

AMENDED IN SENATE APRIL 9, 2007

SENATE BILL

No. 368

Introduced by Senator Harman
(Coauthors: Senators Battin, Cogdill, Cox, and Hollingsworth)
(Coauthors: Assembly Members Maze and Silva)

February 20, 2007

An act to amend Section ~~311.4~~ 311 of the Penal Code, relating to ~~child pornography~~ *obscene matter*.

LEGISLATIVE COUNSEL'S DIGEST

SB 368, as amended, Harman. ~~Child pornography: live internet production.~~ *Obscene matter: distribution: Internet.*

~~Existing law makes it a felony for a person to knowingly use a minor to engage in, or assist others in, posing for any representation of data, as specified, depicting sexual conduct by the minor.~~

~~This bill would, in addition, make it a felony for any person to knowingly use a minor to engage in sexual conduct for the purpose of transmitting a live performance of the conduct over the Internet.~~

Existing law defines the term "distribute" for purposes of crimes relating to obscene matter.

This bill would include within the definition of "distribute" making available for access or possession over the Internet.

~~Because this bill would create a new crime~~ *expand the definition of existing crimes*, it would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 311 of the Penal Code is amended to
2 read:

3 311. As used in this chapter, the following definitions apply:
4 (a) “Obscene matter” means matter, taken as a whole, that to
5 the average person, applying contemporary statewide standards,
6 appeals to the prurient interest, that, taken as a whole, depicts or
7 describes sexual conduct in a patently offensive way, and that,
8 taken as a whole, lacks serious literary, artistic, political, or
9 scientific value.

10 (1) If it appears from the nature of the matter or the
11 circumstances of its dissemination, distribution, or exhibition that
12 it is designed for clearly defined deviant sexual groups, the appeal
13 of the matter shall be judged with reference to its intended recipient
14 group.

15 (2) In prosecutions under this chapter, if circumstances of
16 production, presentation, sale, dissemination, distribution, or
17 publicity indicate that matter is being commercially exploited by
18 the defendant for the sake of its prurient appeal, this evidence is
19 probative with respect to the nature of the matter and may justify
20 the conclusion that the matter lacks serious literary, artistic,
21 political, or scientific value.

22 (3) In determining whether the matter taken as a whole lacks
23 serious literary, artistic, political, or scientific value in description
24 or representation of those matters, the fact that the defendant knew
25 that the matter depicts persons under the age of 16 years engaged
26 in sexual conduct, as defined in subdivision (c) of Section 311.4,
27 is a factor that may be considered in making that determination.

28 (b) “Matter” means any book, magazine, newspaper, or other
29 printed or written material, or any picture, drawing, photograph,
30 motion picture, or other pictorial representation, or any statue or
31 other figure, or any recording, transcription, or mechanical,
32 chemical, or electrical reproduction, or any other article, equipment,
33 machine, or material. “Matter” also means live or recorded
34 telephone messages if transmitted, disseminated, or distributed as
35 part of a commercial transaction.

1 (c) “Person” means any individual, partnership, firm,
2 association, corporation, limited liability company, or other legal
3 entity.

4 (d) “Distribute” means transfer possession of, whether with or
5 without consideration, *including making available for access or*
6 *possession over the Internet.*

7 (e) “Knowingly” means being aware of the character of the
8 matter or live conduct.

9 (f) “Exhibit” means show.

10 (g) “Obscene live conduct” means any physical human body
11 activity, whether performed or engaged in alone or with other
12 persons, including but not limited to singing, speaking, dancing,
13 acting, simulating, or pantomiming, taken as a whole, that to the
14 average person, applying contemporary statewide standards,
15 appeals to the prurient interest and is conduct that, taken as a whole,
16 depicts or describes sexual conduct in a patently offensive way
17 and that, taken as a whole, lacks serious literary, artistic, political,
18 or scientific value.

19 (1) If it appears from the nature of the conduct or the
20 circumstances of its production, presentation, or exhibition that it
21 is designed for clearly defined deviant sexual groups, the appeal
22 of the conduct shall be judged with reference to its intended
23 recipient group.

24 (2) In prosecutions under this chapter, if circumstances of
25 production, presentation, advertising, or exhibition indicate that
26 live conduct is being commercially exploited by the defendant for
27 the sake of its prurient appeal, that evidence is probative with
28 respect to the nature of the conduct and may justify the conclusion
29 that the conduct lacks serious literary, artistic, political, or scientific
30 value.

31 (3) In determining whether the live conduct taken as a whole
32 lacks serious literary, artistic, political, or scientific value in
33 description or representation of those matters, the fact that the
34 defendant knew that the live conduct depicts persons under the
35 age of 16 years engaged in sexual conduct, as defined in
36 subdivision (c) of Section 311.4, is a factor that may be considered
37 in making that determination.

38 (h) The Legislature expresses its approval of the holding of
39 *People v. Cantrell*, 7 Cal. App. 4th 523, that, for the purposes of
40 this chapter, matter that “depicts a person under the age of 18 years

1 personally engaging in or personally simulating sexual conduct”
2 is limited to visual works that depict that conduct.

3 *SEC. 2. No reimbursement is required by this act pursuant to*
4 *Section 6 of Article XIII B of the California Constitution because*
5 *the only costs that may be incurred by a local agency or school*
6 *district will be incurred because this act creates a new crime or*
7 *infraction, eliminates a crime or infraction, or changes the penalty*
8 *for a crime or infraction, within the meaning of Section 17556 of*
9 *the Government Code, or changes the definition of a crime within*
10 *the meaning of Section 6 of Article XIII B of the California*
11 *Constitution.*

12 ~~SECTION 1. Section 311.4 of the Penal Code is amended to~~
13 ~~read:~~

14 ~~311.4. (a) Every person who, with knowledge that a person is~~
15 ~~a minor, or who, while in possession of any facts on the basis of~~
16 ~~which he or she should reasonably know that the person is a minor,~~
17 ~~hires, employs, or uses the minor to do, or assist in doing, any of~~
18 ~~the acts described in Section 311.2, shall be punished by~~
19 ~~imprisonment in the county jail for up to one year, or by a fine not~~
20 ~~exceeding two thousand dollars (\$2,000), or by both that fine and~~
21 ~~imprisonment, or by imprisonment in the state prison. If the person~~
22 ~~has previously been convicted of any violation of this section, the~~
23 ~~court may, in addition to the punishment authorized in Section~~
24 ~~311.9, impose a fine not exceeding fifty thousand dollars (\$50,000).~~

25 ~~(b) Every person who, with knowledge that a person is a minor~~
26 ~~under the age of 18 years, or who, while in possession of any facts~~
27 ~~on the basis of which he or she should reasonably know that the~~
28 ~~person is a minor under the age of 18 years, knowingly promotes,~~
29 ~~employs, uses, persuades, induces, or coerces a minor under the~~
30 ~~age of 18 years, or any parent or guardian of a minor under the~~
31 ~~age of 18 years under his or her control who knowingly permits~~
32 ~~the minor, to engage in, or assist others to engage in, either posing~~
33 ~~or modeling alone or with others for purposes of preparing any~~
34 ~~representation of information, data, or image, including, but not~~
35 ~~limited to, any film, filmstrip, photograph, negative, slide,~~
36 ~~photocopy, videotape, video laser disc, computer hardware,~~
37 ~~computer software, computer floppy disc, data storage media,~~
38 ~~CD-ROM, or computer-generated equipment or any other~~
39 ~~computer-generated image that contains or incorporates in any~~
40 ~~manner, any film, filmstrip, or a live performance involving, sexual~~

1 conduct by a minor under the age of 18 years alone or with other
2 persons or animals, for commercial purposes, is guilty of a felony
3 and shall be punished by imprisonment in the state prison for three,
4 six, or eight years.

5 (e) Every person who, with knowledge that a person is a minor
6 under the age of 18 years, or who, while in possession of any facts
7 on the basis of which he or she should reasonably know that the
8 person is a minor under the age of 18 years, knowingly promotes,
9 employs, uses, persuades, induces, or coerces a minor under the
10 age of 18 years, or any parent or guardian of a minor under the
11 age of 18 years under his or her control who knowingly permits
12 the minor, to engage in, or assist others to engage in, either posing
13 or modeling alone or with others for purposes of preparing any
14 representation of information, data, or image, including, but not
15 limited to, any film, filmstrip, photograph, negative, slide,
16 photocopy, videotape, video laser disc, computer hardware,
17 computer software, computer floppy disc, data storage media,
18 CD-ROM, or computer-generated equipment or any other
19 computer-generated image that contains or incorporates in any
20 manner, any film, filmstrip, or a live performance involving, sexual
21 conduct by a minor under the age of 18 years alone or with other
22 persons or animals, is guilty of a felony. It is not necessary to prove
23 commercial purposes in order to establish a violation of this
24 subdivision.

25 (d) Every person who, with knowledge that the minor is a person
26 under the age of 18 years, or who, while in possession of any facts
27 on the basis of which he or she should reasonably know that the
28 person is a minor under the age of 18 years, knowingly promotes,
29 employs, uses, persuades, induces, or coerces a minor under the
30 age of 18 years to engage in, or assist others to engage in, sexual
31 conduct for the purpose of transmitting a live performance of the
32 sexual conduct over the Internet, is guilty of a felony. It is not
33 necessary to prove commercial purposes in order to establish a
34 violation of this subdivision.

35 (e) (1) As used in subdivisions (b) and (c), “sexual conduct”
36 means any of the following, whether actual or simulated: sexual
37 intercourse, oral copulation, anal intercourse, anal oral copulation,
38 masturbation, bestiality, sexual sadism, sexual masochism,
39 penetration of the vagina or rectum by any object in a lewd or
40 lascivious manner, exhibition of the genitals or pubic or rectal area

1 for the purpose of sexual stimulation of the viewer, any lewd or
2 lascivious sexual act as defined in Section 288, or excretory
3 functions performed in a lewd or lascivious manner, whether or
4 not any of the above conduct is performed alone or between
5 members of the same or opposite sex or between humans and
6 animals. An act is simulated when it gives the appearance of being
7 sexual conduct.

8 (2) As used in subdivisions (b) and (c), “matter” means any
9 film, filmstrip, photograph, negative, slide, photocopy, videotape,
10 video laser disc, computer hardware, computer software, computer
11 floppy disc, or any other computer-related equipment or
12 computer-generated image that contains or incorporates in any
13 manner, any film, filmstrip, photograph, negative, slide, photocopy,
14 videotape, or video laser disc.

15 (f) This section does not apply to a legally emancipated minor
16 or to lawful conduct between spouses if one or both are under the
17 age of 18.

18 (g) In every prosecution under this section involving a minor
19 under the age of 14 years at the time of the offense, the age of the
20 victim shall be pled and proven for the purpose of the enhanced
21 penalty provided in Section 647.6. Failure to plead and prove that
22 the victim was under the age of 14 years at the time of the offense
23 is not a bar to prosecution under this section if it is proven that the
24 victim was under the age of 18 years at the time of the offense.

25 SEC. 2. No reimbursement is required by this act pursuant to
26 Section 6 of Article XIII B of the California Constitution because
27 the only costs that may be incurred by a local agency or school
28 district will be incurred because this act creates a new crime or
29 infraction, eliminates a crime or infraction, or changes the penalty
30 for a crime or infraction, within the meaning of Section 17556 of
31 the Government Code, or changes the definition of a crime within
32 the meaning of Section 6 of Article XIII B of the California
33 Constitution.

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