STATE OF NEW YORK

5583

2023-2024 Regular Sessions

IN SENATE

March 8, 2023

Introduced by Sen. SCARCELLA-SPANTON -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

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:

Section 1. The penal law is amended by adding a new section 240.80 to read as follows:

§ 240.80 Aggravated harassment by means of electronic or digital communication.

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

2. For purposes of this section, "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 this part, 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.

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

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

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

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

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

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

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

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

3. This section shall not apply to the following:

a. the reporting of unlawful conduct;

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

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

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

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

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

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

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

b. Such still [~~or~~]**,** 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.

e. "sexually explicit material" means any portion of an audio visual work**, or deep fake,** that shows the depicted individual performing in the nude, meaning with an unclothed or exposed intimate part, as defined in section 245.15 of the penal law, or appearing to engage in, or being

subjected to, sexual conduct, as defined in subdivision ten of section 130.00 of the penal law.

f. "deep fake" means a digitized image that is altered to incorporate an individual'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.

2. a. A depicted individual shall have a cause of action against a person who, discloses, disseminates**, produces** or publishes sexually explicit material **or a deep fake** related to the depicted individual, and the person knows or reasonably should have known the depicted individual in that material did not consent to its creation, disclosure, dissemination, **production** or publication.

b. It shall not be a defense to an action under this section that there is a disclaimer in the sexually explicit material that communicates that the inclusion of the depicted individual in the sexually explicit material was unauthorized or that the depicted individual did not participate in the creation or development of the material.

3. a. A depicted individual may only consent to the creation, disclosure, dissemination, **production,** or publication of sexually explicit material **or a deep fake** by knowingly and voluntarily signing an agreement written in plain language that includes a general description of the sexually explicit material and the audiovisual work in which it will be incorporated.

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

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

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

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

i. the person discloses, disseminates or publishes the sexually explicit material in the course of reporting unlawful activity, exercising the person's law enforcement duties, or hearings, trials or other legal proceedings; or

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

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

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 sexually explicit material; or

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

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

8. The provisions of this section including the remedies are in addition to, and 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.

§ 4. This act shall take effect immediately.