# Tracking Early State Legislative Efforts To Curb Deepfakes

By **Doug Mirell and Josh Geller** (October 28, 2019)

On Jan. 1, California will become the next state to restrict the creation and distribution of deepfake videos. Deepfakes are the result of technology that employs artificial intelligence (using deep learning) to generate doctored video content that appears realistic. The technology has been widely used to create sexually explicit depictions of celebrities, as well as altered videos of politicians and other public figures.



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The first new California law — A.B. 602 — addresses the proliferation of sexually explicit deepfakes by creating a private right of action against those who distribute them.[1] Existing California law prohibits the nonconsensual distribution of sexually explicit photographs and recordings through both civil and criminal so-called revenge porn statutes.[2]

However, these laws presume that the images in question are those of an actual person. A.B. 602 creates civil remedies against those who both create, as well as distribute, nonconsensual sexually explicit digitally created content.
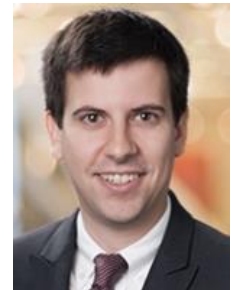


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The law does not refer to deepfakes by name, but instead addresses "altered depictions," defined as "a performance that was actually performed by the depicted individual but was subsequently altered to be in violation of this section."

A.B. 602 affords a "depicted individual" private remedies against those who create such material (if they reasonably should have known it was created without the depicted individual's consent) and against those who disclose it (if they know it was created without consent). A "depicted individual" is defined as an individual who appears, "as a result of digitization, to be giving a performance they did not actually perform to be performing in an altered depiction." These definitions address the blending of real and fake performances that constitute a typical deepfake.

A.B. 602 carefully excludes a variety of uses that might otherwise receive constitutional protection. For example, the new law carves out material that is a "matter of legitimate public concern," a work of "political or newsworthy value," or "commentary, criticism, or disclosure that is otherwise protected by the California Constitution or the United States Constitution."

This new law also makes clear that the mere inclusion of a disclaimer that the depicted material is unauthorized, is not a defense to liability. Remedies under the act include monetary damages, injunctive relief, reasonable attorney's fees and costs and the potential for punitive damages.

In lieu of actual monetary damages, a prevailing plaintiff may recover statutory damages in an amount ranging from $1,500 to $30,000, or, if the unlawful act was done with actual malice, up to $150,000. The upper limits of A.B. 602's statutory damage awards mirror the amounts currently available for ordinary and willful copyright infringement.[3]

On the same day that California Gov. Gavin Newsom signed A.B. 602 into law, he also

approved A.B. 730. That legislation focuses on the creation and distribution of deceptive photographs or audiovisual content depicting candidates for public office and other elected officials. In a statement issued following his introduction of A.B. 730, State Assembly Member Marc Berman, D-Palo Alto, who also authored A.B. 602, specifically cited an incident in which a video of U.S. House of Representatives Speaker Nancy Pelosi, D-Calif., had been widely circulated after being doctored to make it appear as though she was slurring her words.[4]

A.B. 730 prohibits the dissemination of doctored and otherwise deceptive material depicting a candidate within 60 days of an election in the absence of an affirmative disclosure that the material has been manipulated. Like A.B. 602, A.B. 730 carves out certain categories of protected speech: bona fide newscasts, websites that routinely carry "news and commentary of general interest" and satire or parody.

A candidate whose voice or likeness has been used in a "materially deceptive" manner in violation of the act may bring an action for injunctive relief and/or damages, and the prevailing party may recover their reasonable attorney's fees and costs.

In order to qualify as "materially deceptive," A.B. 730 requires that images or audio/video recordings of a candidate must have been "intentionally manipulated" in a manner that both: (1) makes it "falsely appear to a reasonable person to be authentic" and (2) causes "a reasonable person to have a fundamentally different understanding or impression of the expressive content ... than that person would have if the person were hearing or seeing the unaltered version."

In expressing support for both bills, Erwin Chemerinsky, dean and professor of law at the University of California, Berkeley, School of Law, recently wrote that, "although these two bills would regulate speech, they would not violate the First Amendment," because such nonconsensual depictions of fabricated sexual activity or false depictions of political candidates offer "nothing useful to public discourse."[5]

Dean Chemerinsky, a renowned constitutional law scholar, also recently observed:

Deep fakes undermine the very essence of freedom of speech, as well as harming those falsely depicted and those deceived by the images ... The technology of deep fakes is advancing quickly. The law must keep up and deal with this serious problem. By enacting these bills, California is providing a model for Congress and for state legislatures all over the country. I am a staunch defender of freedom of speech ... But the harms of deep fakes are so great and the benefits so small, the new laws are desirable and constitutional.[6]

While others have noted that such laws may be difficult to enforce, particularly as social media sites have consistently struggled to limit the spread of misinformation or outright fabrications on their platforms,[7] there is movement in Congress to reconsider whether the immunity bestowed, under Section 230 of the Communications Decency Act, upon platforms that merely host user-generated content should be abandoned or at least limited.[8]

These two new California laws, both of which become effective on Jan. 1, arrive amid a dramatic uptick in the dissemination of deepfake videos on the internet. One cybersecurity firm detected an 84% increase in the number of deepfake videos on the internet between December 2018 and July 2019 — from approximately 8,000 to nearly 15,000.[9] The vast majority of these videos consist of pornographic content, primarily of women in the entertainment industry. California now joins a growing trend of states attempting to combat the proliferation of such videos.

In March 2019, the Virginia General Assembly passed a bill similar to A.B. 602 which expands that state's criminal "revenge porn" legislation to specifically address deepfakes. The Virginia act (H.B. 2678) criminalizes the malicious dissemination or sale of "falsely created videographic or still image" content "with the intent to coerce, harass, or intimidate" the depicted individual.[10] Though the mens rea elements of this legislation are likely necessary because of its penal consequences, it may prove difficult for those whose likenesses are imported into deepfakes to demonstrate that its distributors acted maliciously and with the requisite degree of intentionality.

And as of Sept. 1, a law took effect in Texas that, akin to California's A.B. 730, prohibits the creation or distribution of deepfakes intended to harm candidates for public office or otherwise influence elections. Texas' S.B. 751 broadly criminalizes the creation of any video "with the intent to deceive, that appears to depict a real person performing an action that did not occur in reality."

Once such a deepfake is created, S.B. 751 separately punishes those who "cause" it "to be published or distributed within 30 days of an election." Both aspects of S.B. 751 require that the punishable conduct must occur "with intent to injure a candidate or influence the result of an election."[11] It appears likely that the "intent to deceive" element of these criminal offenses may prove difficult or could potentially be remedied by appropriate disclaimers.

On the federal side, two pieces of legislation have been introduced, though neither has yet received any committee hearings. The DEEP FAKES Accountability Act (H.R. 3230) was introduced in June 2019 by Rep. Yvette Clarke, D-N.Y. That bill would create both a private right of action and criminal liability against those who disseminate deepfakes without including a digital watermark "clearly identifying such record as containing altered audio or visual elements."

And in the U.S. Senate, the Malicious Deep Fake Prohibition Act of 2018 (S. 3805), introduced by Sen. Ben Sasse, R-Neb., would create liability for the creation or distribution of a deepfake with the intent that such distribution "would facilitate criminal or tortious conduct" under existing law.

Given the rapidly increasing ubiquity of deepfakes and the harm they have already caused to performers in the entertainment industry, not to mention the serious threat they pose to both electoral integrity and our national security, there is no doubt that many more states will join California, Virginia and Texas in exploring ways of curbing their proliferation through civil and criminal penalties. These efforts, however, are but the first steps down a long road that may well lead to deepfake regulations at the national, and ultimately international, level.

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***Disclosure: On behalf of the Screen Actors Guild – American Federation of Television and Radio Artists, Doug Mirell and Josh Geller worked on the legal analysis that helped win passage of A.B. 602 in California.***

*article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB602

[2] See California Civil Code Section 1708.85 (https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CIV§ionNum=1708.85) and California Penal Code Section 647(j)(4) (https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=647.&lawCode=PEN).

[3] 17 U.S.C. § 504(c) (https://www.law.cornell.edu/uscode/text/17/504).

[4] https://a24.asmdc.org/press-releases/20190624-berman-introduces-legislation-combat-nefarious-deepfakes-protect-election

[5] https://www.sacbee.com/opinion/california-forum/article232515577.html

[6] Erwin Chemerinsky, "California's new deep fake laws and the First Amendment," Los Angeles Daily Journal, Oct. 16, 2019.

[7] https://www.theguardian.com/us-news/2019/oct/07/california-makes-deepfake-videos-illegal-but-law-may-be-hard-to-enforce

[8] https://www.theverge.com/2019/6/13/18677847/deep-fakes-regulation-facebook-adam-schiff-congress-artificial-intelligence

[9] https://www.techtimes.com/articles/245628/20191009/number-of-deepfake-videos-online-rises-84-percent-in-less-than-a-year.htm

[10] https://lis.virginia.gov/cgi-bin/legp604.exe?191+ful+CHAP0490

[11] https://capitol.texas.gov/tlodocs/86R/billtext/html/SB00751F.htm