

# Obscene Pornographic Materials Analysis of the Criminal Responsibility of Purchasers of Private Customized "AI Face-swapping"

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**Abstract.** The advancement of technology has given rise to the emergence of AI, which is like a double-edged sword, bringing convenience and efficiency while also posing risks and challenges. While enjoying its intelligent services, we must be vigilant against potential threats and use this powerful tool wisely, allowing technology to serve human well-being rather than become a shackle that binds us. This paper strongly opposes the emergence of private customized "AI face-swapping" obscene pornographic materials, which not only seriously infringe upon the legitimate rights and interests of portrait rights holders, but also disseminate obscene content and corrupt social norms. The individuals who purchase such services are participating in illegal activities, violating not only the portrait rights of others but also relevant laws and regulations by disseminating obscene materials. Therefore, according to legal provisions, they should bear corresponding criminal responsibilities. Such behaviors are supposed to be banned, safeguard social order and good customs, and ensure that the legitimate rights and interests of individuals are fully protected. The spread of such materials poses a serious threat to society, and action must be taken to prevent its further occurrence.

**Keywords:** AI face-swapping; obscene; purchasers; criminal liability.

## 1. Introduction

In August 2022, XiaoShan police in Hangzhou obtained a clue during online inspections that someone in the district was using AI technology to produce pornographic videos and widely disseminate them online for profit. The police promptly launched an investigation into the case and arrested the suspect Yu. Subsequently, the case was transferred to the XiaoShan District People's Procuratorate in Hangzhou for review and prosecution. According to media reports, the suspect also provided private customization services, namely, producing customized videos that meet customers' specific needs, such as replacing the protagonist of pornographic videos with public figures or people they secretly admire in real life. Currently, in addition to pursuing the criminal liability of Yu in accordance with the law, the XiaoShan District People's Procuratorate has also filed a civil public interest litigation. AI technology, essentially a new technology reflecting human will, is neutral. However, using AI to produce pornographic items destroys public order and good customs and infringes on the personal rights of the subjects whose faces are swapped. It is true that the criminal suspects who produce pornographic items using "AI face-swapping" technology should bear corresponding legal responsibilities. However, whether customers who purchase these customized services should also bear criminal responsibilities and what basis should be used to determine their criminal responsibilities are issues to be discussed in this article.

To study such cases, it is necessary to clarify the concept of "buyers of customized services for pornographic items with AI face-swapping" (hereinafter referred to as "buyers"). These buyers actively provide portrait materials or propose relevant production requirements, referring to their intended benefits. This behavior can be understood as a special entrustment agency relationship, where the principal and the agent reach an agreement, and the agent produces videos according to the principal's intentions and preferences, and the principal pays corresponding compensation. Notably, such "buying and selling behavior" has stimulated the expansion of the market to a certain extent, and



the benefits generated may even lead to criminal intent. If the behavior of purchasing customized services for pornographic items with AI face-swapping is not regulated from the perspective of criminal law, it will obviously deviate from the public sense of justice and have a negative social impact. It is worth noting that it is necessary to clarify the boundary between such buyers and ordinary buyers. If the criminal responsibility of all buyers of pornographic videos with AI face-swapping is pursued, it would violate the principle of moderation in criminal law. Therefore, the analysis of the concept and behavioral standards of buyers needs to be very clear.

## **2. Characteristics of "AI Face-swapping"**

### **2.1. Long-lasting Influence**

The legal interests infringed by "AI face-swapping" are the personal rights of the subjects whose faces are swapped and social public order and good customs. Its nature can be referenced by the behavior of sexual crime network transmission. Pornographic items with AI face-swapping are mainly disseminated through the internet as a medium. Due to the high popularity and uncontrollable nature of the internet, the impact of such criminal acts on victims will be more extensive and lasting than that of general crimes. Even if the websites are closed or the original videos are deleted, others can still download and disseminate them. Therefore, it is difficult to eliminate the reputational damage and mental harm caused by pornographic items to the subjects whose faces are swapped.

### **2.2. Urgency of Regulation**

As Catharine Mackinnon professor points out that Pornography is the graphic sexually explicit subordination of women through pictures and words [1]. It is worth noting that pornographic video makers using "AI" face-swapping technology can replace the victim's face with any unspecified pornographic videos, causing the videos to be circulated and discussed by countless people. Such behavior brings particularly serious humiliation to the victims. Unfortunately, at present, the author has not found any reports or judicial documents indicating that any buyer has been held accountable for this behavior. It needs to be recognized that AI technology itself does not have any inclinations, but the criminal intent of these buyers has led to the technology deviating from its normal use. If only the makers are held accountable without regulating such behavior, these people will still try their best to find new ways to achieve their criminal purposes. just like drug addicts will not stop using drugs just because one drug dealer disappears, but will find new dealers to obtain drugs, or even become dealers themselves to support their drug use. Tracing the source is the only way to stop pollution, so it is necessary to regulate the behavior of purchasing customized services for pornographic items with "AI face-swapping" technology.

## **3. Constituent Elements of a Crime: Within the Field of Face-swapping**

### **3.1. Characteristics of the Subject of a Crime**

AI face-swapping technology belongs to non-humanoid AI, which cannot get rid of the control of natural persons to implement autonomous behavior, lacks deep learning ability, and cannot generate independent consciousness beyond programming [2]. Therefore, it should not be regarded as the subject of criminal responsibility. in this type of crime, natural persons who have the ability of criminal responsibility, commit criminal acts that harm society, and should bear criminal responsibility according to law, are the crime subjects that fully meet the requirements. Specifically, both buyers and producers in such cases are usually natural persons with full capacity for conduct. From the perspective of criminal responsibility age, the buyer should be a person who has reached 16 years old. Therefore, as long as they meet the constituent elements of the crime, they should have the qualification to constitute the subject of relevant crimes.

### **3.2. The Subjective Aspect of Crime**

The subjective aspect of crime refers to the psychological attitude held by the criminal subject towards the harmful behavior they have committed to society and the consequences it has caused, including direct intent and indirect intent [3]. Direct intent refers to the psychological attitude of the perpetrator who knows that their behavior will inevitably or possibly cause harmful consequences to society and hopes for such consequences to occur. From the behavior of the purchasers, it can be seen that they actively seek technical assistance from others to achieve their illegal purposes, and their psychological attitude undoubtedly belongs to direct intent. In addition, the subjective aspect of crime also includes factors such as purpose and motivation. Obtaining privately customized pornographic videos through transactions is the criminal purpose. Motivation refers to the internal cause that generates criminal intent. In specific cases, the purpose of obtaining the videos may be to commit other crimes such as extortion and fraud. For example, A provides B's facial photo to C and pays a certain fee for C to place B's face with the protagonist of a pornographic video. A then uses this video to extort a certain amount of money or other interests from B, otherwise they will spread the video. The criminal motivation can be to satisfy sexual desire, revenge, and other psychological reasons. In the case uncovered by the XiaoShan police, the purchasers requested that the protagonist of the pornographic video be replaced with a celebrity or a woman they secretly admire. Such behavior is motivated by abnormal sexual desires.

### **3.3. The Objective Aspect of Crime**

The objective aspect of a crime refers to the objective external factual characteristics stipulated in the criminal law, which explain the infringement of the social relations contained in the criminal law [4]. From the perspective of the buyer, they do not directly participate in the implementation of the crime, but through acts such as instigation, offering rewards, and assistance. Therefore, their harmful acts are generally manifested as acts. However, depending on different behavior patterns, buyers may be involved in different crimes simultaneously. For example, motivated by extortion or fraud, buyers will commit corresponding criminal acts, thus constituting the crime of extortion or fraud. In the case of customized services for pornographic content with "AI face-swapping", the video producer is a natural person who masters AI technology. Therefore, there is no situation of performing uninformed legal acts or being unable to discern one's own acts during the commission of the criminal act. However, if the buyer is a person with full criminal capacity who has reached the age of 16 but employs a minor under the age of 16 to produce videos for themselves, their act should be classified as an "indirect principal offender" in the joint crime under criminal law. In cases of indirect principal offenders, the producer and the buyer cannot constitute a joint crime, and the criminal responsibility of the buyer should be pursued separately.

## **4. Analysis of Criminal Attributes in Joint Crimes**

As mentioned above, the private customization service of pornographic content is essentially a special kind of principal-agent relationship, which is also an employment relationship in criminal law. Employment crime is a type of joint crime, with its core attribute being employment. Employment acts often exhibit some characteristics of instigation and accessory, but there are also differences. Therefore, when determining the nature of the crime related to the private customization service of pornographic content with "AI face-swapping", we need to comprehensively consider the characteristics of the act, the relationship between the buyer and the producer, and the essence of the criminal act, to ensure the accuracy and fairness of the application of the law.

### **4.1. Abettor**

Some argue that the buyer's purchase behavior is essentially intentionally inducing others to commit crimes driven by interests, similar to the behavior of abettors, and therefore the employer should be treated as an abettor [5]. However, I tend to believe that there are significant differences between this type of crime and general joint crimes and abetting crimes. Such crimes cannot be simply equated

with abetting crimes. In practice, it is incomplete and inappropriate to solely rely on the standards of abetting crimes to determine the criminal responsibility of the actor in the case. Although purchase behavior and abetting crimes have similarities in some respects, they often show distinct differences in most cases. Specifically, employment behavior is more based on the exchange of interests between the two parties, while abetting behavior focuses on stimulating others' criminal intentions through words or other means. I believe that the most significant difference between abettors and other joint crimes is whether they have triggered the criminal intent of others. For example, if Person A initially had no criminal intention, but Person B induced Person A, who possesses "AI face-swapping" technology, to produce pornographic videos for them through financial incentives, and Person A participated in the criminal act out of a strong desire for compensation, then in this case, Person B should constitute an abettor in a joint crime.

#### **4.2. Assistance of behavior**

In practice, the buyer usually provides the producer with the facial information of the subject of the face-swapping, such as photos, videos, etc., to assist in the completion of criminal activities. However, if the subject of the face-swapping is a public figure and their facial information is publicly available, the buyer's provision of information does not constitute an assisting behavior. The author did not define such assisting behavior as a helper because it would require a broadened interpretation of the helper, which may violate the principle of moderation. Wolfenden points out that we must reserve a territory for privacy, both moral and immoral, which cannot be occupied by law [6].

“When we consider the legitimacy of punishment based on its deservedness, punishment becomes an amoral issue, and jurisprudence is also a science of rights and obligations. In principle, the law can not transcend the constraints of social conscience, and everyone has the right to express their opinions [7].” To address the deviation between the sentencing of sexual crime network dissemination behavior caused by mechanical justice and the popular sense of justice, and to enhance social acceptance of punishment, the criminal sanctions for such behavior should fully leverage the dynamic nature of judicial discretion.

#### **4.3. Analysis of Criminal Responsibility**

To sum up, the pursuit of criminal responsibility for purchasers should be cautious and reasonable. If the behavior involves intimidation, threats, and fraud, it should be subject to concurrent punishment for the crimes of extortion or fraud that are constituted.

According to the current laws and regulations, the act of spreading pornographic electronic information through the Internet or mobile communication terminals without the purpose of profiteering, with one of the following circumstances, shall be convicted and punished in accordance with the provisions of the criminal law as the crime of disseminating pornographic materials: forty or more pornographic movies performances, animations, and other video files are produced, replicated, published, sold, or disseminated; two hundred or more pornographic audio files are produced, replicated, published, sold or disseminated; four hundred or more pornographic electronic publications, pictures, articles, short messages, etc. are produced, replicated, published, sold or disseminated. the actual number of clicks on the pornographic electronic information disseminated reaches 20,000 or more; And the act of publishing, selling, or disseminating pornographic electronic information in the form of membership. with 400 or more registered members. If the above-mentioned acts are committed through chat rooms forums, instant messaging software, e-mail, and other means, they shall be convicted and punished in accordance with the provisions of Article 364(1) of the Criminal Law as the crime of disseminating pornographic materials [8]. The buyer may also duplicate, publish, sell, and disseminate the pornographic items purchased for the purpose of profiteering. According to Article 363 of the Criminal Law, a sentence of fixed-term imprisonment of not more than three years, criminal detention, or public surveillance, and a fine shall be imposed: if the circumstances are serious, a sentence of fixed-term imprisonment of not less than three years but not more than ten years, and a fine shall be imposed; if the circumstances are especially serious, a

sentence of fixed-term imprisonment of not less than ten years or life imprisonment, and a fine or confiscation of property shall be imposed [9].

In the United States, "AI face-swapping" is referred to as "deep-fake". Virginia has broadened the scope of its "revenge porn law" to include deep-fakes with the revised law taking effect on July 1st local time. The expanded law stipulates that it is illegal to share someone's nude videos or photos without their permission, and using them for "coercion harassment, or intimidation" will be classified as a Class 1 misdemeanor. This applies regardless of whether the photo or video is authentic or fake. In addition to deep-fakes, falsified photos and videos created using photo shop or other tools are also included. Furthermore, Congresswoman Yvette Clarke introduced the Deep Fakes Accountability Act in June 2019, which targets those who provide videos containing false depictions of others' sexual behavior or nudity, without applying watermarks to the content, and with the subjective intent to humiliate others [10].

It can be seen that both China and the United States mainly regulate the production and dissemination of such materials in their criminal legislation. The author believes that the mere purchase of services for personal viewing should not be subject to criminal liability. Furthermore, whether assisting or instigating such behavior constitutes a crime should be determined based on the specific actions and consequences involved. For example, if Party A provides Party B with the facial photo of Party C and requests Party B to produce pornographic videos using Party C's facial information solely for personal viewing, and does not disseminate the material, but Party B, without informing Party A, voluntarily disseminates the material on the internet and the dissemination reaches a level that triggers criminal liability, the illegal outcome is not intended by Party A. Party A cannot foresee the illegal consequences, does not hope for or indulge in their occurrence, and has not assisted in the widespread dissemination. Therefore, Party A does not constitute a crime. However, if Party B tells Party A that he will widely disseminate the pornographic material, and Party A responds, "Go ahead and disseminate it," the author believes that in this scenario, Party A's response indicates that he knows the possibility of widespread dissemination of the pornographic material but mistakenly believes that the harmful consequences can be avoided, constituting indirect intentionality in criminal law. If Party B's subsequent dissemination violates criminal law, then Party A should constitute an accomplice to the corresponding crime.

## 5. Conclusion

While AI technology brings us huge productivity that can be exploited by those with ulterior motives to produce negative impacts. The case of "AI face-swapping" for private customized pornographic videos is a typical example. The rapid transformation of information technology has led to the spread of risks, making the victims of such cases suffer more severe impacts. If only the video producers are pursued for legal responsibility, while ignoring the pursuit of responsibility for the buyers, this obviously deviates from the intuitive sense of justice among the public. One important reason for this is the lack of clear criminal sentencing rules in judicial practice for such behaviors. This article believes that the responsive requirement of criminal law interpretation should be linked with social demands to promote the growth and improvement of criminal law norms. Therefore, in order to achieve the legitimacy of sentencing discretion, factors such as interest balancing, value appeals, and public should be integrated into normative interpretation. Due to the relatively limited research on such cases, the author hopes that this article can serve as a starting point to attract more attention to the dual nature of technological innovation and the protection of women's rights.

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