# Regulating Deepfake Content: Protections and Gaps under Existing Regulations

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With the rising popularity of AI-generated content, governments worldwide are racing to regulate the creation and distribution of "deepfakes", a type of AI-generated image, video or audio recording that replicates the likeness of a real person to create synthetic content. In the US, a recent incident involving a pop star's explicit deepfake photos has prompted legislators to push for regulations to specifically deal with these kinds of incidents. In Indonesia, public figures have also fallen victim to deepfake content, where a fake interview between a well-known journalist and an influencer went viral at the beginning of the year. The Ministry of Communications and Informatics ("**MOCI**") issued a circular letter on December 2023 on the ethics of artificial intelligence, which outlines the general ethical guidelines on the use of AI, including principles of inclusivity, credibility and accountability. MOCI is planning to follow up on the circular letter with an AI regulation which it aims to issue at the end of 2024. In the meantime, MOCI has stated that there are available avenues in existing regulations to counteract any bad actors using AI.[1] How do these existing regulations safeguard against the creation and distribution of deepfake content?

## Personal Data Protection Law

Law No. 27 of 2022 regarding Personal Data Protection ("**UU PDP**") includes the prohibition of the creation of fake personal data or falsification of personal data for one's own interest at the loss of other individuals. Violation of this provision is subject to a maximum of 6 years of imprisonment and/or a fine at a maximum of Rp6 billion Rupiah.

UU PDP further provides that such violation may also be subject to additional criminal sanctions, including seizure of any profits made from the violation and payment of compensation.

Since the violation is dependent on the losses of a third party, it falls under the category of "offense based on complaint" (*delik aduan*), which are violations that can only be processed if the victim themselves request an investigation by the relevant authorities. In this regard, UU PDP is silent on the threshold of "loss" the victim needs to experience to be able to report the offense. If the creator creates the deepfake content using the victim's likeness for their personal use but never distributes it, is the victim sufficiently "at loss"?

Presumably due to the recent ratification of UU PDP (the law has only been ratified for one year) and the novelty of deepfake AI, there has yet to be court cases involving personal data protection as a way to protect a party from the wrong use of deepfakes. By way of analogy, in India, the circulation of a certain Bollywood star's deepfake images prompted an investigation by the police, citing identity theft and privacy violation under India's Information Technology Act.[2] In theory, UU PDP may be the basis for victims of deepfake AI to seek justice. However, law enforcers such as judges, prosecutor, or the police may have different view regarding the interpretation of the nature of the UU PDP provisions.

## Indonesian Penal Code

Under the current prevailing Indonesian Penal Code (*Kitab Undang-Undang Hukum Pidana* or the "**KUHP**"), there are a few relevant provisions that may be used against those who create and/or distribute deepfake content, depending on the specific content and context:

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[1] https://www.antaranews.com/video/3937776/kemenkominfo-sebut-korban-deepfake-bisa-perkarakan-dengan-uu-ite
[2] https://www.businesstoday.in/india/story/did-it-to-get-instagram-followers-how-man-behind-rashmika-mandanna-deepfake-was-caught-414295-2024-01-21

a. **Defamation** (Article 310 paragraph (1) of the KUHP): the defamation clause covers acts of accusation that targets another person's "honor" or "good name" in writing or images that are broadcast, shown or placed in public, which act is subject to a maximum term of imprisonment of 1 (one) year and 4 (four) months or maximum sanction of Rp 4.5 million Rupiah.
b. **Calumny** (Article 311 paragraph (1) of the KUHP): this clause provides that, in the case persons who are charged with alleged defamation (under Article 310 paragraph (1) of the KUHP above) and (i) cannot prove that their accusations against the victim are true and (ii) whose accusations are against what they actually know to be true, will be liable to a maximum term of imprisonment of 4 (four) years.
c. **Fraud** (Article 378 of the KUHP): the clause regarding fraud mentioned in the KUHP provides that any person is prohibited from unlawfully benefitting themselves or another, either by assuming a false name or a false capacity, or by crafty artifices, or by a web of fictions, and inducing someone to deliver any property or to negotiate a loan or to annul a debt. Such action will be punished by a maximum term of imprisonment of 4 (four) years. It should be noted that the "fraud" clause may only be invoked if there is an element of "inducing" another person to commit certain acts.

The ratification of Law No. 1 of 2023 ("**New KUHP**") as the new Indonesian penal code that will replace the prevailing KUHP made certain changes and additions to the provisions relevant to the creation and/or distribution of deepfake content which will come into effect in 2026. The differences in the provisions prohibiting acts related to deepfake content are as follows:

a. **Defamation** (Article 433 of the New KUHP): the violator will be subject to a maximum 1 (one) year and 6 (six) months term of imprisonment or a maximum fine of Rp 50 million Rupiah.
b. **Calumny** (Article 434 of the New KUHP): the violator will be subject to a maximum term of imprisonment of 3 (three) years or a maximum fine of Rp 200 million Rupiah.
c. **Fraud** (Article 492 of the New KUHP): the violator will be subject to a maximum imprisonment of 4 (four) years or a maximum fine of Rp500 million rupiah.
d. **Pornography** (Article 407 of the New KUHP): the pornography clause prohibits acts of producing, manufacturing, reproducing, duplicating, disseminating, broadcasting, importing, exporting, offering, trading, renting, or providing pornography. Such acts will attract terms of imprisonment for a minimum of 6 (six) months

and a maximum of 10 (ten) years or a minimum and maximum criminal fine of Rp200 million Rupiah.
e. **Mild Insult** (Article 436 of the New KUHP): insults that do not rise to the level of defamation may be subject to a maximum imprisonment of 6 months or a maximum sanction of Rp 50 million Rupiah.

Additionally, Article 441 of the New KUHP further provides that the above criminal imprisonment and sanctions may be increased by one third (1/3) if done through information technology tools.

As of this date, there has yet to be a case where the prosecutor has used the KUHP's provisions to penalize perpetrators who has wrongfully used deepfake tools to generate content prohibited under the KUHP. Law enforcers such as judges, prosecutor, or the police may have differing views regarding the interpretation of the nature of the KUHP or the New KUHP provisions mentioned above.

## UU ITE

The government has ratified Law No. 11 of 2008 regarding Information and Electronic Transaction which has lastly been amended through Law No. 1 of 2024 ("**UU ITE**"), where since it was first ratified back in 2008, it has been used to give legal certainty regarding many cyber-crime related activities. A few of the prohibited activities regulated in the UU ITE that may be relevant to deepfake content include:

a. **Violation of Decency** (Article 27 paragraph (1) of the UU ITE): This clause provides a prohibition on illegally broadcasting, distributing, transmitting, and/or making accessible electronic information, and/or electronic document which contains content that violates decency (such as displaying nudity, genitals, and sexual activity) for the public. Therefore, such action committed by an actor through AI generated content that violates decency may lead to sanctions of a term of imprisonment for a maximum of 6 (six) years and/or a maximum fine of Rp 1 billion Rupiah.
b. **Distribution of Hoaxes** (Article 28 paragraph (3) of the UU ITE): This clause provides a prohibition on disseminating electronic information and/or electronic documents which are known to contain false information that causes a disturbance to the public. Therefore, such action committed by an actor through AI generated content that provides false information may lead to sanctions of a term of imprisonment for a maximum of 6 (six) years and/or a maximum fine of Rp 1 billion Rupiah. UU ITE further elucidates that "disturbance" means public disturbance in physical space and not in digital/cyber settings.

c. **Defamation** (Article 27A paragraph (1) of the UU ITE): the defamation clause covers acts of accusation that target another person's "honor" or "good name" by way of visuals that are publicly posted in the form of electronic information and/or electronic documents through the electronic system. Therefore, such action committed by an actor through the AI generated content that defames the target's honor or good name may lead to sanctions of a term of imprisonment for a maximum of 2 (two) years and/or a maximum fine of Rp 400 million Rupiah.

Authorities may instigate an investigation of the above violations based on the Indonesian Criminal Procedure Code. Individuals who experience harm from another person's use of electronic systems or information technology may also lodge a claim against such person through a civil claim.

## Pornography Law

Aside from the ratification of the UU ITE back in 2008, the government also ratified Law No. 44 of 2008 regarding Pornography ("**Pornography Law**") which has been a legal basis for legal enforcers to penalize bad actors in relation to pornography. The Pornography Law prohibits producing, creating, reproducing, duplicating, distributing, broadcasting, importing, exporting, offering, selling, renting or providing pornography that explicitly contains: (i) sexual intercourse, including deviant sexual intercourse; (ii) sexual violence; (iii) masturbation; (iv) nudity or display of nudity; (v) genitals; or (vi) child pornography. Deepfake content creators who violate the aforementioned action may be subject to sanctions of a term of imprisonment for a minimum of 6 (six) months and a maximum of 12 (twelve) years and/or a minimum fine of Rp 250 million Rupiah and a maximum fine of Rp 6 billion Rupiah. Due to the fact that the New KUHP has a specific clause related to pornography, the Pornography Law will still act as the prevailing regulation up to the effective date of the New KUHP.

In addition, it is important to note that in the elucidation of Article 4 of Pornography Law, "creating" does not include creating content for one's own personal use. Presumably at the time of drafting the law, the lawmakers at the time of drafting did not take into account the possibility of deepfakes, where people can now create explicit videos using the likeness of others without their consent.

## The Enforcement Of Deepfake Related Laws and Regulations

In relation to the enforcement of the prevailing law and regulations, law enforcers (the police, prosecutor, and other related parties) can decide which provisions will be used to penalise a defendant depending on the ongoing case between the victim and the perpetrator. Therefore, the choice of laws and regulations regarding the violation of deepfake related provisions will be on a case-to-case basis. For example, if the case is related to defamation committed online by a certain party, then the UU ITE's provision will prevail.

In addition, Supreme Court Regulation No. 1 of 1956 states that a party may institute a criminal lawsuit in parallel with a civil claim proceeding, where the criminal lawsuit may be postponed in order to wait for a court decision in the examination of the civil case regarding the existence or non-existence of civil rights. A civil claim proceeding may also be instituted after the criminal lawsuit decision has been made by the judges. This is done by using the criminal lawsuit decision as an authentic proof in the civil court proceedings, to further prove the defendant has conducted an unlawful act and has caused losses for the applicant.

## Conclusion

Generally, there are still many gaps in current regulations that do not cover the endless possibilities in the misuse of deepfake content. Should the creation of deepfake pornography without the consent of the people whose likeness is used be prohibited, even if it is for personal use? Who will be responsible if such content is involuntarily leaked? Regulators must take these questions into account before more people are harmed by the misuse of deepfake content generation.

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