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HOUSE OF REPRESENTATIVES
152nd GENERAL ASSEMBLY

HOUSE BILL NO. 353

AN ACT TO AMEND TITLES 10 AND 11 OF THE DELAWARE CODE RELATING TO DEEP FAKES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Two-thirds of all members elected to each house thereof concurring therein):

Section 1. Amend Chapter 78, Title 10 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows and redesignating accordingly:

Chapter 78. Delaware Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act

§ 7802. Definitions.

For purposes of this chapter:

(1) “Consent” means affirmative, conscious, and voluntary authorization by an individual with legal capacity to give authorization.

(2) “Deep fake” means synthetic media where one or both of the following applies:

a. The synthetic media appears to a reasonable person to depict a real individual saying or doing something that did not actually occur.

b. The synthetic media provides a reasonable person a fundamentally different understanding or impression of the appearance, action, or speech than a reasonable person would have from an unaltered, original version of the image, audio recording, or video recording.

~~(2)~~ (3) “Depicted individual” means an individual whose body is shown in whole or in part in an intimate image.

~~(3)~~ (4) “Disclosure” means transfer, publication, or distribution to another person. “Disclose” has a corresponding meaning.

~~(4)~~ (5) “Identifiable” means recognizable by a person other than the depicted individual from any of the following:

a. An intimate image itself.

b. An intimate image and identifying characteristic displayed in connection with the intimate image.

(5) (6) "Identifying characteristic" means information that may be used to identify a depicted individual.

(6) (7) "Individual" means a human being.

(7)-(8) "Intimate image" means a photograph, film, video recording, or other similar medium that shows 1 or more of the following:

a. The uncovered genitals, pubic area, anus, or female post-pubescent nipple of a depicted individual.

b. A depicted individual engaging in or being subjected to sexual conduct.

(8) (9) "Person" means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(9) (10) "Sexual conduct" includes any of the following:

a. Masturbation.

b. Genital, anal, or oral sex.

c. Sexual penetration of, or with, an object.

d. Bestiality.

e. The transfer of semen onto a depicted individual.

(11) "Synthetic media" means an intimate image that has been created or intentionally manipulated with the use of generative adversarial network techniques or other digital technology in a manner to create a realistic but false image, audio, or video.

§ 7803. Civil action.

(a) In this section:

(1) "Harm" includes physical harm, economic harm, and emotional distress whether or not accompanied by physical or economic harm.

(2) "Private" means 1 or more of the following:

a. Created or obtained under circumstances in which a depicted individual had a reasonable expectation of privacy.

b. Made accessible through theft, bribery, extortion, fraud, false pretenses, sexual exploitation of a minor, violation of privacy, or computer-related offenses.

(b) Except as otherwise provided under § 7804 of this title, a depicted individual who is identifiable and who suffers harm from a person's intentional disclosure or threatened disclosure of an intimate image that was private without the depicted individual's consent has a cause of action against the person if the person knew or acted with reckless disregard for all of the following:

(1) The depicted individual did not consent to the disclosure.

(2) The intimate image was private.

(3) The depicted individual was identifiable.

(c) Except as otherwise provided under § 7804 of this title, a depicted individual who is identifiable and who suffers harm from a person's intentional disclosure or threatened disclosure of a deep fake without the depicted individual's consent has a cause of action against the person if the person knew or acted with reckless disregard for all of the following:

(1) The depicted individual did not consent to the disclosure.

(2) The depicted individual was identifiable.

~~(e)~~ (d) The following conduct by a depicted individual does not establish by itself that the individual consented to the disclosure of the intimate image or deep fake which is the subject of an action under this chapter or that the individual lacked a reasonable expectation of privacy:

(1) Consent to creation of the image.

(2) Previous consensual disclosure of the image.

~~(d)~~ (e) A depicted individual who does not consent to the sexual conduct or uncovering of the part of the body depicted in an intimate image of the individual retains a reasonable expectation of privacy even if the image was created when the individual was in a public place.

§ 7804. Exceptions to liability.

(a) In this section:

(1) "Child" means an unemancipated individual who is less than 18 years of age.

(2) "Parent" means an individual recognized as a parent under law of this State other than this chapter.

(b) A person is not liable under this chapter if the person proves that disclosure of, or a threat to disclose, an intimate image or deep fake meets any of the following:

(1) Made in good faith in any of the following:

a. Law enforcement.

b. A legal proceeding.

c. Medical education or treatment.

(2) Made in good faith in the reporting or investigation of 1 or more of the following:

a. Unlawful conduct.

b. Unsolicited and unwelcome conduct.

(3) Related to a matter of public concern or public interest.

(4) Reasonably intended to assist the depicted individual.

(c) Subject to subsection (d) of this section, a defendant who is a parent or guardian of a child is not liable under this chapter for a disclosure or threatened disclosure of an intimate image, as defined under ~~§ 7802(7)a.~~ § 7802(8)a. of this title, of the child.

(d) If a defendant asserts an exception to liability under subsection (c) of this section, the exception does not apply if the plaintiff proves the disclosure was any of the following:

(1) Prohibited by law other than this chapter.

(2) Made for the purpose of sexual arousal, sexual gratification, humiliation, degradation, or monetary or commercial gain.

(e) Disclosure of, or a threat to disclose, an intimate image or deep fake is not a matter of public concern or public interest solely because the depicted individual is a public figure.

§ 7806. Remedies.

(a) In an action under this chapter, a prevailing plaintiff may recover all of the following:

(1) The greater of either of the following:

a. Economic and noneconomic damages proximately caused by the defendant's disclosure or threatened disclosure, including damages for emotional distress whether or not accompanied by other damages.

b. Statutory damages not to exceed \$10,000 against each defendant found liable under this chapter for all disclosures and threatened disclosures by the defendant of which the plaintiff knew or reasonably should have known when filing the action or which became known during the pendency of the action. In determining the amount of statutory damages under this paragraph (a)(1)b., consideration must be given to the age of the parties at the time of the disclosure or threatened disclosure, the number of disclosures or threatened disclosures made by the defendant, the breadth of distribution of the image by the defendant, and other exacerbating or mitigating factors.

(2) An amount equal to any monetary gain made by the defendant from disclosure of the intimate ~~image.~~ image or deep fake.

(3) Punitive damages.

(b) In an action under this chapter, the court may award a prevailing plaintiff any of the following:

(1) Reasonable attorneys' fees and costs.

(2) Additional relief, including injunctive relief.

(c) This chapter does not affect a right or remedy available under law of this State other than this chapter.

Section 2. Amend § 1335, Title 11 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 1335. Violation of privacy; class A misdemeanor; class G felony.

(a) A person is guilty of violation of privacy when, except as authorized by law, the person:

(9) Knowingly reproduces, distributes, exhibits, publishes, transmits, or otherwise disseminates a visual depiction of a person who is nude, or who is engaging in sexual conduct, when the person knows or should have known that the reproduction, distribution, exhibition, publication, transmission, or other dissemination was without the consent of the person depicted and that the visual depiction was created or provided to the person under circumstances in which the person depicted has a reasonable expectation of privacy.

a. For the purposes of the introductory paragraph of this paragraph (a)(9), paragraphs (a)(9)b., and (a)(9)d. of this section:

1. “Deep fake” means synthetic media where one or both of the following applies:

A. The synthetic media appears to a reasonable person to depict a real individual saying or doing something that did not actually occur.

B. The synthetic media provides a reasonable person a fundamentally different understanding or impression of the appearance, action, or speech than a reasonable person would have from an unaltered, original version of the image, audio recording, or video recording.

~~1.~~ 2. “Nude” means any 1 or more of the following uncovered parts of the human body, or parts of the human body visible through less than opaque clothing:

A. The genitals;

B. The pubic area;

C. The buttocks;

D. Any portion of the female breast below the top of the areola.

~~2.~~ 3. “Personally identifiable information” means any information about a person that permits the physical or online identifying or contacting of a person. The term includes either a person’s face or a person’s first and last name or first initial and last name in combination with any 1 or more of the following:

A. A home or other physical address, including street name and name of a city or town;

B. An e-mail address;

C. A telephone number;

D. Geolocation data;

E. Any other identifier that permits the physical or online identifying or contacting of a person.

~~3.~~ 4. “Sexual conduct” means actual or simulated:

A. Sexual contact;

B. Sexual intercourse;

C. Sexual penetration;

D. Masturbation;

E. Bestiality;

F. Sadism;

G. Masochism; or

H. Explicit representations of the defecation or urination functions.

~~4.~~ 5. “Sexual contact” means any touching by 1 person of the uncovered anus, breast, buttocks, or genitalia of another person or any touching of a person with the uncovered anus, breasts, buttocks or genitalia of another person.

~~5.~~ 6. “Sexual intercourse” means any act of physical union of the genitalia or anus of a person with the mouth, anus, or genitalia of another person.

~~6.~~ 7. “Sexual penetration” means the placement of an object inside the anus or vagina of a person or the placement of a sexual device inside the mouth of a person.

8. “Synthetic media” means an image that has been created or intentionally manipulated with the use of generative adversarial network techniques or other digital technology in a manner to create a realistic but false image, audio, or video.

~~7.~~ 9. “Visual depiction” shall have the meaning as used in § 1100 of this ~~title.~~ title and includes a deep fake.

b. A person who has, within the context of a private or confidential relationship, consented to the capture or possession of a visual depiction of the person when nude or when engaging in sexual conduct retains a reasonable expectation of privacy with regard to the reproduction, distribution, exhibition, publication, transmission, or other dissemination of the visual depiction beyond that relationship.

c. For the purposes of this paragraph (a)(9), each of the following shall be an aggravating factor and shall be alleged in the charging information or indictment and constitute an element of the offense:

1. The actor knowingly obtains such visual depictions without the consent of the person depicted.

170 A. A violation of this paragraph (a)(9)c.1. occurs when a person commits a theft as provided for
171 in § 841, § 842, § 843, or § 844 of this title or obtains such visual depictions by committing
172 unauthorized access to a computer system as provided for in § 932 of this title or by unauthorized access
173 to electronic mail or an electronic mail service provider as defined in § 931 of this title.

174 B. A violation of this paragraph (a)(9)c.1. consistent with § 932 of this title is subject to the
175 venue provision in § 940 of this title.

176 2. The actor knowingly reproduces, distributes, exhibits, publishes, transmits, or otherwise
177 disseminates such visual depictions for profit.

178 3. The actor knowingly maintains an Internet website, online service, online application, or mobile
179 application for the purpose of reproducing, distributing, exhibiting, publishing, transmitting, or otherwise
180 disseminating such visual depictions.

181 4. The actor knowingly reproduces, distributes, exhibits, publishes, transmits, or otherwise
182 disseminates such visual depictions with the intent to harass, annoy, or alarm the person depicted and such
183 conduct would cause a reasonable person to suffer significant mental anguish or distress.

184 5. The actor pairs such visual depiction with personally identifiable information of the person
185 depicted.

186 6. At the time of the creation of the visual depiction, the actor was over the age of 18 and the person
187 depicted was under the age of 18.

188 d. For purposes of this paragraph (a)(9), the fact the actor committed this offense within 5 years of a prior
189 conviction for a violation of this paragraph (a)(9) shall be an aggravating factor for sentencing purposes only and,
190 therefore, this fact is not to be alleged in the charging information or indictment and does not constitute an element
191 of the offense.

192 e. In addition to when the consent of the person depicted is given, the introductory paragraph of this
193 paragraph (a)(9) and paragraph (a)(9)b. of this section do not apply to any of the following:

194 1. When the visual depiction is of an individual less than 18 years of age and does not violate §
195 1108, § 1109, or § 1111 of this title, or any similar provision of this title, and the reproduction, distribution,
196 exhibition, publication, transmission, or other dissemination is not for commercial purposes.

197 2. When the visual depiction is reproduced, distributed, exhibited, published, transmitted, or
198 otherwise disseminated in the course of lawful and common practices of a law-enforcement officer, the
199 reporting of unlawful conduct, legal proceedings, or medical treatment procedures.

200 3. When the person depicted has consented to the reproduction, distribution, exhibition, transmission,
201 or other dissemination of the visual depiction for commercial purposes.

202 4. When the person depicted has voluntarily appeared nude in public or voluntarily engages in sexual
203 conduct in public.

204 5. When the reproduction, distribution, exhibition, publication, transmission, or other dissemination
205 serves a legitimate public purpose.

206 f. Nothing within this paragraph (a)(9) shall be construed to impose liability on an interactive computer
207 service, as defined in 47 U.S.C. § 230(f)(2), or an information service or telecommunications service, as defined in
208 47 U.S.C. § 153, for content provided by the actor or another person.

209 g. When the visual depiction is a deep fake, it is not necessary to prove that the visual depiction was
210 created or provided to the person under circumstances in which the person depicted has a reasonable expectation
211 of privacy.

SYNOPSIS

This Act provides civil and criminal remedies for the wrongful disclosure of deep fakes that depict individuals in the nude or engaging in sexual conduct. It provides the same remedies as those available under: (1) the Delaware Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act, Chapter 78 of Title 10; and (2) a Violation of Privacy offense under §1335 of Title 11. It further provides that when an adult creates a visual depiction of a minor that is nude or engaging in sexual conduct, the adult would be subject to a felony prosecution, rather than a misdemeanor prosecution.