

# LEGAL CONSIDERATIONS IN CANADA RELATED TO “VOICE CLONING”

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In late 2023, a song entitled “NostalgIA” and “featuring” Justin Bieber, Bad Bunny and Daddy Yankee went viral on the Internet. If you have been keeping up with pop culture news, you may know that this “dream collaboration”<sup>[1]</sup> never happened. Rather, “NostalgIA” was a song generated using artificial intelligence and “voice cloning” technology. Voice cloning (also known as audio deepfake) is a process of creating a synthetic copy of one’s voice and speech pattern based on a sample audio recording. Such a copy can then be used to create convincing audio clips containing the likeness of the voice of the person whose voice was “cloned”. According to news reports,<sup>[2]</sup> Bad Bunny became particularly upset that a song that he never made but incorporated the likeness of his voice was circulating on the Internet.

In this bulletin, we discuss some potential causes of actions that one may have in Canada if they become victim of voice cloning.

## **Statutory Cause of Action: Violation of Privacy**

Provinces across Canada have laws to protect privacy interests of individuals. In particular, some provinces like British Columbia, Saskatchewan, Manitoba, Québec, and Newfoundland and Labrador have statutory causes of action pertaining to the violation of one’s privacy.<sup>[3]</sup> These causes of action are based on the unauthorized use of someone’s likeness, and most of these pieces of legislation explicitly identify the unauthorized use of someone’s voice as an actionable tort.<sup>[4]</sup> For example, *The Privacy Act* in Manitoba states the following:

**2(1)** A person who substantially, unreasonably, and without claim of right, violates the privacy of another person, commits a tort against that other person.

**3** Without limiting the generality of section 2, privacy of a person may be violated

[...]

(c) by the unauthorized use of the name or likeness or voice of that person for the purposes of advertising or promoting the sale of, or any other trading in, any property or services, or for any other purposes of gain to the user if, in the course of the use, that person is identified or identifiable and the user intended

to exploit the name or likeness or voice of that person;<sup>[5]</sup>

[emphasis added]

Although, as of the date of this bulletin, there has not been a reported decision in Canada related to the application of a statutory right to privacy in the context of voice cloning, it is clear that, at least in some provinces, there is a statutory basis for advancing a claim that one's privacy has been violated should one be a victim of voice cloning in such provinces.

### **Appropriation of Personality**

In Canada, the tort of "appropriation of personality" is committed when one's personality has been exploited for a commercial purpose without one's consent.<sup>[6]</sup>

The term "commercial purpose" has been interpreted in Canada to exclude any expression that predominantly serves a social function which is valued by the protection of free speech.<sup>[7]</sup> For example, in *Gould Estate v Stoddart Publishing Co.*,<sup>[8]</sup> the court cited the following passage from a United States decision<sup>[9]</sup> in its reasoning, ultimately denying the plaintiff's claim that the defendants had appropriated the personality of a famous pianist:

Thus, the purpose of the portrayal in question must be examined to determine if it predominantly serves a social function valued by the protection of free speech. If the portrayal merely serves the purpose of contributing information, which is not false or defamatory, to the public debate of political or social issues or of providing the free expression of creative talent which contributes to society's cultural enrichment, then the portrayal generally will be immune from liability. If, however, the portrayal functions primarily as a means of commercial exploitation, then such immunity will not be granted.<sup>[10]</sup>

Note, however, that the facts of a case ultimately determine whether the content created using voice cloning technology would be excluded from the scope of this tort.

A claim pursuant to this tort may also require that the exploitation which a complaining party complains of clearly refers to the complaining party. For example, in *Joseph v Daniels*, the court stated that a picture of someone's torso, without identifying them by name or face, is not sufficient to meet this part of the test, as it did not point to the plaintiff's "name, reputation, likeness or some other component of the plaintiff's individuality or personality which the viewer associates or identifies with the plaintiff".<sup>[11]</sup> On the other hand, a photograph of a person's face accompanied by such person's name being featured on flyers was considered sufficient to meet this part of the test.<sup>[12]</sup>

Recently, the scope of this tort was expanded in British Columbia to provide remedies for not only celebrities,

but also professionals whose professional identities had been used and commercially exploited without their permission.<sup>[13]</sup>

### **Common Law Tort: False Light**

In our previous bulletin, *What Has the Law Done About “Deepfake”*, we discussed the tort of false light as a potential recourse for victims of deepfake technology.<sup>[14]</sup> The tort of false light is a relatively new tort recognized in Ontario and British Columbia,<sup>[15]</sup> and targets the wrong of publicly misrepresenting a person.

In claiming that one has been placed in a “false light”, one must establish the following:

- a. the false light in which the person was placed would be highly offensive to a reasonable person; and
- b. the individual had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.<sup>[16]</sup>

Courts have emphasized that the first step of the above test can be met by showing that “a reasonable person would find it highly offensive to be publicly misrepresented as they have been,” and that such misrepresentation does not need to amount to defamation.<sup>[17]</sup> Further, the courts have noted that the “wrong is in publicly representing someone, not as worse than they are, but as other than they are”.<sup>[18]</sup>

The tort was first recognized in Ontario in *Yenovkian v Gullian*, a family law proceeding where the respondent sought damages from her ex-husband who had engaged in a long campaign of cyberbullying against her. The cyberbullying involved creating websites and social media posts accusing the wife and her parents of various illegal acts including child abuse, kidnapping and fraud.<sup>[19]</sup>

The tort of false light was recently recognized by the British Columbia Supreme Court in *Durkin v Marlan*,<sup>[20]</sup> a case in which the plaintiff claimed defamation and invasion of privacy torts related to an article authored by the defendant. In particular, the plaintiff argued that the defendant’s article placed him in a misleading light by portraying him as a thief.<sup>[21]</sup> The Court held that the plaintiff’s false-light claim was “legally tenable” but noted that in the circumstances of the case, the plaintiff had failed to prove all of the elements of the tort.<sup>[22]</sup>

While, as of the date of this bulletin, there are no reported cases in Canada in which the tort of false light has been applied to voice cloning, the potential application of this tort to issues related to voice cloning technology appears to be inevitable.

### **Conclusion**

There are several causes of action that may be available for victims of voice cloning, including violation of privacy, appropriation of personality and false light. With the expanding use of deepfakes, including voice cloning, in many aspects of daily life, the likelihood of deepfake technology crossing paths with tort law

appears inevitable.

McMillan LLP continues to monitor the developments in generative AI and the law, including their implications on civil liability.

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[1] Such collaboration may be a “dream collaboration” to some, but may not be a “dream collaboration” to all.

[2] “Bad Bunny not happy about AI track using his voice”, *BBC* (8 November 2023), [online](#).

[3] *Privacy Act*, [RSBC 1996, c 373](#); *The Privacy Act*, [RSS 1978, c P-24](#); *The Privacy Act*, [CCSM c P125](#); Article 35 *Civil Code of Québec*; *Privacy Act*, [RSNL 1990, c P-22](#).

[4] Note that British Columbia’s *Privacy Act*, [RSBC 1996, c 373](#) focuses on the unauthorized use of one’s “portrait”. Such term is defined in Section 3(1) of the Act.

[5] *The Privacy Act*, [CCSM c P125](#), ss 3-4.

[6] While in Ontario, the tort is recognized under common law, in some provinces such as British Columbia, appropriation of personality is pled under the provincial *Privacy Act*, as seen in *Poirier v Wal-Mart Canada Corp.*, [2006 BCSC 1138](#) [*Poirier*].

[7] *Gould Estate v Stoddart Publishing Co.*, [1996 CanLII 8209 \(ON SC\)](#) [*Gould Estate*].

[8] *Ibid*.

[9] *Presley v. Russen*, 513 F.Supp. 1339 (U.S. Dist. Ct. D.N.J. 1981).

[10] *Gould Estate*, *supra* note [7](#) at para 16; the same passage was also cited in *Wiseau Studio, LLC et al. v Harper et al.*, [2020 ONSC 2504](#) at para 212.

[11] *Joseph v Daniels*, [1986 CanLII 1106 \(BC SC\)](#).

[12] *Poirier supra* note 6.

[13] For example, in *Bao v Welltrend United Consulting Inc.*, [2023 BCSC 1566](#), the tort was applied where a lawyer’s identity was used without his consent to submit immigration-related documents.

[14] Pablo Tseng and Paola Ramirez, “What Has the Law Done About “Deepfake“?”, McMillan LLP, (10 May 2023), [online](#).

[15] In a recent decision, the Manitoba King’s Bench has noted that the tort has yet to be recognized in Manitoba (*Galton Corporation v Riley*, [2023 MBKB 73](#)).

[16] *Yenovkian v Gulian*, [2019 ONSC 7279](#), at para. 170.

[17] *Yenovkian*, *supra* note [16](#) at para. 171.

[18] *Ibid*.

[19] *Yenovkian*, *supra* note [16](#), at para. 23.

[20] *Durkin v Marlan*, [2022 BCSC 193](#).

[21] *Ibid* at para 23.

[22] *Ibid* at para 22.

**A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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