

Forced Faming: How the Law Can Protect Against Non-Consensual Recording and Distributing of a Person's Voice or Image

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Abstract:

Forced-Faming is a term coined by the author to describe the non-consensual recording and distributing of a person's image or voice, typically - but not exclusively - on social media, where the perpetrator takes a photo or video of a victim and shares it without their knowledge or consent. This issue is exasperated by artificial intelligence (AI) which uses videos, images, and voice to create deepfake content that is indistinguishable from human created content. This article argues that the law needs to be updated to protect people against forced-faming, where it currently fails to do so. This is an urgent issue that needs to be addressed in view of current social media trends and emerging AI technology which the Online Safety Bill does not adequately address.

Keywords: forced faming; social media; artificial intelligence; Online Safety Bill

Introduction

Sharing content is the purpose and business model of social media platforms. It is encouraged and facilitated by the platform because the longer a user stays on their platform, the higher their advertising revenue.¹ For example, in 2022, Instagram revenue increased from \$26.46 Billion dollars to \$33.25 Billion in the US alone², in which time it's US user base grew from 123.1 million to 127.3 million.³

Contextually, this is an era where so many have a smart phone to hand to capture any moment, and generations of people are living a large proportion of their lives online and through social media. Internet users were using more than six different online communications platforms on average and half of internet users aged 16-24 had multiple profiles on the same online communication platform.⁴ Young adults spend the most time online, with 18- 24-year-olds spending an average of 5 hours 6 minutes online a day, and those aged 55+ spending the least amount of time which is still an average of 2 hours 58 minutes per day.⁵

Together, social media and smart phone technology have generated a culture of panoptic surveillance and self-documenting, motivated by a viral lottery whereby a user might win attention and instant gratification. Fifteen minutes of fame used to be a media concept, but has now been gamified and monetised by the social media industry, where everyone is a player, with or without their permission. Whilst social media has demonstrative positives such as knowledge exchange, social support, social justice, and users have reported it broadening their understanding of the world.⁶ However, there is a steadfast rising body of research that have found social media to be addictive, increase anxiety and depression⁷, and decreases sleep and self-esteem⁸, particularly in young adults who are the primary users.⁹

As such, it is relatively unsurprising that there is a growing trend across social media of user's sharing videos of people without their consent. These trends include pranks, public shaming, and even 'acts of kindness'. For example, a woman in Melbourne reported to The Guardian that she felt '*dehumanised*' after being filmed without consent for a '*random act of kindness*' TikTok video, that went viral with 59 million views.¹⁰ The videos have led to people being forced into viral fame or shame without their consent, or even their prior knowledge.

The video's themselves cause distress to the victims, as does the responses of the viewers. For example, two men were filmed whilst on the street and used in a TikTok video with the text overlaid suggesting that one of them had lied to cancel a date and was caught in the act. Timothy Goodman was one of the men, who complained to BuzzFeed that he was oblivious to the filming and was '*upset*' by the vicious comments on the post and the fact that the content creator was '*egging it on like I'm really her man and this whole thing was real.*'¹¹

Then add artificial intelligence (AI) into this mix and the situation becomes even more worrying. AI tools can create false information, as well as deepfake videos of a person's appearance and voice. This creates the same effect as the forced-faming, but the footage is entirely manufactured. There has been some pushback from victims of AI misinformation such as a regional Australian mayor recently claimed he would sue OpenAI if it does not correct ChatGPT's false claims that he had served time in prison for bribery.¹² Likewise, AI deepfakes have proved deeply problematic, particular relating to pornographic content, but as this article will demonstrate, the law is still falling short in protecting people from this behaviour.

Whilst there are no legal provisions specifically designed to deal with these issues, there are some areas of law that, in certain specific circumstances is able to be shoe-horned into dealing with this new behaviour and providing relief for some victims. However, this paper argues that the law is inadequate in protecting victims of forced-faming and needs to be updated to address this phenomenon. To do so, it will first explore the phenomenon, followed by an analysis of the current legal repercussions, and argues that the law needs to be updated to protect people against forced-faming, particularly addressed in view of current social media trends and emerging AI technology.

Forced Filming: Current and Evolving Trends

Forced-Faming is a term coined by the author to describe the non-consensual recording, or livestreaming, and distributing of a person's image or voice, typically - but not exclusively - on social media, where the perpetrator takes a photo or recording of a victim and shares it without their knowledge or consent.

This is a growing trend across social media platforms, and in particular TikTok is one platform where videos of strangers have gone viral incredibly quickly. In these circumstances, victims are suddenly exposed to thousands, and sometimes millions, of people, whilst often being unaware that they have even been filmed, until someone they know shares the video with them.

This is a highly jarring and violating experience, not least because the video is filmed and shared without consent or knowledge, but because what happens next in this trend is that the viewers of the video project an onslaught of opinions, interactions, investigations, speculation and often criticism towards the victim.

For example, Lilly Simon has neurofibromatosis, a genetic condition that causes tumors to grow along her nerves, which look like bumps on her skin. In July 2022, during the mpox outbreak in New York City, she was filmed on the subway by a stranger who shared the video on TikTok,

zooming in on the bumps and adding monkey emojis, insinuating that she had mpox. Simon found out days later when her sister showed her the video. The video included comments mocking her and even threatening her life. These videos, and the subsequent behaviours that they invoke cause mental distress to the victims, and in many instances platform bullying, ridicule, and even verbal violence.

As demonstrated in the example above of Timothy Goodman, users are often unable to ascertain whether a video is genuine, or falsely curated. Ofcom's study into online behaviours found that although 69% of adult internet users said they were confident in judging whether online content was true or false, most were in fact unable to correctly evaluate the reasons that indicate whether a social media post is genuine. Furthermore, 61% social media users who said they were confident in judging whether online content is true or false lacked the skills to do so. This was higher among 55-64s (70%), men (65%) compared to women (58%).¹³ This is of course exasperated by AI which can create deepfake videos and content which is wholly fabricated. There have already been reports that perpetrators of dating scams are using AI-powered deepfake videos to convince victims that the person they have met online looks like the person they claim to be.¹⁴

The issue of fake-framing is therefore prevalent and growing in popularity and in complexity in view of developing technologies. The next section sets out the current legal and policy framework that may apply in certain circumstances.

Current Legal, Policy and Social Responses to Forced-Faming

This section will address the numerous ways that people have attempted to resolve the challenges faced by forced-faming including social justice by recording a response video, reporting the video to the social media platform, as well as legal remedies including privacy, defamation, sexual offences and copyright infringement.

Social Justice and Backlash

Social media has provided a platform for increased public debate and increased the pressure of public perception on decision making for example in relation to management and enforcement of intellectual property rights due to social media backlash.¹⁵ For example, when Marks and Spencer initiated a claim against Aldi for infringement of its 'Colin the Caterpillar' trade mark, Aldi responded on social media with jokes which engaged the public in a social media #freecuthbert campaign. Later, the case settled between the parties. It is likely that the public debate was a factor in Marks and Spencer's decision not to enforce their rights through the courts. Likewise, Beyoncé's decision to remove a sample of a musical work from her song, despite the rights having been cleared, was likely influenced by backlash created after the performer in the sample, Kelis, took to social media.

In the case of Lilly Simon, mentioned above, she posted a response video. Simon reported to the New York Times being reluctant to talk about her condition at first as it was very private and she hadn't discussed it with her closest friends, but she didn't want to let it go.¹⁶ The forced-fame video and content creator account has since both been deleted, and Simon is now an advocate for her community; "*a stranger filmed me without my consent and put it on TikTok. I stood up for myself – and won.*"¹⁷

In the example Timothy Goodman, he also responded to the TikTok video. Subsequently the content creator removed the TikTok and made an apology video. Although, the content creator herself then received violent backlash for the apology and incident, she told BuzzFeed News that

she got death threats. This demonstrates that the integrity of online behaviour needs to be improved overall, and that whilst the power of social justice can be utilised, it is fickle. Seeking support in this way also requires the victim to lean into the public visibility, which may be the main reason for their distress.

Social Media Platform Policy Rules and Terms of Service

In order to use social media platforms, users must agree to the terms and conditions of the service. These terms are recognised by researchers as being contentious, but more often not read or understood by the user themselves.¹⁸ The terms of service typically stipulate that the user grants an overly generous licence of their content to the platform, whilst retaining all liability for content that may infringe or breach the rights of others. This, along with notice and take down procedures protects the platform itself from any liability. Notice and take down procedures currently allow users to request the takedown of content that infringes their legal rights, however, as explained, the law is not currently able to adequately encompass this behaviour.

Since social media platforms derive such considerable financial gain from the user's data and content sharing, whilst protecting themselves and leaving the users at risk, it seems reasonable to suggest that the platforms take a bigger role in educating and informing users of the legal implications relevant to sharing content.

Platforms also tend to self-regulate and decide rules which may or may not be aligned with legal principles.¹⁹ Social media platforms could therefore make fake-faming contrary to their user agreements and more easily enable victims to make takedown requests. They could also introduce prompts to user's explaining that they should seek the permission of any subject of their video before upload.

Privacy Rights and Data Protection

Privacy rights are protected by the UK Human Rights Act 1998, which aims to prevent other people from interfering with your life. It stipulates that personal information, including photographs and correspondence such as letters and emails, should not be shared publicly without permission. Other personal information, such a person's address and telephone number, is protected under the UK Data Protection Act 2018.

The difficulty with privacy law as a remedy against forced-faming is that it only applies where there is a "reasonable expectation of privacy". And the law determines there is not usually a reasonable expectation of privacy in a public place, where many forced-faming videos are recorded. If the video or photos were hacked and stolen, privacy rights could be engaged, but videos recorded in a public place or on public transport are unlikely to be violating privacy rights.

Privacy is a qualified right, meaning that it can be breached under certain circumstances, such as if it is in the public interest. This defence can be used by newspapers publishing intimate photos of high-profile politicians whose behaviour may reflect something important about their leadership for example²⁰, but should not apply to social media platforms sharing of forced-fame content.

Overall, since forced-fame content tends to be filmed in public, privacy and data protection rights are unlikely to be a useful remedy for victims.

Defamation and Deepfakes

The UK Defamation Act 2013 could protect a person if the footage is used in a defamatory way. The legal test for what is defamatory requires that the content causes, or is likely to cause, serious harm to the victim's reputation and only applies if the content is untrue. Serious harm is a relatively high threshold that must be demonstrated as fact, what amounts to serious harm is more than merely substantial, it is distinguished from the hurt feelings of the victim and cannot be established solely by reference to the inherent tendency of words to cause harm to reputation.²¹

The challenges for victims would be if the video is real, it would unlikely be defamatory. If even if it is taken out of context, such as in the case of Timothy Goodman, the next hurdle would be proving serious harm caused by the video.

If the video or image is manipulated to look like a person doing something that they didn't do, such as deepfakes, then it could apply. This may be particularly relevant, where AI is being used to create naked and pornographic images of people. For example, messaging app Telegram facilitates an autonomous programme which is able to digitally synthesise deepfake naked images. A research study found that 70% of Telegram users use its deepfake bot to target women and that, as of the end of July 2020, at least 104,852 fake nude images had been shared in a "*image collections*" channel available on the app.²² Another study found that there were 14,678 deepfakes online and 96% of them were pornographic in nature,²³ a sobering statistic that demonstrates the serious need to protect people from this kind of activity.

As mentioned above, the first defamation case against AI has been threatened by an Australian Mayor, against a Chatbot that incorrectly named him as a guilty party in a foreign bribery scandal, but we are yet to see any concrete legal action in these circumstances.

Sexual Offences and Nudity

In circumstances where the content is sexual there are some areas of law that can be applied, in relation to real footage. Since 2015, the law has specifically prohibited the sharing of private, sexual photos or videos of another person without their consent. Since 2021, this also includes threatening to disclose intimate sexual images.²⁴ Upskirting – taking a picture under another person's clothing without their knowledge – was criminalised in 2019.²⁵ However, criminal laws such as these depend on the Crown Prosecution Service to press charges against the perpetrator. This means that individuals must report the incident to the police and rely on them to take it forward.

Pictures and videos might not be sexual in nature but might only contain nudity. When speaker and author Ed Gillespie tweeted a photo of topless man working on his laptop on the train in a heatwave, it went viral. The person in the photo saw the tweet and replied: "*Ed, I'm not sure why you felt entitled to photograph me and share it on Twitter without my permission, nor why others feel entitled to comment*", prompting Gillespie to delete it and apologise. Unfortunately for the man, the image had already been republished by the Mail Online, The Metro and The Sun.²⁶ As explained, this did not breach the man's privacy rights, because there is no expectation of privacy in a public place and as the nature of the image was not sexual or private, the 2021 law would not assist in this circumstance.

Therefore, a person shares or threatens to share explicit images or photos of another online, then this is a criminal offence, and they should report the incident to the police. However, this does not

necessarily remedy the victim since the material has already been shared and once something is online it is incredibly difficult, if not impossible, to remove it entirely. Likewise, if the image or video is not sexual but contains nudity, the law is unlikely to provide any protection, and will certainly not apply where the recording is taken in public.

Copyright and Control

Copyright is a legal right that gives the owner the power to control the use of their content, including photos, videos and correspondence. Therefore, it is another legal mechanism that could be considered in these circumstances. Sometimes, claimants bring an action for copyright infringement where the true concern is privacy, because copyright is more straightforward to enforce. For example, in the matter of *HRH The Duchess of Sussex Claimant v Associated Newspapers*²⁷, Meghan Markle succeeded in a claim for copyright infringement after the Mail on Sunday published extracts of a private letter written to her father.²⁸

The copyright holder is usually the person who took the photo, made the video or wrote the letter. This means that it is only helpful in the context of forced-faming where the images or videos were taken by the victim, who would therefore be the rightsholder. This legality appears strange to social media users because it is part of the normal use of the platform to share other people's content. This is one of the great paradoxes of copyright and social media that is managed through the terms and conditions to protect the platforms but still leaves the users vulnerable to infringement claims.²⁹

Since the copyright owner is usually the photographer, being the object of the image or video does not give someone the copyright in the photograph or film. This has been at the heart of the US copyright infringement cases against celebrities such as Gigi Hadid³⁰ for sharing photos of themselves taken by paparazzi on their social media channels. Hadid tried to claim that there was at least joint authorship since she had posed for the image, contributing the creativity and originality of the photo.³¹ This argument was made on the basis of a previous cases³² where it was held that elements of originality in a photograph included the “*posing the subjects*” and a defendant was held to be the joint author of photographs where they contributed to “clothing” and “poses” of models. Thereby suggesting that Hadid is in fact co-author of the image due to her input of smiling and posing, and the photograph was only made possible by her cooperation. The case was dropped on other grounds,³³ so it remains to be seen if these arguments would prevail.

There have been no cases of equivalent circumstances and arguments under UK law, but based on the requirements of joint authorship recently clarified in *Kogan v Martin*³⁴ this would only apply in particular circumstances where the victim was a conscious part of the creative process. In the context of forced-faming, the victim is often unaware that the video or photo is being taken and it would therefore be difficult to argue “*collaboration between contributors pursuant to a common design*” for example.

UK law does offer some related rights to performers. Performer's rights³⁵ enable a performer to stop someone recording a live performance without permission and can stop unauthorised copies of their performance being shared. However, this right is limited by the definition of what constitutes a performance for the purpose of a performer right. The legal guidance suggests that this right only applies if the performer is acting, singing, dancing or performing a literary, dramatic or musical work. It doesn't have to be a paid performance to qualify, but it is not clear exactly what else does or does not count as a performance are quite vague – magicians, clowns, jugglers, impersonations, interviews and catwalks³⁶ are likely to count but sports performances do not. Arnold argues³⁷ that it also includes improvisation, which has the potential to be more helpful

in the circumstances of forced-fame, but so far there is no case law precedent for this.

To What Extent Could the Online Safety Bill Address These Issues?

This paper has demonstrated that whilst there are a number of legal mechanisms that come close protecting victims of forced-faming, they are limited and often fall short since they were not drafted with this new phenomenon in mind. Much of the regulation discussed was of course drafted before the internet and social media and therefore are not able to adequately address these developing challenges.

There was growing agreement on the need for online protection. The proportion of internet users that thought those online should be protected from inappropriate or offensive content rose from 61% in 2020 to 65% in 2021.³⁸

More recently, the UK government have drafted the Online Safety Bill³⁹, which is intended to better protect children and adults online and make social media companies more responsible for their users' safety on their platforms. For example, social media platforms will need to remove illegal content quickly or prevent it from appearing in the first place and prevent children from accessing harmful and age-inappropriate content. Illegal content, for these purposes includes: child sexual abuse, controlling or coercive behaviour extreme sexual violence, fraud, hate crime, inciting violence, illegal immigration and people smuggling, promoting or facilitating suicide, promoting self-harm, revenge porn, selling illegal drugs or weapons, sexual exploitation and terrorism.⁴⁰

Whilst this Bill is broadly welcomed and recognised as a step forward in the protecting people online, there are gaps in its remit that need to be addressed in order to protect those most vulnerable. For example, a recent YouGov survey revealed that 53% of the UK public do not feel the internet is a safe space for women, and 62% of the UK believe that not enough is being done to tackle online and offline misogyny.⁴¹ Women of colour are 34% more likely to be mentioned in abusive tweets than white women and 87% of women change their behaviour after receiving online abuse. Glitch, highlight that *“the draft law is currently 262 pages and does not mention women and girls once, despite the disproportionate levels of online gender-based violence.”*⁴²

As mentioned, social media platforms allow users to submit takedown requests if content breaches certain rights or does not follow the platform's community guidelines against bullying, harassment or hate speech. However, there needs to be more clarification on exactly what behaviour this encapsulates, including forced-faming. For the time being, this is currently still the best course of action for forced-faming, despite 65% of women who report abuse to internet companies don't feel heard. Ultimately, legal intervention is required due to the harm that this behaviour causes. Forced-faming should be recognised as unlawful and unethical in order to curb this behaviour and provide victims with an equate route to justice in these circumstances. These rules should be enforced not only by victim, but social media platforms, who as the main benefactors of social media activity must take more responsibility for the protection of their users.

Notes

¹ Hayleigh Boshier and Sevil Yeşiloğlu, An analysis of the fundamental tensions between copyright and social media: the legal implications of sharing images on Instagram (2019) 33(2) International Review of Law, Computers & Technology, 164-186.

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³ Number of Instagram users in the United States from 2020 to 2023

<https://www.statista.com/statistics/293771/number-of-us-instagram-users/>

⁴ The most common site or app for this was Instagram, and the most common reasons were having a separate account dedicated to a hobby or business or having one account for close friends and another for a wider circle of contacts. Ofcom, Adults' Media Use and Attitudes Report 2022, 2.

⁵ Ofcom, Online Nation Report 2022.

⁶ Ofcom, Adults' Media Use and Attitudes Report 2022, 22.

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⁹ One quarter of all social media users fall into the 25-to-34-year age group

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¹³ Ofcom, Adults' Media Use and Attitudes Report 2022, 13.

¹⁴ Valentines Day: Online romance fraud nearing an 'industrial scale' as criminals embrace deepfake technology https://inews.co.uk/news/technology/valentines-day-2022-romance-fraud-nearing-industrial-scale-criminals-embrace-deepfake-technology-1456482?ito=twitter_share_article-top

¹⁵ Hayleigh Boshier, Emerging Public Perceptions of Intellectual Property in the UK Media Initial Review (UK Intellectual Property Office 2023).

¹⁶ <https://www.nytimes.com/2022/08/04/style/monkeypox-tiktok.html>

¹⁷ Lilly Simon, A stranger filmed me without my consent and put it on TikTok. I stood up for myself – and won <https://eu.usatoday.com/story/opinion/voices/2023/03/08/tiktok-viral-video-educate-neurofibromatosis-monkeypox/11385130002/>

¹⁸ Hayleigh Boshier and Sevil Yeşiloğlu, An analysis of the fundamental tensions between copyright and social media: the legal implications of sharing images on Instagram (2019) 33(2) International Review of Law, Computers & Technology, 164-186.

¹⁹ Hayleigh Boshier, Key Issues Around Copyright and Social Media: Ownership, Infringement and Liability, (2020) Journal of Intellectual Property Law and Practice, 15 (2). pp. 123 - 133.

²⁰ Polly Rippon, Why Matt Hancock's private life is very much in the public interest (The Conversation, 2021) <https://theconversation.com/why-matt-hancocks-private-life-is-very-much-in-the-public-interest-163444>

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³² *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992) and *Gillespie v. AST Sportswear, Inc.*, No. 97 Civ. 1911, 2001 WL 180147 (S.D.N.Y. Feb. 22, 2001).

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³⁴ *Kogan v Martin & Ors* (Rev 1) [2019] EWCA Civ 1645 (09 October 2019).

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