal life and personal data can be found both in international treaties such as the Universal Declaration of Human Rights and International Covenant of Civil and Politic Rights. And also in national regulations such as the Law on Information and Electronic Transactions, Government Regulations on the Implementation of Electronic

<sup>17</sup> Siti Nurwulan and Hendrik Fasco Siregar, 'Asas Konsensualisme Dalam Penambahan Klausula Kontrak Berdasarkan Prinsip Itikad Baik', *PROCEEDINGS UNIVERSITAS PAMULANG 1.1* (2020).

<sup>18</sup> Fajar Sahat and others, 'Kekuatan Mengikat Perjanjian Yang Dibuat Secara Lisan', *Fakultas Hukum Universitas Udayana*, 2014.

Systems and Transactions and Regulation of the Minister of Communication and Informatics on the Protection of Personal Data in Electronic Systems. Some of these rules suggest that the protection of personal data is very important and should not be threatened by anyone and must even be protected by the state. Out of 37 survey respondents have obtained many 'intimate' meanings. And it has been found that not all of these intimate video/sex tape are made with their consent and there are even some of them who do not know they are being recorded. These things relate to consensualism. Although consent is permissible by oral means, but still, it is easier to prove a written consent. But not having evidence does not mean eliminating a person's right to file a lawsuit or obtain protection.

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