STATE OF NEW YORK

8510

IN SENATE

February 7, 2024

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

AN ACT to amend the penal law, the criminal procedure law and the correction law, in relation to establishing offenses involving sexually explicit digital alterations

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

Section 1. Short title. This act shall be known and may be cited as the "digital alterations protections act".

§ 2. The penal law is amended by adding a new article 246 to read as follows:

ARTICLE 246
OFFENSES INVOLVING SEXUALLY EXPLICIT DIGITAL ALTERATIONS

Section 246.00 Definitions.
246.05 Unlawful dissemination of a sexually explicit depiction of an individual.
246.10 Unlawful publication of a sexually explicit depiction of an individual.
246.15 Unlawful access of a sexually explicit depiction of a child.
246.20 Unlawful distribution of a sexually explicit depiction of a child in the second degree.
246.25 Unlawful distribution of a sexually explicit depiction of a child in the first degree.
246.30 Affirmative defense.
246.35 Consent.
246.40 Application of article.

§ 246.00 Definitions.

As used in this article, the following definitions shall apply:

1. "Disseminate" and "publish" shall have the same meanings as such terms are defined in section 250.40 of this title.

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

LBD11051-04-4

2. "Create" means to design, develop, devise, generate, issue, make, manufacture, produce, or transmute.

3. "Sexually explicit depiction" means any work created through sexually explicit digitization, including still and audio visual.

4. "Sexually explicit digitization" means to realistically depict either: (a) the nude body parts of another human being as the nude body parts of the depicted individual or computer-generated nude body parts as the nude body parts of the depicted individual; or (b) the depicted individual engaging in sexual conduct, as defined by subdivision three of section 263.00 of this part, or sexual contact, as defined by subdivision three of section 130.00 of this part, in which the depicted individual did not engage.

5. "Audio visual" means any film, motion picture, audio and/or visual recording, digital image, computer image or computer-generated image.

6. "Sexually explicit material" means any portion of a sexually explicit depiction that shows the depicted individual performing, or appearing to perform, in the nude, meaning with an unclothed or exposed intimate part, as defined in section 245.15 of this title, or performing in, appearing to perform in, or being subjected to, sexual conduct, as defined by subdivision three of section 263.00 of this part, or sexual contact, as defined by subdivision three of section 130.00 of this part.

7. "Depicted individual" means an identifiable person who appears, as a result of sexually explicit digitization, to be giving a performance that the identifiable person did not actually perform or that was actually performed by the identifiable person but was subsequently altered to be in violation of this article.

8. "Identifiable person" means an individual whose image is or would be clearly identifiable as a specific person by any individual. "Identifiable person" shall not be construed to require proof of the actual identity of the individual.

9. "Individual" means a natural, human being.

§ 246.05 Unlawful dissemination of a sexually explicit depiction of an individual.

A person is guilty of unlawful dissemination of a sexually explicit depiction of an individual when the person, with the intent to cause harm to the reputation or emotional, financial, or physical welfare of another person, disseminates sexually explicit material that includes the depicted individual, and he or she knows or reasonably should have known the depicted individual did not consent to its creation or its dissemination.

Unlawful dissemination of a sexually explicit depiction of an individual is a class B misdemeanor.

§ 246.10 Unlawful publication of a sexually explicit depiction of an individual.

A person is guilty of unlawful publication of a sexually explicit depiction of an individual when the person, with the intent to sexually gratify that person or another person or with the intent to cause harm to the reputation or emotional, financial, or physical welfare of another person, publishes sexually explicit material that includes the depicted individual, and he or she knows or reasonably should have known the depicted individual did not consent to its creation or its publication.

Unlawful publication of a sexually explicit depiction of an individual is a class A misdemeanor.

§ 246.15 Unlawful access of a sexually explicit depiction of a child.

A person is guilty of unlawful access of a sexually explicit depiction of a child when the person, knowing the character and content thereof, knowingly accesses with intent to sexually gratify a person and to view any sexually explicit depiction that includes sexual conduct by a child less than seventeen years of age.

Unlawful access of a sexually explicit depiction of a child is a class A misdemeanor.

§ 246.20 Unlawful distribution of a sexually explicit depiction of a child in the second degree.

A person is guilty of unlawful distribution of a sexually explicit depiction of a child in the second degree when the person, knowing the character and content thereof, disseminates or publishes sexually explicit material that includes a depicted individual, and he or she knows or reasonably should have known that the depicted individual is less than seventeen years of age.

Unlawful distribution of a sexually explicit depiction of a child in the second degree is a class E felony.

§ 246.25 Unlawful distribution of a sexually explicit depiction of a child in the first degree.

A person is guilty of unlawful distribution of a sexually explicit depiction of a child in the first degree when the person, knowing the character and content thereof, creates and either disseminates or publishes sexually explicit material that includes a depicted individual, and the depicted individual is less than seventeen years of age.

Unlawful distribution of a sexually explicit depiction of a child in the first degree is a class D felony.

§ 246.30 Affirmative defense.

1. It shall be an affirmative defense to unlawful publication of a sexually explicit depiction of an individual and unlawful dissemination of a sexually explicit depiction of an individual that a depicted individual who is eighteen years of age or older consented to the creation and either the dissemination or publication of the sexually explicit depiction.

(a) A depicted individual who is eighteen years of age or older may consent to the creation, dissemination, or publication of sexually explicit material only by knowingly and voluntarily signing an agreement written in plain language that includes a general description of the sexually explicit material, the sexually explicit depiction in which it will be incorporated, and the nature of the depicted individual's consent.

(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, or longer if an agreement so stipulates.

2. It shall not be a defense under this article that:

(a) there is a disclaimer included in the sexually explicit depiction that communicates that the inclusion of the depicted individual was unauthorized, that the depicted individual did not participate in the creation or development of the sexually explicit depiction, or that the sexually explicit depiction has been altered through digitization; or

(b) the features of the depicted individual have been or are altered prior to or after the creation or distribution of the sexually explicit depiction, provided that the depicted individual remains an identifiable person.

§ 246.35 Consent.

A person under eighteen years of age shall be incapable of consent for the purposes of this article. No adult can consent on behalf of a person under eighteen years of age.

§ 246.40 Application of article.

1. This article shall not apply to the following:

(a) the reporting of unlawful conduct;

(b) the creation, dissemination, or publication of a sexually explicit rendition of a depicted individual made during lawful and common practices of law enforcement, legal proceedings, or medical treatment;

(c) the creation, dissemination, or publication of a sexually explicit depiction made for a legitimate public purpose, including for political or newsworthy value or similar work, commentary, criticism, or disclosure that is otherwise protected by the constitution of this state or of the United States, provided that sexually explicit material shall not be considered of newsworthy value solely because the depicted individual is a public figure.

(d) the creation, dissemination, or publication of a sexually explicit depiction that does not include sexually explicit material.

2. (a) Nothing in this article 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.

(b) Nothing in this article shall be deemed to interfere with or prohibit any rights established by section fifty-two-c of the civil rights law, as added by chapter three hundred four of the laws of two thousand twenty.

§ 3. Subdivision 2 of section 30.10 of the criminal procedure law is amended by adding a new paragraph (a-3) to read as follows:

(a-3) A prosecution for unlawful distribution of a sexually explicit depiction of a child must be commenced within five years after the period set forth in paragraph (f) of subdivision three of this section;

§ 4. Paragraph (f) of subdivision 3 of section 30.10 of the criminal procedure law, as amended by chapter 11 of the laws of 2019, is amended to read as follows:

(f) For purposes of a prosecution involving a sexual offense as defined in article one hundred thirty of the penal law, other than a sexual offense delineated in paragraph (a) of subdivision two of this section, committed against a child less than eighteen years of age, incest in the first, second or third degree as defined in sections 255.27, 255.26 and 255.25 of the penal law committed against a child less than eighteen years of age, [~~or~~] use of a child in a sexual performance as defined in section 263.05 of the penal law, unlawful publication of a sexually explicit depiction of an individual as defined in section 246.10 of the penal law, unlawful dissemination of a sexually explicit depiction of an individual as defined in section 246.05 of the penal law, or unlawful distribution of a sexually explicit depiction of a child in the first degree or second degree as defined in sections 246.25 and 246.20 of the penal law, the period of limitation shall not begin to run until the child has reached the age of twenty-three or the offense is reported to a law enforcement agency or statewide central register of child abuse and maltreatment, whichever occurs earlier.

§ 5. Paragraph (e) of subdivision 4 of section 510.10 of the criminal procedure law, as amended by section 2 of part UU of chapter 56 of the laws of 2020, is amended to read as follows:

(e) a sex trafficking offense defined in section 230.34 or 230.34-a of the penal law, or a felony sex offense defined in section 70.80 of the

penal law, or a crime involving incest as defined in section 255.25, 255.26 or 255.27 of such law, or a misdemeanor defined in article one hundred thirty of such law**, or a felony defined in article two hundred forty-six of such law**;

§ 6. Subparagraph (v) of paragraph (b) of subdivision 1 of section 530.20 of the criminal procedure law, as amended by section 3 of part UU of chapter 56 of the laws of 2020, is amended to read as follows:

(v) a sex trafficking offense defined in section 230.34 or 230.34-a of the penal law, or a felony sex offense defined in section 70.80 of the penal law or a crime involving incest as defined in section 255.25, 255.26 or 255.27 of such law, or a misdemeanor defined in article one hundred thirty of such law**, or a felony defined in article two hundred forty-six of such law**;

§ 7. Paragraph (m) of subdivision 4 of section 530.40 of the criminal procedure law, as added by section 4 of part UU of chapter 56 of the laws of 2020, is amended to read as follows:

(m) assault in the third degree as defined in section 120.00 of the penal law or arson in the third degree as defined in section 150.10 of the penal law, when such crime is charged as a hate crime as defined in section 485.05 of the penal law**, or a felony defined in article two hundred forty-six of the penal law**;

§ 8. Subparagraph (i) of paragraph (a) of subdivision 2 of section 168-a of the correction law, as amended by chapter 189 of the laws of 2018, is amended to read as follows:

(i) a conviction of or a conviction for an attempt to commit any of the provisions of sections 120.70, 130.20, 130.25, 130.30, 130.40, 130.45, 130.60, 230.34, 230.34-a, 250.50, 255.25, 255.26 [~~and~~]**,** 255.27**, 246.20 and 246.25** or article two hundred sixty-three of the penal law, or section 135.05, 135.10, 135.20 or 135.25 of such law relating to kidnapping offenses, provided the victim of such kidnapping or related offense is less than seventeen years old and the offender is not the parent of the victim, or section 230.04, where the person patronized is in fact less than seventeen years of age, 230.05, 230.06, 230.11, 230.12, 230.13, subdivision two of section 230.30, section 230.32, 230.33, or 230.34 of the penal law, or section 230.25 of the penal law where the person prostituted is in fact less than seventeen years old, or

§ 9. Subparagraph (i) of paragraph (a) of subdivision 2 of section 168-a of the correction law, as amended by chapter 23 of the laws of 2024, is amended to read as follows:

(i) a conviction of or a conviction for an attempt to commit any of the provisions of sections 120.70, 130.20, 130.25, 130.30, former section 130.40, former section 130.45, sections 130.60, 230.34, 230.34-a, 250.50, 255.25, 255.26 [~~and~~]**,** 255.27**, 246.20 and 246.25** or article two hundred sixty-three of the penal law, or section 135.05, 135.10, 135.20 or 135.25 of such law relating to kidnapping offenses, provided the victim of such kidnapping or related offense is less than seventeen years old and the offender is not the parent of the victim, or section 230.04, where the person patronized is in fact less than seventeen years of age, 230.05, 230.06, 230.11, 230.12, 230.13, subdivision two of section 230.30, section 230.32, 230.33, or 230.34 of the penal law, or section 230.25 of the penal law where the person prostituted is in fact less than seventeen years old, or

§ 10. Severability. If any provision of this article, or any application of any provision of this article, is held to be invalid, that shall not affect the validity or effectiveness of any other provision of this

act, or of any other application of any provision of this act, which can be given effect without that provision or application; and to that end, the provisions and applications of this act are severable.

§ 11. This act shall take effect immediately; provided, however, that the amendments to subdivision 2 of section 168-a of the correction law, made by section nine of this act shall take effect on the same date and in the same manner as section 32 of chapter 23 of the laws of 2024, takes effect.