Remedies Exist Under New York Law
To Address "Deepfakes"

The practice of integrating the images of celebrities and others into pornographic videos without their consent (often referred to as "fake porn" or "deepfakes") is deeply troubling. That said, this phenomenon is not entirely new; rather, it is just the latest iteration of the old problem of fake pictures and videos, albeit with a new name, using the latest technology. Fortunately, existing law already provides the tools to address deepfakes; thus new legislation is not needed. Not only does existing law adequately address this problem, but further legislating to offer a solution when several are already available risks encroaching on forms of creative expression that do not involve pornography, and are in fact protected by the First Amendment.

The following existing claims may provide remedies to individuals aggrieved by deepfakes, depending on the particular facts and circumstances, and subject, of course, to First Amendment and similar defenses.

- **Defamation.** To the extent a photo falsely implies that an individual has posed for a nude or salacious photo, libel law very likely provides a potential remedy. *See e.g.*, *Rejent v. Liberation Publ'ns, Inc.*, 611 N.Y.S.2d 866, 868-69 (1st Dep't 1994) (plaintiff stated claim for libel per se by alleging that defendant, without authorization, published his picture in advertisement for erotic photograph collection); *see also Leser v. Penido*, 879 N.Y.S.2d 107, 107-108 (1st Dep't 2009) (plaintiff stated claim for libel by alleging that defendant linked plaintiff's name and picture to pornographic pictures and statements).

- **Intentional Infliction of Emotional Distress.** New York recognizes the tort of intentional infliction of emotional distress. *See Howell v. New York Post Co.*, 81 N.Y.2d 115, 121 (1993). New York case law requires the conduct to be "extreme and outrageous," *id.*—and the unauthorized use of a person's likeness in pornography would likely qualify in most instances.

- **Prima Facie Tort.** New York's prima facie tort applies to (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful, (5) with a malicious intent. *Curiano v. Suozzi*, 63 NY.2d 113, 117 (1984).

- **Unjust Enrichment.** New York law recognizes a tort of unjust enrichment upon proof that (1) defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against defendant to retain what plaintiff is seeking to recover. *See Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011). A New York court could conclude that this tort applies where a deepfake creator benefits economically.

- **Lanham Act §43(a).** Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a), provides nationwide prohibition of false advertising and implied false endorsements. *See Gibson v. BTS North, Inc.*, 2018 WL 888872 (S.D. Fla. Feb. 14, 2018); *Downing v. Abercrombie & Fitch,* 265 F.3d 994, 1007 (9th Cir. 2001).

- **Copyright Infringement.** In some instances, the victim may own the copyright in the photograph or video used in a deepfake, which could form the basis of a copyright infringement action.

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It is understandable that individuals would wish to seek redress for the unauthorized use of their likenesses in pornography. As detailed above, existing New York and federal law provides the means to hold the purveyors of deepfakes and similar pornographic works legally accountable. There is thus no need to legislate further in this area—and doing so would risk infringement on the well-established constitutional protections afforded to editorial comment and creative expression. Therefore, the New York Legislature should not enact additional, unnecessary legislative remedies in this regard.

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