

WHAT HAS THE LAW DONE ABOUT “DEEFAKE”?

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Introduction

In our previous articles from 2018 titled [What Can The Law Do About 'Deepfake'?](#) and [What Can and Should the Law Do About 'Deepfake': An Update](#), we outlined legal recourses that are available to victims of deepfake technology, including a claim for copyright infringement and defamation. At the time of those publications, Canadian courts had not yet recognized the tort of false light. However, courts in Ontario and British Columbia have recently adopted the view that such tort preserves an important privacy right that existing invasion of privacy torts fail to protect: the right to control the way in which a person presents themselves to the world. This bulletin provides an overview of the tort of false light in Canada and its potential use in addressing the wrongs committed by those who misuse deepfake technology.

Recent Developments in Deepfake Technology

In general terms, “deepfakes” refer to text, image, audio or video manipulated using artificial intelligence and machine learning techniques.^[1] The dangers of deepfake technology were first made publicly apparent in 2017, when an anonymous user uploaded to Reddit fabricated pornographic videos in which the faces of Hollywood celebrities were superimposed onto those of the original actors and actresses.^[2] Nowadays, virtually anyone can create deepfakes with free publicly available software programs. ^[3] Due to advancements in artificial intelligence and the public availability of images and videos, the quality, sophistication, volume and use of deepfake content has expanded, examples of which are provided in the footnotes below.^{[4], [5], [6]}

Canadian case law on the subject of deepfakes is highly sparse. Reference to deepfakes was made in *R v Larouche*, a Quebec decision in which an accused was charged with possessing photo and video files of child pornography, with some of those files constituting deepfakes.^[7] In that decision, the Quebec Court described deepfakes as “electronic montages allowing the face of one person to be included on the body of another” but did not expand on the subject further.^[8] As of the date of this bulletin’s publication, there have been no documented cases in Canada in which a claimant has sought relief after being victimized by deepfake technology.

Recognition of the Tort of False Light

Since the tort of false light targets the wrong of publicly misrepresenting a person, it could be used as an additional recourse to address the wrongs committed by a person's misuse or abuse of deepfake technology. This privacy tort was first recognized by the Ontario Superior Court of Justice in the 2019 decision of *Yenovkian v Gulian*.^[9] In that case, a wife 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.^[10]

After revisiting the existing common law privacy torts in Ontario, Kristjanson J. adopted the elements of the tort of false light from the American *Restatement (Second) of Torts* (2010). According to the *Restatement*, an individual will be liable for portraying another person publicly in a false light if:

1. the false light in which the other was placed would be highly offensive to a reasonable person, and
2. 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.^[11]

Kristjanson J. distinguished the tort of false light from defamation, noting that while the publicity giving rise to the tort of false light will often be defamatory, defamation is not required. It is enough for a plaintiff to show that a reasonable person would find it highly offensive to be misrepresented as they have been.^[12] In this case, Kristjanson J. found the ex-husband liable for the tort of false light and awarded the plaintiff \$100,000 in damages for the ex-husband's "outrageous and egregious conduct".^[13]

The tort of false light was most recently recognized by the British Columbia Supreme Court in *Durkin v Marlan*,^[14] 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.^[15] 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.^[16]

Although provinces other than Ontario and British Columbia have yet to recognize the tort of false light, the Manitoba Court of Queen's Bench in *Parasiuk v Canadian Newspapers Co.* unequivocally held that a common law tort of false light does not exist in Manitoba. The Manitoba Court reasoned that since the concept of false light was "fabricated in the markedly different social, constitutional and legal framework of the United States" there was no foundation for its existence in the province.^[17] Even though this decision rejected the common law existence of the tort of false light in Manitoba, the tort has been to some extent enacted by the Manitoba *Privacy Act*, which states that the privacy of a person may be violated "by the unauthorized use of the name or likeness or voice of that person" for any purpose of gain to the user. ^[18] However, there has been no reported decision interpreting the meaning of this section.

In the United States, the tort of false light has a much lengthier history than Canada, with courts in Tennessee, Ohio, Missouri and Nevada expressly approving the tort.^[19] The Ohio Supreme Court, which adopted the false light tort in 2007, noted in its reasoning that due to the accessibility of the Internet, “the barriers to generating publicity are slight, and the ethical standards regarding the acceptability of certain discourse have been lowered.”^[20] Although, the need to protect individuals from the dangers of the Internet age has provided some impetus for the tort’s recognition in the United States, not all American states have accepted the tort. For example, the Supreme Court of Colorado in *Denver Publishing Company v Bueno* held that the tort was “too amorphous” and that it duplicated the tort of defamation in several respects.^[21] Likewise, the Supreme Courts of Colorado and Florida have rejected the tort due to its substantial overlap with the tort of defamation.^[22]

Application of the Tort of False Light

As of date of this publication, there have been less than a handful of decisions on the tort of false light in Canada following its recognition in *Yenovkian* and *Durkin*.

In the Ontario case of *Kaur v Virk*, the defendant, a former business acquaintance of the plaintiff’s husband, had posted to her WhatsApp account a video she had made, which displayed a series of photographs of the plaintiff along with a voiceover suggesting that the plaintiff was promiscuous and accusing the plaintiff of damaging her car.^[23] In finding the defendant liable for publicly placing the plaintiff in a false light, the court found that the defendant acted in reckless disregard as to the falsity of the statements she made in the video and that a reasonable person would find the statements highly offensive. However, since the defendant’s conduct was not as reprehensible as that of the ex-husband’s in *Yenovkian*, the Court awarded the plaintiff general damages in the amount of \$5,000.^[24]

In *Gillespie v Fraser*, another Ontario decision, the defendant, who was sentenced to life in prison for murdering the plaintiff’s mother, created a website containing false and malicious statements that the plaintiff was responsible for her mother’s death. This website was then circulated to the plaintiff’s family members and close friends with the assistance of the defendant’s friend. The Superior Court of Justice found the friend who helped disseminate the website liable for publicly placing the plaintiff in a false light.^[25] The issue of the quantum of damages was reserved pending further submissions from the plaintiff’s counsel.^[26]

While Canadian case law related to the tort of false light continues to evolve, the application of such tort in the context of a deepfake claim has yet to be seen in Canada. Similarly, while there has been case law on the tort of false light in the United States, none relate to the misuse or abuse of deepfake technology. Nevertheless, with the expanding use of deepfakes in many aspects of daily life, the likelihood of deepfake technology crossing paths with tort law appears inevitable.

[1] Hany Farid, “Creating, Using, Misusing, and Detecting Deep Fakes” (2022) 1:4 *Journal of Online Trust & Safety*.

- [2] Ian Sample, *What are deepfakes – and how can you spot them?* (January 13, 2020), online: [The Guardian](#).
- [3] Markus Appel and Fabian Prietzel, “The detection of political deepfakes” (2022) 27:4 *Journal of Computer-Mediated Communication*.
- [4] Jane Wakefield, *Deepfake presidents used in Russia-Ukraine war* (March 18, 2022), online: [BBC Technology](#).
- [5] Thania Garcia, *David Guetta Replicated Eminem’s Voice in a Song Using Artificial Intelligence* (February 8, 2023), online: [Variety](#).
- [6] Ray Fernandez, *Companies Are Using Deep Fake Profiles On LinkedIn, How To Spot Them* (March 29, 2022), online: [Screen Rant](#).
- [7] *R v Larouche*, 2022 QCCQ 6917.
- [8] *Ibid* at para 3.
- [9] *Yenovkian v Gulian*, 2019 ONSC 7279.
- [10] *Ibid* at para 23.
- [11] *Ibid* at para 170.
- [12] *Ibid* at para 171.
- [13] *Ibid* at para 193.
- [14] *Durkin v Marlan*, 2022 BCSC 193.
- [15] *Ibid* at para 23.
- [16] *Ibid* at para 22.
- [17] *Parasiuk v Canadian Newspapers Co.*, 1988 CarswellMan 108, [1988] 2 W.W.R. 737 at para 3.
- [18] *The Privacy Act*, C.C.S.M. c. P125 at section 3(c).
- [19] Fraser Duncan, “Illuminating False Light: Assessing the Case for the False Light Tort in Canada” (2020) 43:2 *Dalhousie LJ* 605 at page 623.
- [20] *Welling v Weinfeld*, 866 NE (2d) 1051 at 1057 (Ohio Sup Ct 2007) at para 60.
- [21] *Denver Pub Co v Bueno*, 54 P (3d) 893 (Colo Sup Ct 2002).
- [22] *Jews For Jesus, Inc v Rapp*, 997 So (2d) 1098 at 1109 (Fla Sup Ct 2008).
- [23] *Ibid* at para 29.
- [24] *Ibid* at para 56.
- [25] *Gillespie v Fraser*, 2023 ONSC 537.
- [26] *Ibid* at para 58.

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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.

The logo for mcmillan, featuring the word "mcmillan" in a lowercase, sans-serif font. The letters are a reddish-orange color. The background of the logo area is a photograph of a modern glass skyscraper, likely the Burj Khalifa, viewed from a low angle looking up, with the sky visible in the background.

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