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Deepfakes: IP Is Not the Cure

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Deepfakes are plaguing our information society. Deepfakes poison the public sphere, sow hatred, enhance racism, manipulate political discourse and undermine trust in science, journalism and the mainstream media. Like disinformation in general, deepfakes pose an existential threat to our increasingly vulnerable democracies.

An estimated 90% of deepfakes are pornographic; ‘deep porn’ has become a business model that exploits and humiliates countless women. Deepfakes are used to mislead consumers and patients, and as tools of identity fraud and scams. Deepfakes have been presented as false evidence in legal proceedings. Deepfakes have even served as weapons of hybrid warfare, such as the infamous video in which the Ukrainian President Zelensky appears to surrender to Russia. Finally, deepfakes may also harm the commercial interests of celebrities, actors and artists with marketable popularity. The proliferation of deepfakes and the variety of societal concerns this raises have led to a flurry of legislative initiatives worldwide. In the United States, the TAKE IT DOWN Act was enacted in 2025, while other bills are pending in Congress. In addition, hundreds of deepfake-related bills have been introduced at the U.S. state level. China, South Korea, India and Singapore have seen several deepfake laws adopted or introduced in recent years, mainly aimed at criminalizing deepfake pornography or enhancing platform liability.

In Europe, legislative responses vary. At the EU level, the 2024 AI Act and the 2022 Digital Services Act require transparency of deepfakes and obligate AI companies and large platforms to mitigate ‘systemic risks’ to human dignity and privacy, such as deep porn. In the United Kingdom, the creation of non-consensual sexually explicit deepfakes became a criminal offence by early 2026. In Germany, a bill that would more broadly criminalize harmful or misleading deepfakes, is pending before the Bundesrat. By contrast, in Denmark and the Netherlands, bills have been proposed that would equip natural persons with a novel intellectual property right to control the making and making available of deepfakes.

While using different terminology both the Danish and the Dutch bills purport to regulate AI generated deepfakes by way of neighbouring (related) rights. Both bills would grant natural persons exclusive rights to control deepfakes of their persona. The Danish bill would additionally extend the neighbouring rights of performing artists to cover digital imitations. In Denmark, protection

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would last for 50 years following the deepfaked person's death. The Dutch bill, even more generously, would accord a term of 70 years post-mortem. While the Danish bill would subject the general deepfake right to a requirement of strict consent, the performer's deepfake right would be assignable and licensable. The Dutch bill would generally allow licensing, subject to the rules on authors' contracts transposed from the EU Directive on Copyright in the Digital Single Market.

The Danish and Dutch proposals raise the question of whether and to what extent intellectual property law has a role to play in regulating deepfakes of a person's likeness. *Prima facie*, the exclusive-rights model that is inherent in intellectual property systems does seem to make sense. By invoking the exclusive right, a victim of a deepfake might seek damages and injunctive relief in a civil court or request a takedown from a platform. Upon further reflection, however, an IP approach to deepfakes is misconceived and bears risks to our information society.

The main purpose of IP rights is to promote and reward cultural or technical achievements. Copyright and neighbouring rights protect creative works and related cultural achievements. However, we mortals are not the creators of our faces, our voices or our physical appearances. The primary rationale for protecting a person's likeness lies elsewhere, in the domain of privacy law. For this reason alone, the Danish/Dutch approach does not merit a place in the realm of intellectual property, not even within the heterogeneous category of neighbouring rights.

Another more compelling reason to be cautious about an IP approach is that it might overlap with and potentially undermine protection already available under privacy and personality rights. Many countries, including the Netherlands, Germany and France, currently provide for so-called image or portrait rights that protect persons against uses of their visual likeness that are defamatory or commercially harmful. Moreover, the General Data Protection Regulation (GDPR) offers citizens across the EU personal data protection that extends to any kind of information relating to an 'identifiable natural person'. This includes identification 'by factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person' (Art. 4(1) GDPR). Consequently, the use of personal images to generate deepfakes and the subsequent processing and dissemination of deepfakes must comply with the GDPR. Non-consensual deepfakes may therefore inform damage claims and injunctions before the national courts.

While the GDPR does leave some room for consensual data processing, consent must be 'unambiguous' and is strictly circumscribed. Moreover, 'the data subject shall have the right to withdraw his or her consent at any time' (Art. 7(3) GDPR). These conditions are much stricter than the contract rules found in European copyright and neighbouring rights laws. For good reason: privacy rights are meant to protect an individual's identity, the most personal of human attributes. In contrast, intellectual property rights are primarily designed to turn the subject matter of protection into a tradeable commodity. The main purpose of copyright and related rights is not to prevent the use of creative content. Quite the opposite; they promote commercial exploitation by granting exclusive rights that reward creatives. By granting licensable exclusive rights, the Danish

and Dutch bills would not restrict deepfakes but instead facilitate their exploitation and incentivize their making.

This becomes patently clear when examining the Dutch Bill and its Explanatory Memorandum. After reciting some of the dangers posed by deepfakes (fraud, disinformation, sexual deepfakes), the memorandum goes on to emphasize that deepfakes also offer new business opportunities:

‘Deepfakes are increasingly being used commercially, thereby offering new opportunities for performing artists in the entertainment industry, such as actors and performers. Consider, for example, the deepfakes used by ABBA and Kiss.’

Deepfakes ‘offer new opportunities’ – a new and potentially lucrative business model, not only for actors, performers and their estates, but also for the entertainment industry. For this reason, the Dutch proposal provides for the tradability of deepfake rights in the form of licenses and – in the case of film productions – the assignment of these rights. For the same reason, a term of protection is proposed that is much longer than would be justified on grounds of privacy. If the bill were to become law, deepfakes of Charlie Chaplin and Elvis Presley (both deceased in 1977) could generate significant revenue for the estates for many years to come.

Regarding the U.S. NO FAKES Bill, which inspired the Danish and Dutch proposals, Professor Ginsburg observed:

‘[...] the true purpose of the NO FAKES Act is to provide individuals (primarily celebrities) with an enforceable property right to prevent – or perhaps more significantly – to control the marketing of their voices and visual likenesses. Or more accurately, and potentially perniciously, given the ambiguities surrounding the granting of rights, to provide licensee right holders, especially motion picture and record producers, with exclusive rights to exploit digital replicas.’

Like the American proposal, the Danish and Dutch bills would mainly serve the commercial interests of celebrities, famous artists and actors, their estates, and the entertainment industry at large. The bills ignore the moral question of whether it is at all desirable for artists to commodify their digital persona. There is widespread anxiety within artistic circles regarding the rise of AI. In 2023, American actors’ unions went on strike for months to prevent movie studios from replacing real actors with digital replicas. These bills, however, would facilitate that transition.

In any case, given the remedies already available under the laws of privacy, image rights, personality rights, data protection, and defamation, the average citizen whose deepfake is without market value has little to gain from the long-lasting deepfake right the bills propose. On the contrary, the ease with which the right might be licensed – under the Dutch proposal – could well be a hidden pitfall. For example, tech companies might one day be tempted to acquire the deepfake rights of ordinary citizens and then sell deepfakes of the deceased to their next of kin at premium prices.

In sum, there are good reasons to think twice about an IP approach to deepfakes. The European Commission agrees. In a recent letter to the Danish government, responding to the TRIS notification of the Danish Bill, the Commission opines:

‘The protection of personal characteristics such as voice, movements and appearance, seems to be in contrast with the underlying rationale that informs copyright legislation, and more broadly the entire realm of intellectual property (IP) protection. The attribution of an IP right usually serves to reward its holder and ensure the maintenance and further development of creativity and innovation. The possibility to prevent dissemination of an imitation of a person’s characteristics, while it might respond to other public interest objectives, would not meet those of IP protection.’

Indeed, regulating deepfakes by way of intellectual property rights is misconceived. While the big stars of the entertainment industry might financially benefit from this approach, a transferable right would undermine the privacy rights of ordinary citizens. As for our society severely infected by disinformation, a right that would normalize, or even incentivize, deepfakes is obviously not the right cure.