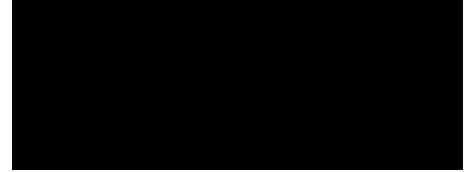


GOOD LAW Practice



Office of Communications (“OFCOM”)
Riverside House
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London
SE1 9HA

30 May 2024

Dear OFCOM

Deepfakes – criminal offences

1. We are instructed by Good Law Project (“GLP”) in relation to the growing problem of deepfakes – artificial images, audio and videos generated by “deep” machine learning.
2. There have already been a number of damaging deepfakes, including some targeting politicians. For example, in February 2024, Sadiq Khan was the subject of a deepfake audio that purported to show him making inflammatory remarks about Remembrance Day. The audio, which spread widely online including among far-right groups, triggered a spike in hateful comments against Mr Khan. He said of the clip: “[w]hen you've got friends and family who see this stuff, it's deeply upsetting... I've got two daughters, a wife, I've got, you know, siblings. I've got a mum”. The Metropolitan Police concluded at the time, however, that the deepfake “does not constitute a criminal offence”.¹
3. GLP has instructed counsel to advise on whether the existing criminal law does, in fact, provide the tools for dealing with deepfakes. The advice they have received – enclosed with this letter - is that deepfakes could constitute breaches of the criminal law, including in particular the False Communications Offence under section 179 Online Safety Act 2023 (“OSA 2023”).

¹ <https://news.sky.com/story/deepfake-audio-of-sadiq-khan-is-not-a-criminal-offence-met-police-says-13005420>

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S179 OSA 2023

4. s179(1) OSA 2023 creates a new criminal offence of sending, without reasonable excuse, a message that you know to be false and that you intend “*to cause non-trivial psychological or physical harm to a likely audience*” (replacing the malicious communications offence at s127(2)(a) and (b) of the Communications Act 2003).
5. The OSA 2023 also created new sexual offences of sending or sharing intimate media of persons without their consent, including intimate deepfakes.
6. As explained in her enclosed advice, Racheal Muldoon considers that that “*legislators likely intended for the [s179] False Communications Offence to encompass inter alia the dissemination of non-intimate Deepfakes, falling outside the scope of the new sexual offences*”. She accordingly considers that non-intimate deepfakes, such as those targeted at politicians, could constitute a “message” giving rise to an offence under s179.
7. On 9 November 2023 OFCOM published draft guidance for consultation, “*Annex 10: Online Safety Guidance on Judgment for Illegal Content*” (hereafter “the draft guidance”), with the final decision to be published by the end of 2024 and final Codes of Practice shortly thereafter. The draft guidance address the s179 offence.
8. Racheal’s view, on balance, is that OFCOM does not have a statutory duty or discretion to bring prosecutions for breaches of s179, and that the Crown Prosecution Service (“CPS”) is instead the body with a statutory duty to prosecute. But she considers that the draft guidance is “*deficient in several respects that ought to be remedied before the final version is published, so as not to risk perpetuating misunderstanding about the False Communications Offence*” (§2.8 of the advice).
9. These deficiencies are explained at §5.12 – §5.19 of the advice; in short, Racheal is concerned that the draft guidance:
 - a. acknowledges the difficulty of determining whether content is illegal based on an evaluation of the ‘message’ in isolation, and therefore calls for an assessment of “contextual information” – but fails to specify any relevant types or examples of contextual information. (Racheal considers that in relation to deepfakes, relevant contextual information will likely include technological indicators of deepfake content, such as positive findings by deepfake detection tools.)
 - b. does not explicitly address the extent to which the dissemination of non-intimate deepfakes is caught by s179. Deepfakes are only explicitly referenced twice in the draft guidance, and neither of those references relate specifically to s179. The references instead to, for example, “manipulated media” and “generated media” are unclear in their meaning.

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Conclusions

12. GLP recognises that the formal consultation period for the draft guidance has closed. However, given the importance of the matters raised in this letter and the enclosed advice, they ask OFCOM to consider the concerns and remedy the deficiencies before the final guidance is produced.
13. We should be grateful if you would confirm by return that this letter will be considered and factored into the consultation and future guidance.

Yours faithfully

A handwritten signature in black ink that reads "Good Law Practice". The script is cursive and fluid, with the words connected together.

Good Law Practice