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## AB 602 and AB 730: Curbing “deepfakes” in pornography and elections

Two new laws restricting the creation and distribution of so-called “deepfake” videos – Assembly Bills 602 and 730 – will become effective on Jan. 1, 2020.

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Two new laws restricting the creation and distribution of so-called “deepfake” videos – Assembly Bills 602 and 730 – will become effective on Jan. 1, 2020. Deepfakes are the result of technology employing “deep learning” artificial intelligence to create hyper-realistic, doctored video content without the consent of those being portrayed. These two measures arrive amid a dramatic proliferation 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. The technology has been widely used to create sexually explicit depictions of celebrities, as well as altered videos of politicians and other public figures.

AB 602 addresses the first category of deepfakes, creating a new private right of action against those who create and distribute sexually explicit deepfakes. Existing California criminal and civil laws -- Penal Code Section 647(j)(4) and Civil Code Section 1708.85 -- prohibit the nonconsensual distribution of sexually explicit photographs and recordings through so-called “revenge porn” statutes. However, these laws do not explicitly cover digitally created, but photorealistic, images and videos. AB 602 creates civil remedies against those who both create and distribute nonconsensual sexually explicit digitally created content.

The law addresses “altered depictions” of individuals, defined as “a performance that was actually performed by the depicted individual but was subsequently altered to be in violation of this section.” AB 602 creates a civil claim against those who either: (1) create and intentionally disclose sexually explicit material if the person knows or reasonably should have

known the depicted individual did not consent to its creation or disclosure; or (2) intentionally disclose sexually explicit material that the person did not create if the person knows the depicted individual did not consent to its creation. 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 or to be performing in an altered depiction.”

The law therefore targets the unique blending of real and fake performances that is enabled by deepfake technology. At the same time, AB 602 excludes a variety of uses that might otherwise receive constitutional protection, including the creation of 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.”

AB 602 strictly proscribes altered depictions in the absence of consent from the depicted individual; the inclusion of a disclaimer that the depiction is unauthorized is not a defense to liability. Remedies under the statute include monetary damages, disgorgement, injunctive relief, reasonable attorney’s fees and costs, and the potential for punitive damages. The bill also allows the recovery of statutory damages, in lieu of actual damages, in an amount ranging from \$1,500 to \$30,000, or, in the event of actual malice, up to \$150,000. The upper limits of AB 602’s statutory damage awards mirror the amounts currently available for ordinary and willful copyright infringement under 17 U.S.C. Section 504(c).

Concurrent with the passage of AB 602, California also enacted AB 730 to tackle another facet of “deepfake” technology. AB 730 addresses the creation and distribution of false or doctored depictions of candidates for

public office and other elected officials. Specifically, AB 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.

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. AB 730 defines “materially deceptive” as “an image or an audio or video recording of a candidate’s appearance, speech, or conduct that has been intentionally manipulated” in a manner such that it would both: (1) “falsely appear to a reasonable person to be authentic”; and (2) “would cause a reasonable person to have a fundamentally different understanding or impression of the expressive content” compared to the unaltered version.

AB 730 also prohibits less technologically sophisticated deceptions, including campaign material in which an image of a candidate has been “superimposed” in a manner intended to create a false impression, absent a disclaimer that the material has been doctored. In such cases, both the candidate depicted and the public at large have a private right of action against

the distributor. The law provides for injunctive relief and, as to the candidate, damages equal to the cost of producing, distributing, publishing, or broadcasting the campaign material, plus reasonable attorney’s fees. It will remain in effect until Jan. 1, 2023, unless a later-enacted statute deletes or extends that sunset date.

Like AB 602, AB 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. In expressing support for both bills, UC Berkeley School of Law Dean Erwin Chemerinsky 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.”

Taken together, these two laws represent a meaningful step toward combating the proliferation of highly deceptive materials that, thanks to increasingly sophisticated deepfake technology, are nearly indistinguishable from authentic content.

*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 AB 602 in California.*

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