



New York State Broadcasters Association, Inc. Memorandum in Opposition to S6829A & A10217A

The New York State Broadcasters Association, Inc., which represents local radio and television stations across New York State has significant concerns with the above referenced legislation. We are forced to oppose certain aspects the bills as currently drafted.

At the outset we understand the problems with “deep fakes” that may be appearing in various forms of video content and photographs. We agree that steps need to be taken to address on-line harassment. Nonetheless, we urge the Senate and Assembly to narrow the scope of the legislation to avoid unintended consequences that may impact news gathering in New York.

We recognize the legislature’s efforts to impose liability for the use of “deep fake” technology as it relates to pornographic content. Local stations would never broadcast any content that may be considered pornographic. FCC regulations prohibit broadcasting indecent content. Creating liability for using “deep fake” technology as it relates to pornographic content is already penalized under Federal law. Such content, regardless of whether “deep fake” technology is used, would never appear on our stations.

Unfortunately, this legislation goes far beyond protecting citizens from being harassed by “deep fake” pornographic images. Simply stated the legislation is overbroad. Section 1 in relevant part reads:

“A person is guilty of aggravated harassment by means or electronic or digital communications when, with the intent to harass, annoy, threaten or alarm another person. ...he or she broadcasts material... that contains a picture, photograph or image of a person or persons or a deep fake into which the image of another person or persons is superimposed as a deep fake.” (*emphasis supplied*)

As drafted, broadcasting a picture, photograph or image of a person that *annoys* or *alarms* another person will give rise to criminal liability. The language does not require that the image be a pornographic, intimate or even violent. Liability attaches if the image is broadcast or published with the intent to *annoy* or *alarm* someone. Newscasts, news documentaries and

even political advertisements are sometimes produced to annoy another person. A news story may be designed to annoy or alarm the perpetrator of a crime. Political content is often produced with the intention of annoying a government official or political opponent. Much of today's political debate is premised on intentionally annoying the opposition. For example, commentators in political discussion programs that are designed to annoy former President Trump, may now be subject to criminal liability.

Such a criminal standard would have a chilling effect on a significant amount of the programming that is transmitted today over broadcast stations, newspapers and other media. Again, the scope of the provision goes well beyond "deep fakes." Because the provision uses disjunctive word "or," it applies to all content, not just content with deep fake images. This overbroad provision simply will not withstand First Amendment review.

The problem is exacerbated by the addition of the deep fake language in Section 2. Criminal and civil liability would now apply where "deep fake" technology is used in the depiction of "graphic violence." This term is not defined and there is no clear understanding of its meaning. For example, is the violence portrayed in the movie "Saving Private Ryan" sufficiently violent to warrant criminal or civil liability? What about movies such as "Halloween," "Die Hard" or even the "Passion of the Christ?" Television programs such as "Vikings" or even "Law and Order" often depict violence. Moreover, some news content may be viewed as being "graphic violence." The Zapruder film of President Kennedy's assassination is perhaps one of the most graphically violent scenes ever recorded on film. News reports from Ukraine may be characterized by some as "graphic violence." Under the legislation, content similar to these programs will become illegal if a digital image is employed.

To avoid liability, local stations and newspapers must first assess whether an image depicts graphic violence even though there are no legal standards or definitions. Local stations will have no idea whether the level of violence in a program or photographic image is sufficient to trigger criminal or civil liability. Such vagueness raises serious constitutional issues both from a criminal law and First Amendment prospective.

Digitization has become commonplace in content production, especially where CGI technology is used. It is often difficult to determine what is real and what is a digital. Every day local stations receive hundreds of programs and advertisements from program suppliers. The task of determining which images are real and which are digitized becomes nearly impossible. Similar concerns apply to the print media. It may be impossible to tell whether a photograph is a real or digital image. Under the legislation, liability is not limited to the entity that created the "deep fake image." Anyone who transmits the image may be criminally or civilly liable, even though they were unaware that the image was fake.

Finally, it is not clear whether this law is necessary. Existing New York law already criminalizes various forms of harassment, whether committed in the physical world or online. See, e.g., N.Y. Penal Law §240.26(3).

We understand the government's desire to protect its citizens from on-line harassment. Nonetheless, such protection must be done in a manner that is consistent with the constitution. The legislation must eliminate provisions creating liability as it applies to "deep fakes" that depict so called "graphic violence." The concept is too vague to survive constitutional scrutiny. Moreover, it is unconstitutional to apply criminal liability simply because an image was published to "annoy" or "alarm" another person. Such a standard would unconstitutionally restrict political debate in this country. At the very least, the legislation needs to include a broad exemption to protect news, newscasts and other types of creative works. For the reasons stated above, we must oppose S6829A and A10217A as drafted.

Respectfully submitted,

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