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The Rise of Deepfake and Media Synthetization

Internet users are sounding the alarm as “Deepfake” videos are increasingly becoming more common. Deepfakes are videos made by software apps where users can take an original video file and have an app alter the subject matter’s speech, appearance and facial expression in real time.

Concerns range from copyright violations, sexual harassment, video renderings depicting celebrities engaging in illicit acts, to the use of Deepfake videos as a form of subversive political tactics via “fake news.” For example, in Iraq, there are reports of Deepfake videos being used against rival politicians.¹

Privacy and other special interest groups² are monitoring the trends involving how Deepfake videos and “fake news”³ are used and addressed by lawmakers.



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The proliferation of cheap technology and deliberate misinformation campaigns by state agencies,⁴ have made internet users vulnerable to having their image manipulated. This area of the law must now evolve to keep up with the rapid pace of technology.

How Other Countries are Reacting

Other jurisdictions have enacted legislation designed to combat Deepfake videos. On January 12, 2018, Germany enacted the Act to Improve Enforcement of the Law in Social Networks, also known as the Network Enforcement Act (NEA). The NEA allows for stiff penalties against social media providers who host “hate speech.”

In the United States, lawmakers are grappling with the inadequacy of their content provider laws, such as the Communications Decency Act of 1996 (CDA) in combatting Deepfakes.⁵ The state of New York has introduced Bill A08155, preventing the unlawful use of personal images. This bill, if passed, would provide injunctive relief and a claim for damages for persons whose ‘persona’ is unlawfully used “without the written consent first obtained.”⁶

Other countries such as the United Kingdom (UK), France⁷ and Spain⁸ have also proposed their own legislation with varying aims from combatting sexual harassment to combatting the proliferation of “fake news.”

How Canada is Reacting

Canada has yet to legislate specific Deepfake concerns. Certain provinces have existing legislation that combats the distribution of intimate images without a person’s consent (also known as “revenge porn” or “cyberbullying” laws). These provincial legislations provide for a tort of non-consensual distribution of intimate

images. Similar laws are found under the Criminal Code of Canada (Criminal Code). How Canadian law defines “intimate image” under provincial legislation such as Manitoba’s The Intimate Image Protection Act (IIPA) is in uniform with the Criminal Code.

The IIPA defines intimate image as “a visual recording of a person made by any means, including a ‘video recording’ in which the person depicted in the image is nude... or is engaged in explicit sexual activity, which was recorded in circumstances that gave rise to a reasonable expectation of privacy in respect of the image, and if the image has been distributed, in which the person depicted in the image retained a reasonable expectation of privacy at the time it was distributed.”⁹

Under Canadian Federal legislation, the Criminal Code has existing harassment and unlawful distribution offenses under section 264(1) and 162.1(1) which may be of some assistance for victims. Under section 264(1), “No person shall, without lawful authority... engage in conduct... that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them... and repeatedly communicating with, either directly or indirectly, [to] the other person or anyone known to them.”¹⁰

Under section 162(1) of the Code, it is an offense for anyone who knowingly publishes, distributes, makes available an “intimate image” of a person knowing that the person depicted in the image did not give their consent to that conduct. The penalty for this offense may result in imprisonment for a term of not more than five years; or an offense punishable on summary conviction.”¹¹

Where the need for the law to evolve arises in how the provincial legislation and the Criminal Code define “intimate image.” An issue arises as these laws are designed to prevent distribution of “real” or “authentic” videos. In other words, the law presumes that the intimate images are true, that the events in the video occurred, or were done by the person(s) depicted in them. Both acts, and other similar legislation from other Canadian provinces do not specifically prohibit “created” or fictionally rendered “intimate images.” An issue may arise as the Deepfaked video does not actually depict a “real” person, but rather a fictional simulation of an individual’s likeness.

The vagueness in the legislation may make prosecution difficult but may still be used successfully. For example, the U.K. has recently successfully convicted an identifiable offender using Deepfake to harass their co-worker, leading to a 12-year jail sentence for the offender.¹²

Procedural Issues in Canadian Private Civil Claims

If the only viable solution appears to be private actions against offender(s) in defamation or copyright infringement claims, potential plaintiffs should keep these procedural issues in mind. Of course, a general warning is always warranted as these types of actions are almost always costly, time consuming and difficult for plaintiffs to obtain a judgement.

Here are eight things to keep in mind when deliberating whether to file a claim for a private tort or copyright action.

1. Jurisdictional concerns

Defendant(s) may be spread throughout Canada, or the world. Deciding which forum to use will dictate procedural steps that need to be complied with, such as filing and serving a notice of action against all defendants or internet service providers. It is best to ensure you check with the local jurisdictions as to what notice provisions are required.

2. The medium for the message is ever changing

Video distribution is no longer reliant on websites. There are now more mobile apps where media is distributed, such as Instagram, Snapchat, Discord and other livestreaming applications. Lawyers should

ensure that they have mechanisms in place to preserve evidence in the proper format.

3. Defendant(s) are most likely anonymous

Websites don’t require you to disclose who you are prior to using them. Doxing (the public posting of personal identifying information) is usually prohibited by website user norms and breach privacy laws. Cooperation from internet service providers (ISP) is difficult to obtain and usually requires a court order compelling the ISP to provide disclosure. Furthermore, disclosure from ISP may only be useful where the defendant(s) is in the ISP’s coverage area.

4. Financial compensation is hard to find

Unlike traditional corporate media defendants, online publishers may have no assets or have non-attachable assets that are outside the jurisdiction of the court where the claim is filed. Worse still, defendants may be transient or may involve an unknowable number of users all participating in the creation and dissemination of Deepfake videos.

5. Lawyers are not exactly safe from abuse

Parties to traditional defamation disputes usually see lawyers as disinterested actors. Online disputes involving anonymous users make no consideration for this and lawyers may be subject to personal attacks, doxing or defamatory comments.

6. Decision whether to file a claim entails new variables

Traditional claims for defamation require clients to act due to strict limitation dates (often plaintiffs must act, or not at all) and actions seek to force the defendant to apologize, remove content from their newspaper or magazine article. The difficulty faced by victims of Deepfake videos are that the material that they seek to remove may not be easily removed from the internet. Alternative steps may require plaintiffs to hire companies that specialize in removing content from the internet instead of using their resources in addressing their claim in court.

7. Don’t forget about hyperlinks


Hyperlinks may be considered defamatory under Canadian law depending on the circumstances. The question to ask is whether if “read contextually, the text that includes the hyperlink constitutes adoption

or endorsement of the specific content it links to.”¹³ If so, the posting of hyperlinks may be considered defamatory.

8. Limitation periods may be variable

The usual limitation periods for a claim of defamation is two years from the date of publication. In a situation where the Deepfake video is published repeatedly in different websites, each publication may restart the clock on the limitation period.

Conclusion

This area of the law is ever changing. It is not a bad idea to update the lawyer’s toolbox every few weeks. As always, the above information is meant for general knowledge. Please consult your legal counsel for any legal advice. 

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- 10 Criminal Code (R.S.C., 1985, c. C-46) s 264(1)
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