Deepfakes and Private Rights in the Perspective of EU Law: Is It Necessary to Intervene?

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INTRODUCTION

Fakes have always existed, but AI systems' now-limitless capacity for manipulation has also uncovered positive uses: Our capacity to now reconstitute events or places that once existed but were never recorded is only an illustration of what can also be an interesting development of these new fakes. The rapid spread of AI-generated images or voices that starkly—deeply—resemble the individuals on which they have been modeled has raised two major, and quite opposing, concerns. On the one hand is the risk of deceiving the public: giving them the false belief that what is been displayed is an expression of reality. On the other hand is the development and control of the emerging market for these new synthetic features. The first concern ought to produce protective measures to prevent the risk of deception, but such measures run the risk of impeding the potential development of the market at a moment where the still-

unrealized potential of the technology provides both new opportunities for creating "fakes" and genuine benefits.

I. THE LACK OF SPECIFIC HARMONIZED SOLUTIONS FOR DEEPFAKES

Part I will address the (so far limited) EU obligation of Disclosure imposed on AI deployers by the AI Act (I.A), recall that due to the restricted competence of the European Union, there is a lack of harmonization of the criminal offenses that can cover some misuses of deepfakes (I.B), and examine a recent political initiative driven by the Danish government aiming at creating an exclusive right on individual's likeness (I.C).

A. THE (SO-FAR LIMITED) EU OBLIGATION OF DISCLOSURE FOR AI DEPLOYERS

With the exception of rules regarding unfair business practices and consumer protection,[1]European law has so far addressed the risk of deception primarily by imposing a specific disclosure obligation on deployers (i.e., professional users) of deepfakes. Deployers must clearly and distinguishably indicate that the content has been artificially generated or manipulated, typically by labeling the AI output accordingly and disclosing its artificial origin.[2] The definition appears in Article 3, paragraph 60 of the AI Act, which provides that "deepfake means AI-generated or manipulated image, audio or video content that resembles existing persons, objects, places, entities or events and would falsely appear to a person to be authentic or truthful."[3] This legal intervention may be considered minimalist in some respects. First, it has not yet entered into force but will only apply from August 2026. Second, the definition is limited to images, audio and video content, leaving aside deception that would be expressed through literary form, such as fake news,[4] even though a similar

1. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, 2005 O.J. (L 149) 22, as amended by Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019, 2019 O.J. (L 328) 7 (regarding the better enforcement and modernization of EU consumer protection rules).

2. Artificial Intelligence Act, Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonized rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 ["EU AI Act"], 2024 O.J. (L 1689), recital 134 and art. 50(4). "Deployers of an AI system that generates or manipulates image, audio or video content constituting a deepfake, shall disclose that the content has been artificially generated or manipulated. This obligation shall not apply where the use is authorised by law to detect, prevent, investigate or prosecute criminal offence. Where the content forms part of an evidently artistic, creative, satirical, fictional or analogous work or programme, the transparency obligations set out in this paragraph are limited to disclosure of the existence of such generated or manipulated content in an appropriate manner that does not hamper the display or enjoyment of the work."

3. EU AI Act, *supra* note 2, art. 3(60).

4. *Id.* art. 50(4). The second paragraph of art. 50(4) provides that "deployers of an AI system that generates or manipulates text which is published with the purpose of informing the public on matters of public interest shall disclose that the text has been artificially generated or manipulated. This obligation shall

disclosure obligation exists for manipulated informational content. More fundamentally, the AI Act also does not prohibit deepfakes, nor does it establish a way of distinguishing truth from manipulation, which would be the only solution adequately addressing the risk of deception normally at the heart of this disclosure obligation. This obligation is subject to limitations: It does not even apply when such use is authorized by law to detect, prevent, investigate, or prosecute criminal offenses. It is also limited when the content forms part of an evidently artistic, creative, satirical, fictional, or analogous work or program, in which case the disclosure should be made in an appropriate manner that does not hamper the display or enjoyment of the work. This possible contextualization demonstrates that deepfakes are not treated as wrongful in themselves, notably when their use is embedded in a fictional setting: What matters, rather, is ensuring the public's awareness that it is being confronted with a synthetic output. As Magritte's *The Treachery of Images* reminds us, the representation of a pipe is not a pipe; likewise, the algorithmic representation of a thing or a person is never that thing or person.

B. THE LACK OF HARMONIZATION OF CRIMINAL OFFENSES

This form of moral neutrality demonstrates an absence of choice with regards to the direction that the European Union should take in regulating deepfakes. Although the AI Act does not proscribe deepfakes, prohibition of their use and creation can nevertheless rely on public-interest considerations, such as preventing forgeries committed through synthetic features for purposes of extorsion, the circumvention of authentication systems, revenge pornography, or similar harms. Generally, these behaviors are already banned irrespective of the presence of deepfakes, which in these cases would only be considered as a means of committing the offense.

Yet, in some cases, national legislation may directly ban deepfakes as such, as illustrated by French criminal law. Until recently, Article 226-8 of the penal code punished the act of "publishing, by any means whatsoever, the montage made with the words or image of a person without his consent, if it does not appear obvious that it is a montage or if it is not expressly mentioned," by one year's imprisonment and a fine of 15,000 euros.[5] Since the enactment of Loi SREN,[6] which has modified the article 226-8 in 2024, it is now also prohibited to "bring to the attention of the public or a third party, by any means whatsoever, visual or sound content generated by algorithmic processing and representing the image or words of a person, without his consent, if it is not obvious that it is algorithmically generated content or if it is not expressly

not apply where the use is authorized by law to detect, prevent, investigate or prosecute criminal offences or where the AI-generated content has undergone a process of human review or editorial control and where a natural or legal person holds editorial responsibility for the publication of the content."

5. CODE PÉNAL [Penal Code] art. 226-8 (Fr.) (before 2024 amendment).

6. Loi 2024-449 du 21 mai 2024 visant à sécuriser et à réguler l'espace numérique [To Secure and Regulate the Digital Space], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 21, 2024.

mentioned."[7] Recently, Italy has adopted new provisions in its Criminal Code, introducing Article 612-quater, entitled "[i]llicit dissemination of content generated or altered using artificial intelligence," according to which "[a]nyone who causes unjust harm to a person by transferring, publishing, or otherwise disseminating, without her consent, images, videos, or voices that have been falsified or altered through the use of artificial intelligence systems and are capable of misleading as to their authenticity, shall be punished with imprisonment for a term of one to five years."[8] In Italy, the offense is normally punishable upon complaint by the offended person.

Although the two provisions are broadly similar, their elements differ slightly: Where the definition of the French offense relies only on the absence of consent of the person targeted by the deepfake and on the absence of disclosure of the algorithmic origin of the feature, the Italian law requires the existence of unjust ham for the victim, acts of falsification or alteration and finally the capacity to deceive on the authenticity of the information conveyed by the deepfake. These solutions are not harmonized because they rely on criminal law, which does not fall within the scope of the competence of the European Union.

C. RECENT POLITICAL INITIATIVES

Facing this lack of uniformity within the EU, a call for action came recently from the Danish government, which took over the presidency of the EU in July 2025. Denmark is currently adopting a modification of its copyright law to extend the system of exclusive rights to every individual's likeness, following the rationale of the No Fakes Act currently being discussed in the United States.[9] In doing so, Denmark expects to increase the efficiency of the notice and take down procedure when fighting against the unconsented use of deepfakes, by benefiting from the reactivity of the platform when copyright rules are invoked. It has signified its intention to promote such a system at the EU level.

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7. CODE PÉNAL [Penal Code] art. 226-8 (Fr.) (amended 2024).

8. Art. 612-quater, Illecita diffusione di contenuti generati o alterati con sistemi di intelligenza artificiale, L. 132/2025, 10 October 2025 (It.) ("Chiunque cagiona un danno ingiusto ad una persona, cedendo, pubblicando o altrimenti diffondendo, senza il suo consenso, immagini, video o voci falsificati o alterati mediante l'impiego di sistemi di intelligenza artificiale e idonei a indurre in inganno sulla loro genuinità, è punito con la reclusione da uno a cinque anni. Il delitto è punibile a querela della persona offesa. Si procede tuttavia d'ufficio se il fatto è connesso con altro delitto per il quale si deve procedere d'ufficio ovvero se è commesso nei confronti di persona incapace, per età o per infermità, o di una pubblica autorità a causa delle funzioni esercitate.") ["The offense is punishable upon complaint by the offended person. However, proceedings shall be initiated ex officio if the act is connected with another crime for which proceedings must be initiated ex officio, or if it is committed against a person who is incapable due to age or infirmity, or against a public authority due to the functions exercised."].

9. *See* Elin Hofverberg, *Denmark: Political Parties Agree to Protect Danes Against Deepfakes*, LIBR. OF CONG. (Aug. 5, 2025), https://www.loc.gov/item/global-legal-monitor/2025-08-05/denmark-political-parties-agree-to-protect-danes-against-deepfakes/ [https://web.archive.org/web/20250812222931/https://www.loc.gov/item/global-legal-monitor/2025-08-05/denmark-political-parties-agree-to-protect-danes-against-deepfakes/].

This initiative brings forth at least two types of questions. On the one hand, it raises the philosophical debate on the opportunity to create an intellectual property right for the benefit of all citizens, notwithstanding the absence of any creative input. On the other hand, it highlights the relevance of an economic monopoly, which is a right to prohibit and to authorize, eventually against remuneration, with the corollary risk of commodification of the likeness and voice of the individuals. It thus appears necessary to assess whether other types of protection of the right of the individuals, such as the protection of personality rights or the protection of personal data, would be more adequate to tackle the issue of personal deepfakes.

This Article will explore the opportunity to use the concept of ownership to deal with the deepfakes issues starting in the next part by appraising the existing solutions of IP (Part II). Then, it will consider the different potential consequences of the extension of such model, which, after scrutiny, does not prove to be necessary (Part III). Finally, it will envisage whether other types of existing protections based on the protection of the person within the EU could be more suitable (Part IV).

II. CAN EXISTING IP SOLVE THE DEEPFAKES ISSUE?

Part II will explore the possibility of using the concept of ownership in relation to deepfakes, and in this respect, the potential applicability of the existing intellectual property rights (II.A), together with the adequacy of the internal balance of interests within the IP system (II.B).

A. A PARTIAL RELEVANCE OF EXISTING INTELLECTUAL PROPERTY RIGHTS

Under the broad definition of deepfakes adopted by the AI Act, not only the image or voice of a person, but also objects, places, entities, or events, may constitute the subject-matter of a deepfake.[10] This AI-generated reconstitution may therefore concern persons, things, and information alike. Unsurprisingly, such reconstitution may infringe an intellectual property right when it entails the reproduction and/or adaption of protected content. Copyright (II.A.1), related rights (II.A.2), the sui generis database right (II.A.3) and even industrial property rights (II.A.4) may, under certain conditions, be exercised against the publication of a deepfake that would infringe the scope of the right holder's exclusivity. Conversely, they may also be licensed to authorize such use.

1. Copyright

Take the example of a photograph that is copyright-protected and modified through the use of an AI system by including an element that was not present in the original image or by removing part of the scenery. This type of manipulation is part of the history of photography, so much so that the relation between truth and fiction in photography has long raised debates between those who defend photographic work as

10. *See supra* notes 2–4 and accompanying text.

work of the mind, and those who claim that a photo is merely the automatic reflection of reality. In this respect, AI does not radically alter the state of the play, albeit for the quality and economy of the algorithmic process. In such a case, the modification of the photograph can be qualified at the very least as an act of reproduction, if not also as an act of adaptation, and reproduction in principle requires the prior consent of the author. In the absence of such authorization, and if the reproduction is not covered by a specific legal exception, both the creation of the deepfake and its communication to the public will infringe the copyright holder's monopoly. European copyright law has already harmonized the exclusive rights of reproduction, communication to the public, and distribution, so that the answer will, in principle, be uniform across Member States.[11] In such a situation, the modification of the work will appear as an act of reproduction thereof, this broad conception of the reproduction right having been reaffirmed by the European Court of Justice in the *Eva-Maria Painer*[12] and the *Art & Allposters*[13] cases. This is copyright business as usual.

More difficult is the case in which the deepfake output does not reproduce an identifiable part of a pre-existing work, but was conceived "à la manière de," or in the style of, a specific author, and is evocative of its works or personality. Given the classic distinction between form and idea, copyright law normally rejects the mere protection of style when no reproduction of the form of a work can be showed. Yet, for AI-generated deepfakes, it is likely that the works of the author in question have been reproduced at one point in the process of feeding the application (training, retrieval-augmented generation (RAG), fine-tuning), so that the principal characteristic of the paintings, photos, videos, songs can later be retrieved. Consequently, even if the comparison of the output with a specific work shows little or no resemblance, the possibility of recognizing the author's style may nevertheless imply prior digital acts of reproductions, whereas the forger in the analogue world was merely reconstructing the work mentally. The problem here lies in identifying the reproduction of a specific work, which is ordinarily a condition for bringing suit.

There also remains, uncovered under EU law (except for the database and for the computer program), the right of adaptation, whose definition may vary across countries. Under a narrow understanding, adaptation corresponds to a situation where a work created in one form of expression—say, a literary work—is transformed into another form of expression, such as a movie or a video game. AI now offers unexpected possibilities in this respect: AI applications can produce music out of a book, or images from a piece of music. Even if the result may appear surprising from the point of view of the human expectations, this type of transformation may be understood as adaptation, even though no formally recognizable elements of the original work will be found in the synthetic output. In such a case, a claim based on reproduction rights

11. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [hereinafter "Infosoc Directive"], arts. 2–4, 2001 O.J. (L 167).

12. Case C-145/10, Eva-Maria Painer v. Standard VerlagsGmbH and Others, 2011 E.C.R. I-12533.

13. Case C-419/13, Art & Allposters Int'l BV v. Stichting Pictoright, ECLI:EU:C:2015:27 (Jan. 22 2015).

may fall short, due to the impossibility of identifying the original work in the output. Although this difficulty is not limited to deepfakes, the absence of harmonization of the adaptation right constitutes a barrier to a coherent European framework. Intervention on the part of the EU would be pertinent, as it would help right holders ascertain the scope of their rights in relation to AI-driven, transformative uses.

2. Related Rights

Even though the practice of deepfakes is not limited to transformation of the image or voice of famous individuals, the most salient examples concern them (performers in particular). Possible uses are wide-ranging: synthetizing the voice of a comedian to offer a service of audiobooks allegedly read by the artist; allowing an actor to appear in a film while he cannot be physically present during the shooting, or sparing the use of a stuntman for dangerous scenes; resurrecting deceased performers to appear on screen or produce a new song (see the Beatles).[14] These possibilities are a source of concern for performers who fear the risk of substitution of their effective presence by these digital duplicates. Besides, the subject matter of their exclusive rights as defined in the Directive 2006/115 is the "performance."[15] Consequently, where a deepfake mimics an actress playing a role that she never actually performed, it is debatable whether her exclusive right may be exercised, since there is no actual reproduction, communication to the public, or distribution of her performance. Among other reasons, these uncertainties help explain why some legal systems are considering the adoption of new provisions within the IP regime in order to secure broader performers' rights.

In our view, it is not necessary to create a whole new IP regime to solve this problem if we retain a large interpretation of the notion of performance. It is obvious that the use of the image or the voice of a performer in deepfake or duplicate does not implicate her ordinary, day-to-day likeness or voice. Who would make a fake Janis Joplin song merely by reproducing the sound of her speaking voice from interviews, and not from the songs she already sang? Who would train a deepfake application on photographs of Marylin Monroe buying a hot dog, without make-up and a hairdo? Most of the examples mentioned above refer to situations where the commercial attractiveness of the deepfake comes from the extraction of the substantial value of the performer's prior interpretations and not merely from her personal attributes. Therefore, even if the transformative use made by the AI-generated deepfake results in a work that the artist never actually performed, this result cannot be achieved without the prior reproduction and selection of the characteristics of the performer *while performing*. The economic value of the service derives from the extraction of the value of those aggregated performances.

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14. *See* Miguel Perez, *How Producers Used AI to Finish the Beatles' "Last" Song, "Now and Then,"* NPR MUSIC (Nov. 2, 2023), https://www.npr.org/sections/world-cafe/2023/11/02/1208848690/the-beatles-last-song-now-and-then [https://perma.cc/8BP5-FM2G].

15. Directive 2006/115/EC, of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, 2006 O.J. (L 376) 28.

The same reasoning may be extended to producers' rights. If a deepfake mimics a previous film or song, its reproduction is plausible. For example, there is certainly a reproduction of the phonogram where the voice of a singer singing a specific song is reproduced in a video featuring another character pretending to interpret it. A more difficult case would be one in which the voice of a performer is being synthetized to interpret new songs. As with copyright, it is likely that the training necessary for the development of the application required copies of previous fixations. But in *Pelham*, the ECJ held that article 2(c) of Directive 2001/29/EC

> must, in the light of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that the phonogram producer's exclusive right under that provision to reproduce and distribute his or her phonogram allows him to prevent another person from taking a sound sample, even if very short, of his or her phonogram for the purposes of including that sample in another phonogram, unless that sample is included in the phonogram in a modified form unrecognizable to the ear.[16]

3. Makers of a Sui Generis Database Right

A more unconventional hypothesis lies in the possibility to apply the maker's sui generis database right whenever the AI system reproduces data extracted from a database to generate deepfakes.[17] A database compiled by archeologists documenting the excavations of a certain site may be used to reconstitute through AI an image of this site as it might have appeared before its destruction. As the quantified-self movement grows, real-time data on activities, reporting on pulse, blood pressure, weight, or snoring during the night of a person could be also analyzed as a database of one's personal data that may be used to build a very sophisticate avatar of this person by an AI system.

Such an intellectual property right may prove useful in combating the undue appropriation of data because, subject to certain conditions, the maker of a database has the right to prevent the extraction and/or re-utilization, whether quantitative or qualitative, of the whole or of a substantial part of that database.[18] Interestingly, the European Court of Justice has interpreted this notion of extraction broadly, so as to encompass mere intellectual extraction, even in the absence of material or digital reproduction. In the *Directmedia* case, the ECJ held that the acknowledgement, by the maker of an anthology of German poems, that he had had access to a former anthology before making his own selection of poems was sufficient to amount to quantitative

16. Case C-476/17, Pelham I, ECLI:EU:C:2019:624 (July 29, 2019).

17. According to article 1(2) of Council Directive 96/9/EC of 11 March 1996 on the legal protection of databases, 1996 O.J. (L 77) 20, a database shall mean "a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means."

18. Council Directive 96/9/EC of 11 March 1996 on the legal protection of databases, art. 7(1), 1996 O.J. (L 77) 20 ("Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.").

extraction, due to the number of the same occurrences appearing in both anthologies.[19] In such a case, there was no need to demonstrate a prior act of reproduction in the course of making the database, as it was obvious from the content itself that such an extraction had occurred, due to the substantial presence of elements in common. It was sufficient that the value of the first maker's selection had been extracted. Even if the significance of this case should not be overstated,[20] it offers a means of bypassing the requirement for proof of technical reproduction. To return to the example of an AI-generated reconstitution of an ancient city, the fact that the archaeologist's database constitutes the only existing source of information could suffice to establish the existence of an extraction and, consequently, of an infringement of the sui generis right if no authorization had been given.

The difficulty, however, lies in demonstrating that the maker made a substantial investment in the obtention, verification, or presentation of the contents of the database. The Court of Justice has interpreted this condition narrowly across several judgments delivered in 2004: Investments made in the creation of the information are not relevant if the maker cannot prove any investments in the production of data itself.[21] Under this interpretation, the cost of the excavation itself cannot be taken into account: Only the time and money necessary to build the database from the results of the excavation are relevant. This requirement would likely constitute an obstacle for an individual seeking to claim ownership over the body of data she produced, for example, when running. One cannot be regarded as making a database of their own vital, bodily information simply by running. Only a person demonstrating investment in the obtention, verification or presentation of such data—namely, the service which collected the data— would be in a position to claim such ownership. Due to this requirement, using the sui generis right to combat the undue and massive appropriation of personal likeness seems unlikely.

4. Industrial Property Rights

It is also possible to claim ownership over a design or model or a trademark if the protected subject matter has been reproduced in the deepfake. Here again, the condition of identification of the element protected within the deepfake will be required. A video appearing to be a fake commercial for a famous trademark of soda would potentially be considered as an infringement if the use of the trademark has not been authorized by the right holder, subject to internal or external limitations for

19. C-304/07, Directmedia Publ'g GmbH v. Albert-Ludwigs-Universität Freiburg, 2008 E.C.R. I-7565, ¶ 60.

20. *Id.* at ¶ 14. In this case, the defendant recognized that he had access to this prior anthology while making his own one.

21. Fixtures Mktg. Ltd v. Oy Veikkaus Ab, Case C-46/02, 2004 E.C.R. I-10365 (Grand Chamber Nov. 9, 2004); British Horseracing Bd. Ltd. V. William Hill Org. Ltd., Case C-203/02, 2004 E.C.R. I-10415 (Grand Chamber Nov. 9, 2004); Fixtures Mktg. Ltd v. OPAP, Case C-444/02, 2004 E.C.R. I-10549 (Grand Chamber Nov. 9, 2004); Fixtures Mktg. Ltd v. Svenska Spel AB, Case C-338/02, 2004 E.C.R. I-10497 (Grand Chamber Nov. 9, 2004); *see also* Estelle Derclaye, *The European Court of Justice Interprets the Database Sui Generis Right for the First Time*. 30 EUR. L. REV. 420 (2005).

parody. Specifically, in the field of trademark law, the guarantee of origin—which is a fundamental function of the trademark recognized as such by the ECJ[22]—would ground the claim of the right holder whenever the use of the trademark is likely to cause a risk of confusion for the consumer. Even if the likelihood of confusion is not a legal condition applicable in the realm of protection of models, case-law could sometimes rely on such appraisal while analyzing the overall impression provided by the model. The recent extension of the definition of design and model to non-physical products now expands the protection to movement, transition, and animation that will certainly pave the way to more claims on that ground against deepfakes.[23]

In a nutshell, actual property rights may be applicable to deepfakes whenever they reproduce significant parts of the protected subject matter, which may be the case in various situations. IP is, therefore and in principle, relevant to tackle certain issues from the perspective of the right holder.

B. THE BALANCE OF THE INTERESTS WITHIN THE IP SYSTEM

The IP system cannot be reduced to a mere granting of exclusive rights but constitute a comprehensive mechanism aimed at combining different and sometimes divergent interests. Deepfakes may be made and are effectually used to convey a message, which, when it is not contrary to public order rules, may benefit from the protection of the freedom of expression. It is therefore interesting to assess whether the IP system contains appropriate rules to balance the respective interests. As many of these messages are humorous or critical, the application of the parody exception widely recognized in EU Intellectual property law may apply *de lege lata* (B.1). But since the public deception may increase due to AI sophisticated tools, the willingness of the right holder not to be associated a deceptive message may be taken into account in a reinforced way, which could be achieved, *de lege ferranda*, by an EU-wide recognition of the moral right (B.2).

1. IP and Parody

While safeguarding the truth is not a relevant justification for IP, and consequently not a duty imposed on the right holder, the protection of freedom of expression may, to some extent, limit the exercise of the exclusive right. This aspect is particularly important for deepfakes, some of which are created with the intention to mock or to criticize. Notions of parody, caricature, or pastiche are being developed within the IP system for copyright, related rights, and, lately, for designs and models with the recent

22. Terrapin (Overseas) Ltd. v. Terranova Industrie CA Kapferer & Co., Case C-119/75, 1976 E.C.R. 1039 (June 22, 1976); SA CNL-Sucal NV v. Hag GF AG (Hag II), Case C-10/89, 1990 E.C.R. I-3711 (Oct. 17, 1990).

23. Regulation (EU) 2024/2822 of the European Parliament and of the Council of 23 October 2024 amending Council Regulation (EC) No 6/2002 on Community designs and repealing Commission Regulation (EC) No 2246/2002, art. 3(1)–(2), 2024 O.J. (L 2822).

adoption of the EU package.[24] Such an extension has not yet been made regarding trademarks, where the satirical use of protected signs can nevertheless be tolerated through the application of the external principles of freedom of expression and/or freedom of creation. So far, the notion of parody has been interpreted in the realm of copyright by the ECJ in the famous *Deckmyn* case, where the Court decided that it should be an autonomous notion of EU law, thus discarding the competence of the Member States on this matter. [25]

Commenting on this decision, the advocate general in his last conclusions under the case *Pelham II* considered that this

> fairly broad approach to 'parody' offers some room for creative reuse of protected material. It may apply, for instance, to many instances of memes, involving the 'recognizable' reproduction of frames of films and their humoristic subversion through substantial modifications and/or addition of captions. Similarly, it may cover certain cases of mashups, potentially created through the 'sampling' of other phonograms, characterized by their humoristic tone or incongruity. It can also cover certain 'found footage', where frames of films are reused in a humoristic way, or even creative *détournement* of some beloved copyright-protected characters.[26]

No doubt that deepfakes may correspond to some elements of this non-exhaustive list.

The *Deckmyn* case has established the cumulative criteria required for applying the parody exception: The parody shall evoke the pre-existing work, albeit with noticeable differences, but must also show humor or mockery.[27] If the parody is made with a work, it is not necessarily about it. Paradoxically, the Court also held that the exception does not require the mention of the source of the work subject to the critical or ironic use.[28] Whereas the parody lies precisely in the differences between the source and the result, the judge did not consider important to let the public appraise these differences and to impose to the person responsible for the parody a duty to inform it. Even if parody exception may justify the rejection of the exclusive right, it does not facilitate the public knowledge of the "truth."

Interestingly, in the abovementioned conclusions in *Pelham II*, the advocate general also suggested a definition for the pastiche described as "an artistic creation that (i) evokes an existing work, adopting its distinctive "aesthetic language", while (ii) exhibiting perceptible differences from the source imitated, and (iii) is intended to be recognized as an imitation."[29] If certain deepfakes were to be recognized pastiche in respect of these criteria, the tribute to the work at the origin of the pastiche should be somehow communicated to the public. It should be indicated (in one way or another)

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24. Directive (EU) 2024/2823 of the European Parliament and of the Council of 23 October 2024 on the legal protection of designs (recast), 2024 O.J. (L 2823); Regulation (EU) 2024/2822 of the European Parliament and of the Council of 23 October 2024 amending Council Regulation (EC) No 6/2002 on Community designs and repealing Commission Regulation (EC) No 2246/200, 2024 O.J. (L 2822).

25. Case C-201/13, ECJ, Johan Deckmyn v. Helena Vandersteen, ECLI:EU:C:2014:2132 (Sept. 3, 2014).

26. Opinion of AG Emiliou, *Pelham II*, Case C-590/23 at ¶ 94, EU:C:2025 (17 June 2025).

27. *Deckmyn*, Case C-201/13 (2014).

28. *Id.*

29. Opinion of AG Emilou, *Pelham II*, Case C-590/23 at ¶ 81.

or, at least, be recognizable as such by the viewer or listener who already knows the source. Consequently, they would be able to appreciate the distance between the deepfake and its source, and to clearly identify the nature of the pastiche. Thus, expressly or implicitly informed of the intent of the maker of the pastiche, the public would avoid any deception. Such a disclosure would be even more useful for the knowledge of the public than the requirements imposed by article 50 of the AI Act.[30]

Yet, with such a broad definition, pastiche would systematically limit the exclusive right of the right holder once the deployer of the deepfake claims his intention to make such a pastiche. To counteract such performative effect, it would be possible to rely on an interesting solution coming from the *Deckmyn* decision, where the reproduction and the transformation of a famous Belgium comic image by a far-right party to communicate a message judged discriminatory by the Court has been forbidden. The ECJ has considered (point 31) that "In those circumstances, holders of rights . . . have, in principle, a *legitimate interest* in ensuring that the work protected by copyright *is not associated* with such a message."[31] This intriguing solution could open interesting leeway for rights holders regarding deepfakes, even if it remains unclear after the *Deckmyn* case, on which grounds such actions could be brought. Their standing to sue could certainly be based on the harmful effect caused by the association of the protected content with a violent message that conflicts with essential democratic values, but would it also cover uses that are not criminal offenses but merely contrary to the intention of the artist as to the meaning of her creation?

Such a possibility would be comparable to the moral right to respect the "intellectual integrity" of the work or of the performance recognized, for example, in France. In an often-cited decision of the French Cour de cassation, the judges agreed with a famous singer Jean Ferrat who contested the possibility to use one of his songs in a compilation together with some pro-Nazi tunes.[32] According to them, "by ruling in this way, while an exploitation in the form of compilations with works by other performers being likely to alter their meaning, could not fall within the exclusive discretion of the assignee and required a special authorization from the artist, the Court of Appeal disregarded the above-mentioned text."[33] Under such an interpretation, if the deepfake has altered the meaning of a work or of a performance, the artist could oppose his moral right, even if the reproduction is materially correct and had been agreed upon by the holder of the economic right of reproduction.

2. The Need for Harmonization of Moral Right

There has been, so far, no harmonization of the moral right within the EU and no such project is pending. Historically, the moral right was considered outside the competence of the EU because of its non-economic and cultural dimensions. Member

30. *See* EU AI Act, *supra* note 2, art. 50.
31. *Deckmyn*, Case C-201/13 (2014).
32. Cour de Cassation [Cass.] [supreme court for judicial matters], oc., Feb. 8 2006, Bull. civ. V, No. 64 (Fr.).
33. *Id.*

States, due to their quite different approaches, were reluctant to any initiative in that respect. However, many reasons may now justify a move forward. First, there is already an indirect international harmonization of the moral right within the EU, through the adhesion of all Member States to the Berne convention (article 6 bis)[34] and more recently with the signature by the EU of the Beijing Treaty, albeit not yet ratified.[35] Second, the competence of the EU in the cultural field has been extended since the Treaty on the Functioning of the European Union (TFUE).[36] Third, the bizarre *Deckmyn* case shows that the ECJ is capable of a judicial harmonization even in the absence of any legal ground.

Adopting a moral right at the EU level would help the individual creators and performers to fight against undue intellectual appropriation of their works and performances, among other situations, in a deepfake. Such prerogatives already exist in various expressions within Member States, and it would not be difficult to demonstrate that misuse of the protected contents has a cross-border effect. Providing to the authors and performers the right to claim their quality when it is not traceable in AI output, or to oppose to the use of their name and quality; or offering them the possibility to oppose to the association of their creations or interpretations with offending content, as a form of violation of the right to respect them, would reduce the development of "mean" deepfakes. The French system—where moral rights are perpetual and not assignable—could be a valid source of inspiration in this perspective. Perpetuity would ensure that the prerogative would last as long as the risk of association subsists, even after economic rights have lapsed. As in France, a public entity could contest misuse and, by doing so, defend the honor and reputation of the dead authors or performers in the absence of heirs of the right holder, or whenever the heirs are acting contrary to the expressed will of the deceased person. The un-assignability of the moral right would limit the effects of the authorization given by the assignee of the economic right to generate deepfakes in contradiction with intention of the author or the performer.

34. *See* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971, and amended in 1979, 828 U.N.T.S. 221, at art. 6 bis.

35. Beijing Convention on Audiovisual Performances, June 24, 2012, 53 I.L.M. 1020, art. 5 (entered into force April 28, 2020) (EU is member):

> 1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live performances or performances fixed in audiovisual fixations, have the right:
>
> (i) to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance; and
>
> (ii) to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation, taking due account of the nature of audiovisual fixations.

36. *See* Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), art. 6, June 7, 2016, 2016 O.J. (C 202) 47 (recognizing that the EU's competences in the field of culture are to "carry out actions to support, coordinate or supplement the actions of the Member States.").

III. SHOULD WE EXTEND THE IP MODEL?

After weighing the pros and cons of an IP model for deepfakes (III.A), the Article concludes that the disadvantages of an extension of copyright or other exclusive IP right on one's likeness, voice or goods exceed the benefits of such a solution (III.B).

A. THE PROS AND CONS OF AN IP MODEL FOR DEEPFAKES

As demonstrated above, IP does not give comprehensive responses to three types of questions that should be taken into account when addressing deepfakes: the role of technology, the respect of the right holders' interests, and the guarantee of truth for the public.

1. Technological Challenge

IP law has a long history of adapting to technology. Even where its principles have remained stable, IP legislation has been constantly modified to integrate technological evolutions (radio, tv, satellite, digital, internet, etc.).Yet, so far, no new provisions have been adopted to deal with AI-generated content under EU law: No specific regime has been imagined to regulate the generation of outputs, including deepfakes. As current laws do not distinguish between different technological means, AI generation must respect IP rules whenever its process involves what may qualify as acts of exploitation under the law. The question is not so much theoretical but resides in the practical difficulty of proving the existence of such acts in a process where many operations remain unrevealed or are evanescent. Many initiatives are pending in Europe and in Member States to alleviate this burden by proposing presumptions of use. The starting point of this initiative is the observation that visible similarities may exist between AI-generated output and protected content, while acts of exploitation may be impossible to prove because of the complexity and the sheer number of operations required to generate the output.[37]

Assuming that this proof can be somehow demonstrated, there are still some "technological" exceptions that may hamper the possibility of exercising the exclusive right. Two sets of provisions are relevant: the exception for transient copy introduced in the Infosoc Directive in 2001, far before the AI-generated content explosion (article 5, paragraph 1), and the two exceptions dedicated to text and data mining (articles 3 and 4) in the DSM Directive, adopted in 2019.[38] These three provisions aim to facilitate a technical copy, being part of a wider process in which such copies have, in principle,

37. *See* FRENCH SENATE, CRÉATION ET IA: DE LA PRÉDATION AU PARTAGE DE LA VALEUR [CREATION AND AI: FROM PREDATION TO VALUE-SHARING] (July 9, 2025), Rapport d'information n° 842 (2024–2025) , https://www.senat.fr/rap/r24-842/r24-842.html [https://perma.cc/9Y22-YR6H]; *see also infra* notes 40 and 41.

38. Infosoc Directive, *supra* note 11, art. 5(1); Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC ["DSM Directive"], arts. 3–4. 2019 O.J. (L 130).

no specific economic value. Unlike the reproduction of a work doomed to be communicated, in whole or in part, to the public, these reproductions—due to the digital technology—are pre-conditions for the transmission or analysis of the data. These provisions, compulsory for Member States, have in common an aim to foster innovation by avoiding a too burdensome circuit of prior authorization. But while the transient copy exception is public order, the text and data mining exception for general uses (art. 4) can be reversed by an opt-out system, which forces the right holder to signal her opposition to the reproduction required to mine if she wants to retain her exclusive rights.[39] Consequently, the right holder can theoretically prevent reproduction made to "feed" an AI system by opting out preventively.

However, the concrete application of this provision demonstrates the many difficulties that right holders face when they exercise their opt-out option, especially when the content is displayed online. That is because only a mechanism readable by the machine is, then, opposable. In many cases, rights holders don't have the possibility to impose such mechanisms on online pages where their content is made available. Moreover, much of the scraping necessary to train AI models would have been done before the entry into force of this exception, which renders this late opt-out unnecessary. Finally, the opt-out is sometimes simply ignored, with reproduction made in spite of the right holder's opposition.

Right holders are currently looking for a way out of this dead end. Some settlements gave them hope that they could, at least, obtain money to compensate their loss. Some try to negotiate the past uses of their content by AI models or to sue them for infringement because they have been reproducing the content without their prior authorization before the entry into force of the DSM Directive, or in violation of the opt-out mechanism. International private law questions are evoked by tech companies to circumvent the territorial application of the directive, advocating that the training occurred in countries where the reproduction is *fair use*. The case law is still scarce and difficult to interpret at the EU level, in the absence of a decision of the ECJ.

Even if some voices have asked for a re-opening of the DSM Directive to better balance the interests of the right holders and the interests of tech companies in favor of the first ones, the Commission has so far shown no intention to do so. Nevertheless, some initiatives have been developed lately in certain Member States[40] and within the European Parliament[41] to encourage the adoption of presumptions which would reverse the burden of the proof, in the presence of certain elements, namely a resemblance between the output and pre-existing content. The mechanism is still unclear. Should it be a national competence based on procedural rules only? Should it

39. DSM Directive, *supra* note 38, art. 4.

40. CSPLA [SUPERIOR COUNCIL OF LITERARY & ARTISTIC PROPERTY], TASK FORCE REPORT ON RENUMERATION FOR CULTURAL CONTENT USED BY AI SYSTEMS—LEGAL COMPONENT (task force co-chair Alexandra Bensamoun & legal component author Joëlle Farachy) (June 25, 2025), https://www.culture.gouv.fr/Media/medias-creation-rapide/cspla-ai-cultural-content-remuneration-legal-component-english.pdf; FRENCH SENATE, *supra* note 37.

41. European Parliament Resolution of 10 March 2026 on Copyright and Generative Artificial Intelligence—Opportunities and Challenges, 2025/2058(INI), P10_TA(2026)0066.

be adopted at the EU level? Which type of event would trigger the presumption? As we have seen, the problem is even more difficult with regards to deepfakes, where the resemblances may not be linked to a specific work or performance but more globally to a part of the author's or performer's repertoire.

2. Interests of the Right Holder

The benefit of an intellectual property right is to provide to the right owner a legal exclusivity on exploitations of her protected content, so that she can shape the market ex-ante because her prior authorization is required to enter it. She has also the possibility to sue, ex-post, without having to demonstrate a harm different from the infringement to her monopoly.

Whether by refusing the authorization to reproduce and to display, or by suing the defendant for having exploited without permission, the right holder normally has the capacity to ban the publicity of deepfakes and therefore to protect herself against their potential deceptive effect and risk of substitution. The performer would for example oppose the reproduction of her performances to feed the AI system, so that no duplicate of her would be available to replace her. The trademark owner would also be capable of banning the use of the distinctive sign in commercials he does not want to be related to. The benefit of intellectual property rights also lies in the efficiency of their infringement procedures. The right holder does not need to demonstrate that he has suffered harm: Infringement is sufficient to trigger the action. However, she can also rely on robust procedural instruments harmonized by the 2004 Directive such as interim measures, information measures, or seizure.[42] Some procedures specific to the digital field, such as a notice and take down and stay down, have been developed. At the EU level, article 17 of the DSM Directive is forcing platforms to implement filtering measures to avoid the new presentation of a file, which has been signaled by the right holder as infringing his copyright or related right.[43] With such an instrument, the right holder can freeze the principle of non-liability of the hosting provider set in the E-commerce Directive since 2000 and reaffirmed in the Digital Services Act (DSA) and sue the platform for direct infringement if it does not implement correctly the appropriate measures of control.[44] He can force the platform to cooperate and to help him fighting against counterfeiting. This constitutes a procedural advantage as compared to the difficulties of private persons to convince platforms to withdraw other offensive contents.

42. Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, 2004 O.J. (L 157).

43. DSM Directive, *supra* note 38, art. 17.

44. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ["E-commerce Directive"], 2000 O.J. (L 178); Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC ["DSA"], 2022 O.J. (L 277).

The exercise of the intellectual property right can also be positive: The right holder may decide to authorize deepfakes, potentially against remuneration. As the economic right is assignable or capable to be licensed, there is in principle no obstacle for such a market. As contractual law is not harmonized across the EU, only some provisions of the DSM Directive secure certain protections for authors and performers, with regards to remuneration, transparency, and revocation of the contract in case of inexecution (article 18 to 21 of the DSM Directive).[45] The performer may give her consent for digital duplicates that would appear in films instead of herself, the producer may authorized reproduction of AI-generated deepfakes where a song is interpreted with the voice of another performer: The possibilities are already numerous and will most likely continue to grow in the next few years. Nevertheless, the deceptive aspect of deepfakes reinforces the disturbing aspect of a market developing with the right holders' blessing so that they can earn royalties deriving from the exploitation thereof. This situation is made possible by the fact that, in most cases, IP rights don't protect the interest of the public in distinguishing truth from counterfeit, even if they usually leave space for freedom of expression.

3. IP Right and Truth: Two Non-Matching Concepts

The crux of intellectual property rights can be located somewhere between the private interest of the right holder and the public interest in the development of creation and innovation. The relevance of what truth is does not interfere with the exercise of the monopoly: Ultimately, truth is what the right holder decides it is. Even in the field of trademark where the guarantee of origin of the product is part of the essential function of the right, and where the assignment of the title shall be published accordingly, there is no legal obstacle to settle a trademark coexistence agreement with another trademark holder, even if such agreement is detrimental to the distinctiveness of the sign. The consumer may therefore be misled on the origin of the product, if the right holder decides so. Even if the absence of risk of confusion and prohibition of deceptive trademarks are key for the obtention of a trademark, this risk does not trigger any obligation to sue for the right holder, who can decide to leave counterfeiting goods on the market. For some right holders, the existence of such copies may be seen as an opportunity to gain some notoriety or to favor a secondary market for other categories of consumers. Such passive behavior, which may favor "fakes," is not considered abusive, although there is a possibility to lose the exclusive right by acquiescence and to legitimize the fake.

In the case of the creation of one performer's digital replica where the use has been agreed by the artist, there is no provision within the IP legislation which obliges the right holder to inform the public that the avatar displayed is not "real." Only the AI Act provides for such information, which must be disclosed, not by the artist, but by the deployer of the AI solution.[46] Other examples in the field of copyright demonstrate this

45. DSM Directive, *supra* note 38, arts. 18–21.
46. EU AI Act, *supra* note 2, art. 50 (transparency obligations for deployers of AI tools).

disregard for the truth: According to the moral right rules when they exist, the copyright holder can decide not to reveal the author's real identity and to publish his work anonymously or under a pseudonym; no mandatory duty to disclose the author's identity exists. It's even the opposite as, according to some legislation, such as the French one, the unconsented revelation of the authorship may constitute a violation of the moral right to attribution and consequently, a copyright infringement.[47] The right to integrity also is exercised by the author or her heirs as regards what *they* believe is betraying the work and not as a duty to inform the public of the fake.[48]

Finally, the concept of truth is a rather complicated one in the field of artistic creation, where most works are fictional, except for press and documentary which report information. Would a deepfake of a video game be less "true" than the model from which it has been generated? If an actress performs a scene of a movie in a deepfake, isn't that as fictional as the same actress performing a scene in a "real" movie? If a performer has accepted the AI processing of her image and voice, and eventually supervises the result for a dangerous scene of a movie, is it really different from the same scene being shot with a stuntman? The AI Act itself, in the final sentence of article 50 paragraph 4, foresees the risk of a systematic obligation of disclosure of the existence of generated or manipulated content in such fictional creations, assuming that the information upon the algorithmic origin of the element shall be revealed in an appropriate manner that does not hamper the display or enjoyment of the work.[49] It appears that IP is not an appropriate instrument to secure the liability of the message conveyed by the protected subject matter.[50] The economic dimension of these assets supersedes the public interest to value the truthfulness of this message. This is even more true concerning the transformation by deepfakes of works that are already fictional and from which the expectancies of the public are not related to the reality.

Thus, the EU IP system seems adapted to tackle the problems raised by deepfakes, but only partially. It may, to a certain extent, provide opportunities for the right holder to control the use of the protected content whenever it is still identifiable: by exercising the monopoly in a positive manner or by bringing defensive action against their misappropriation in deepfakes and enforcing his rights against platforms through notice and take down and stay down or filtering mechanisms. From a perspective of freedom of expression, the exception of parody can give to the deployers a certain margin of maneuver to produce AI-generated funny or critical deepfakes as far as they don't associate the content with offending messages. Yet, in the absence of harmonization of the adaptation right and of the moral right at the EU level there is no

47. CODE DE LA PROPRIÉTÉ INTELLECTUELLE [Intellectual Property Code] art. L. 121-1 (Fr.).

48. Victor Hugo's heirs have had, for example, different views on what should be the respect for the writer's monumental work: They sued an author who had created sequels to *Les Misérables* starting from key characters in the novel, namely because Javert, who had died in Hugo's version, was living again, whereas they did not object to the Disney cartoon *The Hunchback of Notre Dame*, based on Hugo's 1831 novel *Notre-Dame de Paris*, despite the fact that all the main characters are dead at the end of the novel.

49. EU AI Act, *supra* note 2, art. 50(4).

50. Even with respect to the press publishers' right, whose adoption was namely justified by the need to combat fake news, no provision effectively imposes such an obligation.

EU common ground on which the author or the performer can rely to contest the alteration of the content in the deepfake. Furthermore, when the deepfake bears no resemblance to the sources it was produced from, the mechanism of IP proves difficult to apply. The current discussion on the necessity to introduce presumptions to reverse the difficult demonstration of the existence of an act of exploitation may render the system more efficient. The extent to which exceptions may apply and the practicability to opt out are heavily disputed. Finally, with a variation depending on the IP right concerned, the system is offering a poor guarantee to the public on the faithful character of the AI-generated content. No transparency obligation is imposed to the right holder to reveal the fakeness of an output: On the contrary, IP's monopolistic structure would help "launder" the deepfake by the mere consent of the right holder. This overall limited enthusiastic assessment prevents the promotion of the extension of IP mechanisms to the protection of likeness, voice, or goods on behalf of everybody.

B. AN INAPPROPRIATE EXTENSION OF INTELLECTUAL PROPERTY TO ONE'S LIKENESS, VOICE OR GOODS

The current debates around the No Fakes Act in the United States and of the revision of the copyright law in Denmark raise the question of creating new IP rights to one's likeness or voice at the EU level.[51] The numerous scams, sextortions, and revenge porn operated with the use of deepfakes have raised a growing concern within the public, so that people are willing to be "protected" against such damages. But as we have seen, most of these questions have already been addressed by the criminal rules at the national level, such as the recent Italian law.[52] Therefore, the rationale for creating such monopolies should be different from these public order rules and would consist either of the individual bringing a civil action against the exploitation of the deepfake or of steering revenues from this exploitation by assigning the right against economic counterparts. Namely, Denmark is pleading for such an extension at the EU level, arguing that the enforcement of IP rights by platforms is more efficient than the responses given in case of the violation of personality right or unfair competition.

This argument seems fallacious, in the first place because the enforcement efficiency justification can be easily rebutted with the many difficulties encountered by copyright holders depending on the very unstable strategy of the platforms. The second reason why this extension of intellectual property to one's likeness or voice seems irrelevant resides in the danger of creating such legal monopolies without any social counterpart. IP rights have been implemented because they enhance creativity, encourage innovation for the benefit of society as a whole, and limit the reproduction of immaterial goods. Such expectations justify that some restrictions are opposed to other

51. *See* NO FAKES Act of 2025, S. 1367, 119th Cong. (2025); *supra* note 9 and accompanying text.
52. *See* Art. 612-quarter (It.), *supra* note 8.

fundamental rights. In the case of one's likeness or voice, there is no substantial effort or investment made by the person to create them and no reward shall be expected. They just are. The professor is not playing a role in a creation while teaching his class to the pupils while being recorded for a documentary film, as it has been decided by the Cour de cassation in a famous case about the documentary *Etre et avoir* (*To Be and To Have*), nor can the pupils be considered as performers when they are just being filmed in their day-to-day life.[53]

Such an effort may exist for certain categories of persons—such as models, singers, athletes, influencers, reality TV stars—for whom one's image has an economic value, because of their notoriety. While the introduction of a right of publicity under the form of an exclusive right at the EU level may be worth discussing, for the average person, being vested with an intellectual property right will be unnecessary and potentially dangerous. The multiplication of these monopolies may threaten fundamental freedoms to a far-reaching extent. Who would take a photo of an event of ten thousand attendees if each of them can claim an intellectual property right on his image? Who can afford to pay royalties to register the voices of the children singing in a kindergarten? Monopolizing these elements will just lead to a further commodification of the human beings and excite greed: One can imagine a father "selling" the likeness of his kids, or people trading the image of a deceased heir. Rivalry on the ownership may be dramatic: Who should have the exclusive right on the image of his heir? Finally, many contracts signed to use social networks already encompasses clauses where the user assigns a non-exclusive unlimited license to exploit all the elements posted, even after the user resigns. Consequently, even with a new IP right, the social network would be entitled to develop avatars of their members without any further authorization and against no remuneration.

The propensity to analyze any relationship in terms of property may finally lead to weird solutions. Shall I be considered as owning my voice or features, when the images and capture of my voice are being recorded by someone else? So far, IP rights lie with the photographer, not with the subject of the photograph. How will those two pretentions be combined? A similar question was raised about the ownership of the image of a tangible good. Shall the owner of the good be recognized as the owner of all potential images of this good? The French Cour de cassation, after several hesitations, wisely decided not to provide exclusive rights to the owner of a tangible good (here a mansion in Rouen) on the photograph thereof and to submit the action of the latter to the demonstration of the harm he suffered from the use of this image.[54]

Additionally, as demonstrated above, if consent launders the fakeness of the output, granting IP rights to persons on their likeness or vocal expression would not further help the public identify whether the AI-generated output is a fake or not. The proposed extension would be detrimental to the society, by multiplying the risk of conflicts between these millions of right holders claiming exclusivity on their likeness, without

53. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Nov. 13, 2008, Bull. civ. I, No. 259 (Fr.).

54. Cass. ass. plén., May 7, 2004, Hôtel de Girancourt, Bull. civ. n° 516 (Fr.).

providing any benefit in terms of innovation or creation and very tentative chances of incomes for the right holders. Besides, it is uncertain whether creating IP rights is necessary to combat unwelcome uses of deepfakes, as other means of redress exist without the need to implement such monopolies.

IV. ALTERNATIVES FOR "INDIVIDUAL" DEEPFAKES

Other solutions already exist at the national level or across the EU. There is a wide spectrum of possibilities to regain control over deepfakes. They range from the most comprehensive, the ex-ante exercise of personality right, to a mere ex-post action, based on tort law and demonstration of the harm. This section will only develop the first one under two types of legal frameworks: the still unharmonized personality rights (IV.A) and the EU-wide protection of personal data (IV.B).

A. PROTECTING INDIVIDUALS THROUGH PERSONALITY RIGHTS

Natural persons benefit in most EU countries from a protection against the violation of their privacy, and Courts or the EU legal framework have in practice sometimes recognized an embryo of right of publicity.[55] The extreme variety of the situations and legal regimes within the different Member States cannot be exposed in this paper but demonstrates the lack of uniformity of the solution at the EU level.[56] The French system mostly relies on case law based on the article 9 of the Civil Code, which protects the right to privacy.[57] The courts have progressively built a comprehensive protection of the right to one's image, including in some situations the protection of its commercial value for notorious persons, but there is no such thing as an autonomous right like in Spain, where the right to one's image is seen as an autonomous personal right, independent from the right of honor and the right to privacy and is laid out by the Constitution and the Organic Law of May 5, 1982.[58] The Italian system distinguishes between typical rights in the legal statute and un-numerated deriving from the case law.[59] Therefore, in Italy, the defense of the image, likeness, or reputation derives from

55. *See* Jan Klink, *50 Years of Publicity Rights in the United States and the Never Ending Hassle with Intellectual Property and Personality Rights in Europe*, 4 INTELL. PROP. Q. 363, 364 (2003); Daniel Gervais & Martin L. Holmes, *Fame, Property, and Identity: the Scope and Purpose of the Right of Publicity*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 181, 186 (2014).

56. Tatiana Synodinou, *Image Right and Copyright Law in Europe: Divergences and Convergences*, 3 LAWS 181, 183–89 (2014); Kateryna. Moskalenko, T*he Right of Publicity in the USA, the EU, and Ukraine*, 1 INT'L COMPAR. JURIS.113, 115–16 (2015).

57. *See* CODE CIVIL [CIVIL CODE] art. 9 (Fr.).

58. *See* CONSTITUCIÓN ESPAÑOLA art. 18 (Spain) (constitutional provision); Ley Orgánica 1/1982, de 5 de mayo, de protección civil del derecho al honor, a la intimidad personal y familiar y a la propia imagen [Organic Law of May 5, 1982], B.O.E. 1982, 11196 (Spain) (statute implementing the personality rights protected under the constitution).

59. *See* Giorgio Pino, *The Right to Personal Identity in Italian Private Law*, *in* THE HARMONIZATION OF PRIVATE LAW IN EUROPE 225, 227 (M. Van Hoecke & F. Ost, eds., 2000) ("It is easy to conclude, then, that according to this traditional position, the Civil Code regulates only patrimonial-economic relations, while

a combination of privacy right, extension of copyright and tort law. In Germany, the federal Supreme Court has developed a general, non-transferable, right of personality, based on articles 1 and 2 of the German Constitution and section 823 of the German Civil Code.[60]

There is currently no real consensus among EU Member States on the harmonization of such personal rights or on the precise scope of protection that individuals should enjoy. Do these rights protect only an individual's image, or do they also cover her voice, general likeness, and reputation? Can such rights be licensed or assigned? Do they survive the death of the person and if so, who would be entitled to exercise them post-mortem? As far as personality rights are concerned, deepfakes are therefore addressed primarily at the national level. This may generate significant difficulties when action must be taken against a platform. For instance, would it be possible to ask for the removal of a deepfake with the likeness of a dead person in France, where personal rights normally expire upon death, on the ground that it violates an exclusive license to use this likeness under Italian law? Greater uniformity would certainly be welcome, even if EU law already offers substantial protection to personal likeness and voice when they are subject to data processing, as is generally the case for AI-generated deepfakes.

B. PROTECTING PERSONAL DATA

European law has a vibrant set of rules, namely the famous GDPR, which protect the personal data of its citizens.[61] This paper is not the place to analyze the details of this regulation, but it is sufficient to recall that image, voice, and name are considered as protected personal data, whenever they can serve to identify an individual. This vests in the person a bundle of rights regarding the data processing that can be applied uniformly throughout the EU and can be used against platforms when they operate on this territory, notwithstanding the location of their headquarters. The ECJ, considering that personal data is an autonomous notion of EU law, has rendered many decisions providing for a common interpretation of this notion, and of its regime.[62] If the consent is not always required for data processing because other grounds can legitimate such processing, the GDPR may nevertheless offers a standing for action against the entity which would have used personal likeness of one's person in many cases. For example, a deepfake can be forbidden if it has been processed in an algorithm that performs facial

the moral development of the human being is committed to constitutional law, and protected only by penal law.").

60. Grundgesetz [Basic Law], arts. 1–2; Bürgerliches Gesetzbuch [Civil Code] § 823 (Ger.).

61. Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) [hereinafter "GDPR"], 2016 O.J. (L 119) 1.

62. *See* Eur. Data Protection Supervisor (EDPS) v. Single Resolution Bd. (SRB), Case C-413/23 P, ECLI:EU:C:2025:645 (First Chamber Sep. 4, 2025).

recognition. It also prohibits the manipulation of the content and the processing, without the consent of the person, of data regarding race, health, sexual preference, or political beliefs. In any case, the entity which processes the personal data must comply with many requirements of the GDPR such as transparency, data minimization and security, and respect of the purpose of the processing. Whether these conditions can be met at all when creating a deepfake is not evident, as the GDPR doesn't have any specific exception for parody.

The GDPR does not confer a systematic right to authorize data processing but establishes other rights that may be very useful to oppose to the public display of a deepfake, such as the right to information and the right to be forgotten.[63] With respect of the right to information, the creator of the deepfake must inform the individual depicted that she is creating a deepfake of her person. In regard to the right to be forgotten, the controller, who can be either the maker of the deepfake or the platform publicly diffusing it, must delete personal data if the subject requests this. While the GDPR was not conceived with the issue of deepfakes in mind, its broad scope of application is capable of covering some of the issues pertaining to false representation of persons. However, and similarly to some countries with regards to personality rights, it remains true that the GDPR does not cover the scenario of a death, so other solutions may be necessary to adopt.

63. GDPR, *supra* note 61, arts. 13–14 (right to be informed), art. 17 (right to be forgotten).

V. CONCLUSION

This Article has sought to demonstrate that there is currently no lack of legal protection against the harmful consequences of deepfakes in Europe—quite the contrary. The existing rules provide sufficient grounds for persons whose likeness or creations have been commercially exploited to share the benefits of that exploitation, provided they are willing to consent to it, either on the basis of European IP rules whenever these elements are subject to protection, or according to national provisions regarding personality rights. Consequently, the path forward currently promoted by the Danish presidency and inspired by the debate around the No Fakes Act to create an extension of copyright to everyone's likeness, appears not only unnecessary but also hazardous. Such a development would be dangerous for the rationales of the intellectual property system as it would grant monopolies without social counterparts. It would be detrimental to the protection of individuals by multiplying opportunities for commodification that would ultimately benefit powerful economic actors, who already impose on individuals an unremunerated licensing of these immaterial assets through unbalanced contracts. Nor would it increase the public's ability to recognize and identify the deceptive character of the output.

Should reforms be initiated at the EU level, three different solutions could be explored:

(1) strengthening the obligations of the platform to monitor the content they contribute to diffuse and to quickly and efficiently withdraw litigious content when deepfakes are involved, without hindering the freedom of creation and political critique; the DSA and other specific texts are already offering such solutions, the application of which must be rendered more efficient;
(2) alleviating the burden of the holders of intellectual property right to prove that AI-generated content, which somehow evokes protected content, like deepfakes generally do, implies an act of exploitation covered by the monopoly, particularly when there is a risk for the public to associate the deepfake with the right holder; this could be achieved by procedural presumption but also by the harmonization of the adaptation right and of the moral right;
(3) creating a specific regime for the deceased person, which would be more grounded on public interest to the respect of the memory of the deaths than on the private interests of some heirs, not as concerned by this need for respect as they may be by their own assets.