

STATE OF NEW YORK

6829--A

Cal. No. 1113

2021-2022 Regular Sessions

IN SENATE

May 18, 2021

Introduced by Sen. SAVINO -- read twice and ordered printed, and when printed to be committed to the Committee on Codes -- recommitted to the Committee on Codes in accordance with Senate Rule 6, sec. 8 -- reported favorably from said committee, ordered to first report, amended on first report, ordered to a second report and ordered reprinted, retaining its place in the order of second report

AN ACT to amend the penal law, in relation to establishing the crime of aggravated harassment by means of electronic or digital communication; and to amend the civil rights law, in relation to providing for a private right of action for the unlawful dissemination or publication of deep fakes

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The penal law is amended by adding a new section 240.78 to
2 read as follows:

3 § 240.78 Aggravated harassment by means of electronic or digital commu-
4 nication.

5 1. A person is guilty of aggravated harassment by means of electronic
6 or digital communication when, with the intent to harass, annoy, threat-
7 en or alarm another person, he or she produces, distributes, publishes
8 or broadcasts material that contains a picture, photograph or image of a
9 person or persons or a deep fake into which the image of another person
10 or persons is superimposed as a deep fake.

11 2. For purposes of this section, "deep fake" means a digitized image
12 that is altered to incorporate a person's face or their identifiable
13 body part onto such image, and such image is any printed material,
14 advertisement, movie, video, communication or computer image that
15 depicts a pornographic or lewd sex act as defined pursuant to section
16 245.00 or 130.00 of this part, or graphic violence, that is published
17 without the explicit written permission of the individual or individuals

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD11427-04-2

1 depicted, and for no other legitimate purpose other than to harass,
2 annoy, threaten or alarm another person.

3 Aggravated harassment by means of electronic or digital communication
4 shall be a class A misdemeanor.

5 § 2. Section 52-b of the civil rights law, as added by chapter 109 of
6 the laws of 2019, is amended to read as follows:

7 § 52-b. Private right of action for unlawful dissemination or publica-
8 tion of an intimate image or deep fake. 1. Any person depicted in a
9 still or video image, regardless of whether or not the original still or
10 video image was consensually obtained, shall have a cause of action
11 against an individual who, for the purpose of harassing, annoying or
12 alarming such person, disseminated or published, or threatened to
13 disseminate or publish, such still or video image, where such image or
14 deep fake:

15 a. was a deep fake or was taken when such person had a reasonable
16 expectation that ~~the~~ their image would remain private; and

17 b. depicts (i) an unclothed or exposed intimate part of such person;
18 or (ii) such person engaging in sexual conduct, as defined in subdivi-
19 sion ten of section 130.00 of the penal law, with another person; and

20 c. was disseminated or published, or threatened to be disseminated or
21 published, without the consent of such person.

22 2. In any action commenced pursuant to subdivision one of this
23 section, the finder of fact, in its discretion, may award injunctive
24 relief, punitive damages, compensatory damages and reasonable court
25 costs and attorney's fees.

26 3. This section shall not apply to the following:

27 a. the reporting of unlawful conduct;

28 b. dissemination or publication of an intimate still ~~[or]~~, video image
29 or deep fake made during lawful and common practices of law enforcement,
30 legal proceedings or medical treatment;

31 c. images involving voluntary exposure in a public or commercial
32 setting; or

33 d. dissemination or publication of an intimate still ~~[or]~~, video image
34 or deep fake made for a legitimate public purpose.

35 4. Any person depicted in a still or video image or deep fake that
36 depicts an unclothed or exposed intimate part of such person, or such
37 person engaging in sexual conduct as defined in subdivision ten of
38 section 130.00 of the penal law with another person, which is dissem-
39 inated or published without the consent of such person and where such
40 person had a reasonable expectation that the image would remain private,
41 may maintain an action or special proceeding for a court order to
42 require any website that is subject to personal jurisdiction under
43 subdivision five of this section to permanently remove such still ~~[or]~~,
44 video image or deep fake; any such court order granted pursuant to this
45 subdivision may direct removal only as to images that are reasonably
46 within such website's control.

47 5. a. Any website that hosts or transmits a still or video image or
48 deep fake, viewable in this state, taken or produced under circumstances
49 where the person depicted had a reasonable expectation that the image
50 would remain private, which depicts:

51 (i) an unclothed or exposed intimate part, as defined in section
52 245.15 of the penal law, of a resident of this state; or

53 (ii) a resident of this state engaging in sexual conduct as defined in
54 subdivision ten of section 130.00 of the penal law with another person;
55 and

b. Such still ~~[ex]~~, video image or deep fake is hosted or transmitted without the consent of such resident of this state, shall be subject to personal jurisdiction in a civil action in this state to the maximum extent permitted under the United States constitution and federal law.

6. A cause of action or special proceeding under this section shall be commenced the later of either:

a. three years after the dissemination or publication of an image; or

b. one year from the date a person discovers, or reasonably should have discovered, the dissemination or publication of such image.

6-a. For purposes of this section, the following terms shall have the following meanings:

a. "Individual" means a person, corporation, business entity, firm, association, committee or organization conducting business within the state of New York.

b. "Deep fake" means a digitized image that is altered to incorporate a person's face or their identifiable body part onto such image, and such image is any printed material, advertisement, movie, video, communication or computer image that depicts a pornographic or lewd sex act as defined pursuant to section 245.00 or 130.00 of the penal law, or graphic violence, that is published without the explicit written permission of the individual or individuals depicted, and for no other legitimate purpose other than to harass, annoy, threaten or alarm another person.

7. Nothing herein shall be read to require a prior criminal complaint, prosecution or conviction to establish the elements of the cause of action provided for by this section.

8. The provisions of this section are in addition to, but shall not supersede, any other rights or remedies available in law or equity.

9. If any provision of this section or its application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

10. Nothing in this section shall be construed to limit, or to enlarge, the protections that 47 U.S.C § 230 confers on an interactive computer service for content provided by another information content provider, as such terms are defined in 47 U.S.C. § 230.

§ 3. Section 52-c of the civil rights law, as added by chapter 304 of the laws of 2020, is amended to read as follows:

§ 52-c. Private right of action for unlawful dissemination or publication of a sexually explicit depiction or deep fake of an individual. 1. For the purposes of this section:

a. "depicted individual" means an individual who appears, as a result of digitization, to be giving a performance they did not actually perform or to be performing in a performance that was actually performed by the depicted individual but was subsequently altered to be in violation of this section.

b. "digitization" means to realistically depict the nude body parts of another human being as the nude body parts of the depicted individual, computer-generated nude body parts as the nude body parts of the depicted individual or the depicted individual engaging in sexual conduct, as defined in subdivision ten of section 130.00 of the penal law, in which the depicted individual did not engage.

c. "individual" means a natural person.

d. "person" means a human being or legal entity.

1 e. "sexually explicit material" means any portion of an audio visual
2 work, or deep fake, that shows the depicted individual performing in the
3 nude, meaning with an unclothed or exposed intimate part, as defined in
4 section 245.15 of the penal law, or appearing to engage in, or being
5 subjected to, sexual conduct, as defined in subdivision ten of section
6 130.00 of the penal law.

7 f. "deep fake" means a digitized image that is altered to incorporate
8 an individual's face or their identifiable body part onto such image,
9 and such image is any printed material, advertisement, movie, video,
10 communication or computer image that depicts a pornographic or lewd sex
11 act as defined pursuant to section 245.00 or 130.00 of the penal law, or
12 graphic violence, that is published without the explicit written permis-
13 sion of the individual or individuals depicted, and for no other legiti-
14 mate purpose other than to harass, annoy, threaten or alarm another
15 person.

16 2. a. A depicted individual shall have a cause of action against a
17 person who, discloses, disseminates, produces or publishes sexually
18 explicit material or a deep fake related to the depicted individual, and
19 the person knows or reasonably should have known the depicted individual
20 in that material did not consent to its creation, disclosure, dissem-
21 ination, production or publication.

22 b. It shall not be a defense to an action under this section that
23 there is a disclaimer in the sexually explicit material that communi-
24 cates that the inclusion of the depicted individual in the sexually
25 explicit material was unauthorized or that the depicted individual did
26 not participate in the creation or development of the material.

27 3. a. A depicted individual may only consent to the creation, disclo-
28 sure, dissemination, production, or publication of sexually explicit
29 material or a deep fake by knowingly and voluntarily signing an agree-
30 ment written in plain language that includes a general description of
31 the sexually explicit material and the audiovisual work in which it will
32 be incorporated.

33 b. A depicted individual may rescind consent by delivering written
34 notice within three business days from the date consent was given to the
35 person in whose favor consent was made, unless one of the following
36 requirements is satisfied:

37 i. the depicted individual is given at least three business days to
38 review the terms of the agreement before signing it; or

39 ii. if the depicted individual is represented, the attorney, talent
40 agent, or personal manager authorized to represent the depicted individ-
41 ual provides additional written approval of the signed agreement.

42 4. a. A person is not liable under this section if:

43 i. the person discloses, disseminates or publishes the sexually
44 explicit material in the course of reporting unlawful activity, exercis-
45 ing the person's law enforcement duties, or hearings, trials or other
46 legal proceedings; or

47 ii. the sexually explicit material is a matter of legitimate public
48 concern, a work of political or newsworthy value or similar work, or
49 commentary, criticism or disclosure that is otherwise protected by the
50 constitution of this state or the United States; provided that sexually
51 explicit material shall not be considered of newsworthy value solely
52 because the depicted individual is a public figure.

53 5. In any action commenced pursuant to this section, the finder of
54 fact, in its discretion, may award injunctive relief, punitive damages,
55 compensatory damages, and reasonable court costs and attorney's fees.

1 6. A cause of action or special proceeding under this section shall be
2 commenced the later of either:

3 a. three years after the dissemination or publication of sexually
4 explicit material; or

5 b. one year from the date a person discovers, or reasonably should
6 have discovered, the dissemination or publication of such sexually
7 explicit material.

8 7. Nothing in this section shall be read to require a prior criminal
9 complaint, prosecution or conviction to establish the elements of the
10 cause of action provided for in this section.

11 8. The provisions of this section including the remedies are in addi-
12 tion to, and shall not supersede, any other rights or remedies available
13 in law or equity.

14 9. If any provision of this section or its application to any person
15 or circumstance is held invalid, the invalidity shall not affect other
16 provisions or applications of this section which can be given effect
17 without the invalid provision or application, and to this end the
18 provisions of this section are severable.

19 10. Nothing in this section shall be construed to limit, or to
20 enlarge, the protections that 47 U.S.C. § 230 confers on an interactive
21 computer service for content provided by another information content
22 provider, as such terms are defined in 47 U.S.C. § 230.

23 § 4. This act shall take effect immediately.