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BILL ANALYSIS



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House Bill 4047 (Substitute S-1)
House Bill 4048 (as passed by the House)
Sponsor: Representative Matt Bierlein (H.B. 4047)
Representative Penelope Tsernoglou (H.B. 4048)
House Committee: Judiciary
Senate Committee: Civil Rights, Judiciary, and Public Safety

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INTRODUCTION

The bills would enact the "Protection from Intimate Deep Fakes Act" to prohibit an individual from creating or distributing deep fakes that realistically depicted an individual in an intimate or sexual context and prescribe misdemeanor and felony penalties for doing so. The Act would allow individuals to bring a civil action against the nonconsensual distribution or creation of such a deep fake and require a court to allow for confidential filings of a civil action. Plaintiffs in a civil action could seek economic and noneconomic damages and relief, including daily civil fines up to \$1,000 for violations of a temporary restraining order or permanent injunction. The Act would exempt certain uses of deep fakes, such as for legal proceedings and medical treatment, and certain entities from its criminal and civil liability.

House Bill 4048 is tie-barred to House Bill 4047.

BRIEF FISCAL IMPACT

The bills' criminal penalties could have a negative fiscal impact on the State and local government. Violations of the bills would be punishable as misdemeanors and felonies of different severity. Based on 2024 data, the annual cost of housing a prisoner in a State correctional facility is an estimated \$49,600. Per diem rates range from \$100 to \$431 per day (average per diem is \$135), depending on the security level of the facility. Additionally, any associated fine revenue would increase funding to public libraries.

MCL 777.17b (H.B. 4048)

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CONTENT

House Bill 4047 (S-1) would enact the "Protection from Intimate Deep Fakes Act" to do the following:

- Prescribe a misdemeanor penalty punishable by up to one year's imprisonment or maximum fine of \$3,000, or both, for an individual who intentionally created or disseminated an intimate deep fake causing harm.**
- Prescribe a felony penalty punishable by up to three years' imprisonment or a maximum fine of \$5,000, or both, for subsequent offenses or online platform distribution, among other things.**
- Allow an individual who was depicted in a nonconsensual intimate deep fake to bring a civil action for the creation or dissemination of that deep fake in the county of the individual's residence or the county where the deep fake was created or stored.**
- Require a court to allow for the confidential filing of a civil action.**
- Allow a court to issue a restraining order or permanent injunction that could award a plaintiff a daily maximum civil fine of \$1,000 for a violation of such an order.**
- Prescribe the economic and noneconomic damages a court could award in a civil action including profits made from the deep fake and court costs.**
- Exempt specific criminal investigations, medical treatments, and legal proceedings from penalties and liability under the Act under certain conditions.**
- Exempt internet service providers, telecom networks, or educational or library systems providing access to content created by another person and a provider or developer of the technology used in the creation of a deep fake from liability under the Act.**

House Bill 4048 would include in the sentencing guidelines of the Code of Criminal Procedure the dissemination of an intimate deep fake with aggravating factors as proposed under House Bill 4047 (S-1) as a Class F felony against a person with a maximum of three years' imprisonment.

House Bill 4047 (S-1) is described in greater detail below.

Criminalization and Penalties

The Act would prohibit an individual from intentionally creating or disseminating a deep fake if all the following applied:

- The individual knew or reasonably should have known that the creation, distribution, dissemination, or reproduction of the deep fake would cause physical, emotional, reputational, or economic harm to an individual falsely depicted.
- The deepfake realistically depicted the intimate parts of the depicted individual or the depicted individual engaging in a sexual act.
- The depicted individual was identifiable from the deepfake itself, by that individual or by a reasonable individual viewing or listening to the deepfake or from the personal information displayed in connection with the deepfake.

"Depicted individual" would mean an individual in a deep fake who is identifiable by virtue of the person's face, likeness, or other distinguishing characteristic.

"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, that is not an original recording of an actual occurrence or an original photograph without substantial modification 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.
- The production of it was substantially dependent on technical means, rather than the ability of another individual to physically or verbally impersonate the depicted individual.

"Dissemination" would mean distribution to at least one person, other than the individual depicted in the deep fake, or publication by any publicly available medium.

"Intimate parts" would mean individual's genitalia or anus or, if the individual is a female, her nipple.

"Personal information" would mean any identifier that permits communication or in-person contact with an individual. The term would include all 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 telephone 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.

"Sexual act" would mean either sexual contact or sexual penetration. "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 sexual intercourse, cunnilingus, fellatio, anal intercourse or 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.

An individual who violated the prohibitions described above would be guilty of a misdemeanor punishable by up to one year's imprisonment or maximum fine of \$3,000, or both.

If an individual violated the prohibitions described above and at least one of the following applied, the individual would be guilty of a felony punishable by up to three years' imprisonment or a maximum fine of \$5,000, or both:

- The depicted individual suffered financial loss because of the creation or dissemination of the deep fake.
- The individual created or disseminated the deep fake with intent to profit from the dissemination.
- The individual maintained an internet website, online service, online application, or mobile application for the purpose of creating or disseminating the deep fake.
- The individual posted the deep fake on a website.
- The individual created or disseminated the deep fake with intent to harass, extort, threaten, or cause physical, emotional, reputational, or economic harm to the depicted individual.
- The individual had previously been convicted of a violation of the Act.

Civil Actions

The Act would allow a depicted individual or a person representing the depicted individual to bring a civil action against a person for the nonconsensual creation or dissemination of a deep fake if all the following applied:

- The person who created or disseminated the deep fake knew or reasonably should have known that the creation, distribution, or reproduction of the deep fake would cause physical, emotional, reputational, or economic harm to an individual falsely depicted; or created or disseminated the deep fake in order to harass, extort, threaten, or cause physical, emotional, reputational, or economic harm to an individual falsely depicted.
- The deepfake realistically depicted the intimate parts of the depicted individual or the depicted individual engaging in a sexual act.
- The depicted individual was identifiable from the deepfake itself, by that individual or by a reasonable individual viewing or listening to the deepfake or from the personal information displayed in connection with the deepfake.

A cause of action would accrue at the time the depicted individual discovered that the deep fake had been created or disseminated. The action could be filed in the county where the defendant or plaintiff resided or the county where the deepfake was produced, reproduced, or stored. A court would have to allow confidential filings to protect the privacy of the plaintiff in an action. In ordering this relief, the court could grant injunctive relief to maintain the confidentiality of the plaintiff using a pseudonym.

Defenses

The Act specifies that it would not be a defense to a civil action or prosecution for a violation 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 unless the following applied:

- The consent was contained in an agreement written in plain language signed knowingly and voluntarily by the depicted individual.
- The consent included a general description of the intimate digital depiction and, if applicable, the audiovisual work into which it would be incorporated.

The Act specifies that its prohibitions would not apply, and that there would be a defense to its allowed civil action, if one of the following applied:

- The creation or dissemination was made for the purpose of a criminal investigation that was otherwise lawful.
- The creation or dissemination was made 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 was protected from further dissemination.
- The deep fake related to a matter of public interest, the 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, and the person acted in good faith to prevent further dissemination of the deep fake.
- 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 civil justice system, or protected by court order that prohibited any further dissemination.

Damages and Relief

A plaintiff could recover all the following damages from a person found liable in a civil action:

- 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 deepfake by the person found liable.
- Actual court costs and fees and reasonable attorney fees.

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

The Act would specify that liability for a civil action would not affect any other remedy available under law.

General Exemptions and Liability

Additionally, the Act could not be construed to impose civil or criminal liability on the following entities for providing the transmission infrastructure or access to content created by another person:

- Any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet such as systems operated or services offered by libraries or educational institutions.
- A provider of public mobile services or private radio services.
- A telecommunications network or broadband provider.
- A provider or developer of the technology used in the creation of a deep fake, if the technology were not designed for, marketed for, or deployed for the nonconsensual creation or dissemination of deep fakes that realistically depict the intimate parts of depicted individuals or depicted individuals engaging in sexual acts.

The Act also would not affect the ability to bring a civil action under any other law, nor would it limit the ability to prosecute a person under any other law. Additionally, the Act would be severable.

FISCAL IMPACT

House Bill 4047 (S-1)

The bill would have an indeterminate fiscal impact on local courts due to the potential for increased civil filing fees, civil fines, and hearing costs related to increased criminal and civil filings. Filing fees range from \$25 to \$600 and are distributed to several different State funds, including the State Court Fund, the Court Equity Fund, the Court Fee Fund, and the State General Fund. The fines under the bill would support public and county law libraries and the Justice System Fund. It is not know the degree to which criminal and civil filings would increase under the bill, how much increased workload would be added to local courts, and how much fee and fine revenue would be generated.

House Bill 4048

The bill would have no fiscal impact on local government and an indeterminate fiscal impact on the State, in light of the Michigan Supreme Court's July 2015 opinion in *People v. Lockridge*, in which the Court ruled that the sentencing guidelines are advisory for all cases. This means that the addition to the guidelines under the bill would not be compulsory for the sentencing judge. As penalties for felony convictions vary, the fiscal impact of any given felony conviction depends on judicial decisions. The bill would have no fiscal impact on the state or local court systems.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.