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COVER STORY

Assembly pens bill aimed at face-swapping videos

By Steven Crighton
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An Assembly bill has been drafted to address growing concerns around “deepfakes,” hyper-realistic deceptive videos that can easily make it appear as though someone said or did something they didn’t say or do.

Deepfakes have become more prevalent with the widespread use of easily adapted face-swapping technology like FakeApp, including a recently viral video that swapped the face of actor Steve Buscemi onto actress Jennifer Lawrence’s body that served as an introductory course to the technology for many.

The video also highlighted how the technology could be easily abused for propaganda or extortion. AB 602, introduced by Assemblyman Marc Berman, D-Silicon Valley, appears largely aimed at tackling the latter, along with the creation of fake pornographic videos using the faces of non-consenting private and public figures.

That was intentional, according to people familiar with the bill’s creation but not authorized to comment, because the technology is already being used as a tool for sexual harassment against women.

“In a broader context, with this tech-

nology it’s hard to tell what’s real and what’s not, and it’s being used to incite violence and spread information,” the source said.

Under the bill, a person who creates a deceptive recording with the intent to distribute, and while knowing the recording is likely to deceive and subsequently defame or embarrass the recording’s subject, is punishable by up to a \$2,000 fine and a year in county jail. The bill could not be used to target recordings made for satire or parody, nor could creators be charged if it’s found no reasonable person would have believed their video was real.

Melanie J. Howard, a partner at Loeb & Loeb LLP who chairs the firm’s intellectual property protection group and has written on the issue of deepfakes, said it appears as though the bill is attempting to fill gaps in the penal code by focusing on the creation of deepfakes and whether the creator or distributor of such recordings thought it was likely to deceive.

Howard noted the bill sets different standards for culpability between creators and distributors of “deceptive recordings.” For creators, prosecutors have to show they knew the recording was likely to deceive any person who views the recording or it was likely to defame, slander, or

embarrass the subject of the recording. For a distributor to be held in violation, a prosecutor must show they knew, or reasonably should have known, the recording was a fake, a comparatively lower hurdle for a charge.

If the bill moves forward, Howard said she wouldn’t be surprised to see some of the terms used in the bill that lack clear legal analogues swapped or dropped.

“There is a clear attempt by the drafters to carve a broader scope of culpability than a First Amendment type claim,” Howard said. “But I don’t think we have a generally accepted legal standard for embarrassment.”

Notably, the bill doesn’t require commercialization or financial benefit to the creator or distributor for there to be a violation. Simply creating a deceptive recording while knowing it could potentially deceive viewers would be sufficient. That would be a welcome change, Howard said, though she said she wouldn’t be surprised if the apparent criminalization of creation prompted pushback on First Amendment grounds, notwithstanding the exception in the draft legislation for satire or parody.

Berman did not respond to a request for comment.