

# 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, threaten  
7 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.

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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

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

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

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

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

10 6-a. For purposes of this section, the following terms shall have the  
11 following meanings:

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

15 b. "Deep fake" means a digitized image that is altered to incorporate  
16 a person's face or their identifiable body part onto such image, and  
17 such image is any printed material, advertisement, movie, video, commu-  
18 nication or computer image that depicts a pornographic or lewd sex act  
19 as defined pursuant to section 245.00 or 130.00 of the penal law, or  
20 graphic violence, that is published without the explicit written permis-  
21 sion of the individual or individuals depicted, and for no other legiti-  
22 mate purpose other than to harass, annoy, threaten or alarm another  
23 person.

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

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

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

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

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

40 § 52-c. Private right of action for unlawful dissemination or publica-  
41 tion of a sexually explicit depiction or deep fake of an individual. 1.  
42 For the purposes of this section:

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

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

54 c. "individual" means a natural person.

55 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.