
SENATE COMMITTEE ON APPROPRIATIONS

Senator Anthony Portantino, Chair
2023 - 2024 Regular Session

SB 646 (Cortese) - Civil law: personal rights: online sex trafficking: sexual photographs

Version: April 27, 2023

Urgency: No

Hearing Date: May 8, 2023

Policy Vote: JUD. 11 - 0

Mandate: No

Consultant: Matthew Fleming

Bill Summary: SB 646 would allow a person who is depicted in certain sexual images when the person was less than 18 years of age to bring a civil action against a person or entity that distributes that material, as specified. The bill would establish certain procedures for such civil actions and require the Attorney General to enforce the bill's provisions against repeated violators.

Fiscal Impact:

- DOJ: Unknown costs to the Department of Justice (DOJ), likely in the hundreds of thousands, in additional permanent staff resources to conduct the mandatory enforcement of repeat violations as required by the bill (General Fund).
- Judicial Branch: Unknown court workload cost pressures in order to adjudicate civil violations of this bill's provisions (Trial Court Trust Fund, General Fund). See Staff Comments for additional details.

Background: Numerous state and federal laws, both civil and criminal, establish penalties for the creation, distribution, and possession of certain sexually explicit or obscene material. For instance, in California, recently enacted laws specifically provide private causes of action against those creating and/or distributing sexually explicit material without the consent, as provided, of the depicted individuals. This includes actions involving explicit "deep fake" material and so called "revenge porn." Given their heinous nature, a more robust set of laws address such materials when children are involved. Relevant here, "Masha's law" provides civil remedies for personal injuries caused by the sexual exploitation of children, namely the creating, distributing, downloading, and possessing of child sexual abuse material (CSAM). The statute laws out a series of federal criminal laws that serve as predicate offenses and provides actual or liquidated damages, as well as costs and attorney's fees.

This bill authorizes a state cause of action against a person or entity that distributes "actionable material." That term includes material that would serve as a predicate offense under Masha's law and "illicit pictures" of minors, as defined. The bill also requires a person or entity distributing actionable material to remove it or disables its distribution, subject to a civil action for statutory damages for failure to do so within two business days of notice of claimed infringement.

Proposed Law:

- Provides that a person who is depicted in “actionable material,” as defined, when the person was less than 18 years of age may bring a civil action for actual damages, compensatory damages, punitive damages, injunctive relief, any combination of those, and any other appropriate relief, including statutory damages and attorney’s fees and costs, against a person or entity that distributes, including through electronic distribution, actionable material. Specifies that a parent or guardian may bring a civil action pursuant to this section on behalf of a minor or ward.
- Provides that upon receipt of notice from the person in the actionable material, a person or entity distributing actionable material shall immediately remove the material or disable its distribution.
- Provides a for a statute of limitations of six years from the time of discovery of a violation of these provisions, or within 10 years of the person in the actionable material having reached 18 years of age, whichever is longer.
- Provides that In addition to any other damages awarded, statutory damages in the amount of two hundred thousand dollars (\$200,000) shall be awarded to a prevailing plaintiff if the defendant failed to cease distribution of the material within two business days after notice of the violation. Provides that the amount of statutory damages shall be adjusted every five years, as specified.
- Specifies that a person is not be liable for distributing the material pursuant to these provisions if the distribution is made in the course of reporting unlawful activity or is necessary to comply with a court order or other law.
- Requires a person or entity that operates an online service or internet website that is available in California to publicly list an agent for notification of claimed violation of these provisions.
- Provides for injunctive relief to prevent the distribution of actionable material.
- Requires the Attorney General to enforce these provisions against a person or entity that engages in repeated violations and levy fines commensurate with the statutory damages described above.
- Provides that a person or entity that operates an online service or internet website that is available in California shall destroy an item of actionable material if the operator of that online service or internet website has confirmed that any investigation related to that actionable material has been completed.

Related Legislation:

- SB 287 (Skinner, 2023) would subject social media platforms to civil liability for damages caused by their practices, affordances, designs, algorithms, or features, as provided. The bill provides a safe harbor where certain auditing practices are carried out. SB 287 is currently pending on this Committee’s Suspense File.
- SB 1056 (Umberg, Ch. 881, Stats. 2022) required a social media platform, as defined, to clearly and conspicuously state whether it has a mechanism for reporting

violent posts, as defined; and allows a person who is the target, or who believes they are the target, of a violent post to seek an injunction to have the violent post removed.

- AB 587 (Gabriel, Ch. 269, Stats. 2022) required social media companies, as defined, to post their terms of service and report certain information to the Attorney General on a quarterly basis.
- AB 1628 (Ramos, Ch. 432, Stats. 2022) required a social media platform, as defined, that operates in this state to create and publicly post a policy statement including specified information pertaining to the use of the platform to illegally distribute controlled substances, until January 1, 2028.
- AB 2273 (Wicks, Ch. 320, Stats. 2022) established the California Age-Appropriate Design Code Act, placing a series of obligations and restriction on businesses that provide online services, products, or features likely to be accessed by a child.

Staff Comments: It is unknown how many violations of SB 646 will occur and necessitate court involvement. It generally costs about \$1,000 to operate a courtroom for one hour. Although courts are not funded on the basis of workload, increased staff time and resources may create a need for increased funding for courts from the General Fund (GF) to perform existing duties. Numerous trial court operations are funded through the imposition and collection of criminal fines and fees. However, the Legislature has reduced and eliminated criminal fines and fees over the past decade. As a result, the 2023-24 proposed budget anticipates an ongoing annual allocation of \$109.3 million from the GF to backfill declining revenue to the Trial Court Trust Fund.