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AMENDED IN SENATE MAY 28, 1996
AMENDED IN SENATE FEBRUARY 26, 1996

CALIFORNIA LEGISLATURE—1995–96 REGULAR SESSION

ASSEMBLY BILL

No. 1734

Introduced by Assembly Member Frusetta

February 24, 1995

An act to amend Sections 311.2, 311.3, 311.4, and 1524 of, and to add Section 312.6 to, the Penal Code, relating to obscene matter.

LEGISLATIVE COUNSEL'S DIGEST

AB 1734, as amended, Frusetta. Obscene matter.

(1) Existing law governs, among other things, the sale, distribution, possession, and forfeiture of, and prescribes punishment for violations of the law relating to, obscene matter, as defined.

This bill would provide that it does not constitute a violation of these provisions for a person or entity solely to provide access or connection to or from a facility, system, or network over which that person or entity has no control and that an employer is not liable for the actions of an employee or agent under the provisions, except as provided. The bill further would provide that it is a defense to prosecution for a violation of these provisions and in any civil action that may be instituted based on such a violation that a person has taken specified good faith actions to restrict or prevent the

transmission of, or access to, a communication specified in the provisions.

The bill would specify that every person who knowingly possesses 10 or more units of the same obscene videotape and “video distribution equipment,” as defined, who transfers possession of an obscene videotape to another; *knowing that the videotape is obscene*, is guilty of wholesale distribution of obscene matter and shall be punished by imprisonment in the state prison for 16 months, or 2 or 3 years or by a fine not exceeding \$10,000, or by both, or by imprisonment in a county jail not to exceed one year or by a fine of not more than \$1,000, or by both. Because this bill would create new crimes, it would impose a state-mandated local program.

(2) Existing law prohibits sexual exploitation of a child, which is knowingly developing, duplicating, printing, or exchanging any film, photograph, videotape, negative, or slide in which a person under the age of 18 years is engaged in an act of sexual conduct, as defined.

The bill would add any computer disc, video laser disc, recording, and any mechanical, electrical, or chemical reproduction to the means of reproduction enumerated in these provisions. *However, it would provide that these provisions do not apply to matter that is unsolicited and is received without knowledge or consent through a facility, system, or network over which the person or entity has no control.* Because this bill would expand the scope of a crime, it would impose a state-mandated local program.

(3) Existing law prohibits specified activities by a person with regard to a minor under the age of 18 years relating to permitting the minor to engage in either posing or modeling alone or with others for purposes of preparing a film, photograph, negative, slide, or live performance involving sexual conduct by a minor under the age of 18 years, alone or with other persons or animals. Existing law makes it a felony to engage in these activities for commercial purposes.

The bill would add any computer disc, videotape, video laser disc, recording, and any mechanical, electrical, or chemical reproduction to the means of reproduction enumerated in these provisions. Because this bill would



expand the scope of a crime, it would impose a state-mandated local program.

(4) Existing law specifies the grounds upon which a search warrant may be issued, including a circumstance in which the property or things to be seized consist of evidence that tends to show that sexual exploitation of a child has occurred or is occurring.

This bill would add to those grounds a circumstance in which the property or things to be seized consist of evidence that tends to show that possession of matter depicting sexual conduct of a person under the age of 18 years has occurred or is occurring.

~~(6)~~

(5) Proposition 8, an initiative statute approved by the voters at the June 8, 1982, primary election, prescribes a 5-year prison sentence enhancement for any person convicted of a serious felony, as defined, who has been previously convicted of a serious felony. This initiative statute provides that any amendment of its provisions by the Legislature shall require a $\frac{2}{3}$ vote of the membership of each house. Chapter 12 of the Statutes of 1994 amended the initiative statute and prescribes enhanced prison sentences for any person convicted of a felony who has one or more prior felony convictions, as defined.

This bill would provide that a felony conviction for wholesale distribution of obscene matter under the provisions in (1) above shall not constitute a current felony conviction for purposes of the above sentence enhancement provisions. Because this provision would constitute an amendment of an initiative statute, the bill would require a $\frac{2}{3}$ vote.

(6) Proposition 184, an initiative statute approved by the voters at the November 8, 1994, general election, added Section 1170.12 to the Penal Code. This initiative statute also provides that any amendment of its provisions by the Legislature shall require a $\frac{2}{3}$ vote by the membership of each house. Section 1170.12 of the Penal Code also prescribes enhanced sentences for any person convicted of a felony who has one or more prior felony convictions.

This bill would provide that a felony conviction for wholesale distribution of obscene matter under the provisions



in (1) above shall not constitute a current felony conviction for purposes of the above sentence enhancement provisions. Because this provision would also constitute an amendment of an initiative statute, the bill would require a 2/3 vote.

(7) This bill would make technical, nonsubstantive changes to existing law.

(7)

(8) 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~~ 2/3. 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 311.2 of the Penal Code is
2 amended to read:

3 311.2. (a) Every person who knowingly sends or
4 causes to be sent, or brings or causes to be brought, into
5 this state for sale or distribution, or in this state possesses,
6 prepares, publishes, produces, or prints, with intent to
7 distribute or to exhibit to others, or who offers to
8 distribute, distributes, or exhibits to others, any obscene
9 matter is for a first offense, guilty of a misdemeanor. If the
10 person has previously been convicted of any violation of
11 this section, the court may, in addition to the punishment
12 authorized in Section 311.9, impose a fine not exceeding
13 fifty thousand dollars (\$50,000).

14 (b) Every person who knowingly sends or causes to be
15 sent, or brings or causes to be brought, into this state for
16 sale or distribution, or in this state possesses, prepares,
17 publishes, produces, develops, duplicates, or prints, with
18 intent to distribute or to exhibit to, or to exchange with,
19 others for commercial consideration, or who offers to
20 distribute, distributes, or exhibits to, or exchanges with,
21 others for commercial consideration, any obscene matter,
22 knowing that the matter depicts a person under the age



1 of 18 years personally engaging in or personally
2 simulating sexual conduct, as defined in Section 311.4, is
3 guilty of a felony and shall be punished by imprisonment
4 in the state prison for two, three, or six years, or by a fine
5 not exceeding one hundred thousand dollars (\$100,000),
6 in the absence of a finding that the defendant would be
7 incapable of paying that fine, or by both that fine and
8 imprisonment.

9 (c) Every person who knowingly sends or causes to be
10 sent, or brings or causes to be brought, into this state for
11 sale or distribution, or in this state possesses, prepares,
12 publishes, produces, develops, duplicates, or prints, with
13 intent to distribute or exhibit to, or to exchange with, a
14 person 18 years of age or older, or who offers to distribute,
15 distributes, or exhibits to, or exchanges with, a person 18
16 years of age or older any matter, knowing that the matter
17 depicts a person under the age of 18 years personally
18 engaging in or personally simulating sexual conduct, as
19 defined in Section 311.4, is guilty of a misdemeanor and
20 shall be punished by imprisonment in the county jail for
21 up to one year, or by a fine not exceeding two thousand
22 dollars (\$2,000), or by both that fine and imprisonment.
23 It is not necessary to prove commercial consideration or
24 that the matter is obscene in order to establish a violation
25 of this subdivision. If a person has been previously
26 convicted of a violation of this subdivision, he or she is
27 guilty of a felony.

28 (d) Every person who knowingly sends or causes to be
29 sent, or brings or causes to be brought, into this state for
30 sale or distribution, or in this state possesses, prepares,
31 publishes, produces, develops, duplicates, or prints, with
32 intent to distribute or exhibit to, or to exchange with, a
33 person under 18 years of age, or who offers to distribute,
34 distributes, or exhibits to, or exchanges with, a person
35 under 18 years of age any matter, knowing that the
36 matter depicts a person under the age of 18 years
37 personally engaging in or personally simulating sexual
38 conduct, as defined in Section 311.4, is guilty of a felony.
39 It is not necessary to prove commercial consideration or



1 that the matter is obscene in order to establish a violation
2 of this subdivision.

3 (e) (1) Every person who knowingly possesses 10 or
4 more units of the same obscene videotape, possesses
5 video distribution equipment, and transfers possession of
6 an obscene videotape to another, *knowing the videotape*
7 *is obscene*, is guilty of wholesale distribution of obscene
8 matter and shall be punished by imprisonment in the
9 state prison for 16 months or two or three years or by a
10 fine of not more than ten thousand dollars (\$10,000), or
11 by both that fine and imprisonment, or by imprisonment
12 in a county jail not to exceed one year or by a fine of not
13 more than one thousand dollars (\$1,000), or by both that
14 fine and imprisonment.

15 (2) For the purposes of this subdivision, “matter”
16 means videotapes and “video distribution equipment”
17 includes, but is not limited to, videotapes for use in
18 reproduction, master tapes, reproduction equipment,
19 mailing lists, mailing paraphernalia, and similar objects.

20 (f) Subdivisions (a) to (e), inclusive, do not apply to
21 the activities of law enforcement and prosecuting
22 agencies in the investigation and prosecution of criminal
23 offenses, to legitimate medical, scientific, or educational
24 activities, or to lawful conduct between spouses.

25 (g) This section does not apply to matter that depicts
26 a legally emancipated child under the age of 18 years or
27 to lawful conduct between spouses when one or both are
28 under the age of 18 years.

29 (h) It does not constitute a violation of this section for
30 a telephone corporation, as defined by Section 234 of the
31 Public Utilities Code, to carry or transmit messages
32 described in this chapter or to perform related activities
33 in providing telephone services.

34 (i) *A felony conviction under subdivision (e) shall not*
35 *constitute a current felony conviction for purposes of*
36 *subdivisions (b) to (i), inclusive, of Section 667 or Section*
37 *1170.12.*

38 SEC. 2. Section 311.3 of the Penal Code is amended to
39 read:



1 311.3. (a) A person is guilty of sexual exploitation of
2 a child when he or she knowingly develops, duplicates,
3 prints, or exchanges any film, photograph, videotape,
4 video laser disc, negative, computer disc, slide, recording,
5 or any mechanical, electrical, or chemical reproduction
6 in which a person who is under the age of 18 years is
7 engaged in an act of sexual conduct.

8 (b) As used in this section, “sexual conduct” means any
9 of the following:

10 (1) Sexual intercourse, including genital-genital,
11 oral-genital, anal-genital, or oral-anal, whether between
12 persons of the same or opposite sex or between humans
13 and animals.

14 (2) Penetration of the vagina or rectum by any object.

15 (3) Masturbation for the purpose of sexual stimulation
16 of the viewer.

17 (4) Sadoomasochistic abuse for the purpose of sexual
18 stimulation of the viewer.

19 (5) Exhibition of the genitals or pubic or rectal area of
20 any person for the purpose of sexual stimulation of the
21 viewer.

22 (6) Defecation or urination for the purpose of sexual
23 stimulation of the viewer.

24 (c) Subdivision (a) does not apply to the activities of
25 law enforcement and prosecution agencies in the
26 investigation and prosecution of criminal offenses or to
27 legitimate medical, scientific, or educational activities, or
28 to lawful conduct between spouses.

29 (d) Every person who violates subdivision (a) shall be
30 punished by a fine of not more than two thousand dollars
31 (\$2,000) or by imprisonment in the county jail for not
32 more than one year, or by both that fine and
33 imprisonment. If the person has been previously
34 convicted of a violation of subdivision (a) or any section
35 of this chapter, he or she shall be punished by
36 imprisonment in the state prison.

37 (e) The provisions of this section do not apply to an
38 employee of a commercial film developer who is acting
39 within the scope of his or her employment and in
40 accordance with the instructions of his or her employer,



1 provided that the employee has no financial interest in
2 the commercial developer by which he or she is
3 employed.

4 (f) *Subdivision (a) does not apply to matter that is*
5 *unsolicited and is received without knowledge or consent*
6 *through a facility, system, or network over which the*
7 *person or entity has no control.*

8 SEC. 3. Section 311.4 of the Penal Code is amended to
9 read:

10 311.4. (a) Every person who, with knowledge that a
11 person is a minor, or who, while in possession of any facts
12 on the basis of which he or she should reasonably know
13 that the person is a minor, hires, employs, or uses the
14 minor to do or assist in doing any of the acts described in
15 Section 311.2, is, for a first offense, guilty of a
16 misdemeanor. If the person has previously been
17 convicted of any violation of this section, the court may,
18 in addition to the punishment authorized in Section 311.9,
19 impose a fine not exceeding fifty thousand dollars
20 (\$50,000).

21 (b) Every person who, with knowledge that a person
22 is a minor under the age of 18 years, or who, while in
23 possession of any facts on the basis of which he or she
24 should reasonably know that the person is a minor under
25 the age of 18 years, knowingly promotes, employs, uses,
26 persuades, induces, or coerces a minor under the age of
27 18 years, or any parent or guardian of a minor under the
28 age of 18 years under his or her control who knowingly
29 permits the minor, to engage in or assist others to engage
30 in either posing or modeling alone or with others for
31 purposes of preparing a film, photograph, negative,
32 computer disc, slide, videotape, video laser disc,
33 recording, or any mechanical, electrical, or chemical
34 reproduction or live performance involving sexual
35 conduct by a minor under the age of 18 years alone or with
36 other persons or animals, for commercial purposes, is
37 guilty of a felony and shall be punished by imprisonment
38 in the state prison for three, six, or eight years.

39 (c) Every person who, with knowledge that a person
40 is a minor under the age of 18 years, or who, while in



1 possession of any facts on the basis of which he or she
2 should reasonably know that the person is a minor under
3 the age of 18 years, knowingly promotes, employs, uses,
4 persuades, induces, or coerces a minor under the age of
5 18 years, or any parent or guardian of a minor under the
6 age of 18 years under his or her control who knowingly
7 permits the minor, to engage in or assist others to engage
8 in either posing or modeling alone or with others for
9 purposes of preparing a film, photograph, negative,
10 computer disc, slide, videotape, video laser disc,
11 recording, or any mechanical, electrical, or chemical
12 reproduction or live performance involving sexual
13 conduct by a minor under the age of 18 years alone or with
14 other persons or animals, is guilty of a felony. It is not
15 necessary to prove commercial purposes in order to
16 establish a violation of this subdivision.

17 (d) As used in subdivisions (b) and (c), “sexual
18 conduct” means any of the following, whether actual or
19 simulated: sexual intercourse, oral copulation, anal
20 intercourse, anal-oral copulation, masturbation,
21 bestiality, sexual sadism, sexual masochism, penetration
22 of the vagina or rectum by any object in a lewd or
23 lascivious manner, exhibition of the genitals or the pubic
24 or rectal area for the purpose of sexual stimulation of the
25 viewer, any lewd or lascivious sexual act as defined in
26 Section 288, or excretory functions performed in a lewd
27 or lascivious manner, whether or not any of the above
28 conduct is performed alone or between members of the
29 same or opposite sex or between humans and animals. An
30 act is simulated when it gives the appearance of being
31 sexual conduct.

32 (e) This section does not apply to a legally
33 emancipated minor or to lawful conduct between spouses
34 if one or both are under the age of 18 years.

35 (f) In every prosecution under this section involving
36 a minor under the age of 14 years at the time of the
37 offense, the age of the victim shall be pled and proven for
38 the purpose of the enhanced penalty provided in Section
39 647.6. Failure to plead and prove that the victim was
40 under the age of 14 years at the time of the offense is not



1 a bar to prosecution under this section if it is proven that
2 the victim was under the age of 18 years at the time of the
3 offense.

4 SEC. 4. Section 312.6 is added to the Penal Code, to
5 read:

6 312.6. (a) It does not constitute a violation of this
7 chapter for a person or entity solely to provide access or
8 connection to or from a facility, system, or network over
9 which that person or entity has no control, including
10 related capabilities that are incidental to providing access
11 or connection. This subdivision does not apply to an
12 individual or entity that is owned or controlled by, or a
13 conspirator with, an entity actively involved in the
14 creation, editing, or knowing distribution of
15 communications that violate this chapter.

16 (b) An employer is not liable under this chapter for the
17 actions of an employee or agent unless the employee's or
18 agent's conduct is within the scope of his or her
19 employment or agency and the employer has knowledge
20 of, authorizes, or ratifies the employee's or agent's
21 conduct.

22 (c) It is a defense to prosecution under this chapter
23 and in any civil action that may be instituted based on a
24 violation of this chapter that a person has taken
25 reasonable, effective, and appropriate actions in good
26 faith to restrict or prevent the transmission of, or access
27 to, a communication specified in this chapter.

28 SEC. 5. Section 1524 of the Penal Code is amended to
29 read:

30 1524. (a) A search warrant may be issued upon any
31 of the following grounds:

- 32 (1) When the property was stolen or embezzled.
- 33 (2) When the property or things were used as the
34 means of committing a felony.
- 35 (3) When the property or things are in the possession
36 of any person with the intent to use it as a means of
37 committing a public offense, or in the possession of
38 another to whom he or she may have delivered it for the
39 purpose of concealing it or preventing its being
40 discovered.



1 (4) When the property or things to be seized consist of
2 any item or constitutes any evidence that tends to show
3 a felony has been committed, or tends to show that a
4 particular person has committed a felony.

5 (5) When the property or things to be seized consist of
6 evidence that tends to show that sexual exploitation of a
7 child, in violation of Section 311.3, or possession of matter
8 depicting sexual conduct of a person under the age of 18
9 years, in violation of Section 311.11, has occurred or is
10 occurring.

11 (b) The property or things described in subdivision
12 (a) may be taken on the warrant from any place, or from
13 any person in whose possession it may be.

14 (c) Notwithstanding subdivision (a) or (b), no search
15 warrant shall issue for any documentary evidence in the
16 possession or under the control of any person who is a
17 lawyer as defined in Section 950 of the Evidence Code, a
18 physician as defined in Section 990 of the Evidence Code,
19 a psychotherapist as defined in Section 1010 of the
20 Evidence Code, or a clergyman as defined in Section 1030
21 of the Evidence Code, and who is not reasonably
22 suspected of engaging or having engaged in criminal
23 activity related to the documentary evidence for which
24 a warrant is requested unless the following procedure has
25 been complied with:

26 (1) At the time of the issuance of the warrant the court
27 shall appoint a special master in accordance with
28 subdivision (d) to accompany the person who will serve
29 the warrant. Upon service of the warrant, the special
30 master shall inform the party served of the specific items
31 being sought and that the party shall have the
32 opportunity to provide the items requested. If the party,
33 in the judgment of the special master, fails to provide the
34 items requested, the special master shall conduct a search
35 for the items in the areas indicated in the search warrant.

36 (2) If the party who has been served states that an item
37 or items should not be disclosed, they shall be sealed by
38 the special master and taken to court for a hearing.

39 At the hearing the party searched shall be entitled to
40 raise any issues that may be raised pursuant to Section



1 1538.5 as well as a claim that the item or items are
 2 privileged, as provided by law. The hearing shall be held
 3 in the superior court. The court shall provide sufficient
 4 time for the parties to obtain counsel and make any
 5 motions or present any evidence. The hearing shall be
 6 held within three days of the service of the warrant unless
 7 the court makes a finding that the expedited hearing is
 8 impracticable. In that case the matter shall be heard at
 9 the earliest possible time.

10 (3) The warrant shall, whenever practicable, be
 11 served during normal business hours. In addition, the
 12 warrant shall be served upon a party who appears to have
 13 possession or control of the items sought. If after
 14 reasonable efforts, the party serving the warrant is unable
 15 to locate the person, the special master shall seal and
 16 return to the court for determination by the court any
 17 item that appears to be privileged as provided by law.

18 (d) As used in this section, a “special master” is an
 19 attorney who is a member in good standing of the
 20 California State Bar and who has been selected from a list
 21 of qualified attorneys that is maintained by the State Bar
 22 particularly for the purposes of conducting the searches
 23 described in this section. These attorneys shall serve
 24 without compensation. A special master shall be
 25 considered a public employee, and the governmental
 26 entity that caused the search warrant to be issued shall be
 27 considered the employer of the special master and the
 28 applicable public entity, for purposes of Division 3.6
 29 (commencing with Section 810) of Title 1 of the
 30 Government Code, relating to claims and actions against
 31 public entities and public employees. In selecting the
 32 special master the court shall make every reasonable
 33 effort to ensure that the person selected has no
 34 relationship with any of the parties involved in the
 35 pending matter. Any information obtained by the special
 36 master shall be confidential and shall not be divulged
 37 except in direct response to inquiry by the court.

38 In any case in which the magistrate determines that,
 39 after reasonable efforts have been made to obtain a
 40 special master, a special master is not available and would



1 not be available within a reasonable period of time, the
2 magistrate may direct the party seeking the order to
3 conduct the search in the manner described in this
4 section in lieu of the special master.

5 (e) Any search conducted pursuant to this section by
6 a special master may be conducted in such a manner as
7 to permit the party serving the warrant or his or her
8 designee to accompany the special master as he or she
9 conducts his *or her* search. However, that party or his or
10 her designee shall not participate in the search nor shall
11 he or she examine any of the items being searched by the
12 special master except upon agreement of the party upon
13 whom the warrant has been served.

14 (f) As used in this section “documentary evidence”
15 includes, but is not limited to, writings, documents,
16 blueprints, drawings, photographs, computer printouts,
17 microfilms, X-rays, files, diagrams, ledgers, books, tapes,
18 audio and video recordings, films or papers of any type or
19 description.

20 (g) No warrant shall issue for any item or items
21 described in Section 1070 of the Evidence Code.

22 SEC. 6. No reimbursement is required by this act
23 pursuant to Section 6 of Article XIII B of the California
24 Constitution because the only costs which may be
25 incurred by a local agency or school district will be
26 incurred because this act creates a new crime or
27 infraction, changes the definition of a crime or infraction,
28 changes the penalty for a crime or infraction, or
29 eliminates a crime or infraction. Notwithstanding Section
30 17580 of the Government Code, unless otherwise
31 specified in this act, the provisions of this act shall become
32 operative on the same date that the act takes effect
33 pursuant to the California Constitution.

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