

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 972 (Berman)

Version: February 18, 2021

Hearing Date: June 21, 2022

Fiscal: No

Urgency: No

TSG

SUBJECT

Elections: deceptive audio or visual media

DIGEST

This bill extends the sunset date – from January 1, 2023 to January 1, 2027 – for the law prohibiting a person, committee, or other entity from distributing materially deceptive audio or visual deepfakes of a candidate for election with actual malice and the intent to injure the candidate’s reputation or to deceive a voter into voting for or against the candidate within 60 days of an election at which a candidate for elective office will appear on the ballot, as specified, and unless certain conditions are met.

EXECUTIVE SUMMARY

Certain forms of media – audio recordings, video recordings, and still images – can be powerful evidence of what truly took place. While such media have always been susceptible to some degree of manipulation, until recently, fakes were relatively easy to detect. Advancing technology is making it cheaper and easier to produce so-called “deepfakes”: audio, images, and video recordings that do not depict what actually happened, but that are so realistic that they are virtually impossible to distinguish from a genuine recording. In the context of election campaigns, such deepfakes can be weaponized to deceive voters into thinking that a candidate said or did something which the candidate did not. In an attempt to prevent deepfakes from altering the outcome of an election in this way, California enacted laws in 2019 that restrict the use of deepfakes within 60 days of an election and that provide impacted candidates with a legal mechanism for trying to prevent deepfakes from circulating during that time period. Those laws are currently set to expire on January 1, 2024. This bill extends the sunset date for these laws out to January 1, 2027.

The bill is author-sponsored. Support comes from a local community foundation which believes the bill is important to prevent deepfakes from undermining democracy. There is no known opposition. The bill passed out of the Senate Elections and Constitutional Amendments Committee by a vote of 3-1. If the bill passes out of this Committee, it will next be heard on the Senate Floor.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides that “Congress shall make no law... abridging the freedom of speech...” (U.S. Const., amend. 1.)
- 2) Applies the First Amendment to the states through operation of the Fourteenth Amendment. (*Gitlow v. New York* (1925) 268 U.S. 652; *NAACP v. Alabama* (1925) 357 U.S. 449.)
- 3) Provides that no provider or user of an interactive computer service shall be treated for liability purposes as the publisher or speaker of any information provided by another information content provider. (47 U.S.C. § 230.)
- 4) Defines “materially deceptive audio or visual media” 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 both of the following conditions are met:
 - a) the image or audio or video recording would falsely appear to a reasonable person to be authentic; and
 - b) the image or audio or video recording would cause a reasonable person to have a fundamentally different understanding or impression of the expressive content of the image or audio or video recording than that person would have if the person were hearing or seeing the unaltered, original version of the image or audio or video recording. (Elec. Code § 20010(e).)
- 5) Prohibits a person, committee, or other entity from distributing with actual malice materially deceptive audio or visual media of a candidate with the intent to injure the candidate’s reputation or to deceive a voter into voting for or against the candidate within 60 days of an election at which a candidate for elective office will appear on the ballot, as specified and unless specified conditions are met. (Elec. Code § 20010(a).)
- 6) Exempts audio or visual media that includes a disclosure stating: “This _____ has been manipulated.” Requires the blank in the disclosure to be filled with a term that most accurately describes the media, as specified. Requires the following disclosures for visual and audio-only media:
 - a) for visual media, the text of the disclosure shall appear in a size that is easily readable by the average viewer and no smaller than the largest font size of other text appearing in the visual media. If the visual media does not include any other text, then the disclosure shall appear in a size that is easily readable by the average viewer. Requires, for visual media that is video, the disclosure to be displayed throughout the duration of the video;

- b) for audio-only media, the disclosure shall be read in the clearly spoken manner and in a pitch that can be easily heard by the average listener, at the beginning of the audio, at the end of the audio, and, if the audio is greater than two minutes in length, interspersed within the audio at intervals of not greater than two minutes each. (Elec. Code § 20010(b).)
- 7) Permits a candidate for elective office whose voice or likeness appears in a materially deceptive audio or visual media distributed in violation of the provisions of (4), above, to seek injunctive or other equitable relief prohibiting the distribution of audio or visual media in violation of the provisions of this bill. (Elec. Code § 20010(c)(1).)
- 8) Directs the courts to give precedence to an action under (7), above. (Code Civ. Proc. § 35; Elec. Code § 21101(c)(1).)
- 9) Permits a candidate for elective office whose voice or likeness appears in materially deceptive audio or visual media distributed in violation of the provisions of this bill to bring an action for general or special damages against the person, committee, or other entity that distributed the materially deceptive audio or visual media, as specified. Requires the plaintiff to bear the burden of establishing the violation through clear and convincing evidence in any civil action alleging a violation of the provisions of this bill, as specified. (Elec. Code § 21101(c)(2).)
- 10) Provides that (4) through (9), above, do not apply to a radio or television broadcasting station, including a cable or satellite television operator, programmer, or producer, that broadcasts materially deceptive audio or visual media prohibited by this bill as part of a bona fide newscast, news interview, news documentary, or on-the-spot coverage of bona fide news events, if the broadcast clearly acknowledges through content or a disclosure, in a manner that can be easily heard or read by the average listener or viewer, that there are questions about the authenticity of the materially deceptive audio or visual media. (Elec. Code § 20010(d)(2).)
- 11) Provides that the provisions of this bill do not apply to a radio or television broadcasting station, including a cable or satellite television operator, programmer, or producer, when it is paid to broadcast materially deceptive audio or visual media. (Elec. Code § 20010(d)(3).)
- 12) Exempts an Internet Web site, or a regularly published newspaper, magazine, or other periodical of general circulation, including an internet or electronic publication, that routinely carries news and commentary of general interest, and that publishes materially deceptive audio or visual media prohibited by the provisions of this bill if the broadcast or publication clearly states that the

materially deceptive audio or visual media does not accurately represent the speech or conduct of the candidate. (Elec. Code § 20010(d)(4).)

- 13) Provides that the provisions of this bill shall not be construed to alter or negate any rights, obligations, or immunities of an interactive service provider under the federal Communications Decency Act. (Elec. Code § 20010(d)(1).)
- 14) Provides that the provisions of this bill do not apply to materially deceptive audio or visual media that constitutes satire or parody. (Elec. Code § 20010(d)(5).)
- 15) Provides that (4) through (14) above are repealed as of January 1, 2024.

This bill:

- 1) Extends the applicability of (4) through (14) of the existing law set forth above through December 31, 2026.

COMMENTS

1. Brief background on “deepfakes”

Deepfake technology refers to software capable of producing a realistic-looking video of someone saying or doing something that they did not, in fact, say or do. This technology has advanced rapidly in recent years thanks to the use of artificial intelligence to help train the software. Software applications that enable a user to make deepfake videos are now available for easy download. Among the more common apps are FaceSwap, DeepNude, and FakeApp.

This bill does not apply exclusively to deepfakes. It applies to any intentional manipulation of audio or visual images that results in a version that a reasonable observer would believe to be authentic. Nonetheless, it is the ready availability and advancing quality of deepfake technology that provides the ongoing impetus for this bill.

2. Examples of the problem the bill is intended to address

This bill extends the operative duration of a 2019 law designed to prevent the use of deepfakes to alter the outcome of an election. (AB 730, Berman, Ch. 493, Stats. 2019.) When that law was under consideration, the author pointed to the following incidents as evidence of the need for legal standards in this area:

- In late May of 2019, a video of U.S. House of Representatives Speaker Nancy Pelosi, sounding and appearing drunk while giving a speech, began circulating on the Internet. Users of Twitter, Facebook and YouTube among other online platforms shared the video widely. One site recorded that over two million of its

users had watched the video. Subsequent investigation revealed that the video had been slowed down to create the appearance that Pelosi was intoxicated at the time. Shown at full speed, the video left no such impression.¹

- In 2018, suspicions that a video of Gabon's president was a deepfake led members of that nation's military to stage a coup attempt. Before the video came out, Gabonese President Ali Bongo had not been seen in public for months. He was rumored to be in poor health or perhaps already dead.²
- In early 2018, the Flemish Socialist Party in Belgium commissioned production of a deepfake video of U.S. President Donald Trump urging Belgians to withdraw their country from international climate change accords. The video was distributed online. Although, towards its end, the deepfake video shows Trump saying “[w]e all know climate change is fake, just like this video,” that element of the video was not included in the Flemish subtitles.³

3. The legislative solution enacted to prevent deepfakes from impacting elections

In the summer of 2019, the nation was about to commence with the nationwide political campaigns that would culminate in the 2020 presidential elections. In anticipation of the possibility that deepfakes might be used to try to influence the outcome of that election, California enacted AB 730 (Berman, Ch. 493, Stats. 2019). AB 730 prohibited the use of deepfakes depicting a candidate for office within 60 days of the election unless the deepfake is accompanied by a prominent notice that the content of the audio, video, or image has been manipulated. (Elec. Code § 20010(a),(b).) Additionally, AB 730 authorized a candidate who was falsely depicted in a deepfake to seek rapid injunction relief against further publication and distribution of the deepfake. (Code Civ. Proc. §35(a); Elec. Code § 20010(c).)

Free expression and civil liberties advocates raised some concerns about AB 730 during legislative deliberation on the bill. (*See* Sen. Com. on Judiciary, Analysis of Assem. Bill No. 730 (2019-2020 Reg. Sess.) as amended Jun. 25, 2019, at pp. 6-12.) Ultimately, the author took amendments clarifying that people could only incur liability for publishing or distributing deepfakes of political candidates in the run up to an election if the publication or distribution was done with actual malice, meaning that the person

¹ Harwell, *Faked Pelosi Videos, Slowed to Make Her Appear Drunk, Spread Across Social Media* (May 24, 2019) The Washington Post https://www.washingtonpost.com/technology/2019/05/23/faked-pelosi-videos-slowed-make-her-appear-drunk-spread-across-social-media/?noredirect=on&utm_term=.f6bc368f1590 (as of Jun. 5, 2022).

² Harwell, *Top AI Researchers Race to Detect ‘Deepfake’ Videos: ‘We are Outgunned’* (Jun. 12, 2019) The Washington Post https://www.washingtonpost.com/technology/2019/06/12/top-ai-researchers-race-detect-deepfake-videos-we-are-outgunned/?utm_term=.aeb7558380a9 (as of Jun. 5, 2022).

³ Von der Berchard, *Belgian Socialist Party Circulates ‘Deep Fake’ Donald Trump Video* (May 21, 2018) Politico <https://www.politico.eu/article/spa-donald-trump-belgium-paris-climate-agreement-belgian-socialist-party-circulates-deep-fake-trump-video/> (as of Jun. 5, 2022).

publishing or distributing the audio, video, or image knew it was false or demonstrated reckless disregard for the truth. (Elec. Code § 20010(a).) Amendments also made it clear that liability or an injunction would be available only where the manipulation in the deepfake was sufficiently material that a reasonable person would be left with a fundamentally different impression of what took place than if they had seen or heard the unaltered version of the footage or recording. (Elec. Code § 20010(e).) Finally, amendments to AB 730 ensured that the bill did not prohibit people from engaging in satire or parody of a candidate. (Elec. Code § 20010(d)(5).)

4. Impact of AB 730?

Several election cycles have now passed since AB 730 was enacted. To date, there are no recorded judicial rulings invoking Elections Code 20010, the primary statute that AB 730 enacted into law. Committee staff is not aware of any cases brought under AB 730 or of any lawsuits challenging the law. The bill does seem to have had some influence on at least one application used for the creation of deepfakes. According to online media reports, the deepfake production application Impressions removed Donald Trump from among its celebrity deepfake roster in September 2020, citing concerns about AB 730, among other things.⁴ Apart from that instance, however, there seems to be scant evidence from which to determine whether AB 730 has effectively deterred deepfakes from influencing elections, as its proponents hoped, or whether it has chilled legitimate political discourse, as AB 730's opponents feared. It may be fair to conclude from this absence of dramatic reports about the bill's impact one way or another that extending the law's duration for another four years is unlikely to result in major harm.

5. Arguments in support of the bill

According to the author:

Deepfakes—fabricated photos and recordings of someone appearing to say or do something they did not—are a powerful and dangerous technology with the potential to sow misinformation and discord among an already hyper-partisan electorate. Deepfakes distort the truth, making it difficult to distinguish between legitimate and fake media and more likely that people will accept content that aligns with their views. By blurring truth and fiction, deepfakes also make it easier to pass off fake events as real as well as dismiss real events as fake. [...] AB 972 would [...] ensur[e] that California law continues to dissuade the creation and distribution of nefarious election-related deepfakes and other manipulated content.

⁴ Thalen, *Deepfake App Takes Trump Videos Offline Until After the Election* (Sep. 2, 2020) Daily Dot <https://www.dailydot.com/debug/deepfake-app-trump-2020-election> (as of Jun, 5, 2022).

In support, the Silicon Valley Community Foundation (SCVF) writes:

[W]e support this necessary extension. SVCF believes that a healthy democracy is dependent upon all community members being able to participate in the public policy process without being deceived or influenced by manipulated audio, video, or images prior to an election. We support policies to build a fair democratic system that improves public engagement on local issues. SVCF respectfully requests your support of AB 972.

SUPPORT

Silicon Valley Community Foundation

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: SB 1216 (Gonzalez, 2022) requires the Secretary of the Government Operations Agency to establish the Deepfake Working Group to evaluate the impacts and risks associated with digital content forgery. SB 1216 is currently pending consideration before the Assembly Privacy and Consumer Protection Agency.

Prior Legislation:

AB 730 (Berman, Ch. 493, Stats. 2019) was identical to this bill except that its sunset provision repeals the statute it enacted effective January 1, 2023.

AB 1104 (Chau, Ch. 715, Stats. 2017) expanded the California Political Cyberfraud Abatement Act to prohibit the use of deceptive websites for political candidates.

AB 1233 (Leach, Ch. 718, Stats. 1998) enacted the Truth in Political Advertising Act, which this bill would repeal and replace. The bill prohibited, except as specified, a person, firm, association, corporation, campaign committee, or organization from, with actual malice, producing, distributing, publishing, or broadcasting campaign material that contains (1) a picture or photograph of a person or persons into which the image of a candidate for public office is superimposed or (2) a picture or photograph of a candidate for public office into which the image of another person or persons is superimposed. The bill permitted campaign material to be produced, distributed, published, or broadcast if each picture or photograph in the campaign material includes a specified disclaimer, as specified.

PRIOR VOTES:

Senate Elections and Constitutional Amendments (Ayes 3, Noes 1)

Assembly Floor (Ayes 54, Noes 3)

Assembly Elections Committee (Ayes 6, Noes 0)
