

Introduced by Senator Harman

February 23, 2009

An act to amend Sections 311, 311.1, 311.2, 311.3, 311.4, 311.5, 311.7, 311.10, and 311.11 of the Penal Code, relating to child pornography.

LEGISLATIVE COUNSEL'S DIGEST

SB 203, as introduced, Harman. Child pornography: separate offense per child: Internet distribution.

Existing law includes provisions criminalizing conduct involving obscene matter and child pornography. In *People v. Hertzig* (2007) 156 Cal.App.4th 398, the court, in interpreting one of these, a child pornography possession provision, held that the possession of multiple video images on a laptop computer was a single violation.

This bill would revise the provisions criminalizing conduct involving obscene matter and child pornography to provide that the depiction or involvement of each individual person pursuant to any of those provisions shall constitute a distinct and separate offense.

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.

By revising the definition of existing crimes to expand their application, this bill 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. Section 311.1 of the Penal Code is amended to read:

4 311.1. (a) Every person who knowingly sends or causes to be
5 sent, or brings or causes to be brought, into this state for sale or
6 distribution, or in this state possesses, prepares, publishes,
7 produces, develops, duplicates, or prints any representation of
8 information, data, or image, including, but not limited to, any film,
9 filmstrip, photograph, negative, slide, photocopy, videotape, video
10 laser disc, computer hardware, computer software, computer floppy
11 disc, data storage media, CD-ROM, or computer-generated
12 equipment or any other computer-generated image that contains
13 or incorporates in any manner, any film or filmstrip, with intent
14 to distribute or to exhibit to, or to exchange with, others, or who
15 offers to distribute, distributes, or exhibits to, or exchanges with,
16 others, any obscene matter, knowing that the matter depicts a
17 person under the age of 18 years personally engaging in or
18 personally simulating sexual conduct, as defined in Section 311.4,
19 shall be punished either by imprisonment in the county jail for up
20 to one year, by a fine not to exceed one thousand dollars (\$1,000),
21 or by both the fine and imprisonment, or by imprisonment in the
22 state prison, by a fine not to exceed ten thousand dollars (\$10,000),
23 or by the fine and imprisonment.

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

28 (c) This section does not apply to matter which depicts a child
29 under the age of 18, which child is legally emancipated, including
30 lawful conduct between spouses when one or both are under the
31 age of 18.

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

37 (e) *The depiction of each individual person as described in this*
38 *section shall constitute a distinct and separate offense.*

39 SEC. 3. Section 311.2 of the Penal Code is amended to read:

1 311.2. (a) Every person who knowingly sends or causes to be
2 sent, or brings or causes to be brought, into this state for sale or
3 distribution, or in this state possesses, prepares, publishes,
4 produces, or prints, with intent to distribute or to exhibit to others,
5 or who offers to distribute, distributes, or exhibits to others, any
6 obscene matter is for a first offense, guilty of a misdemeanor. If
7 the person has previously been convicted of any violation of this
8 section, the court may, in addition to the punishment authorized
9 in Section 311.9, impose a fine not exceeding fifty thousand dollars
10 (\$50,000).

11 (b) Every person who knowingly sends or causes to be sent, or
12 brings or causes to be brought, into this state for sale or distribution,
13 or in this state possesses, prepares, publishes, produces, develops,
14 duplicates, or prints any representation of information, data, or
15 image, including, but not limited to, any film, filmstrip, photograph,
16 negative, slide, photocopy, videotape, video laser disc, computer
17 hardware, computer software, computer floppy disc, data storage
18 media, CD-ROM, or computer-generated equipment or any other
19 computer-generated image that contains or incorporates in any
20 manner, any film or filmstrip, with intent to distribute or to exhibit
21 to, or to exchange with, others for commercial consideration, or
22 who offers to distribute, distributes, or exhibits to, or exchanges
23 with, others for commercial consideration, any obscene matter,
24 knowing that the matter depicts a person under the age of 18 years
25 personally engaging in or personally simulating sexual conduct,
26 as defined in Section 311.4, is guilty of a felony and shall be
27 punished by imprisonment in the state prison for two, three, or six
28 years, or by a fine not exceeding one hundred thousand dollars
29 (\$100,000), in the absence of a finding that the defendant would
30 be incapable of paying that fine, or by both that fine and
31 imprisonment.

32 (c) Every person who knowingly sends or causes to be sent, or
33 brings or causes to be brought, into this state for sale or distribution,
34 or in this state possesses, prepares, publishes, produces, develops,
35 duplicates, or prints any representation of information, data, or
36 image, including, but not limited to, any film, filmstrip, photograph,
37 negative, slide, photocopy, videotape, video laser disc, computer
38 hardware, computer software, computer floppy disc, data storage
39 media, CD-ROM, or computer-generated equipment or any other
40 computer-generated image that contains or incorporates in any

1 manner, any film or filmstrip, with intent to distribute or exhibit
2 to, or to exchange with, a person 18 years of age or older, or who
3 offers to distribute, distributes, or exhibits to, or exchanges with,
4 a person 18 years of age or older any matter, knowing that the
5 matter depicts a person under the age of 18 years personally
6 engaging in or personally simulating sexual conduct, as defined
7 in Section 311.4, shall be punished by imprisonment in the county
8 jail for up to one year, or by a fine not exceeding two thousand
9 dollars (\$2,000), or by both that fine and imprisonment, or by
10 imprisonment in the state prison. It is not necessary to prove
11 commercial consideration or that the matter is obscene in order to
12 establish a violation of this subdivision. If a person has been
13 previously convicted of a violation of this subdivision, he or she
14 is guilty of a felony.

15 (d) Every person who knowingly sends or causes to be sent, or
16 brings or causes to be brought, into this state for sale or distribution,
17 or in this state possesses, prepares, publishes, produces, develops,
18 duplicates, or prints any representation of information, data, or
19 image, including, but not limited to, any film, filmstrip, photograph,
20 negative, slide, photocopy, videotape, video laser disc, computer
21 hardware, computer software, computer floppy disc, data storage
22 media, CD-ROM, or computer-generated equipment or any other
23 computer-generated image that contains or incorporates in any
24 manner, any film or filmstrip, with intent to distribute or exhibit
25 to, or to exchange with, a person under 18 years of age, or who
26 offers to distribute, distributes, or exhibits to, or exchanges with,
27 a person under 18 years of age any matter, knowing that the matter
28 depicts a person under the age of 18 years personally engaging in
29 or personally simulating sexual conduct, as defined in Section
30 311.4, is guilty of a felony. It is not necessary to prove commercial
31 consideration or that the matter is obscene in order to establish a
32 violation of this subdivision.

33 (e) Subdivisions (a) to (d), inclusive, do not apply to the
34 activities of law enforcement and prosecuting agencies in the
35 investigation and prosecution of criminal offenses, to legitimate
36 medical, scientific, or educational activities, or to lawful conduct
37 between spouses.

38 (f) This section does not apply to matter that depicts a legally
39 emancipated child under the age of 18 years or to lawful conduct
40 between spouses when one or both are under the age of 18 years.

1 (g) It does not constitute a violation of this section for a
2 telephone corporation, as defined by Section 234 of the Public
3 Utilities Code, to carry or transmit messages described in this
4 chapter or to perform related activities in providing telephone
5 services.

6 (h) *The depiction of each individual person as described in this*
7 *section shall constitute a distinct and separate offense.*

8 SEC. 4. Section 311.3 of the Penal Code is amended to read:

9 311.3. (a) A person is guilty of sexual exploitation of a child
10 if he or she knowingly develops, duplicates, prints, or exchanges
11 any representation of information, data, or image, including, but
12 not limited to, any film, filmstrip, photograph, negative, slide,
13 photocopy, videotape, video laser disc, computer hardware,
14 computer software, computer floppy disc, data storage media,
15 CD-ROM, or computer-generated equipment or any other
16 computer-generated image that contains or incorporates in any
17 manner, any film or filmstrip that depicts a person under the age
18 of 18 years engaged in an act of sexual conduct.

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

21 (1) Sexual intercourse, including genital-genital, oral-genital,
22 anal-genital, or oral-anal, whether between persons of the same or
23 opposite sex or between humans and animals.

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

25 (3) Masturbation for the purpose of sexual stimulation of the
26 viewer.

27 (4) Sadomasochistic abuse for the purpose of sexual stimulation
28 of the viewer.

29 (5) Exhibition of the genitals or the pubic or rectal area of any
30 person for the purpose of sexual stimulation of the viewer.

31 (6) Defecation or urination for the purpose of sexual stimulation
32 of the viewer.

33 (c) Subdivision (a) does not apply to the activities of law
34 enforcement and prosecution agencies in the investigation and
35 prosecution of criminal offenses or to legitimate medical, scientific,
36 or educational activities, or to lawful conduct between spouses.

37 (d) Every person who violates subdivision (a) shall be punished
38 by a fine of not more than two thousand dollars (\$2,000) or by
39 imprisonment in a county jail for not more than one year, or by
40 both that fine and imprisonment. If the person has been previously

1 convicted of a violation of subdivision (a) or any section of this
2 chapter, he or she shall be punished by imprisonment in the state
3 prison.

4 (e) The provisions of this section do not apply to an employee
5 of a commercial film developer who is acting within the scope of
6 his or her employment and in accordance with the instructions of
7 his or her employer, provided that the employee has no financial
8 interest in the commercial developer by which he or she is
9 employed.

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

13 (g) *The depiction of each individual person as described in this*
14 *section shall constitute a distinct and separate offense.*

15 SEC. 5. Section 311.4 of the Penal Code is amended to read:

16 311.4. (a) Every person who, with knowledge that a person is
17 a minor, or who, while in possession of any facts on the basis of
18 which he or she should reasonably know that the person is a minor,
19 hires, employs, or uses the minor to do or assist in doing any of
20 the acts described in Section 311.2, shall be punished by
21 imprisonment in the county jail for up to one year, or by a fine not
22 exceeding two thousand dollars (\$2,000), or by both that fine and
23 imprisonment, or by imprisonment in the state prison. If the person
24 has previously been convicted of any violation of this section, the
25 court may, in addition to the punishment authorized in Section
26 311.9, impose a fine not exceeding fifty thousand dollars (\$50,000).

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

1 computer-generated image that contains or incorporates in any
2 manner, any film, filmstrip, or a live performance involving, sexual
3 conduct by a minor under the age of 18 years alone or with other
4 persons or animals, for commercial purposes, is guilty of a felony
5 and shall be punished by imprisonment in the state prison for three,
6 six, or eight years.

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

27 (d) (1) As used in subdivisions (b) and (c), “sexual conduct”
28 means any of the following, whether actual or simulated: sexual
29 intercourse, oral copulation, anal intercourse, anal oral copulation,
30 masturbation, bestiality, sexual sadism, sexual masochism,
31 penetration of the vagina or rectum by any object in a lewd or
32 lascivious manner, exhibition of the genitals or pubic or rectal area
33 for the purpose of sexual stimulation of the viewer, any lewd or
34 lascivious sexual act as defined in Section 288, or excretory
35 functions performed in a lewd or lascivious manner, whether or
36 not any of the above conduct is performed alone or between
37 members of the same or opposite sex or between humans and
38 animals. An act is simulated when it gives the appearance of being
39 sexual conduct.

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

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

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

(g) Violations of this section regarding each individual person as specified above shall constitute a distinct and separate offense.

SEC. 6. Section 311.5 of the Penal Code is amended to read:

311.5. (a) Every person who writes, creates, or solicits the publication or distribution of advertising or other promotional material, or who in any manner promotes, the sale, distribution, or exhibition of matter represented or held out by him to be obscene, is guilty of a misdemeanor.

(b) The depiction of each individual person in material or matter described in subdivision (a) shall constitute a distinct and separate offense.

SEC. 7. Section 311.7 of the Penal Code is amended to read:

311.7. (a) Every person who, knowingly, as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, publication or other merchandise, requires that the purchaser or consignee receive any obscene matter or who denies or threatens to deny a franchise, revokes or threatens to revoke, or imposes any penalty, financial or otherwise, by reason of the failure of any person to accept obscene matter, or by reason of the return of such obscene matter, is guilty of a misdemeanor.

(b) The depiction of each individual person in obscene matter as provided in this section shall constitute a distinct and separate offense.

1 SEC. 8. Section 311.10 of the Penal Code is amended to read:

2 311.10. (a) Any person who advertises for sale or distribution
3 any obscene matter knowing that it depicts a person under the age
4 of 18 years personally engaging in or personally simulating sexual
5 conduct, as defined in Section 311.4, is guilty of a felony and is
6 punishable by imprisonment in the state prison for two, three, or
7 four years, or in a county jail not exceeding one year, or by a fine
8 not exceeding fifty thousand dollars (\$50,000), or by both such
9 fine and imprisonment.

10 (b) Subdivision (a) shall not apply to the activities of law
11 enforcement and prosecution agencies in the investigation and
12 prosecution of criminal offenses.

13 (c) *Advertisement as specified in subdivision (a) shall constitute*
14 *a distinct and separate offense for each individual person under*
15 *18 years of age depicted in the obscene matter.*

16 SEC. 9. Section 311.11 of the Penal Code is amended to read:

17 311.11. (a) Every person who knowingly possesses or controls
18 any matter, representation of information, data, or image, including,
19 but not limited to, any film, filmstrip, photograph, negative, slide,
20 photocopy, videotape, video laser disc, computer hardware,
21 computer software, computer floppy disc, data storage media,
22 CD-ROM, or computer-generated equipment or any other
23 computer-generated image that contains or incorporates in any
24 manner, any film or filmstrip, the production of which involves
25 the use of a person under the age of 18 years, knowing that the
26 matter depicts a person under the age of 18 years personally
27 engaging in or simulating sexual conduct, as defined in subdivision
28 (d) of Section 311.4, is guilty of a felony and shall be punished by
29 imprisonment in the state prison, or a county jail for up to one
30 year, or by a fine not exceeding two thousand five hundred dollars
31 (\$2,500), or by both the fine and imprisonment.

32 (b) Every person who commits a violation of subdivision (a),
33 and who has been previously convicted of a violation of this
34 section, an offense requiring registration under the Sex Offender
35 Registration Act, or an attempt to commit any of the
36 above-mentioned offenses, is guilty of a felony and shall be
37 punished by imprisonment in the state prison for two, four, or six
38 years.

39 (c) It is not necessary to prove that the matter is obscene in order
40 to establish a violation of this section.

1 (d) This section does not apply to drawings, figurines, statues,
2 or any film rated by the Motion Picture Association of America,
3 nor does it apply to live or recorded telephone messages when
4 transmitted, disseminated, or distributed as part of a commercial
5 transaction.

6 (e) *The depiction of each individual person as described in this*
7 *section shall constitute a distinct and separate offense.*

8 SEC. 10. It is the intent of the Legislature in enacting Sections
9 2 to 9, inclusive, of this act to abrogate the holding in *People v.*
10 *Hertzig* (2007) 156 Cal.App.4th 398.

11 SEC. 11. No reimbursement is required by this act pursuant to
12 Section 6 of Article XIII B of the California Constitution because
13 the only costs that may be incurred by a local agency or school
14 district will be incurred because this act creates a new crime or
15 infraction, eliminates a crime or infraction, or changes the penalty
16 for a crime or infraction, within the meaning of Section 17556 of
17 the Government Code, or changes the definition of a crime within
18 the meaning of Section 6 of Article XIII B of the California
19 Constitution.