

PROTECTION FROM INTIMATE DEEP FAKES ACT

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<http://www.house.mi.gov/hfa>

House Bill 5569 (H-2) as reported from committee
Sponsor: Rep. Penelope Tsernoglou

Analysis available at
<http://www.legislature.mi.gov>

House Bill 5570 as reported from committee
Sponsor: Rep. Matthew Bierlein

Committee: Criminal Justice
Complete to 6-5-24

SUMMARY:

House Bill 5569 would create a new act, the Protection from Intimate Deep Fakes Act, to establish civil and criminal liability for the nonconsensual creation or *dissemination* of *deep fake* sexual images of an identifiable individual under certain circumstances.

Dissemination would mean the distribution to one or more persons, other than the individual depicted in the deep fake, or publication by any publicly available medium.

Deep fake would mean a video recording, motion picture film, sound recording, electronic image, or photograph, or a technological representation of speech or conduct substantially derivative of such a recording, film, image, or photograph, to which both of the following apply:

- It is so realistic that a reasonable person would believe it depicts speech or conduct of a *depicted individual*.
- Its production substantially depended on technical means, and not the ability of another individual to physically or verbally impersonate the depicted individual.

Depicted individual would mean an individual in a deep fake who is identifiable by virtue of their face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature, or from information displayed in connection with the digital depiction, and who appears to be engaging in speech or conduct in which they did not engage.

Civil action

The bill would allow an individual to bring a civil action against a person for the nonconsensual creation or dissemination of a deep fake if all of the following apply:

- Either of the following:
 - The person created or disseminated a deep fake with the knowledge that (or with reckless disregard for whether) the creation, distribution, reproduction, or manipulation of the deep fake will cause physical, emotional, reputational, or economic harm to an individual falsely depicted.
 - The person created or disseminated a deep fake to *harass*, extort, threaten, or cause physical, emotional, reputational, or economic harm to an individual falsely depicted.

- The deep fake realistically depicts any of the following:
 - The intimate parts (genitals, pubic area, partially or fully exposed nipple, or anus) of another individual presented as the intimate parts of the depicted individual.
 - Artificially generated intimate parts presented as the intimate parts of the depicted individual.
 - The depicted individual engaging in *sexual contact* or *sexual penetration*.
- The depicted individual is identifiable in either of the following ways:
 - From the deep fake itself, by the depicted individual or by another individual.
 - From the *personal information* displayed in connection with the deep fake.

Harass would mean an act that would cause a substantial adverse effect on the safety, security, or privacy of a reasonable person.

Sexual contact would mean the intentional touching of intimate parts or intentional touching with seminal fluid onto another individual's body.

Sexual penetration would mean any of the following acts:

- Sexual intercourse, cunnilingus, fellatio, or anal intercourse.
- An intrusion, however slight, into the genital or anal openings of an individual by another's body part or an object used by another for this purpose.

Personal information would mean any identifier that enables communication or in-person contact with an individual, including at least all of the following:

- The individual's first and last name, first initial and last name, first name and last initial, or nickname.
- The individual's home, school, or work address.
- The individual's phone number, email address, or *social media* account information.
- The individual's geolocation data.

Social media would mean any electronic medium, including an interactive computer service, telephone network, or data network, that allows users to create, share, and view user-generated content.

A cause of action described above would accrue at the time the depicted individual discovers that the deep fake has been created or disseminated. It could be filed in the county where the defendant resides, the county where the plaintiff resides, or the county where the deep fake was produced, reproduced, or stored.

The court would have to allow confidential filings to protect the privacy of the plaintiff in such an action, and it could grant injunctive relief to maintain the confidentiality of the plaintiff using a pseudonym.

Defenses

That the depicted individual consented to the creation or possession of the deep fake or to the voluntary private or public transmission of the deep fake would *not* be a defense to an action described above *unless* both of the following apply to that consent:

- It is contained in an agreement written in plain language that is signed knowingly and voluntarily by the depicted individual.
- It includes a general description of the intimate digital depiction and, if applicable, the audiovisual work into which it will be incorporated.

It *would be* a defense to an action described above that one or more of the following apply:

- The creation or dissemination was made for the purpose of a criminal investigation or prosecution that is otherwise lawful.
- The creation or dissemination was for the purpose of, or in connection with, the reporting of unlawful conduct.
- The creation or dissemination was made in the course of seeking or receiving medical or mental health treatment and the image is protected from further dissemination.
- The creation or dissemination was made for legal proceedings and was consistent with common practice in civil proceedings necessary for the proper functioning of the criminal justice system, or protected by court order that prohibited any further dissemination.
- All of the following:
 - The deep fake related to a matter of public interest.
 - Its creation or dissemination served a lawful public purpose.
 - The person creating or disseminating the deep fake as a matter of public interest clearly identified that the video recording, motion picture film, sound recording, electronic image, photograph, or other item was a deep fake.
 - The person acted in good faith to prevent further dissemination of the deep fake.

Damages and injunctive relief

In an action described above, the court could award all of the following damages to a prevailing plaintiff from a person found liable:

- Economic and noneconomic damages, including financial losses because of the creation or dissemination of the deep fake and damages for mental anguish, embarrassment, and humiliation.
- An amount equal to any profit made from the creation or dissemination of the deep fake by the person found liable.
- A civil fine, to be awarded to the plaintiff, of up to \$100,000.
- Actual court costs and fees and reasonable attorney fees.

In an action described above, the court could enter a temporary restraining order or a permanent injunction to prevent further harm to the plaintiff. The court could award the plaintiff a civil fine of up to \$1,000 per day for the violation of such an order.

Liability under the above provisions would not affect any other remedy available under law.

Criminal prohibition and penalties

The bill also would prohibit an individual from intentionally creating or disseminating a deep fake if all of the following apply:

- The individual knows that (or has reckless disregard for whether) the creation, distribution, dissemination, reproduction, or manipulation of the deep fake will cause physical, emotional, reputational, or economic harm to an individual falsely depicted.
- The deep fake realistically depicts any of the following:
 - The intimate parts of another individual presented as the intimate parts of the depicted individual.
 - Artificially generated intimate parts presented as the intimate parts of the depicted individual.
 - The depicted individual engaging in a sexual act.
- The depicted individual is identifiable in either of the following ways:
 - From the deep fake itself, by the depicted individual or by another individual.
 - From the personal information displayed in connection with the deep fake.

An individual who violates the above would be guilty of a misdemeanor punishable by imprisonment for up to one year, a fine of up to \$3,000, or both.

However, if one or more of the following apply, an individual who violates the above prohibition would be guilty of a felony punishable by imprisonment for up to three years, a fine of up to \$5,000, or both:

- The depicted individual suffers financial loss because of the creation or dissemination of the deep fake.
- The individual maintains an internet website, online service, online application, or mobile application for the purpose of creating or disseminating the deep fake.
- The individual posts the deep fake on a website.
- The individual creates or disseminates the deep fake with intent to profit from the dissemination.
- The individual creates or disseminates the deep fake with intent to harass, extort, threaten, or cause physical, emotional, reputational, or economic harm to the depicted individual.
- The individual has been previously convicted of violating the above prohibition.

Defenses and exceptions

That the depicted individual consented to the creation or possession of the deep fake or to the voluntary private or public transmission of the deep fake would *not* be a defense to a prosecution *unless* both of the following apply to that consent:

- It is contained in an agreement written in plain language that is signed knowingly and voluntarily by the depicted individual.
- It includes a general description of the intimate digital depiction and, if applicable, the audiovisual work into which it will be incorporated.

The above provisions concerning the criminal prohibition of, and penalties for, dissemination of a deep fake would not apply if any of the following apply:

- The creation or dissemination is made for the purpose of a criminal investigation or prosecution that is otherwise lawful.

- The creation or dissemination is for the purpose of, or in connection with, the reporting of unlawful conduct.
- The creation or dissemination is made in the course of seeking or receiving medical or mental health treatment and the image is protected from further dissemination.
- The creation or dissemination is made for legal proceedings and is consistent with common practice in civil proceedings necessary for the proper functioning of the criminal justice system, or protected by court order that prohibits any further dissemination.
- The deep fake relates to a matter of public interest and creation or dissemination serves a lawful public purpose.

Other provisions

The bill provides that the new act could not be construed to impose civil or criminal liability on the following entities solely as a result of content or information provided by another person:

- An interactive computer service as defined in federal law.¹
- A provider of public mobile services or private radio services.
- A telecommunications network or broadband provider.

The bill states that the new act would not affect the ability to bring a civil action, or limit the ability to prosecute a person, under any other law.

The bill also states that the new act is severable, even though all Michigan laws are always already severable under section 5 of Chapter 1 of the Revised Statutes of 1846.²

The bill would take effect January 1, 2025, and would apply to the creation or dissemination of a deep fake on and after that date.

House Bill 5570 would amend the Code of Criminal Procedure to make complementary changes to the sentencing guidelines. Dissemination of a deep fake with aggravating factors would be added as a Class F crime against a person with a statutory maximum term of imprisonment of three years.

MCL 777.17b

Neither bill would take effect unless both were enacted.

FISCAL IMPACT:

House Bill 5569 would have an indeterminate fiscal impact on the state and on local units of government. The number of convictions that would result under provisions of the bill is not known. Violations could be either misdemeanors or felonies, depending on the circumstances. New misdemeanor convictions would increase costs related to county jails and/or local misdemeanor probation supervision. Costs of local incarceration in county jails and local misdemeanor probation supervision, and how those costs are financed, vary by jurisdiction.

¹ <https://www.law.cornell.edu/uscode/text/47/230#f>

² This means that, under Michigan law, if any portion of an act is declared invalid or unenforceable, the remaining provisions of the act still have effect. <https://www.legislature.mi.gov/Laws/MCL?objectName=MCL-8-5>

New felony convictions would result in increased costs related to state prisons and state probation supervision. In fiscal year 2023, the average cost of prison incarceration in a state facility was roughly \$48,700 per prisoner, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision averaged about \$5,400 per supervised offender in the same year. Those costs are financed with state general fund/general purpose revenue. Under the bill, revenue from civil fines collected would be awarded to plaintiffs. The fiscal impact on local court systems would depend on how provisions of the bill affect court caseloads, including civil actions filed under the bill, and related administrative costs. Any increase in penal fine revenue would increase funding for public and county law libraries, which are the constitutionally designated recipients of those revenues.

House Bill 5570 is a companion bill to House Bill 5569 and would amend the sentencing guidelines chapter of the Code of Criminal Procedure to include the proposed new felony of dissemination of intimate deep fake with aggravating factors, as a Class F felony punishable by a statutory maximum of three years. The bill would not have a direct fiscal impact on the state or on local units of government.

POSITIONS:

A representative of Public Citizen testified in support of the bills. (5-14-24)

The following entities indicated support for the bills:

- Department of Attorney General (5-14-24)
- American Association of University Women of Michigan (5-14-24)
- Michigan Coalition to End Domestic and Sexual Violence (5-14-24)
- Michigan Sheriffs' Association (5-21-24)

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.