Legal Definitions of Intimate Images in the Age of Sexual Deepfakes and Generative AI

By Suzie Dunn

Abstract

In January 2024, non-consensual deepfakes came to public attention with the spread of AI generated sexually abusive images of [Taylor Swift](#). Although this brought new found energy to the debate on what some call non-consensual synthetic intimate images (i.e. images that use technology such as AI or photoshop to make sexual images of a person without their consent), female celebrities like Swift have had deepfakes like these made of them [for years](#). In 2017, a Reddit user named "deepfakes" posted several videos in which he had used opensource machine learning tools to swap the faces of female celebrities on to the faces of female porn actors, displaying what appeared to be live video footage of the celebrity engaging in sex acts she never engaged in. Since that time, deepfake technology has advanced astronomically. What once were choppy sexualized videos are now nearly flawless videos that can be difficult to distinguish from a real video. According to recent research on deepfakes by [Sensity AI](#), this technology has been used primarily on women to create sexual videos. These women's sexual autonomy has been co-opted for the purposed of gratifying men's sexual pleasure, but have also been used in campaigns to delegitimize and humiliate female journalists and politicians. In Canada, civil and criminal legislation has addressed the non-consensual distribution of intimate images, but in only a few provinces – [British Columbia](#), [New Brunswick](#), [Prince Edward Island](#) and [Saskatchewan](#) – does this offence include altered images that [could include deepfakes](#). This paper explores the evolution of synthetic technology such as AI image generators and Canada's legal responses to the non-consensual sharing of intimate images.

Introduction

In January 2024, X (formally Twitter) was flooded with sexual images of Taylor Swift.[1] These images were created using artificial intelligence (AI) image generators without Swift's consent.[2] Some of the most well-known AI image generators, including the one used to create the images of Swift, have attempted to curb or prevent the generation of celebrity and sexual images through their products altogether.[3] However, a group of 4chan users challenged each other to find a way to bypass these prompt guardrails and were eventually able to generate the intimate images of Swift that were later widely shared on X.[4] The images were viewed millions of times and the non-consensual creation and distribution of these images was widely condemned in the media and by some governments.[5] Although this story brought newfound energy to the debate about regulating non-consensual synthetic intimate images (NSII; i.e., sexual images of a person that were created using technology such as AI or photoshop without their consent), female celebrities like Swift have had sexual deepfakes made of them for years without their consent with little legal recourse.[6] As the technology became more accessible and diverse, the breadth of who is targeted has also expanded and in today's world we see a wide swath of people targeted by NSII, ranging from celebrities to school girls.[7]

Nationally and internationally, there have been various calls to regulate synthetic media.[8] This article does not address the full breadth of potential harms that synthetic media in general may cause; its analysis will be limited to various forms of NSII.[9] While it is important that law

---

[1] Samantha Cole & Emanuel Maiberg, "The Taylor Swift Deepfake Disaster Threatens to Change the Internet as We Know it" *404 Media* (31 January 2024).

[2] Suzie Dunn & Kristen Thomasen, "Taylor Swift May Speak Now about Sexual Deepfake Images. But That's Not Enough" *The Globe and Mail* (1 Feb 2024).

[3] Matt O'Brien & Haleluya Hadero, "AI Image-Generators Are Being Trained On Explicit Photos Of Children, A Study Shows" *Associated Press* (20 December 2023).

[4] Emanuel Maiberg & Samantha Cole, "AI-Generated Taylor Swift Porn Went Viral on Twitter. Here's How It Got There" *404 Media* (25 January 2024); Tiffany Hsu, "Fake and Explicit Images of Taylor Swift Started on 4chan, Study Says" *New York Times* (5 February 2024);

[5] "White House 'Alarmed' by AI Deepfakes of Taylor Swift" *The Washington Post* (26 January 2024); Saba Eitizaz, "Taylor Swift and the Dystopian World of AI Deepfakes" *Toronto Star* (15 Feb 2024).

[6] Samantha Cole, "AI-Assisted Fake Porn Is Here And We're All Fucked" *Motherboard* (11 December 2017) [Cole, Fake Porn is Here].

[7] Darren Bernhardt, "AI-Generated Fake Nude Photos Of Girls From Winnipeg School Posted Online" *CBC News* (15 December 2013), [Bernhardt, Fake Nudes].

[8] Robert Chesney & Danielle Keats Citron, "Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security" (2019) 107 California Law Review 1753; Britt Paris & Joan Donovan, "Deepfakes and Cheap Fakes: The Manipulation of Audio Visual Evidence" (2019) Data & Society [Paris & Donovan]; Sarah Alex Howes, "Digital Replicas, Performers' Livelihoods, and Sex Scenes: Likeness Rights for the 21st Century" (2019) 42:3 Colum J L & Arts 345; Asher Flynn, Jonathan Clough, & Talani Cooke, "Disrupting and Preventing Deepfake Abuse: Exploring Criminal Law Responses to AI-Facilitated Abuse" in Anastasia Powell et al, eds, *The Palgrave Handbook of Gendered Violence and Technology* (London, UK: Palgrave Macmillan, 2021) [Flynn et al, "Disrupting and Preventing"].

[9] Rebecca Umbach, Nicola Henry, Gemma Beard, & Colleen Berryessa, "Non-Consensual Synthetic Intimate Imagery: Prevalence, Attitudes, and Knowledge in 10 Countries" (2024) arXiv:2402.01721 [cs.CY]. [Umbach et al.].

2

makers address the broader violations associated with synthetic media,[10] NSII requires a different legal analysis compared to other forms of synthetic imagery because these images contain sexual content that addresses specific issues of sexual integrity and privacy that are uniquely sensitive.[11] This article will examine some of the existing and proposed legal solutions related to NSII in Canada and discuss the evolving definition of intimate images.

Part I will provide an overview of NSII. It will describe what is meant by this term, how it fits into the larger umbrella of image-based sexual abuse (IBSA), and the harms caused by NSII that call for a legal remedy. Part II will provide a brief overview of existing and proposed laws in Canada that address NSII. It will then examine how the definition of "intimate images" in Canada's criminal and civil intimate image laws could be inclusive of NSII and discuss some challenges that may arise with various existing and proposed definitions.

Part I: Overview of Non-Consensual Synthetic Intimate Images and their Harms

What are non-consensual synthetic intimate images?

Non-consensual synthetic intimate images (NSII) are intimate images of a person that were created using technology such as AI or photoshop without the consent of the person featured in them.[12] Synthetic media is any form of media that has been digitally manipulated or created to represent something that does not exist in reality, often with the use of AI.[13] This includes face-swapping technology, such as replacing a person's face in an existing pornography video or superimposing their face on a live sex video; image manipulation, which adds or changes the information in an image such as making a clothed person appear nude; or generative AI that is used to create entirely new images where the person is nude or engaged in sexual activity.[14] This technology can be used for creative and positive sexual purposes, however, when used without the consent of the person in the image, it can cause harms worthy of legal intervention. NSII includes images where the person is depicted as nude or semi-nude, exposing their genitals, anal region, and/or breasts, or engaged in sexually explicit activity that were made or distributed *without* that person's consent. NSII can be a form of image-based sexual abuse.[15]

---

[10] Suzie Dunn "Identity Manipulation: Responding To Advances In Artificial Intelligence And Robotics" WeRobot2020 Conference Paper (Unpublished) [Dunn, "Identity Manipulation"].

[11] Danielle Keats Citron, "Sexual Privacy" (2019) 128:7 Yale LJ 1870 [Citron, "Sexual Privacy"].

[12] Umbach et al., *supra* note 9.

[13] Henry Ajder & Joshua Glick, "Just Joking! Deepfakes, Satire, and the Politics of Synthetic Media" (2021, Witness Media Lab & MIT Open Documentary Lab).

[14] Dunn, "Identity Manipulation", *supra* note 10; Ruman Chowdhury & Dhanya Lakshmi, "Technology-Facilitated Gender-Based Violence In An Era Of Generative AI" (2023) UNESCO [Chowdry & Lakshmi, Era of Gen AI].

[15] Clare McGlynn, Erika Rackley, & Ruth Houghton, "Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse" (2017) 25 Fem Leg Stud 25.

3

One of the most well-known forms of synthetic media are deepfake videos.[16] Deepfakes are videos or images in which AI is used to alter the content that appears in the images.[17] Deepfakes originated as a form of AI that could swap faces in videos, but the term "deepfake" has been used to describe many forms of synthetic media that misrepresents something or someone using digital media.[18] Typically, a non-consensual sexual deepfake is a video where the face of another person has been superimposed on a previously existing pornographic video, resulting in fairly realistic footage that appears as though a person is engaging in sex acts they did not actually engage in.[19] As discovered by journalist Samantha Cole, deepfake technology was popularized in 2017 after a Reddit user posted sexual deepfakes he had made of several famous female celebrities on a Reddit board.[20] By 2023, there were hundreds of thousands of deepfake videos online.[21] Of the publicly available sexual deepfakes, the vast majority are made without the consent of the person in the image and they almost exclusively feature women.[22] Recent studies by Umbach et al and Flynn et al also show noteworthy self-reported rates of victimization among men as well,[23] although images featuring men seem less likely to appear online publicly. These studies also show that men are more likely to create and consume sexual deepfakes.

Other forms of AI and digital technologies have been used to create NSII, such as "nudifying" apps that transform still images of fully clothed women or girls into photos where they appear to be fully nude,[24] generative AI used to create fully new sexual images,[25] or older

---

[16] Witness Media Lab, "Mal-uses of AI-generated Synthetic Media and Deepfakes: Pragmatic Solutions Discovery Convening" Witness Media Lab (11 June 2018).

[17] Citron, "Sexual Privacy", *supra,* note 11.

[18] Jacquelyn Burkell & Chandell Gosse, "Nothing New Here: Emphasizing The Social And Cultural Context Of Deepfakes" (2019) 24:12 First Monday; Hany Farid, "Creating, Using, Misusing, And Detecting Deep Fakes" (2022) 1:4 Journal of Online Trust and Safety 1.

[19] Chidera Okolie, "Artificial Intelligence-Altered Videos (Deepfakes): Image-Based Sexual Abuse, and Data Privacy Concerns" (2023) 25:2 J Int'l Women's Studies 11.

[20] Cole, Fake Porn is Here, *supra* note 6; Lux Alptraum, "Deepfake Porn Harms Adult Performers, Too" *Wired* (15 January 2020); Nicola Henry, Clare McGlynn, Asher Flynn, Kelly Johnson, Anastasia Powell & Adrian Scott, *Image-Based Sexual Abuse: A Study on the Causes and Consequences of Non-Consensual Nude or Sexual Imagery* (New York: Routledge, 2020) [Henry et al, IBSA Study]; Samantha Cole, *How Sex Changed the Internet and the Internet Changed Sex: An Unexpected History*, (New York: Workman Publishing Co, 2022).

[21] Matt Burgess, "Deepfake Porn Is Out of Control" *Wired* (16 October 2023).

[22] Henry Ajder, Giorgio Patrini, Francesco Cavalli & Laurence Cullen, *The State of Deepfakes: Landscape, Threats and Impact* (Deeptrace Labs, 2019) [Ajder et al]

[23] Rebecca Umbach, Nicola Henry, Gemma Beard, & Colleen Berryessa, "Non-Consensual Synthetic Intimate Imagery: Prevalence, Attitudes, and Knowledge in 10 Countries" (2024) arXiv:2402.01721 [cs.CY]. [Umbach et al.]; Asher Flynn, Anastasia Powell, Adrian J. Scott & Elena Cama, "Deepfakes and Digitally Altered Imagery Abuse: A Cross-Country Exploration of an Emerging form of Image-Based Sexual Abuse" (2022) 62 The British Journal of Criminology 1341 [Flynn et al, "Deepfakes"].

[24] Matthew Hall, Jeff Hearn, & Ruth Lewis, " Image-Based Sexual Abuse: Online Gender-Sexual Violations " (2023) 3:1 Encyclopedia 327.

[25] Cole & Maiberg, *supra* note 1.

4

technology like photo editing software that can merge or edit photos of a person to make it falsely appear they are naked or engaging in sex acts.[26]

Despite many social media and pornography websites banning NSII,[27] the popularity of these images has not waned.[28] Wired reported that an independent researcher found that nearly 250,000 sexual deepfakes were uploaded onto 35 of the most popular deepfake pornography websites over the last seven years, with more than 100,000 being uploaded in 2023 alone.[29] One of the most popular deepfake websites gets 17 million visitors per month.[30] In 2020, 100,000 people were artificially stripped nude by users of a popular nudifying app and had their images non-consensually uploaded onto the app, 70% of whom were women.[31] These images are sometimes called "deepnudes", and in 2023, Graphika identified over 24 million unique views on 34 NSII providers' websites, showing the growing interest in the technology.[32] The use of this type of technology is becoming more common and widespread. In 2023–2024, there were reports of high school girls in Winnipeg and London, Ontario whose images were nudified by boys in their classes using these apps.[33] A 2024 New York Times article described the prevalence of this behaviour as an epidemic confronting teen girls.[34] Today, with the advent of AI image generators, users can create fully new images of people rather than having to swap out their face or body in those images.[35]

Harms of Non-consensual Synthetic Intimate Images

Research has shown that there are harms associated with NSII. McGlynn and Rackley, and Flynn et al identify NSII as a form of image-based sexual abuse.[36] They define NSII as the non-consensual creation, distribution, or threat to distribute nude or sexual images of another person, which includes acts like voyeurism, sexual extortion, and the non-consensual distribution of intimate images, synthetic or real. One of the most extensive studies on IBSA[37] by Henry et al included targets of NSII. The number of participants in the study who had their images altered was relatively low compared to other more common forms of IBSA, such as the non-consensual

---

[26] Clare McGlynn, Erika Rackley, & Ruth Houghton, "Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse" (2017) 25 Fem Leg Stud 25; Paris & Donovan, *supra* note 8.

[27] Sophie Maddocks, "'A Deepfake Porn Plot Intended to Silence Me': Exploring continuities between pornographic and 'political' deep fakes" (2020) 7:4 Porn Studies 415 [Maddocks].

[28] Home Security Heroes, "2023 State Of Deepfakes Realities, Threats, And Impact" (2023).

[29] Matt Burgess, "Deepfake Porn Is Out of Control" *Wired* (16 October 2023).

[30] Clare McGlynn, "Deepfake Porn: Why We Need To Make It A Crime To Create It, Not Just Share It" The Conversation (9 April 2024).

[31] Henry Ajder, Giorgio Patrini & Francesco Cavalli, "Automating Image Abuse: Deepfake Bots on Telegram" (2020) Sensity.

[32] Santiago Lakatos, "A Revealing Picture" (Graphika, 2023).

[33] Bernhardt, Fake Nudes, *supra,* note 7; Jessica Wong, "Amid Rise In AI Deepfakes, Experts Urge School Curriculum Updates For Online Behaviour" CBC News (9 Jan 2024).

[34] Natasha Singer, "Teen Girls Confront an Epidemic of Deepfake Nudes in Schools" *New York Times* (8 April 2024).

[35] Chowdry & Lakshmi, Era of Gen AI, *supra,* note 14.

[36] Clare McGlynn & Erika Rackley, 'Image-Based Sexual Abuse' (2017) 37:3 Oxford Journal of Legal Studies 534 [McGlynn & Rackley]; Flynn et al, "Deepfakes", *supra* note 23.

[37] *Ibid*, McGlynn & Rackley.

distribution of actual intimate images of a person. However, participants who had experienced either of these forms of abuse reported similar harms to those who had their actual images shared, including social rupture, ongoing harms when the images were shared or viewed repeatedly, ongoing fear that the abuse will reoccur, social isolation, and lost freedom, including the ability to trust.[38] The majority of participants in that study found IBSA to be harmful, whereas a smaller percentage reported feeling neutral or even some positive feelings, such as finding it funny or feeling flattered when their images were created or shared.

That study is an example of the emerging empirical research that documents the negative impacts of NSII.[39] Additional recent research shows that many people recognize NSII as a social wrong requiring legal intervention. Umbach et al surveyed over 16,000 people across 10 countries about their experiences with deepfakes. The results of their research showed the majority of participants reported the non-consensual creation and distribution of deepfakes as harmful, with many supporting legal intervention.[40] An American study by Kugler and Pace noted that their participants rated the distribution of non-consensual sexual deepfakes as highly morally blameworthy, even when clearly labeled as fake.[41] Participants from two UK studies by Fido et al reported that deepfakes were harmful especially when the images were shared rather than used for private use, featured women compared to men, or featured people that participants knew personally compared to celebrities.[42] Participants from these studies generally supported a criminal or civil legal response to non-consensual sexual deepfakes.

The above research shows that this behaviour has been recognized as harmful, however, some non-consensual deepfake creators, consumers, and researchers argue that there are few significant harms caused by these images and that they are a form of legitimate sexual fantasy and technological experimentation.[43] Research by Newton and Stanfill found that some deepfake creators fail to see their subjects as fully humans and not simply digital objects to be used in their exploration of the technology.[44] Other deepfake creators, consumers, and researchers claim that these images cause no harm because they are not actually real images of the person and, as

---

[38] Henry et al, IBSA Study, *supra* note 20; Ubmach et al, *supra* note 7; Clare McGlynn et al, "'It's Torture for the Soul': The Harms of Image-Based Sexual Abuse" (2021) 30:4 Social & Legal Studies 541.

[39] Flynn et al, "Deepfakes", *supra* note 23.

[40] Umbach et al., *supra* note 9.

[41] Matthew B Kugler & Carly Pace, "Deepfake Privacy: Attitudes and Regulation" (2021) 116:3 Nw U L Rev 611 [Kugler & Pace, Deepfake Privacy].

[42] Dean Fido, Jaya Rao & Craig A Harper, "Celebrity Status, Sex, and Variation in Psychopathy Predicts Judgements of and Proclivity to Generate and Distribute Deepfake Pornography" (2022) 129 Computers in Human Behaviour 1.

[43] Daniel Story & Ryan Jenkins, "Deepfake Pornography and the Ethics of Non-Veridical Representations" (2023) 36-56 Philosophy & Technology 55; Lara Karaian, "Indicting Deepfakes?: Why Gender-Based Violence Frameworks and Censorship aren't the Only (or Best) Way to Respond to AI Generated Pornography" *Centre for Free Expression* (6 March 2023); For example: Lara Karaian, "Addressing Deepfake Porn Doesn't Require New Criminal Laws, Which Can Restrict Sexual Fantasy And Promote The Prison System" The Conversation (24 March 2024) [Karaian, "Criminal"].

[44] Olivia B Newton & Mel Stanfill, "My Nsfw Video Has Partial Occlusion: Deepfakes And The Technological Production Of Non-Consensual Pornography" (2020) 7:4 Porn Studies 398; Rachel Winter & Anastasia Salter, "DeepFakes: Uncovering Hardcore Open Source on GitHub" (2020) 7:4 Porn Studies 382.

6

argued by Öhman, that the images are just a form of fantasy that should be permissible.[45] Some even argue that there may be benefits to some forms of sexual deepfakes of children as they do not always feature real children in the way that real child pornography does and thus cause less harm.[46] Despite those beliefs, research shows that non-consensual sexual deepfakes do cause harms to people featured in them in most cases.

Although widespread empirical research is still lagging due to the relatively recent nature of this phenomenon, there is abundant evidence of the lived experience of people who have been targeted by NSII that show the significant emotional, reputational, professional, and financial harms caused.[47] As noted by Bailey and Dunn, NSII is simply one of the newest forms of technology-facilitated gender-based violence that have occurred in digital spaces since the advent of the internet.[48] With each development of new forms of technology, abusers seem to find a way to use them to sexually violate others against their will.

When abusers use technology to cause sexual harms like these, Bailey and Mathen state that the creator "instrumentalizes" the person they target "using her to achieve his own goals and sublimating her will to his."[49] An individual's sexual integrity should be in their control, and that control is lost when someone makes NSII of them.[50] As argued by Citron, a person's sexual integrity and privacy is deeply impacted by non-consensual sexual deepfakes that "highjack people's sexual and intimate identities…creating a sexual identity not of the individual's own making." [51]

People should have the right to control the sexual boundaries of their digital selves in a similar way that they do with their physical bodies. Unlike personal sexual fantasies that stay within the mind of the individual, NSII is a real-world manifestation of that fantasy that alters the balance of the rights of the people involved. Regardless of an observer's sexual interest in another person's body or nude images, the person whose body or image it is should have control over their sexual experiences, including determining who touches them or views intimate images of them. One person's sexual interest and feelings of sexual entitlement or curiosity should not trump the sexual integrity of the other person. With the increasing prevalence of NSII and the

---

[45] Carl Öhman, "Introducing The Pervert's Dilemma: A Contribution To The Critique Of Deepfake Pornography" (2020) 22-2 Ethics and Information Technology 133 [Öhman].

[46] Harshita Ganesh, "Protecting Children Through Deepfake Child Pornography: A Moral, Legal, and Philosophical Discussion on the Intersection of the Evolution in Law and Technology" (2022) 60 American Criminal Law Review.

[47] NZZ, *Fake Porn: Real Victims* (Film) (2023); Danielle Keats Citron, *The Fight for Privacy: Protecting Dignity, Identity, and Love in the Digital Age*, (WW Norton: 2022); Sophie Compton, Reuben Hamlyn & Isabel Freeman, *Another Body* (Film) (2023); BBC Three, *Deepfake Porn: Could You Be Next?, Documentary* (Film) (2022); Asia Eaton & Clare McGlynn, "The Psychology of Nonconsensual Porn- Understanding and Addressing a Growing Form of Sexual Violence" (2020) 7:2 Policy Insights from the Behavioral and Brain Sciences 190 [McGlynn & Eaton].

[48] Jane Bailey & Suzie Dunn, "The More Things Change, The More They Stay the Same: Recurring Themes in Tech-facilitated Sexual Violence Over Time" Criminalising Intimate Image Abuse, (Oxford, Oxford University Press, 2024).

[49] Jane Bailey & Carissima Mathen, "Technologically-facilitated Violence Against Women and Girls: If Criminal Law Can Respond, Should It?" (2017) Ottawa Faculty of Law Working Paper No 2017-44 at 22.

[50] Mary Anne Franks & Ari Ezra Waldman, "Sex, Lies, and Videotape: Deep Fakes and Free Speech Delusions" (2019) 78:4 Md L Rev 892.

[51] Citron, "Sexual Privacy", *supra* note 11 at 1921.

7

documentation of their harms, it is important for law makers to start considering what types of images should be included in intimate image laws.

Part II: Legal Responses

Canada already has several laws that address NSII directly, however, there are gaps in some of those laws, and many of the definitions of intimate images are not consistent across the country. It will take time, research, and some experimentation to develop a law that properly addresses NSII. In the meantime, these efforts are worthwhile. Some forms of NSII are a form of sexual wrongdoing and should be regulated to protect the sexual integrity, privacy, and digital identities of those featured in them. People should have the right to control their sexual expression in digital spaces, including limiting the distribution of realistic sexual images of themselves. Those targeted by NSII should have access to effective legal tools to prevent and remedy these types of harms.

Of course, comprehensively addressing the harms of NSII will require more than just well-crafted legal responses. As noted in previous Canadian research on technology-facilitated gender-based violence and image-based sexual abuse, a holistic approach that includes legal, technical, social, educational, and community-based efforts is essential to responding to and preventing these types of harms, particularly when it comes to shaping social norms about IBSA.[52] This article focuses on some of the legal responses to NSII, while recognizing that these are only a small piece of the puzzle.

This section will provide a brief overview of some of the existing laws in Canada that address intimate images, including some that address NSII, as well as two new bills that propose to address NSII in the future. It will then examine current and proposed definitions of prohibited images and address some of the challenges that may arise in applying NSII to these definitions.

Existing and Proposed Laws

In Canada, a variety of laws that prohibit the distribution of intimate images of adults and children have been introduced across the country. Some of the definitions of prohibited images are expansive enough to capture NSII, while others are not.[53] The exclusion of NSII in some of these laws is due in part to the fact the technology used to create NSII either had not been invented or was not widely used to create NSII at the time that some of these laws were created. However, as NSII has become more common place and concerns about the adequacy of Canadian law to respond to NSII have grown, so has the definition of prohibited intimate

---

[52] Cynthia Khoo, "Deplatforming Misogyny: Report on Platform Liability for Technology-Facilitated Gender-Based Violence" (Toronto: LEAF, 2021) [Khoo, "Deplatforming Misogyny"]; Suzie Dunn, Tracy Vaillancourt, & Heather Brittain, Supporting Safer Digital Spaces (Waterloo-Centre for International Governance Innovation, 2023) [Dunn et al].

[53] For example: *Criminal Code,* RSC 1985, C C-46, s 162.1 (does not include altered or fake images); *Intimate Images Unlawful Distribution Act*, SNB 2022, c 1, s 1 (includes altered images).

8

images.[54] For example, some provinces began including "altered" in their civil definition of intimate images, which could capture forms of NSII such as deepfakes and nudifying apps.[55] In those cases a person could bring a civil case against someone for sharing their images without consent. Other legislation, such as the recently introduced federal Bill C-63, the *Online Harms Act*[56]*,* and Manitoba's Bill C-24, the *Intimate Image Protection Amendment Act (Distribution of Fake Intimate Images),*[57] include even broader definitions of prohibited intimate images that could be widely inclusive of many forms of NSII as long as the images are reasonably convincing.

This article looks specifically at statutory laws that explicitly address intimate images. These are not the only laws available for people targeted by NSII.[58] For those wishing to pursue a legal remedy for NSII today, there are a variety of existing civil, criminal, intellectual property, and human rights laws in Canada that could apply to NSII, such as extortion, defamation, privacy, or copyright.[59] Additionally, leading scholars on IBSA including Laidlaw,[60] Citron,[61] Eaton and McGlynn[62], have called for more general privacy laws that would protect the privacy of targets of IBSA, including NSII. However, this article will not examine those laws and limits its analysis to laws that directly address distributing intimate images.

Criminal Law: Child Pornography and the Publication of an Intimate Image Without Consent

Canada's *Criminal Code* addresses prohibited intimate images under its provisions on child pornography and the publication of intimate images without consent.[63] The child pornography provision prohibits the making, distributing, possessing, and accessing "a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means" that shows or depicts a person under the age of 18 engaged in sexual

---

[54] Michelle Rempel Garner, "Your Ex Used AI To Create Intimate Images Of You, And Sent Them To Your Friends. It Might Not Be Illegal." (7 November 2023); "Manitoba Introduces Bills To Protect Against AI-Generated Nudes, Prevent Certain Offenders From Changing Names" *CBC News* (14 March 2024).

[55] *The Privacy Act*, RSS 1978, c P-24, s 7.1.

[56] Bill C-63, *An Act to enact the Online Harms Act,* 1st Sess, 44th Parl, 2024.

[57] Bill C-24 Intimate Image Protection Amendment Act (Distribution of Fake Intimate Images), Manitoba, 1st Sess, 43rd Leg, 2024.

[58] J Siekierski, "Deep Fakes: What Can Be Done About Synthetic Audio and Video?" Publication No 2019-11-E Library of Parliament (8 April 2019).

[59] Vasileia Karasavva & Aalia Noorbhai, "The Real Threat of Deepfake Pornography: A Review of Canadian Policy" (2021) 24:3 Cyberpsychology, Behavior, and Social Networking 203; Suzie Dunn & Alessia Petricone-Westwood, More than "Revenge Porn" Civil Remedies for the Nonconsensual Distribution of Intimate Images, 2018 38th Annual Civil Litigation Conference 16, 2018 CanLIIDocs 10789; Meghan Sali, "Intimate Images and Authors' Rights: Non- Consensual Disclosure and the Copyright Disconnect" (2022) 19:2 CJLT 343; Anne Pechenik Gieseke, "The New Weapon of Choice: Law's Current Inability to Properly Address Deepfake Pornography" (2020) 73 Vand L Rev 1479.

[60] Emily Laidlaw, "Technology Mindfulness and the Future of the Tort of Privacy" (2023) 60:3 Osgoode Hall Law Journal 597.

[61] Citron, "Sexual Privacy", *supra* note 11.

[62] McGlynn & Eaton, *supra* note 47.

[63] This exact term, "intimate image", is not used in the child pornography provision, but it does address sexual/sexualized images of children.

9

activity, as well as images depicting the sexual organ or anal region of a person under the age of 18 for a sexual purpose.[64] This definition includes both real and synthetic intimate images of children and is inclusive of some forms of NSII.

The non-consensual intimate images provision of the *Criminal Code* prohibits the distribution of intimate images. It defines an intimate image as "a visual recording of a person made by any means including a photographic, film or video recording" where a person is engaged in sexual activity or is nude, exposing his or her genital organs or anal regions or her breasts, where the person would have a reasonable expectation of privacy at the time the recording was made and at the time of distribution.[65] Although a case involving NSII has yet to test this definition to see if it could be interpreted to be inclusive of NSII, on a plain reading, it appears to only include authentic intimate images of a person and would not capture NSII.

To date, there is only one reported criminal case in Canada where a person was prosecuted under the child pornography provision for making non-consensual sexual deepfakes. However, there are other child pornography cases involving simpler technological techniques, such as photoshop.[66] In the 2023 case, *R v Larouche*, the accused created sexual deepfakes of children and included them in his collection of real child pornography. He was convicted of making, possessing, and distributing child pornography.[67] This is the first, but will not be the last NSII child pornography case. With the increase in deepfakes and other forms of synthetic media being used for child sexual abuse material[68] it is likely that there will be more successful criminal cases involving child based NSII in the future, however, the criminal law likely does not protect adults targeted by NSII and there have been no reported cases involving NSII under the non-consensual distribution of intimate image law.

Civil Law: Intimate Image Statutes

In most provinces in Canada, civil intimate image statutes have been introduced over the last decade to provide a civil remedy if an intimate image has been shared without consent. Only Ontario and the territories have not introduced specific statutory civil intimate image laws.[69] In provinces where intimate image statutes have been introduced, several include a definition of intimate images that is similar to that in the *Criminal Code*, including Alberta,[70] Manitoba,[71] Newfoundland and Labrador[72], and Nova Scotia[73]. Like the *Criminal Code,* these statutes' intimate image definitions seem to limit their application to real intimate images of a person.

---

[64] *Criminal Code,* RSC, 1985, c C-46, s 163.1.

[65] *Criminal Code,* RSC, 1985, c C-46, s 162.1.

[66] *R v Rhode*, 2019 SKCA 17; *R v CH*, 2010 ONCJ 270; *R v RMV*, 2015 BCPC 469; *R v GJM*, 2015 MBCA 103; *R v RK*, 2015 ONSC 2391.

[67] *R v Larouche*, 2023 QCCQ 1853.

[68] Emanuel Maiberg, "a16z Funded AI Platform Generated Images That 'Could Be Categorized as Child Pornography,' Leaked Documents Show" *404 Media* (5 December 2023).

[69] Several common law torts have been recognized in Ontario that address some forms of intimate image sharing.

[70] *Protecting Victims of Non-consensual Distribution of Intimate Images Act*, RSA 2017, c P-26.9.

[71] *The Intimate Image Protection Act*, CCSM 2015 c 187, s 1(1).

[72] *Intimate Images Protection Act*, SNL 2018, c I-22, s 2.

[73] *Intimate Images and Cyber-protection Act*, SNS 2017, c C-7, s 3(f).

Following recommendations made by Young and Laidlaw,[74] as well as the Uniform Law Conference of Canada,[75] to better protect victims of deepfakes some provinces, including British Columbia,[76] New Brunswick[77], Prince Edward Island,[78] and Saskatchewan,[79] defined intimate images to include images that have been altered to depict a person engaged in sexual activity, nude (and in some cases such as British Columbia or Prince Edward Island, nearly nude), or exposing their genital organs, anal region, or breasts. The definition in these provinces further require that the person had a reasonable expectation of privacy at the time of the relevant recording, distribution, or, in British Columbia and New Brunswick, simultaneous recording or live stream. This definition can include some forms of NSII where an image was altered to depict an intimate image, such as deepfakes and nudified images, however it remains to be tested to see if that definition is broad enough to capture fully generated images like those made of Swift where there is not a clear original image that was altered. Generative AI technology does require original images of a person in order to generate images in their likeness, so the images could arguably be considered altered images. To date, there have been no reported cases involving NSII under any of these acts.

In March 2024, Manitoba introduced Bill C-24, the *Intimate Image Protection Amendment Act (Distribution of Fake Intimate Images),* which seeks to alter the definition of intimate images to include fake intimate images, which would include any type of visual recording "that, in a reasonably convincing manner, falsely depicts an identifiable person" engaging in explicit sexual activity or as being nude, or exposing their genital organs, anal region, or breasts.[80] It further specifies that the image is created through "the use of software, machine learning, artificial intelligence or other means, including by modifying, manipulating or altering an authentic visual representation" and that "it is reasonable to suspect that the person depicted in the image would not consent to the recording being made or distributed to others".[81] It distinguishes this from a "personal intimate image" of a person that is an authentic intimate image where a person would have a reasonable expectation of privacy at the time the image was recorded and distributed.

Federal Online Harms Bill

In 2024, the federal government introduced Bill C-63, the *Online Harms Act,* which in part aims to regulate social media companies. It includes a special duty requiring social media companies to make content that sexually victimizes a child or re-victimizes a survivor as well as

---

[74] Hilary Young & Emily Laidlaw, "Creating a Revenge Porn Tort for Canada" (2020) Supreme Court Law Review 147 [Young & Laidlaw].
[75] Uniform Law Conference of Canada, Uniform Non-consensual Disclosure of Intimate Images Act (2021) [Uniform Conference].
[76] *Intimate Images Protection Act, SBC 2023*, c C-11, s1.
[77] *Intimate Images Unlawful Distribution Act*, SNB 2022, c 1, s 1.
[78] *Intimate Images Protection Act*, RSPEI 1988, c I-9.1, s 1(f).
[79] *The Privacy Act*, RSS 1978, c P-24, s 7.1.
[80] Bill C-24 Intimate Image Protection Amendment Act (Distribution of Fake Intimate Images), Manitoba, 1st Sess, 43rd Leg, 2024, s 3(1).
[81] Ibid.

11

intimate content communicated without consent inaccessible to all persons in Canada.[82] Its definition of content that sexually victimizes a child or revictimizes a survivor includes a visual representation where a child or someone who is depicted as being a child is engaged in explicit sexual activity, or an image depicting a child's sexual organs or anal region for a sexual purpose, as well as some other sexualized images involving children.[83] Like the *Criminal Code*'s child pornography provisions, this definition is broad enough to capture real or synthetic images. It does not include any additional requirements around a reasonable expectation of privacy or consent to the images being communicated. The bill's definition of intimate content includes actual images and images that "falsely presents in a reasonably convincing manner" a person engaged in sexual activity, nude, or exposing their sexual organs or anal region. [84] It explicitly names deepfakes as a type of image that would fit within this definition and the definition is likely broad enough to capture other forms of NSII, so long as they are "reasonably convincing". For false images, it must be reasonable to suspect the person did not consent to the image being communicated. Both this definition and the Manitoba definition move away from a reasonable expectation of privacy standard for NSII to a standard based on consent to distribution. Neither address the non-consensual creation of these images.[85]

Defining Intimate Images

To address NSII, governments could consider expanding their definition of intimate images to include synthetic or false but reasonably convincing intimate images, as Manitoba and the federal government have proposed. Over the last decade, the evolution of intimate image laws has shifted in some areas of law from a definition seemingly limited to authentic intimate images to one that includes altered images and now there are proposals to include false images that are reasonably convincing in some intimate image laws. These evolving definitions align with the technological and social circumstances at the time that the law was introduced. With early laws reacting to actual intimate images released without consent, followed by newer laws that included altered images after the development deepfakes and nudifying apps, and now with generative AI, the definition in some jurisdictions is proposed to expand even further to intimate images that are reasonably convincing but falsely depict someone nude or engaged in a sexual act. The following section will discuss some of the challenges that will arise with expanding the definition of intimate images to include synthetic or fake but reasonably convincing images under both the criminal and civil non-consensual intimate image sharing laws.

The definition of "altered" intimate images in many civil intimate image laws was introduced to address deepfakes. It raises some challenges as it suggests that there must be an original image to be altered in order to be captured under the statute. This definition would likely capture face swapping deepfakes, nudifying images, and photoshopped images where the original images are identifiable in the final image but may be more difficult in cases such as

---

[82] Bill C-63, *An Act to enact the Online Harms Act,* 1st Sess, 44th Parl, 2024, s 67.

[83] Bill C-63, *An Act to enact the Online Harms Act,* 1st Sess, 44th Parl, 2024, s 2(1).

[84] Bill C-63, *An Act to enact the Online Harms Act,* 1st Sess, 44th Parl, 2024, s 2(1).

[85] Some jurisdictions regulate the creation of NSII. See: Clare McGlynn, "Deepfake Porn: Why We Need To Make It A Crime To Create It, Not Just Share It" The Conversation (9 April 2024).

those involving generative AI[86] or hyper-realistic looking avatars created for virtual reality sexual simulations[87] where an original image may not be identifiable or exist at all. It is becoming increasingly possible to create a realistic digital image of a person without requiring an original photo of the person, something law makers must be alert to when crafting laws to address this evolving harm. This definition could also pose evidentiary hurdles if the original altered image must be identified or produced, in an already difficult evidentiary area of law.[88]

If these laws are meant to protect people from realistic fake intimate images, the definition of altered must either be interpreted broadly enough to capture realistic images of a person whether there is an identifiable original image that was altered or not, or a more encompassing term should be used to capture NSII, such as synthetic images or fake images that are reasonably convincing.

As intimate image laws move towards a definition of reasonably convincing false images, the line between what falls within this definition and what does not is sure to be contested. It is important to note that not all non-consensual sexual representations should be captured by non-consensual distribution of intimate image laws, and certain defenses should be available.[89] For example, a crudely drawn digital image of a person depicted engaging in sexual activity should not fit in these definitions of regulated intimate images. This may be insulting or offensive, but should not cross the threshold into regulated images. However, many NSII are realistic looking but are poor enough quality that an unaided observer can tell that they are fake and many hyper-realistic NSIIs are explicitly labeled so the viewer knows that they are fake.[90] Despite this, these images can still cause cognizable harms, including sexual integrity harms, particularly when distributed without consent.[91] The line between what types of images capture the plaintiff's likeness and purport to depict reality and which do not will need to be thoughtfully addressed by lawmakers and the courts. That analysis should focus on the sexual integrity of the person featured in them.

The question of which altered images and which false images that are reasonably convincing fit within the legal regulation will be challenging.[92] There may be some very realistic altered images that do not to purport to depict reality, such as a high quality deepfake of a person who is depicted in a sexually graphic scene that appears that they are in outer space, for example. The context of the image may not depict reality and thus may impact the consideration of whether it is reasonably convincing, but the images of the face and body may look perfectly real

---

[86] 404 Media "A16z Funded AI Platform Generated Images that 'Could be Categorized as Child Pornography,' Leaked Documents Show" *404 Media Podcast* (6 December 2023).

[87] Dunn, Identity Manipulation, *supra* note 10.

[88] Suzie Dunn & Moira Aikenhead, "On the Internet No One Knows You Are A Dog: Contested Authorship Of Digital Evidence In Cases Of Gender-Based Violence" (2022) Canadian Journal of Law and Technology [Dunn & Aikenhead].

[89] Young & Laidlaw, *supra* note 74.

[90] Keith Harris, "Video on Demand: What Deepfakes Do and How they Harm" (2021) 199:5-6 Synthese 13373.

[91] Cole, How Sex Changed the Internet, *supra* note 20; Miha Sepec & Melanija Lango, "Virtual Revenge Pornography as a New Online Threat to Sexual Integrity" (2020) 15 Balkan Soc Science Rev 117.

[92] For example see the variety of synthetic sexual fanfic media: Milena Popova, "Reading Out Of Context: Pornographic Deepfakes, Celebrity And Intimacy" (2020) 7:4 Porn Studies 367.

and still cause sexual integrity harms if shared. As such, placing a realistic intimate image in an unrealistic context should not be enough to exclude it from the definition of intimate image. There could also be a lower quality deepfake or generated image that is clearly of an individual but may be obvious to some viewers that it is not real due to the glitchy or overly shiny quality of the video or image, or a label stating that it is fake, which is the case for many of the deepfakes today that cause real harms. It will be important for the threshold not to be so high as not to capture the majority of NSII that is realistic but still clearly digitally created when examined closely but not so low to include any artistic rendering of a nude person, such as a crude line drawing or unrealistic cartoon.

There seems to be less debate on whether civil non-consensual distribution of intimate image laws and federal social media content moderation laws should be expanded to include NSII. Many agree that laws that support swift orders for takedowns and deletion of the materials should be introduced.[93] Conversely, the criminalization of these images is more highly debated.[94] As with all criminal laws, there is a need for greater scrutiny when considering criminalizing NSII due to the significant risks to liberty and potential *Charter* challenges related to freedom of expression that could arise. Additionally, many argue that a carceral approach has not been effective in addressing sexual harms in Canada[95] and should not be used for what some argue are expressive behaviours.[96] Others support a criminal approach as an avenue for targets of this type of abuse.[97] Although the criminal law has significant systemic barriers to assisting victims of IBSA[98] and should not be the primary source of legal intervention,[99] scholars such as Mathen argue that criminal law plays an important expressive function in recognizing sexual wrongs that engage in blameworthy sexual objectification that leads to individual and systemic harms, such as forms of IBSA.[100] Criminal law provisions have proven to be an effective tool for some people targeted by forms of IBSA, such as voyeurism and NCDII, since those laws were introduced in Canada.[101] If the definition of intimate images under the criminal law should be expanded to include NSII, there may be a need for a different threshold than civil intimate images laws. For example, in Canada's child pornography laws there is a requirement that the

---

[93] Khoo, "Deplatforming Misogyny", *supra,* note 52.

[94] Karaian, "Criminal", *supra,* note 43.

[95] Kristen Thomasen & Suzie Dunn, "Reasonable Expectations of Privacy in the Era of Drones and Deepfakes: Examining the Supreme Court of Canada's Decision in R v Jarvis" in eds Jane Bailey, Asher Flynn, & Nicola Henry, The Emerald International Handbook of Technology-Facilitated Violence and Abuse (Bingley, UK: Emerald Publishing, 2021); Statistics Canada, "A Comprehensive Portrait Of Police: Reported Crime In Canada, 2021" Statistics Canada. (2022); Statistics Canada, "Police-Reported Cybercrime, By Cyber-Related Violation, Canada (Selected Police Services)" (2023).

[96] Karaian, "Criminal", *supra,* note 43.

[97] Breanna Sheppard, "Deep Fake Pornography and Section 162.1" Robson Crim Law Blog (11 March 2022); Flynn et al, "Disrupting and Preventing", *supra* note 8.

[98] Dunn & Aikenhead, *supra* note 88.

[99] Dunn et al, *supra* note 52.

[100] Carissima Mathen, "Crowdsourcing Sexual Objectification" (2014) 3:3 Laws 529 at 530.

[101] Jane Bailey and Carissima Mathen, "Technologically-facilitated Violence Against Women and Girls: If Criminal Law Can Respond, Should It?" (2017) Ottawa Faculty of Law Working Paper No 2017-44.

14

images be made for a sexual purpose and there is an exception for the private use of some forms of child pornography.[102]

Conclusion

This article reviews one possible option for addressing NSII, changing the language of criminal and civil intimate images laws to be broad enough to cover NSII. It does not suggest that this is the only or even the best solution to address NSII, however, with the proliferation of sexualized generative AI, it is one worth considering. It will take time to assess the effectiveness of the legal and non-legal approaches used to fully address these harms as the technology develops and legal and social responses to them evolve. While the solutions to addressing NSII are developing, what is known is that NSII causes harm to many of the individuals featured in them and legal action is needed. People deserve to have effective rights and supports to protect their sexual integrity, digital or otherwise, and some legal intimate image protections should cover both real and realistic images.

---

[102] *R v Sharpe,* 2001 SCC 2.

15