



TESTIMONY IN SUPPORT OF SB0362 - FORGED DIGITAL LIKENESSES - DISTRIBUTION - PROHIBITION

JUDICIAL PROCEEDINGS

JANUARY 29, 2025

Chair Smith, Vice Chair Waldstreicher and Members of the Committee:

My name is Ben Yelin, and I am the Program Director for Public Policy & External Affairs at the University of Maryland Center for Health and Homeland Security. I am testifying on behalf of myself and Christopher Webster, the Center's Program Director for Cybersecurity and Emerging Technologies. Over the past few legislative sessions, our Center has worked closely with Senator Hester on legislation relating to artificial intelligence, cybersecurity and other matters. After the horrific incident at Pikesville High School, we began working with Senator Hester, Senator Hettleman, and other members of the General Assembly on a potential policy solution that would properly disincentivize the distribution of what we call Deceptive Deepfakes.

This bill is the result of that collaboration. SB0362 would criminalize the distribution of a very specific, and narrow type of deepfake. Under this bill, a person may not distribute a computer-generated video, image, or audio representation of a person if:

- The media is being presented *as if genuine*;
- It is likely to deceive a reasonable person into thinking the media was genuine;
- The sender knows or reasonably should know that the image, video, or audio was fake.

My colleague Christopher Webster and I are in the final stages of writing a law review article defending the approach taken here. In our view, the bill balances the need to disincentivize the type of bad behavior at issue here, while preserving robust First Amendment protection for constitutionally protected speech and technological progress. The ban in this bill is consistent with our long legal tradition of prohibiting certain types of "fakes" or "public cheats." For centuries, the law has criminalized acts that deceive the public by, "some deception against which common prudence cannot guard."ⁱ In the pre-digital world, this philosophy was reflected in bans against forgery, defined historically as, "the act of fraudulently making a false document or altering a real one to be used as if genuine."ⁱⁱ

Just like with the Deceptive Deepfakes at issue here, forged documents are not just crimes against the individual whose signature has been forged, but it is a crime against a society that could lose trust in the authenticity of documents. While the common law ban on forgery has historically been limited to documents of legal significance, courts have recognized a legislature's ability to criminalize other types of false misrepresentations, namely, those that might affect anyone relying on the authenticity of testimonial speech. Many of these laws, like the one proposed here, do not require a legally recognized harm against another to sustain a criminal conviction. For it is not just the person directly affected by the deepfake that is victimized by forged digital speech, but society itself, because such fakes, undermine the basic trust individuals have in the testimony of their fellow citizens in nearly all contexts. We believe that Deceptive Deepfakes designed and distributed for fraudulent gain are just as harmful to our society as those designed to harm.



This bill does not criminalize constitutionally protected speech. Drawings, paintings, cartoons and other works of art are exempted. Any digital media being distributed which is *not* being presented as if genuine, but for some other purpose (such as parody or satire, or special effects in fictional movies, for example) is not criminalized here. Even hyper-realistic deepfakes are permissible under this approach if an individual includes a disclaimer that that the media is a was created using artificial intelligence tools or is otherwise not genuine. Under this law, you may still, should you desire, create hyper-realistic fake videos of yourself or others for entertainment, education, marketing, or any other purpose, so long as you present those videos as AI generated. Finally, a person can only be held criminally liable if they know, or have reason to know, that the media is a Deceptive Deepfake. Cropping the disclaimer out of an AI generated deepfake to share it as genuine is criminalized here, while mistakenly resharing a deepfake that fooled you is not. This law seeks to punish only the willful distribution of computer generated hyper-realistic false media that can cause the type of societal harm we saw in the Pikesville case.

As a free society, we must protect free speech. But, we do not believe that Deceptive Deepfakes can fairly be considered “speech” at all. They add nothing to the marketplace of ideas the First Amendment is intended to protect. Lies and deception enjoy constitutional protection because they can sometimes be valuable, and a false statement can be countered easily with a true one. The same cannot be said of a Deceptive Deepfake, just as the presence of a real twenty-dollar bill does nothing to discredit an indistinguishable fake twenty in the same cash register. While forgeries and false testimony will always plague truth seeking societies, we believe they need not (and should not) enjoy First Amendment protection as a form of expressive speech.

Even if a court was to disagree with this conclusion – and consider Deceptive Deepfakes a form of “speech” within the First Amendment’s purview, we believe a law criminalizing them would be still be constitutional. It is well established that some categories of “speech,” such as fraud, certain types of defamation, false advertising, or speech essential for criminal activity do not merit First Amendment protection because they are forms of communication, “more likely to deceive the public than to inform it.”ⁱⁱⁱ We believe the forged digital likenesses at issue here have the same qualities as these categories, because this “speech” is not properly attributed to any real individual and does not contribute to the marketplace of ideas. Rather, Deceptive Deepfakes attack the social, legal, and political systems upon which democracy relies. Put simply, Deceptive Deepfakes work to undermine the same truth-seeking function and trust-based open society that the First Amendment seeks to protect.

We respectfully request a favorable report on SB0362 and would be happy to answer questions from the Committee.

ⁱ 64 William Livesey Burdick, *The Law of Crime* § 626 (M. Bender, Inc. 1946) at 630.

ⁱⁱ 72 *Black's Law Dictionary* 677 (8th ed. 2004).

ⁱⁱⁱ 60 *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563 (1980).