On the Frontier of the 2020 Election Season, California Legislates Deepfakes

Katherine Proctor   📅 *December 17, 2019*

A s next year's election cycle gets underway, two new laws will take effect in California aimed at combating "deepfakes" -- videos that use machine learning to convincingly replace a person's likeness in an image or video with someone else's.

The scope of the technology's power gained mainstream attention around April 2018, when the actor and director Jordan Peele released a public service announcement using artificial intelligence to ventriloquize a fake speech by Barack Obama. The technology showed up in the national news cycle most recently in May, when a video surfaced of House Speaker Nancy Pelosi that had been doctored to make her appear intoxicated.

Although most of the alarm has been reserved for these political deepfakes and their potential to spread disinformation during a fraught election season, a study published in July by the Amsterdam-based cybersecurity firm Deeptrace found that 96 percent of all deepfake videos online were nonconsensual deepfake pornography.

"If one were to search for 'deepfakes' and the name of any A-list actress at this point, you would probably find a deepfake that embodied their image in some porn film," said Douglas Mirell, a partner and entertainment and First Amendment litigator at Greenberg Glusker in Los Angeles.

California's pair of new laws, both introduced by Assemblymember Marc Berman (D-Palo Alto), aims to tackle both species of deepfakes. AB 602 creates a private right of action for someone depicted in a sexually explicit deepfake, and AB 730 makes it illegal to create or distribute deepfakes of political candidates within 60 days of an election in which they will appear on the ballot.

"This is really a first step in attempting to chill what has up until now been a Wild West environment," Mirell said.

Legislation creates civil remedies

Under AB 602, a "depicted individual" in a deepfake can sue a person who either 1) creates and intentionally discloses sexually explicit material, when the person knows or reasonably should have known the depicted individual didn't consent to

its creation or disclosure, or 2) intentionally discloses such material created by another person.

Mirell worked as an adviser to the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), a sponsor of the bill. The bill's impetus, he said, is that "the technology is continuing to advance at a much faster clip than is the technology that detects and presumably can help remove these deepfakes."

Meanwhile, Assemblymember Berman introduced AB 730 shortly after the altered video of Pelosi went viral. In a statement accompanying his introduction of the bill in June, Berman said that deepfakes constitute "a powerful and dangerous new technology that can be weaponized to sow misinformation and discord among an already hyper-partisan electorate."

"Deepfakes distort the truth, making it extremely challenging to distinguish real events and actions from fiction and fantasy," Berman said. "AB 730 seeks to protect voters from being tricked and influenced by manipulated videos, audio recordings, or images before an election."

The law authorizes candidates to seek both injunctive relief and damages against distributors of a deepfake in which they are depicted. It exempts news organizations from liability if they make a disclosure that the material does not accurately represent the candidate's speech or conduct.

"What the legislature is trying to do is to see if we can't at least cause people to think twice about whether this is something where they're willing to run the risk of injunctive relief as well as damages," Mirell said.

He pointed out that legal challenges may arise under section 230 of the Communications Decency Act, under which internet service providers may be immune from liability for deepfake distribution, if they "are not prepared to act in a responsible way once they get a takedown demand."

"The hope is that with laws like this on the books they will in fact be responsive to those requests," Mirell said. "In the event that they are not, there have been serious conversations taking place in Washington about the scope of the immunity granted

under section 230. The tech community is now under more of a microscope than they've been in the past."

First Amendment ramifications

Leading First Amendment advocates and experts conflict on whether California's new deepfake legislation unconstitutionally limits free speech.

After AB 730 passed the state legislature, the American Civil Liberties Union's California Center for Advocacy and Policy wrote to Gov. Gavin Newsom requesting that he veto the bill, arguing that despite the author's "good intentions," the law "will only result in voter confusion, malicious litigation, and repression of free speech."

"This measure would give politicians a new right to file a lawsuit against virtually anyone who distributes a video or audio recording or image the politician believes is deceptive, unless the distributor states that the recording is inaccurate," Kevin Baker, the Center's legislative director, wrote in the Oct. 2 letter. Such a statement, he wrote, "would have to be nearly universal in order to avoid a lawsuit given how difficult it is with current technology to determine that an image or recording has been manipulated."

The ACLU argued that the goal of guarding against candidates' reputational harm is already protected by defamation laws, while the goal of preventing voter deception "appears to be a questionable governmental purpose, if only because it is unachievable and virtually impossible to prove." It also contended that AB 730 is not narrowly tailored enough to fulfill First Amendment obligations and doesn't have a broad enough journalism exception.

Constitutional law expert and Berkeley Law School Dean Erwin Chemerinsky, on the other hand, has argued that it's deepfakes themselves -- not laws combating them -- that "undermine the very essence of freedom of speech." In an Oct. 16 article for the Daily Journal, Chemerinksy wrote that both AB 730 and AB 602 address First Amendment concerns by exempting news organizations from liability and allowing potentially deceptive audio or video if it includes a disclaimer noting that it's fake.

"The premise of the First Amendment is that rather than have the government determine what ideas can be said, it is better for all views to be capable of expression," Chemerinsky wrote. "But deep fakes add nothing to the marketplace of ideas and indeed detract from it by presenting false information in a manner that is totally believable."

Mirell said he agrees with Chemerinsky that "verifiably false speech has little if any value from a First Amendment standpoint." He added that California's new laws are necessary because the issues presented by deepfakes "don't fall neatly within those preexisting buckets" of laws against defamation and revenge porn.

"In a revenge porn statute, we're talking about individuals in their actual persona as opposed to a composite persona," Mirell said. "In the case of defamation, when these are identified as deepfakes, it becomes difficult to argue that this is portraying a statement of material fact, as opposed to being something that on its face denotes a fake. So in the interstices of those kinds of laws is where this falls."

Related

At Both the State and Local Levels, California Is Reining in Facial Recognition

🕑 Recent Posts

Additions and Amendments to Discovery Rules Provide a Gift to Trial Practitioners

Bruce A. Last December 23, 2019

While the goal of the discovery process is to shorten trial and encourage settlement by allowing parties to obtain factual information early and cost-efficiently, practitioners take the utility of discovery with a grain of salt. While the majority of practitioners utilize discovery as intended and in...

Can You Undo a "Smart Contract"?

Julie Brook   *December 20, 2019*

Smart contracts can be an excellent automation tool, particularly for payment and actions conditional on payment. But there are challenges that come along with the new opportunities they bring. Including whether the parties can undo them. In Rensel v. Centra Tech, Inc. (S.D. Fla., June 14, 2018) 2018...

When Should You Declare a Doubt?

Paul Myslin   *December 20, 2019*

"My client is just crazy!" you may exclaim in a fit of exasperation. Your client seems fixated on some irrelevant aspect of the criminal case, refuses to listen to your legal advice, and can't even communicate to you what it is he or she wants to happen. Never mind having a discussion about trial strategy...