

Demystifying Performers' Rights in the Age of Artificial Intelligence

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Abstract

This article critically assesses the adequacy of South African performers' rights in addressing the legal challenges posed by artificial intelligence (AI), with a particular focus on deepfakes – synthetic media created through machine-learning techniques, falsely depicting people doing or saying things that they did not do or say. While the *Performers' Protection Act* 11 of 1967 has been proposed as a potential tool for addressing some of the harms associated with deepfakes, this legal framework was not designed to confront the technological and normative challenges introduced by such AI-generated content.

The article argues that performers' rights are conceptually ill-suited to regulate synthetic digital imitations, especially where no protected performance has taken place. Consequently, the current legal regime offers insufficient recourse to performers whose identity is simulated or distorted by AI-generated content. Moreover, individuals who do not fall within the statutory definition of "performer", such as ordinary citizens, are left with virtually no recourse under this regime, despite being equally vulnerable to reputation and personal harm.

By exposing these doctrinal limitations, the article highlights the broader inadequacy of existing South African law in responding to the challenges posed by synthetic media. It concludes that a reconfiguration of the legal approach is required, one that more directly engages with the realities of AI-generated expression and its legal implications.

Keywords

Performers' rights; deepfakes; artificial intelligence; intellectual property law.

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1 Introduction

The rapid and ever-increasing development of artificial intelligence (AI) technology is testing the boundaries of the law in various ways. While this is a global concern, scholars in South Africa have also grappled with how the law must be contorted or reformed to address the issues raised by AI, ranging from liability for financial crimes to data protection concerns.¹ One particular type of AI technology that has also been subject to legal scrutiny is so-called deepfake technology.

Deepfakes, in short, are synthetic media created through machine learning techniques. These AI creations raise legal concerns as they often involve the unauthorised use of an individual's likeness or voice to depict them doing or saying something that they have never done or said. While the alteration or synthetisation of existing media is not a new technological concept,² deepfake technology has made it much more accessible and easy to use. This is reflected in the increased use of these technologies as well as the increase in their prevalence on the Internet and in the media.³ While deepfakes may be used for innocuous purposes such as entertainment, education and art, most commonly, deepfake technology is used to create explicit content, where the likeness of an unwitting party, either a celebrity or an ordinary person, is used to create pornographic materials without their consent.⁴ These synthetic videos or images may then be deliberately weaponised to inflict harm on the victim, be it through extortion or emotional and reputational damage. In the majority of these cases, the victims are women and girls.⁵

Deepfakes have also been used in incidents of financial fraud and political interference. In the financial sector deepfakes have been used to impersonate corporate executives or manipulate information to deceive employees, investors or stakeholders into authorising fraudulent transactions or disclosing confidential information.⁶ In the political domain deepfakes have been used to fabricate public statements by political

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¹ Lupton and Reddy 2025 *TSAR* 59; Ka Mtuze and Morige 2024 *Obiter* 161; Ncube *et al Artificial Intelligence and the Law*.

² Digital technologies such as visual effects (VFX), including computer-generated-imaging (CGI) and special effects (SFX), have been around since the 1970s. However, due to their cost, the very advanced versions of these technologies were available to only a limited group and are primarily used in the film industry. Adams 2025 <https://www.theknowledgeacademy.com/blog/history-of-vfx/>.

³ Flynn *et al* 2022 *Brit J Criminol* 1342.

⁴ Sensity 2024 <https://sensity.ai/reports/>.

⁵ Rackley *et al* 2021 *Feminist Legal Studies* 307; Chesney and Citron 2019 *CLR* 1773.

⁶ Sherman 2025 *Geo Wash Intl L Rev* 91.

figures, potentially undermining public trust, distorting democratic processes and exacerbating misinformation campaigns.⁷ Consequently there has been a growing international effort to develop regulatory frameworks aimed at addressing the challenges posed by deepfakes. Proposed reforms include criminalisation,⁸ the development of common law remedies under the law of delict,⁹ and the expansion of remedies under intellectual property law.¹⁰ Among these proposals is the suggestion that performers' rights could provide effective protection against unauthorised deepfakes.¹¹

This article aims to critically examine the application of performers' rights, as a category of intellectual property, to deepfakes. It is argued that performers' rights are an inadequate mechanism to address the legal concerns posed by deepfakes. While this area of the law must certainly be developed to address broader technological concerns, it is argued that such development must occur with due cognisance of the purpose and underlying justification for such protection.

This article commences with a concise technological overview of deepfake technology, offering a working definition and a brief explanation of its underlying mechanisms. A foundational understanding of the technology is essential for the accurate and effective application of the law to its use and regulation. Thereafter the article provides an overview of performers' rights, including their purpose and justification as well as the rights granted in terms of this protection. Following this overview the article commences with a critical application of performers' rights to deepfakes as well as proposals for reform advanced by others in this regard. The article concludes with an outline of the main insights derived from the preceding analysis.

2 Deepfake technology

Deepfakes can be defined as synthetic media created using machine learning techniques, falsely depicting people doing or saying things that they did not do or say. As they have evolved, deepfakes are created using a myriad of machine learning techniques involving neural networks.¹² The two most common forms of neural networks used in the creation of deepfakes

⁷ Hyska 2025 *Philosophical Studies* 143; Chesney and Citron 2019 *CLR* 1777-1784.

⁸ Van der Linde 2024 *SACJ* 382; Kirchengast 2020 *Info & Comm Tech L* 308.

⁹ Wang 2022 *U Chi Legal F* 433; Mashinini 2020 *SA Merc LJ* 415.

¹⁰ Ginsburg and Austin 2025 *Columbia Journal of Law and the Arts* 300-308; Redfearn 2024 *Licensing Journal* 7.

¹¹ Gotorá 2024 *IJLIT* 17; Visser 2024 *Mediaforum* 138; Cooper 2023 *EIPR* 444; Pavis 2021 *Convergence* 974.

¹² Alanazi and Asif 2024 *Human-Intelligent Systems Integration* 49; Mirsky and Lee 2020 *ACM Computer Surveys* 5.

are generative adversarial networks (GANs) and variational autoencoders (VAEs).

GANs consist of two competing neural networks, a generator and a discriminator. The model is trained on a dataset of media, comprising images, video and audio, so that the generator can learn to produce synthetic outputs that resemble the original data. The discriminator attempts to distinguish the real data from the generator's synthetic outputs. Through repeated iterations, the generator refines its outputs to successfully "deceive" the discriminator. In this way the GAN model is able to generate very realistic deepfake media.¹³

VAEs also consist of two parts, an encoder and a decoder. The encoder analyses the input data and condenses it into a latent code, a simplified representation consisting of its critical features, filtering out unnecessary details. The encoder learns from the training data to create latent code for the original data, as well as imitations thereof. The decoder reconstructs the data from this latent code to produce the deepfake output.¹⁴

Both GANs and VAEs operate by identifying statistical patterns or distinctive markers within the training data and using those patterns or markers to generate (or generalise) new outputs that closely resemble the original data. These markers could include facial features, voice characteristics and mannerisms, and are often so minute that they are imperceptible to the human eye or ear. Through their respective processes GANs and VAEs analyse such markers to generate synthetic media that mimic the statistical patterns of the original data, resulting in highly convincing and potentially deceptive imitations, i.e. deepfakes.¹⁵

3 Protection of performers' rights

Before examining the application of performers' rights in the context of deepfakes, it is prudent to briefly consider the historical concept, underlying justifications and scope of such protection. It is important to remain cognisant of these underlying determinants when considering the development of the law, to ensure that legal development remains coherent and grounded in its foundational principles.

¹³ Alanazi and Asif 2024 *Human–Intelligent Systems Integration* 50; Mirsky and Lee 2020 *ACM Computer Surveys* 6.

¹⁴ Alanazi and Asif 2024 *Human–Intelligent Systems Integration* 50; Mirsky and Lee 2020 *ACM Computer Surveys* 6.

¹⁵ Alanazi and Asif 2024 *Human–Intelligent Systems Integration* 50; Mirsky and Lee 2020 *ACM Computer Surveys* 7-9.

3.1 *History of development*

For years the interests of the performers of works did not require legal protection. The main reason for this was that the only way a performance could be exploited was by an audience paying an admission ticket to see it, live.¹⁶ The performer was in control of whether the performance would take place, and, after the performance was over, it continued to exist only in the memory of those who had seen and heard it.¹⁷ Therefore contractual protection sufficed in remunerating performers for their work, and no recognised rights were necessary.

However, with the development of reproductive technology and the introduction of apparatus such as the phonograph, the cinematograph, the radio and the television, things changed. These technological developments made it possible to fix performances as recordings (on cassettes, tapes, records and films) and relay these recordings to a broader audience.¹⁸ Since such recordings could now be used without the presence or authorisation of the performers involved, the interests of such performers gained importance and could be seen as distinct from those of the creator of the work being performed. Suddenly the performance gained economic value separate from the copyright work, as the recording of such performances allowed individuals to enjoy a performance without being present at the place and time where such a performance took place.¹⁹ Thus, there was a need for the protection for performers against the exploitation of their performances without their consent.

It seems that technology has been the most significant element in the fight for the protection of performers' rights, as the speedy development of technology and the advent of the Internet has meant that fixations of performances, unauthorised or not, could very easily be reproduced and distributed without the consent of the performers, and be exploited regardless of the limitations of geographical borders.²⁰ In addition to this, many performers suffered from so-called "technological unemployment", caused by the fact that they were no longer required to perform (and in turn receive remuneration) as often, since recordings made it much easier and cheaper for recording companies to relay works to an audience.²¹ As this

¹⁶ Gruenberger 2006 *Cardozo Arts & Ent LJ* 619.

¹⁷ WIPO *Guide to the Rome Convention* 9.

¹⁸ WIPO *Intellectual Property Handbook* 47.

¹⁹ *Mak Rights Affecting the Manufacture and Use of Gramophone Records* 100.

²⁰ Morgan *International Protection of Performers' Rights* 53.

²¹ Lipszyc *Copyright and Neighbouring Rights* 359-360; WIPO *Intellectual Property Handbook* 47.

was a growing issue nationally and internationally, there was an acute need for a coordinated international response.²²

At the Brussels Revision Conference of the *Berne Convention*, held in 1948, it was highlighted that performers lacked adequate protection against the unauthorised use of their performances.²³ While the *Berne Convention* focusses on authors' rights,²⁴ several delegates stated that a similar legal framework was required for what came to be known as "neighbouring" or "related" rights. These are the protections afforded to performers, producers and broadcasters who, while not authors themselves, played an important role in bringing copyright-protected works to the public.

Due to this ancillary nature of their connection with copyright works, the use of "neighbouring rights" in this context solidified the notion that these rights should be protected independently of copyright protection, and thus required a separate international instrument to provide for their protection. This culminated in the enactment of the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*.²⁵ While South Africa never assented to the Convention, it is clear from the wording of our *Performers' Protection Act* 11 of 1967 that the intention was to bring our law in line with the international position. This was also confirmed in *South African Broadcasting Corporation v Pollecutt*.²⁶

3.2 Justification for protection

It is important to note that while granting exclusive economic rights may allay the concerns of the makers of intellectual creations, granting such rights also means that the greater public's access and enjoyment of such creations are affected. Therefore, it is imperative that a sound justification for such restriction, beyond merely complying with international obligations, is determined. Because performer protection is regarded as a right related

²² WIPO *Guide to the Rome Convention* 8; BIRPI, ILO and UNESCO *Records of the Diplomatic Conference* 66.

²³ WIPO *Berne Convention Centenary* 64; Bodenhausen 1954 *LCP* 157; Morgan *International Protection of Performers' Rights* 119.

²⁴ *Berne Convention for the Protection of Literary and Artistic Works* (1886) 1161 UNTS 3 (hereafter *Berne Convention*).

²⁵ *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* (1961) 496 UNTS 43 (hereafter *Rome Convention*).

²⁶ *South African Broadcasting Corporation v Pollecutt* 1996 1 SA 546 (A) (hereafter *Pollecutt*) 557G-H. Further, as a member of the World Trade Organisation, South Africa is required to comply with the minimum standards of protection provided for in the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (1994) 33 ILM 1197 (the *TRIPS Agreement*). The *TRIPS Agreement* provides the same minimum protections as those provided for in the *Rome Convention*.

to or neighbouring copyright protection, many of the justifications for copyright protection can apply equally to performer protection.²⁷

When discussing intellectual property protection generally, and copyright protection specifically, the economic justification for such protection is the most prominently cited rationale.²⁸ This is due to the fact that such protection generally grants rights holders certain economic rights in their protected work, such as the rights to reproduce, distribute, perform, or communicate their work to the public. These rights allow the rights holders to commercialise the works and derive financial benefit from their use. Beyond this direct economic incentive, the broader justifications for protection are also based on the argument that granting certain exclusive rights in an intellectual creation incentivises the creation of more intellectual works.²⁹ In turn, this supports a vibrant and diverse cultural and informational environment. Copyright protection is framed in this way not only as a reward for individual creativity but also as a mechanism that promotes the ongoing production and dissemination of intellectual works for the benefit of society.

It has been argued that the economic justifications for copyright protection can apply vis-à-vis performers' protection, due to the fact that: both the creation of a literary (or artistic) work and the creation of a performance require intellectual effort, and the execution of both the work and the performance contributes to the success of the performance;³⁰ both the works of authors and performers are susceptible to exploitation by third parties without the knowledge or consent of the author or performer;³¹ and, the established notion that performers' rights are related or neighbouring rights to copyright.

The economic incentive theory is based on the utilitarian theory that granting property rights in intellectual works promotes further creation, which in turn is beneficial to society.³² Without such proprietary incentives "a socially optimal output of intellectual works would not exist".³³ At its core the incentive theory is focussed on the exploitation or monetisation of creative

²⁷ Arnold *Performers' Rights* 6; Morgan *International Protection of Performers' Rights* 35; Copyright Law Review Committee *Report on Performers' Protection* 126-134.

²⁸ Arnold *Performers' Rights* 6; Karjiker 2014 *SAIPLJ* 40; Morgan *International Protection of Performers' Rights* 36.

²⁹ Parkin *Microeconomics* 400; Karjiker 2014 *SAIPLJ* 30; Hettinger 1989 *Phil & Pub Aff* 47-48.

³⁰ Arnold *Performers' Rights* 6; Morgan *International Protection of Performers' Rights* 35; Rembe 1986 *Copyright Bulletin* 30; Globerman and Rothman 1982 *Can Pub Policy* 172.

³¹ Morgan *International Protection of Performers' Rights* 35.

³² Karjiker 2014 *SAIPLJ* 30; Parkin *Microeconomics* 400; Hettinger 1989 *Phil & Pub Aff* 47-48.

³³ Hettinger 1989 *Phil & Pub Aff* 48.

outputs. If one applies this theory to performances, it assumes that granting performers proprietary rights in their performances would incentivise such performers to continue creating more performances as they would be able to exploit such performances for a profit, whether that be through ticket sales for live performances or returns from the sale or commercial making available of recordings of their performances.

There is a general consensus that the incentive theory is the most suitable justification for copyright protection in the South African context.³⁴ This understanding of copyright protection stems from the English justifications, which focus much more on the economic aspects of copyright works, than on the personality of the author, as in civil law jurisdictions. While economic arguments are generally used as the primary justifications for the protection of intellectual property, there are certain moral theories that also support the need for the protection of intellectual creations. These theories provide normative foundations that go beyond market-based reasoning, focussing instead on questions of labour, justice and personhood. The extent to which moral theories of justification are relied upon depends on how a specific jurisdiction views the purpose of the protection of intellectual property. In common-law jurisdictions the protection of intellectual property, such as copyright, is more rooted in traditional property-law principles, while in civil-law jurisdictions a system of author's rights is followed, which places much more emphasis on the intellectual creation's being an extension of the author's personality, which is deserving of protection.³⁵ If one considers that performers' rights were first conceived in civil-law jurisdictions such as Germany, it is clear that such moral theories of justification for performer protection are foundational in discussions on the topic.

One such theory is the natural rights theory, most notably associated with John Locke. According to this theory individuals have a natural property right in the fruits of their labour. When persons expend effort and skill to create something, whether physical or intellectual, they are entitled to claim ownership over the resulting product. In the context of intellectual property, this theory suggests that creators have a moral right to control and benefit from their intellectual labour, just as they would with physical property.³⁶

Closely related is the reward theory, which holds that creators deserve to be compensated or rewarded for their intellectual contributions to society. This theory is grounded in the idea of fairness: by granting exclusive rights over their creations, the legal system ensures that authors and inventors

³⁴ Karjiker 2014 *SAIPLJ* 40; Du Bois 2018 *PELJ* 31.

³⁵ Gruenberger 2006 *Cardozo Arts & Ent LJ* 655; Netanel 1994 *Cardozo Arts & Ent LJ* 7.

³⁶ Karjiker 2014 *SAIPLJ* 47; Moore 2012 *San Diego L Rev* 1071-1072; Hettinger 1989 *Phil & Pub Aff* 37; Mostert 1987 *SALJ* 494-495.

receive their "just deserts" for the time, effort and creativity they have invested. While similar to the natural rights theory, the reward theory places more emphasis on recognition and equitable return, rather than on labour as the basis of ownership.³⁷

A third influential theory is the personality theory, which is often associated with the philosophies of Kant and Hegel. This perspective views intellectual creations not merely as products of labour, but as extensions of the creator's personality and individuality. From this standpoint protecting intellectual works is a way of respecting and safeguarding the personal expression, identity and autonomy of the creator. Because these works embody aspects of the author's self, unauthorised use or misappropriation is seen as a violation of personal integrity rather than just a loss of economic opportunity.³⁸

Even more so than with copyright works, a performance will always be linked to a specific performer.³⁹ Even if performers are performing a copyright author's work, their interpretation of such a work will always have their identity imbued upon it. The timbre and style of a specific performer's vocal performance, the particular interpretation of a musical piece, and most obviously the physical likeness of a performer, are all elements of a performance that cannot be divorced from the performer themselves, even in a case where one is actively trying to mimic the performance of another. Moral justifications, thus, may play an even greater role in justifying the protection of performers' rights.

In sum, both economic and moral justifications offer compelling grounds for the protection of intellectual creations, and these rationales can equally be applied to the recognition of performers' rights. From an economic perspective performers contribute skill, labour and interpretive creativity to the realisation of a work, often enhancing its commercial value and public appeal. Similarly, moral theories grounded in labour, justice and personality support the view that performances are individual expressions deserving of protection. Rather than viewing performance as merely derivative, these underlying theories affirm its creative and expressive dimensions. Recognising performers' rights within this broader justificatory context highlights the importance of a more inclusive and balanced understanding of this form of intellectual property protection.

³⁷ Du Bois 2018 *PELJ* 19; Karjiker 2014 *SAIPLJ* 52; Hughes 1988 *Geo LJ* 303; Mostert 1987 *SALJ* 500.

³⁸ Du Bois 2018 *PELJ* 25; Karjiker 2014 *SAIPLJ* 54; Sterk 1996 *Mich LR* 1240; Hughes 1988 *Geo LJ* 330.

³⁹ Authors of copyright works may be able to disguise themselves behind pseudonyms or, as in the case of computer programs or technical drawings, certain works offer fewer opportunities for personalisation.

3.3 Scope of protection

In South Africa the *Performers' Protection Act* (hereafter the Act) provides protection for the interests of such performers by granting qualifying performers certain rights in respect of their performances. This form of protection is similar to and in the nature of, copyright, but it is important to note that it is not copyright. The protection afforded is, however, supplementary to copyright, as copyright protects literary, musical and artistic works as such, while performers' protection protects a person performing a rendition of such a work. The protection thus subsists in a specific rendition of a work by a performer. The protection afforded in terms of the Act in no way restricts or affects the rights provided for in terms of copyright. Similarly, it is of no consequence whether copyright subsists in the subject work as the two forms of protection are independent and separate from each other.⁴⁰ Performers can therefore acquire protection in their rendition of a work, despite the fact that the copyright in the underlying work may long since have expired, or if still subsisting, may be owned by another person.

The rights granted by the Act in respect of a performance vest in performers, granting them a limited monopoly over certain uses and manners of exploitation of their performance. As a result, any third party wishing to engage in any of these acts must obtain the performer's consent.⁴¹ These restricted acts are: broadcasting or communicating to the public a live performance of a performer, unless the performance used in the broadcast or the public communication is itself already a broadcast performance;⁴² making a fixation of a live performance of a performer;⁴³ or making a reproduction of a fixation of a performance of a performer.⁴⁴ The Act further grants performers the right to receive a royalty where a third party, using a commercially published recording of their performance, broadcasts, transmits it through a diffusion service, or otherwise communicates it to the public.⁴⁵

⁴⁰ Dean and Karjiker *Handbook of South African Copyright Law* 1-192.

⁴¹ Section 5(1)(a) of the *Performers' Protection Act* 11 of 1967 (hereafter the Act).

⁴² Section 5(1)(a)(i) of the Act.

⁴³ Section 5(1)(a)(ii) of the Act.

⁴⁴ Section 5(1)(a)(iii) of the Act. This is subject to certain qualifiers, namely, if the original fixation was itself made without the performer's consent, or if the reproduction is made for purposes other than those in respect of which the performer gave his or her consent to the making of the original fixation or of a reproduction thereof, or if the original fixation was made in accordance with the exceptions to protection provided for in s 8 of the Act, and the reproduction is made for purposes not covered by those exceptions.

⁴⁵ Section 5(1)(b) of the Act.

Having examined the foundational aspects of performers' rights, the discussion now turns to the extent to which they can be applied to address the legal challenges posed by deepfakes.

4 Performers' rights as a mechanism to protect against unauthorised deepfakes

As discussed above, the emergence of deepfake technology has given rise to significant legal concerns, particularly in relation to the unauthorised appropriation of likeness and performance. These concerns are heightened by the fact that deepfake models are often trained on large datasets containing photographs, videos and audio recordings of public figures and ordinary individuals. Based on the markers identified in the data, the deepfake models can produce convincing synthetic media of these individuals, depicting them engaging in activities or expressing views that they never did. In light of these concerns, several scholars have proposed performers' rights as a potentially effective legal mechanism for addressing the misuse of deepfakes.⁴⁶ The following discussion aims to examine the extent to which performers' rights, as currently framed, can be applied to protect against unauthorised deepfakes.

4.1 Protected performances

To properly assess the applicability of performers' rights in the context of deepfakes, it is necessary to first consider what exactly constitutes the subject matter of that protection.

4.1.1 "Performance"

The subject matter of protection is a performance; however, the term may have several meanings. The definition of a performance is important in delineating which activities may fall within the scope of protection and which may not. The *Rome Convention* does not provide a definition of "performance" but rather of "performer", and it can be argued that the scope of the protection is implicitly shaped by the activities of a "performer", as defined, thereby making those activities the effective subject matter of protection. In terms of the *Rome Convention* a "performer" is an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in, or otherwise performs literary or artistic works.⁴⁷

The World Intellectual Property Organisation goes on to define the "performance of a work" as follows: "The presentation of a work to a group of listeners or spectators in their presence, by action such as playing,

⁴⁶ Gotoro 2024 *IJLIT* 17; Visser 2024 *Mediaforum* 138; Cooper 2023 *EIPR* 444; Pavis 2021 *Convergence* 986.

⁴⁷ Article 3 of the *Rome Convention*.

reciting, dancing or by means of such technical devices or processes as microphones, radio or television receiving sets, record players, or projecting."⁴⁸ In South Africa the *Performers' Protection Act* follows the provisions of the *Rome Convention* and provides a definition only of a "performer". A performer is defined as "an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in or otherwise performs literary or artistic works".⁴⁹ This definition is clearly in keeping with that provided in the *Rome Convention*, and the argument that the activities of a performer as defined would be the subject matter of protection applies here as well.

Based on the principles of performance theory, Morgan attempts to find a suitable definition for a performance that would be subject to protection, and provides the following: "A performance is the transitory activity of a human individual that can be perceived without the aid of technology and that is intended as a form of communication to others for the purpose of entertainment, education or ritual."⁵⁰ While this is quite a broad definition, Morgan notes that the definition of performance must contain the essential elements of a performance, namely that the activity is performed by a natural person, the activity must be performative in nature, the activity must take place in the presence of others, and the performer must have the intention to perform in front of others.⁵¹ This principled definition has various advantages, such as concentrating on the essential elements of a performance and not restricting the activity to acts done in relation to specific types of works or media. However, it may be restrictive in the sense that it disregards performances made with the aid of technology. While the intention behind this phrase was to keep the definition technology-neutral, it may exclude new types of performances that are made possible through technological advances, such as performances of electronic dance music.⁵² It may also be problematic in its application to performances by musicians during studio recordings, as such performances are made to be communicated to others through recording and playback technologies.

Be that as it may, considering the various definitions above it is clear that the focus is on the "performative" element of the performance. While the law does not consider any factors such as originality, quality, aesthetic value or the performer's professional status or reputation,⁵³ it is clear that the subject

⁴⁸ WIPO *Glossary of Terms* 182.

⁴⁹ Section 1(1) of the Act.

⁵⁰ Morgan *International Protection of Performers' Rights* 27.

⁵¹ Morgan *International Protection of Performers' Rights* 24, 27-28.

⁵² Arnold *Performers' Rights* 2.

⁵³ Gotora 2024 *IJLIT* 19; Pavis 2021 *Convergence* 986.

of protection refers to something that can commonly be understood as a performance.

This interpretation creates a significant limitation in the context of deepfakes. The protection provided in the *Performers' Protection Act* is relatively unproblematic to apply in the context where the performances of musicians, actors and other individuals engaged in activities that clearly fall within the conventional understanding of "performance" are implicated in a deepfake. However, the position becomes considerably more complex when the subject of a deepfake is a politician, a public figure or an ordinary individual engaged in everyday speech or conduct. In these cases it is arguable that, absent a formal or expressive act that qualifies as a "performance" the individual would not fall within the ambit of the protection afforded by the Act.

This is of particular concern, given that some of the most harmful and malicious uses of deepfakes, such as non-consensual pornography, often involve individuals who are not performing in the traditional legal sense. These are precisely the kinds of uses the law should address, and this indicates that the *Performers' Protection Act* may not be the most effective way to do so.

4.1.2 "Literary and artistic works"

Further to the subject matter of protection and the definitions mentioned above, the Act refers to the performance of "literary and artistic works".⁵⁴ It is important to note that these terms do not have the same meaning as in the *Copyright Act* 98 of 1978, but are instead defined to include "musical, dramatic and dramatico-musical works and expressions of folklore".⁵⁵ This terminology also stems from the *Rome Convention*,⁵⁶ where it is understood to have the same meaning as in the *Berne Convention* and includes musical, dramatic and dramatico-musical works.⁵⁷

In this definition the Act refers to "works", but this term is not defined. In the absence of an explicit definition, it is appropriate to interpret "works" consistently with the meaning established under copyright law, where it denotes a material embodiment of the results of intellectual activity.⁵⁸ This interpretive approach is in line with the historical concept of performers' rights as neighbouring rights within the broader framework of copyright law. As such, the principles and definitions from copyright law can provide guidance in filling the gaps in interpreting performers' rights legislation.

⁵⁴ Section 1(1) of the Act.

⁵⁵ Section 1(1) of the Act.

⁵⁶ Article 3(a) of the *Rome Convention*.

⁵⁷ *WIPO Guide to the Rome Convention* 21.

⁵⁸ Dean and Karjiker *Handbook of South African Copyright Law* 1-192; Pollecutt 558A.

Following this approach, it is argued that the protection in the *Performers' Protection Act* does not extend to the performance of unscripted activities.⁵⁹ If no underlying copyright work is being performed, that performance will not fall within the ambit of the Act. This interpretation is also consistent with that of the *Rome Convention*.⁶⁰ It has been argued that Article 9(1) of the *Rome Convention* allows member states to extend their performers' protection beyond performances of copyright works, and as such, unscripted activities could fall within the ambit of performers' protection.⁶¹ While this is indeed the case, it remains within the discretion of the national legislature to determine whether such extended protection should be granted. Nonetheless, the intention of this provision is not to extend performers' protection to mundane human activity, but rather to include individuals who, though not performing copyright works, are commonly understood to be performers, such as circus performers or athletes.⁶²

Based on this, the interpretation of the term "works", as it relates to the subject matter of performers' protection, poses a challenge when applied in the context of deepfakes. Even if one were to extend the interpretation of "performance" in this context to mean something broader than the colloquial understanding of the word, if that performance is not of a work reduced to a material form, such as a script, it would not fall within the ambit of protection. This once again excludes the actions or behaviours of ordinary individuals simply engaging in everyday life, leaving them unprotected in the face of deepfake misuse.

It must be noted that these limitations to the scope of performers' protection are not without justification. Expanding the interpretation of "performance" and "work" too far risks blurring the distinction between expressive, protectable activities and ordinary human behaviour. An overbroad interpretation of these concepts runs the risk of granting rights over mundane or incidental activities, which could lead to an impractically broad and uncertain scope of possible infringement. In the context of deepfakes, this narrow scope means that only a limited category of individuals, who are understood to be "performers" in the common sense of the word, would this be able to rely on the *Performers' Protection Act* as a mechanism to protect against the unauthorised use of their performances in the creation of deepfakes. As a result, ordinary individuals, whose likenesses may nevertheless be replicated without their consent, remain vulnerable to these harms.

⁵⁹ Dean and Karjiker *Handbook of South African Copyright Law* 1-192; Pollecutt 558A.

⁶⁰ WIPO *Guide to the Rome Convention* 21.

⁶¹ Pavis 2018 *JIPLP* 873.

⁶² Morgan *International Protection of Performers' Rights* 14-15; WIPO *Guide to the Rome Convention* 42.

4.2 *Exclusive rights*

Assuming that the limitations on scope do not preclude the application of performers' rights, the next consideration is how deepfakes impact on the exclusive rights granted by the *Performers' Protection Act*.

4.2.1 *Broadcasting or communication to the public of a live performance*

The first restricted act pertains to the broadcasting or communication to the public of a live protected performance.⁶³ The emphasis of this provision is on how a live performance is made available to the public; thus in the context of deepfakes the focus is on the synthetic output itself and how it is disseminated. As the technology has advanced, certain deepfake models are able to capture live content, such as real-time video or audio, and integrate it into their synthetic outputs. The question is thus, could this activity be regarded as infringing on this exclusive right?

To address this question it is necessary to consider the definitions of "broadcast" and "communicate to the public". The *Performers' Protection Act* defines "broadcast" in a narrow, technical manner, and this interpretation is in line with the conventional understanding of a broadcast as a transmission via radio or television signals.⁶⁴ Considering how deepfake models operate, as described above, it is submitted that the act of generating a deepfake does not fall within this definition. While deepfake material may subsequently be included in a broadcast, such inclusion would not, in and of itself, amount to an infringement of this particular exclusive right.

In contrast, the concept of "communication to the public" is not defined in the Act. This concept, while well-developed internationally, has not been fully incorporated into South African copyright law. In international jurisprudence it is construed broadly as referring to "any transmission of the protected works, irrespective of the technical means or process used",⁶⁵ to a fairly large, indeterminate number of people, irrespective of whether they choose to access it.⁶⁶ Nonetheless, as with broadcasts, the concept of communication to the public presupposes some form of public dissemination. As such, while sharing deepfake content online may potentially infringe this exclusive right, this constitutes a separate act from the creation of the deepfake itself. Accordingly, the act of generating a

⁶³ Section 5(1)(a)(i) of the Act.

⁶⁴ Section 1(1) of the Act.

⁶⁵ *Football Association Premier League Ltd v Media Protection Services Ltd* CJEU (2011) case C-403/08 and C-429/08 para 193.

⁶⁶ *Sociedad General de Autores y Editores de España v Rafael Hoteles SA* CJEU (2006) case C-306/05 para 38. For a complete discussion on the right of communication to the public, see Karjiker and Jansen 2020 *TSAR* 702-723

deepfake, regardless of whether it incorporates a live performance, would not on its own infringe on this right.

4.2.2 *Making a fixation of a live performance*

The second restricted act provided by the *Performers' Protection Act* concerns the making of a fixation of a live performance.⁶⁷ In this regard the Act defines "fixation" as including "the storage of sounds or images or both sounds and images; or data or signals representing sounds or images or both sounds and images".⁶⁸ In the context of deepfakes, this provision must be considered at both the input and the output stages of the process. As mentioned, certain deepfake models can capture real-time footage and incorporate it into their outputs. This process would involve the analytical process briefly described above, where the training data (the real-time input) is analysed and the necessary markers identified.⁶⁹ Considering the broad and technologically-neutral definition of "fixation" provided in the Act, one could argue that this process would amount to a fixation of the live performance, as the information stored in the training data could be construed as "data or signals representing sounds or images or both sounds and images". As such, doing so without the necessary consent of the relevant performer may amount to an infringement of this right.

At the output stage the analysis becomes more complex. Considering how deepfake models work, the resulting output is not a direct fixation of the input data but rather a synthetic reconstruction generated through algorithmic processes. It represents statistical generalisations based on the markers extracted from the input, rather than a literal recording of the original live performance. In this regard two core considerations arise: the relevance of the concept of "a substantial part", and the actual scope of performers' protection.

In terms of section 1(2) of the *Performers' Protection Act*, any reference in the Act to the doing of an act in relation to a performance, a fixation of the performance or a reproduction of such a fixation shall be construed as including a reference to the doing of that act in relation to a substantial part of the protected subject matter.⁷⁰ In this regard there is substantial and settled case law on what constitutes "a substantial part" in copyright jurisprudence. Such interpretations can thus apply *mutatis mutandis* in the case of performers' rights. In *Moneyweb (Pty) Ltd v Media24 (Pty) Ltd* the court noted that one must determine whether the reproduced portion

⁶⁷ Section 5(1)(a)(ii) of the Act.

⁶⁸ Section 1(1) of the Act.

⁶⁹ Alanazi and Asif 2024 *Human-Intelligent Systems Integration* 50; Mirsky and Lee 2020 *ACM Computer Surveys* 6.

⁷⁰ Section 1(2) of the Act.

captured the essence of the original work.⁷¹ In *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty)* the court noted that the quality of the copied portion, not just its quantity, determines whether it is substantial.⁷² In *Galago Publishers (Pty) Ltd v Erasmus* the court focussed on the quality and the significance of the copied portion in relation to the protected work as a whole.⁷³ Broadly speaking, the determination of a "substantial part" is a matter of overall impressions, assessed on qualitative rather than purely quantitative bases.

In the context of deepfakes, the question is then whether the aspects of the live performance incorporated into the generated output constitute a "substantial part" of that performance. This is ultimately a question of fact dependent on the nature and sophistication of the deepfake model used. There are fairly simplistic models that merely superimpose one person's face onto another's body, and here it may be easier to prove that substantial parts of the original performance are included in the synthetic output. The analysis becomes more complex with more advanced models, which are able to generate entirely new performances based on the live-captured input. In such cases the connection to the original performance may be more obfuscated, complicating the assessment of whether a substantial part of that performance has in fact been fixed in the generated output.

Beyond the question of whether a substantial part of a protected performance has been fixed, the greater question when considering this particular restricted act in the context of deepfakes leads back to the underlying purpose and scope of performers' protection. What is this area of law intended to protect?

Considering the historical development and conceptual foundations of performers' rights, it is clear that the protection is primarily focussed on the recording of the performance rather than on the performance itself. As such, the key aspects constituting the substance of a performance, such as the performers' likeness, their interpretive style or physical embodiment, fall outside the ambit of this protection.⁷⁴ This limitation is evident within the performers' rights regime if one considers that there is no right to control the reproduction of a performance itself.⁷⁵ Instead, performers' rights are

⁷¹ *Moneyweb (Pty) Ltd v Media24 (Pty) Ltd* 2016 4 SA 591 (GJ) (hereafter *Moneyweb*) paras 78-85.

⁷² *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd* 2006 4 SA 458 (SCA) (hereafter *Haupt*) para 24.

⁷³ *Galago Publishers (Pty) Ltd v Erasmus* 1989 1 All SA 431 (A) (hereafter *Galago*) para 24.

⁷⁴ Arnold "Performers' Rights and Artificial Intelligence" 221; Pavis 2021 *Convergence* 990; Arnold *Performers' Rights* 149; Morgan *International Protection of Performers' Rights* 67-68.

⁷⁵ Pavis 2021 *Convergence* 991.

confined to regulating the recording of a performance and the subsequent use of that recording.

Accordingly, the imitation, mimicking or impersonation of a performer's performance is not regarded as an infringing activity.⁷⁶ When applied to deepfake models, which operate by creating synthetic media that imitate a performer's style or appearance, this raises a significant concern: if the output is not derived from a recording but merely replicates identifiable features of the live performance, it may amount to nothing more than a mere imitation of that performance, thus falling outside the scope of protection.

4.2.3 *Reproduction of a fixation of a performance*

The third restricted act provided for in the *Performers' Protection Act* relates to the subsequent reproduction of a recorded performance.⁷⁷ In this regard the Act simply defines "reproduction" as "a copy made of a fixation of a performance".⁷⁸ In the context of this reproduction right, much of the analysis relating to the fixation right, as discussed above, can apply *mutatis mutandis*.

Where a recording of a performance is used in the training data of a deepfake model, it may be argued that, in the process of analysing the data and extracting the necessary markers, the model is making a reproduction, in the form of data representing the sounds and images embodied in the recording.⁷⁹ In this instance the application of the reproduction right to deepfakes appears fairly straightforward, and such activities, if undertaken without the requisite consent of the relevant performer, may amount to infringement.

However, the analysis becomes more complex when considering the outputs produced by deepfake models. As with the fixation right, questions arise regarding whether a substantial part of the original recording has been reproduced, and broader concerns relating to the scope and purpose of performers' rights re-emerge. Since many of the arguments discussed under the fixation right apply with equal force here, they will not be repeated in full, but are briefly summarised below in the specific context of the reproduction right.

First, whether the synthetic output generated by the deepfake model incorporates a "substantial part" of the original recording remains a question of fact.⁸⁰ This becomes a more complicated issue if a more sophisticated

⁷⁶ Arnold "Performers' Rights and Artificial Intelligence" 221; Arnold *Performers' Rights* 141.

⁷⁷ Section 5(1)(a)(iii) of the Act.

⁷⁸ Section 1(1) of the Act.

⁷⁹ The definition of "fixation" in s 1(1) of the Act.

⁸⁰ *Moneyweb* paras 78-85; *Haupt* para 24; *Galago* para 24.

deepfake model is used. Second, and more fundamentally, the reproduction right is centred on the protection of recorded performances, and not the performer's identity or expressive characteristics in the abstract.⁸¹ Therefore, unless it is pertinently clear that aspects of the original recording are reproduced in the generated output, it may be difficult to argue that a deepfake that merely mimics rather than copies a recorded performance infringes on this particular right.

5 Proposals for reform

As already mentioned, performers' rights have been posited as a potential legal mechanism to address the harms associated with malicious deepfakes. Several proposals for the reform of performers' rights have as a result been advanced to address some of the legal gaps identified above.

First, it has been suggested that the interpretation of "fixation" or "recording" must be reconsidered to include the synthetisation of a performance.⁸² "Synthetisation" in this context would mean "the manipulation of a performance or a performer's likeness".⁸³ However, adopting such an interpretation would represent a major departure from the current doctrinal framework and would probably necessitate a fundamental reconfiguration of performers' protection as well as broader copyright principles. First, there is the risk that extending technologically neutral definitions too far could dilute their legal precision, creating uncertainty in the application of the law. Furthermore, this interpretation may stray into the dubious realm of granting protection over the constitutive elements of the performance itself.

Second, it has been proposed that an additional restricted act for the reproduction of a performer's performance must be introduced into law.⁸⁴ This approach attempts to respond directly to the synthetic nature of deepfakes by recognising that imitation can in some contexts functionally reproduce a performance. However, this proposal raises the deeper normative question about the intended purpose and scope of performers' protection. These rights were historically conceived to protect a particular kind of right holder, namely a performer in the traditional sense, whose performances are fixed and commercially exploited. Expanding the regime to cover broader forms of simulation and imitation risks distorting this

⁸¹ Pavis 2021 *Convergence* 990; Arnold *Performers' Rights* 149; Morgan *International Protection of Performers' Rights* 67-68.

⁸² Visser 2024 *Mediaforum* 139; Pavis 2021 *Convergence* 991; Pavis 2020 https://ore.exeter.ac.uk/repository/bitstream/handle/10871/123963/PAVIS_AI%20and%20Performers%20Rights_UKIPO_2020.pdf?sequence=1 14-15.

⁸³ Pavis 2020 https://ore.exeter.ac.uk/repository/bitstream/handle/10871/123963/PAVIS_AI%20and%20Performers%20Rights_UKIPO_2020.pdf?sequence=1 5.

⁸⁴ Pavis 2021 *Convergence* 991; Pavis 2020 https://ore.exeter.ac.uk/repository/bitstream/handle/10871/123963/PAVIS_AI%20and%20Performers%20Rights_UKIPO_2020.pdf?sequence=1 20-21.

rationale. In this respect, it may be more appropriate to look to other areas of law, such as personality rights.⁸⁵

Finally, it has also been proposed that an additional restricted act for the synthetisation of a recorded performance be included in the law.⁸⁶ This would directly target the kind of synthetic content produced by AI systems trained on existing recorded materials. While this solution may be more narrowly tailored to the deepfake context, its effectiveness would still be limited by the definitional boundaries of the law. In particular, only those who qualify as "performers" under the Act, and whose activity constitutes a "performance" within the meaning of the law would be able to rely on such a right. As a result, many individuals affected by deepfakes would continue to fall outside the scope of this protection.

6 Conclusion

The rapid development of artificial intelligence, particularly the emergence of deepfake technologies, has introduced complex challenges for existing legal frameworks. These tools allow for the hyper-realistic imitation of a person's likeness, voice, and mannerisms, often without consent, and with the potential to cause profound reputational, psychological and social harm. As the capacity of AI to manipulate identity grows, so too does the urgency of ensuring that the law responds effectively to these challenges.

However, in seeking legal remedies it is essential not to over-extend existing doctrines beyond their original purpose. Legal protections are not merely instruments of convenience; they are grounded in specific historical and normative contexts. In the case of performers' rights the regime was developed to safeguard the interests of performers in relation to the commercial exploitation of their recorded performances. Attempting to stretch this framework to address all instances of digital imitation risks distorting its conceptual integrity.

That being said, performers' rights can still play a role in addressing some of the legal harms posed by deepfakes. In particular, where deepfake models replicate or manipulate recorded performances by individuals who fall within the definition of a "performer" under the Act, these rights may offer a limited but valuable form of recourse. Yet for the vast majority of cases alternative legal remedies must be considered.

Ultimately the challenge lies not only in regulating new technologies but in doing so without losing sight of the original rationale behind existing

⁸⁵ Wang 2022 *U Chi Legal F* 433; Mashinini 2020 *SA Merc LJ* 415.

⁸⁶ Pavis 2021 *Convergence* 992; Pavis 2020 https://ore.exeter.ac.uk/repository/bitstream/handle/10871/123963/PAVIS_AI%20and%20Performers%20Rights_UKIPO_2020.pdf?sequence=1 20-21.

protections. A principled, measured approach to legal reform, that values doctrinal coherence while acknowledging technological change, is essential in crafting a response that is both effective and enduring.

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List of Abbreviations

AI	artificial intelligence
BIRPI	United International Bureau for the Protection of Intellectual Property
Brit J Criminol	British Journal of Criminology
Can Pub Policy	Canadian Public Policy
Cardozo Arts & Ent LJ	Cardozo Arts and Entertainment Law Journal
CGI	computer-generated-imaging
CLR	California Law Review
EIPR	European Intellectual Property Review
GAN	generative adversarial network
Geo LJ	Georgetown Law Journal
Geo Wash Intl L Rev	George Washington International Law Review
IJLIT	International Journal of Law and Information Technology
ILO	International Labour Office
Info & Comm Tech L	Information and Communications Technology Law
JIPLP	Journal of Intellectual Property Law and Practice
LCP	Law and Contemporary Problems
Mich L Rev	Michigan Law Review
PELJ	Potchefstroom Electronic Law Journal
Phil & Pub Aff	Philosophy and Public Affairs
SA Merc LJ	South African Mercantile Law Journal
SACJ	South African Journal of Criminal Justice
SAIPLJ	South African Intellectual Property Law Journal

SALJ	South African Law Journal
San Diego L Rev	San Diego Law Review
SFX	special effects
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
U Chi Legal F	University of Chicago Legal Forum
UNESCO	United Nations Educational, Scientific and Cultural Organisation
VAE	variational autoencoder
VFX	visual effects
WIPO	World Intellectual Property Organisation