
THIRD READING

Bill No: SB 646
Author: Cortese (D)
Amended: 4/27/23
Vote: 21

SENATE JUDICIARY COMMITTEE: 11-0, 4/25/23
AYES: Umberg, Wilk, Allen, Ashby, Caballero, Durazo, Laird, Min, Niello,
Stern, Wiener

SENATE APPROPRIATIONS COMMITTEE: 6-0, 5/18/23
AYES: Portantino, Ashby, Bradford, Seyarto, Wahab, Wiener
NO VOTE RECORDED: Jones

SUBJECT: Civil law: personal rights: online sex trafficking: sexual
photographs

SOURCE: Liberty Law

DIGEST: This bill creates liability for the distribution of certain “actionable material,” which includes illicit pictures of minors and images or depictions of minors that serve as the basis for criminal and civil liability at the federal level.

ANALYSIS:

Existing federal law:

- 1) Provides that no provider or user of a website shall be treated as the publisher or speaker of any information provided by another information content provider, and that no provider of a website shall be held liable on account of any action voluntarily taken in good faith to restrict the availability of materials that the provider determines to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected. (47 U.S.C. § 230(c) (Section 230).)

- 2) Provides that no cause of action may be brought and no liability may be imposed under any state or local law that is inconsistent with Section 230. (47 U.S.C. § 230(e).)
- 3) Authorizes any person who, while a minor, was a victim of a violation of 18 U.S.C. § 1589, 1590, 1591, 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423, and who suffers personal injury as a result of such violation, regardless of whether the injury occurred while such person was a minor, to sue in any appropriate United States District Court and provides for recovery of the actual damages such person sustains or liquidated damages in the amount of \$150,000, and the cost of the action, including reasonable attorney's fees and other litigation costs reasonably incurred. The court may also award punitive damages and such other preliminary and equitable relief as the court determines to be appropriate. There is no statute of limitations for such actions. (18 U.S.C. § 2255.)
- 4) Provides a right to free speech and expression. (U.S. Const., 1st amend; Cal. Const., art 1, § 2.)
- 5) Recognizes certain judicially created exceptions to the rights of freedom of speech and expression, including for true threats and incitement to imminent violence. (*E.g.*, *Virginia v. Black* (2003) 538 U.S. 343, 359.)

Existing state law:

- 1) Prohibits a person who intentionally distributes the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates, under circumstances in which the persons agree or understand that the image shall remain private, the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress. (Pen. Code § 647(j)(4)(A).)
- 2) Creates a private right of action against a person who intentionally distributes a photograph or recorded image of another that exposes that person's intimate body parts, or shows the other person engaging in an act of intercourse, oral copulation, sodomy, or other act of sexual penetration without that person's consent, knowing, or where they should have reasonable known, that the other

person had a reasonable expectation that the material would remain private, and causes the other person to suffer damages. (Civ. Code § 1708.85(a).)

- 3) Defines “intimate body part” as any portion of the genitals, and, in the case of a female, also includes any portion of the breast below the top of the areola, that is uncovered or visible through less than fully opaque clothing. (Civ. Code § 1708.85(b).)
- 4) Exempts the person distributing material from liability pursuant to the above under specified circumstances. (Civ. Code § 1708.85(c).)
- 5) Authorizes the court to award specified remedies and to issue a temporary restraining order, or a preliminary injunction or a permanent injunction against the defendant, ordering the defendant to cease distribution of material. (Civ. Code § 1708.85(d), (e).)
- 6) Provides an individual who appears, as a result of digitization, to be giving a performance they did not actually perform or to be performing in an altered depiction (“depicted individual”) a cause of action against a person who does either of the following:
 - a) creates and intentionally discloses sexually explicit material and the person knows or reasonably should have known the depicted individual in that material did not consent to its creation or disclosure; or,
 - b) intentionally discloses sexually explicit material that the person did not create and the person knows the depicted individual in that material did not consent to the creation of the sexually explicit material. (Civ. Code § 1708.86.)
- 7) Defines “sexually explicit material,” for the purposes of the above action, to mean any portion of an audiovisual work that shows the depicted individual performing in the nude or appearing to engage in, or being subjected to, sexual conduct, as those terms are defined. (Civ. Code § 1708.86(a).)
- 8) Exempts a person from liability in the above action if the person discloses the material in the course of reporting unlawful activity; exercising the person’s law enforcement duties; or in hearings, trials, or other legal proceedings. The person is also exempt if the material meets specified conditions. (Civ. Code § 1708.86(c).)

- 9) Authorizes the court to award specified remedies to a prevailing plaintiff that suffers harm, including economic and noneconomic damages or statutory damages. (Civ. Code § 1708.86.)

This bill:

- 1) Authorizes a person who is depicted in actionable material when the person was less than 18 years of age to bring a civil action for specified damages and other relief, against a person or entity that distributes, including through electronic distribution, actionable material.
- 2) Makes injunctive relief available to block or interrupt the distribution, including electronic distribution, of actionable material.
- 3) Requires the Attorney General to commence an action to enforce this law against a person or entity that engages in repeated violations, and, among other actions, to levy fines commensurate with the statutory damages provided for therein, payable to the person in the actionable material.
- 4) Defines “actionable material” to mean a moving or still photograph in any technological form, regardless of whether it has been altered, that is either of the following:
 - a) an “illicit” picture of a person who was less than 18 years of age at the time the photograph was created, or their identifiable likeness; or
 - b) an image or depiction of a person who, when less than 18 years of age, was a victim of a violation of specified federal laws and would have a cause of action available to them under 18 U.S.C. Section 2255 due, in whole or in part, to that image or depiction.
- 5) Defines “illicit picture” to mean an image of the intimate body part or parts of an identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates.
- 6) Requires a person or entity distributing actionable material, upon receipt of notice from the person in the actionable material, to immediately remove the material or disable its distribution. In addition to any other damages awarded, statutory damages in the amount of \$200,000, as specified, shall be awarded to

the prevailing plaintiff to be paid by the defendant for failing to cease distribution of the material within two business days after notice of claimed infringement of this section was received by the defendant. If the material is removed or access is disabled within that time frame, no liability shall attach.

- 7) Provides that an action brought pursuant thereto shall be commenced within 6 years of discovery of infringement, or within 10 years of the person in the actionable material having reached 18 years of age, whichever is longer.
- 8) Provides that a person shall not be liable for distributing the material if the distribution is made in the course of reporting unlawful activity or is necessary to comply with a court order or other law.
- 9) Requires a person or entity that operates an online service or website that is available in California to do the following:
 - a) list, in a location available to the public via the service or on the website, an agent for notification of claimed violation of this section;
 - b) create a method to contact the agent for the purpose of reporting content that the user believes was erroneously removed as actionable material; and
 - c) destroy an item of actionable material if the operator has confirmed that any investigation related to that actionable material has been completed.
- 10) Provides that its provisions are severable and cumulative to any other rights, duties, obligations, penalties, or crimes imposed under any other law.

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. This bill is sponsored by Liberty Law. The bill is supported by the California Catholic Conference and opposed by various industry groups, including TechNet.

Comments

According to the author:

Child sex abuse material (CSAM) is rampant on social media. Too often, victims have no legal recourse for the online distribution of content depicting their abuse. These sexually exploited children are re-victimized every time a predator watches CSAM content. Often times, predators produce material where the victim is smiling. This leads to survivors worrying that people may think they are enjoying their abuse. Victims have testified that the worst part of the re-victimization process is knowing that the content may be used to normalize the abuse and groom future victims.

SB 646 gives victims standing in state court by codifying a federal statute that enables legal advocates to bring cases against social media companies that profit or benefit from the distribution of CSAM. In 2017, Congress passed the Fight Online Sex Trafficking Act that closed a loophole in law that gave platforms protection from liability when they facilitated CSAM distribution. Victim Advocates use Masha’s Law (2006) to seek restitution and hold platforms accountable for their culpability. Through this statute, victims are able to sue their abusers and their enablers, in federal court.

This bill seeks to provide victims the same standing in state court. Any person or entity who transmits CSAM is liable to be sued for damages under SB 646. SB 646 also requires that platforms list an agent who will be responsible for fielding requests to remove content. If the platform does not act within two business days, they will be liable to the civil remedies listed in Masha’s law. The platform must

also create a method for contacting that agent. Platforms already are using hash values to locate and remove such content.

Any action taken must commence within 6 years of discovery or within 10 years of the victim turning 18, whichever is longer. In addition to any other damages awarded, statutory damages in the amount of two hundred thousand dollars (\$200,000) shall be awarded to the prevailing plaintiff and will be paid by the defendant for failing to cease distribution of the material within two business days after notice. This amount will be adjusted for inflation in 2028 and every five years after that.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: No

According to the Senate Appropriations Committee:

- *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.

SUPPORT: (Verified 5/18/23)

Liberty Law (source)
California Catholic Conference
Child USA
Children's Advocacy Institute
Consumer Attorneys of California
The Soaring Center

OPPOSITION: (Verified 5/18/23)

California Chamber of Commerce
Civil Justice Association of California
Computer & Communications Industry Association
Internet Coalition
NetChoice
TechNet

ARGUMENTS IN SUPPORT: The California Catholic Conference writes:

“Online sexual exploitation is a growing concern, especially on emerging social media such as Instagram, TikTok and OnlyFans. Pornhub, the largest pornographic site in the world had to remove over 10 million pornographic videos in December 2020 because they did not verify users, could not confirm consent was obtained, and had numerous cases of reuploads of the real sexual abuse, rape, nonconsensual content, and sex trafficking of children, teenagers and adults.

This bill will help to deter traffickers and other bad actors from sharing sexually exploitive material of children and will empower survivors with the tools to have their images removed – helping them to recover their dignity and rebuild their lives.”

ARGUMENTS IN OPPOSITION: A coalition of business and technology groups, including the Computer and Communications Industry Association, believe the bill’s provisions that hold platforms liable for distributing illicit pictures of minors and other actionable material violates the First Amendment:

“SB 646 will have a significant chilling effect on lawful speech and violates established First Amendment principles

As noted above, SB 646 raises several constitutional concerns and its overbreadth creates a significant chilling effect on lawful speech. For example, Section 2 of the bill creates a strong incentive to over-remove content any time a request is submitted. Platforms deal with millions of pieces of content every single day. If confronted with a notice to take down content, they will air on the side of caution and remove it due to the significant liability exposure. They will have no choice but to do this even if the content does not violate their policies because the risk is too high. Though well-intentioned, this bill will result in more lawful speech being removed and fewer online spaces for people to communicate and share ideas with one another.”

Prepared by: Christian Kurpiewski / JUD. / (916) 651-4113
5/20/23 13:00:40

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