

Department of Legislative Services
Maryland General Assembly
2025 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 362 (Senators Hester and Hettleman)
Judicial Proceedings

Forged Digital Likenesses - Distribution - Prohibition

This bill prohibits a person from knowingly distributing a forged digital likeness if the person (1) distributes the forged digital likeness as genuine and (2) knows or reasonably should know the forged digital likeness is not a genuine visual representation or audio recording. Violators are guilty of a misdemeanor punishable by imprisonment for up to three years and/or a \$1,000 maximum fine. It is an affirmative defense that the defendant took reasonable action to place viewers or listeners of the forged digital likeness on notice that the forged digital likeness was not genuine. These provisions may not be construed in a manner that infringes on the right to free speech or of the press as guaranteed by the First Amendment to the U.S. Constitution or the Maryland Declaration of Rights. The bill also specifies that the distribution of a “forged digital likeness” to another constitutes a statement or communication for the purpose of an action for defamation.

Fiscal Summary

State Effect: Potential minimal increase in general fund revenues and expenditures due to the bill’s penalty provision. Otherwise, the bill is not expected to materially affect State finances or operations.

Local Effect: Potential minimal increase in local revenues and expenditures due to the bill’s penalty provision. Otherwise, the bill is not anticipated to materially affect local finances or operations.

Small Business Effect: None.

Analysis

Bill Summary:

“Forged digital likeness” means a computer-generated visual representation of an actual and identifiable individual or audio recording of an actual and identifiable individual’s voice that (1) has been created, adapted, or modified to be indistinguishable from a genuine visual representation or audio recording of the individual; (2) misrepresents the appearance, speech, or behavior of the individual; and (3) is likely to deceive a reasonable person to believe that the visual representation or audio recording is genuine. “Visual representation” includes a pictorial or motion picture representation, regardless of the media used.

The bill’s criminal prohibition does not apply to a drawing, cartoon, sculpture, or painting.

Current Law:

Civil Cause of Action –Defamation

A *prima facie* common law case for defamation involves four elements: (1) the defendant made a defamatory statement to a third person; (2) the statement was false; (3) the defendant was legally at fault in making the statement; and (4) the plaintiff suffered harm as a result of the defendant’s statement. *Smith v. Danielczyk*, 400 Md. 98, 115 (2006) (quoting *Gohari v. Darvish*, 363 Md. 42, 54, 767 A.2d 321, 327 (2001), quoting *Rosenberg v. Helinski*, 328 Md. 664, 675, 616 A.2d 866, 871 (1992)).

Forgery and Related Offenses

Under the common law, “[f]orgery is the fraudulent making of a false writing having apparent legal significance. The offense is comprised of essentially three elements. First, there must be a writing which is the proper subject of forgery. Secondly, this writing must be false. Finally, the writing must have been rendered false with intent to defraud.” *State v. Reese*, 283 Md. 86, 90-91 (1978) (internal citations omitted).

Title 8, Subtitle 6 of the Criminal Law Article contains several prohibitions against counterfeiting.

Child Pornography and Revenge Pornography

Criminal statutes that address fake images of a person tend to focus on content that is sexual in nature. For example, the prohibition against possession of child pornography under § 11-208 of the Criminal Law Article:

- prohibits the knowing possession and intentional retention of a *computer-generated* image that is indistinguishable from an actual and identifiable child younger than age 16 (1) engaged as a subject of sadomasochistic abuse; (2) engaged in sexual conduct; or (3) in a state of sexual excitement; and
- prohibits a person from knowingly or intentionally accessing and intentionally viewing a film, videotape, photograph, or other visual representation showing an actual child or a *computer-generated image* that is indistinguishable from an actual and identifiable child younger than age 16 (1) engaged as a subject of sadomasochistic abuse; (2) engaged in sexual conduct; or (3) in a state of sexual excitement.

The statute includes a specified exception and an affirmative defense. Violators are guilty of a misdemeanor punishable by imprisonment for up to 5 years and/or a \$2,500 maximum fine for a first offense. A person who has previously been convicted under § 11-208 is guilty of a felony punishable by imprisonment for up to 10 years and/or a \$10,000 maximum fine. A prosecution for a misdemeanor offense under § 11-208 of the Criminal Law Article must be instituted within 2 years after the offense was committed.

The prohibition against revenge pornography does not specifically reference fake or computer-generated images but does prohibit a person from knowingly distributing a visual representation of another identifiable person that displays the other person with his or her intimate parts exposed or while engaged in an act of sexual activity (1) with the intent to harm, harass, intimidate, threaten, or coerce the other person; (2) under circumstances in which the person knew that the other person did not consent to the distribution or with reckless disregard as to whether the person consented to the distribution; and (3) under circumstances in which the other person had a reasonable expectation that the image would remain private. The State may institute a prosecution for a violation of § 3-809 at any time. Violators are guilty of a misdemeanor, punishable by imprisonment for up to two years and/or a \$5,000 maximum fine.

State Revenues: General fund revenues may increase minimally as a result of the bill's monetary penalty provision from cases heard in the District Court.

State Expenditures:

Department of Public Safety and Correctional Services

General fund expenditures may increase minimally as a result of the bill's incarceration penalty due to more people being committed to State correctional facilities and increased payments to counties for reimbursement of costs for incarcerated individuals. The number of people convicted of this proposed crime is expected to be minimal.

Persons serving a sentence longer than 18 months are incarcerated in State correctional facilities. Currently, the average total cost per incarcerated individual, including overhead, is estimated at \$5,339 per month. Persons serving a sentence of one year or less in a jurisdiction other than Baltimore City are sentenced to local detention facilities. For persons sentenced to a term of between 12 and 18 months, the sentencing judge has the discretion to order that the sentence be served at a local facility or a State correctional facility. The State provides assistance to the counties for locally sentenced incarcerated individuals and for (1) incarcerated individuals who are sentenced to and awaiting transfer to the State correctional system; (2) sentenced incarcerated individuals confined in a local detention center between 12 and 18 months; and (3) incarcerated individuals who have been sentenced to the custody of the State but are confined in or who receive reentry or other prerelease programming and services from a local facility.

The State does not pay for pretrial detention time in a local correctional facility. Persons sentenced in Baltimore City are generally incarcerated in State correctional facilities. The Baltimore Pretrial Complex, a State-operated facility, is used primarily for pretrial detentions.

Office of the Public Defender

The Office of the Public Defender (OPD) advises that the bill's provisions may result in costs for the agency due to additional cases and litigation. The Department of Legislative Services advises that it is unlikely that the bill alone will necessitate additional OPD staff or a meaningful amount of other resources. Should actual experience under the bill indicate otherwise, OPD can request additional resources through the annual budget process.

Judiciary

The Judiciary advises that it does not anticipate a significant operational or fiscal impact on the trial courts as a result of the bill.

Additional Information

Recent Prior Introductions: Similar legislation has not been introduced within the last three years.

Designated Cross File: None.

Information Source(s): Anne Arundel, Baltimore, Cecil, and Frederick counties; Maryland Association of Counties; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender;

Maryland State's Attorneys' Association; Department of Public Safety and Correctional Services; Department of Legislative Services

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