

AMENDED IN SENATE APRIL 16, 2009

AMENDED IN SENATE APRIL 2, 2009

SENATE BILL

No. 203

Introduced by Senator Harman

(Coauthors: Senators Dutton, Huff, Runner, and Walters)

(Coauthors: Assembly Members Bill Berryhill, DeVore, Fletcher,
Harkey, Jeffries, Niello, and Smyth)

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 amended, 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. In *People v. Manfredi* (2008) 169 Cal.App.4th 622, the court, in interpreting the same provision, held that the defendant's simultaneous possession of multiple child pornography materials at the same location 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. *The bill would state that it is the intent of the Legislature in enacting the bill to abrogate*

the holdings in the cases of People v. Hertzig and People v. Manfredi, cited above.

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.

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

7 (b) “Matter” means any book, magazine, newspaper, or other
8 printed or written material, or any picture, drawing, photograph,
9 motion picture, or other pictorial representation, or any statue or
10 other figure, or any recording, transcription, or mechanical,
11 chemical, or electrical reproduction, or any other article, equipment,
12 machine, or material. “Matter” also means live or recorded
13 telephone messages if transmitted, disseminated, or distributed as
14 part of a commercial transaction.

15 (c) “Person” means any individual, partnership, firm,
16 association, corporation, limited liability company, or other legal
17 entity.

18 (d) “Distribute” means transfer possession of, whether with or
19 without consideration, including making available for access or
20 possession over the Internet.

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

23 (f) “Exhibit” means show.

24 (g) “Obscene live conduct” means any physical human body
25 activity, whether performed or engaged in alone or with other
26 persons, including but not limited to singing, speaking, dancing,
27 acting, simulating, or pantomiming, taken as a whole, that to the
28 average person, applying contemporary statewide standards,
29 appeals to the prurient interest and is conduct that, taken as a whole,
30 depicts or describes sexual conduct in a patently offensive way
31 and that, taken as a whole, lacks serious literary, artistic, political,
32 or scientific value.

33 (1) If it appears from the nature of the conduct or the
34 circumstances of its production, presentation, or exhibition that it
35 is designed for clearly defined deviant sexual groups, the appeal
36 of the conduct shall be judged with reference to its intended
37 recipient group.

38 (2) In prosecutions under this chapter, if circumstances of
39 production, presentation, advertising, or exhibition indicate that
40 live conduct is being commercially exploited by the defendant for

1 the sake of its prurient appeal, that evidence is probative with
2 respect to the nature of the conduct and may justify the conclusion
3 that the conduct lacks serious literary, artistic, political, or scientific
4 value.

5 (3) In determining whether the live conduct taken as a whole
6 lacks serious literary, artistic, political, or scientific value in
7 description or representation of those matters, the fact that the
8 defendant knew that the live conduct depicts persons under the
9 age of 16 years engaged in sexual conduct, as defined in
10 subdivision (c) of Section 311.4, is a factor that may be considered
11 in making that determination.

12 (h) The Legislature expresses its approval of the holding of
13 *People v. Cantrell*, 7 Cal.App.4th 523, that, for the purposes of
14 this chapter, matter that “depicts a person under the age of 18 years
15 personally engaging in or personally simulating sexual conduct”
16 is limited to visual works that depict that conduct.

17 SEC. 2. Section 311.1 of the Penal Code is amended to read:

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

38 (b) This section does not apply to the activities of law
39 enforcement and prosecuting agencies in the investigation and

1 prosecution of criminal offenses or to legitimate medical, scientific,
2 or educational activities, or to lawful conduct between spouses.

3 (c) This section does not apply to matter which depicts a child
4 under the age of 18 years, which child is legally emancipated,
5 including lawful conduct between spouses when one or both are
6 under the age of 18 years.

7 (d) It does not constitute a violation of this section for a
8 telephone corporation, as defined by Section 234 of the Public
9 Utilities Code, to carry or transmit messages described in this
10 chapter or perform related activities in providing telephone
11 services.

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

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

15 311.2. (a) Every person who knowingly sends or causes to be
16 sent, or brings or causes to be brought, into this state for sale or
17 distribution, or in this state possesses, prepares, publishes,
18 produces, or prints, with intent to distribute or to exhibit to others,
19 or who offers to distribute, distributes, or exhibits to others, any
20 obscene matter is for a first offense, guilty of a misdemeanor. If
21 the person has previously been convicted of any violation of this
22 section, the court may, in addition to the punishment authorized
23 in Section 311.9, impose a fine not exceeding fifty thousand dollars
24 (\$50,000).

25 (b) Every person who knowingly sends or causes to be sent, or
26 brings or causes to be brought, into this state for sale or distribution,
27 or in this state possesses, prepares, publishes, produces, develops,
28 duplicates, or prints any representation of information, data, or
29 image, including, but not limited to, any film, filmstrip, photograph,
30 negative, slide, photocopy, videotape, video laser disc, computer
31 hardware, computer software, computer floppy disc, data storage
32 media, CD-ROM, or computer-generated equipment or any other
33 computer-generated image that contains or incorporates in any
34 manner, any film or filmstrip, with intent to distribute or to exhibit
35 to, or to exchange with, others for commercial consideration, or
36 who offers to distribute, distributes, or exhibits to, or exchanges
37 with, others for commercial consideration, any obscene matter,
38 knowing that the matter depicts a person under the age of 18 years
39 personally engaging in or personally simulating sexual conduct,
40 as defined in Section 311.4, is guilty of a felony and shall be

1 punished by imprisonment in the state prison for two, three, or six
2 years, or by a fine not exceeding one hundred thousand dollars
3 (\$100,000), in the absence of a finding that the defendant would
4 be incapable of paying that fine, or by both that fine and
5 imprisonment.

6 (c) Every person who knowingly sends or causes to be sent, or
7 brings or causes to be brought, into this state for sale or distribution,
8 or in this state possesses, prepares, publishes, produces, develops,
9 duplicates, or prints any representation of information, data, or
10 image, including, but not limited to, any film, filmstrip, photograph,
11 negative, slide, photocopy, videotape, video laser disc, computer
12 hardware, computer software, computer floppy disc, data storage
13 media, CD-ROM, or computer-generated equipment or any other
14 computer-generated image that contains or incorporates in any
15 manner, any film or filmstrip, with intent to distribute or exhibit
16 to, or to exchange with, a person 18 years of age or older, or who
17 offers to distribute, distributes, or exhibits to, or exchanges with,
18 a person 18 years of age or older any matter, knowing that the
19 matter depicts a person under the age of 18 years personally
20 engaging in or personally simulating sexual conduct, as defined
21 in Section 311.4, shall be punished by imprisonment in the county
22 jail for up to one year, or by a fine not exceeding two thousand
23 dollars (\$2,000), or by both that fine and imprisonment, or by
24 imprisonment in the state prison. It is not necessary to prove
25 commercial consideration or that the matter is obscene in order to
26 establish a violation of this subdivision. If a person has been
27 previously convicted of a violation of this subdivision, he or she
28 is guilty of a felony.

29 (d) Every person who knowingly sends or causes to be sent, or
30 brings or causes to be brought, into this state for sale or distribution,
31 or in this state possesses, prepares, publishes, produces, develops,
32 duplicates, or prints any representation of information, data, or
33 image, including, but not limited to, any film, filmstrip, photograph,
34 negative, slide, photocopy, videotape, video laser disc, computer
35 hardware, computer software, computer floppy disc, data storage
36 media, CD-ROM, or computer-generated equipment or any other
37 computer-generated image that contains or incorporates in any
38 manner, any film or filmstrip, with intent to distribute or exhibit
39 to, or to exchange with, a person under 18 years of age, or who
40 offers to distribute, distributes, or exhibits to, or exchanges with,

1 a person under 18 years of age any matter, knowing that the matter
2 depicts a person under the age of 18 years personally engaging in
3 or personally simulating sexual conduct, as defined in Section
4 311.4, is guilty of a felony. It is not necessary to prove commercial
5 consideration or that the matter is obscene in order to establish a
6 violation of this subdivision.

7 (e) Subdivisions (a) to (d), inclusive, do not apply to the
8 activities of law enforcement and prosecuting agencies in the
9 investigation and prosecution of criminal offenses, to legitimate
10 medical, scientific, or educational activities, or to lawful conduct
11 between spouses.

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

15 (g) It does not constitute a violation of this section for a
16 telephone corporation, as defined by Section 234 of the Public
17 Utilities Code, to carry or transmit messages described in this
18 chapter or to perform related activities in providing telephone
19 services.

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

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

23 311.3. (a) A person is guilty of sexual exploitation of a child
24 if he or she knowingly develops, duplicates, prints, or exchanges
25 any representation of information, data, or image, including, but
26 not limited to, any film, filmstrip, photograph, negative, slide,
27 photocopy, videotape, video laser disc, computer hardware,
28 computer software, computer floppy disc, data storage media,
29 CD-ROM, or computer-generated equipment or any other
30 computer-generated image that contains or incorporates in any
31 manner, any film or filmstrip that depicts a person under the age
32 of 18 years engaged in an act of sexual conduct.

33 (b) As used in this section, "sexual conduct" means any of the
34 following:

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

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

39 (3) Masturbation for the purpose of sexual stimulation of the
40 viewer.

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

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

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

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

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

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

(f) Subdivision (a) does 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.

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

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

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

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

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

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

(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 or her to be obscene, is guilty of a misdemeanor.

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

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

5 311.7. (a) Every person who, knowingly, as a condition to a
6 sale, allocation, consignment, or delivery for resale of any paper,
7 magazine, book, periodical, publication or other merchandise,
8 requires that the purchaser or consignee receive any obscene matter
9 or who denies or threatens to deny a franchise, revokes or threatens
10 to revoke, or imposes any penalty, financial or otherwise, by reason
11 of the failure of any person to accept obscene matter, or by reason
12 of the return of such obscene matter, is guilty of a misdemeanor.

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

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

17 311.10. (a) Any person who advertises for sale or distribution
18 any obscene matter knowing that it depicts a person under the age
19 of 18 years personally engaging in or personally simulating sexual
20 conduct, as defined in Section 311.4, is guilty of a felony and is
21 punishable by imprisonment in the state prison for two, three, or
22 four years, or in a county jail not exceeding one year, or by a fine
23 not exceeding fifty thousand dollars (\$50,000), or by both such
24 fine and imprisonment.

25 (b) Subdivision (a) shall not apply to the activities of law
26 enforcement and prosecution agencies in the investigation and
27 prosecution of criminal offenses.

28 (c) Advertisement as specified in subdivision (a) shall constitute
29 a distinct and separate offense for each individual person under
30 18 years of age depicted in the obscene matter.

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

32 311.11. (a) Every person who knowingly possesses or controls
33 any matter, representation of information, data, or image, including,
34 but not limited to, any film, filmstrip, photograph, negative, slide,
35 photocopy, videotape, video laser disc, computer hardware,
36 computer software, computer floppy disc, data storage media,
37 CD-ROM, or computer-generated equipment or any other
38 computer-generated image that contains or incorporates in any
39 manner, any film or filmstrip, the production of which involves
40 the use of a person under the age of 18 years, knowing that the

1 matter depicts a person under the age of 18 years personally
2 engaging in or simulating sexual conduct, as defined in subdivision
3 (d) of Section 311.4, is guilty of a felony and shall be punished by
4 imprisonment in the state prison, or a county jail for up to one
5 year, or by a fine not exceeding two thousand five hundred dollars
6 (\$2,500), or by both that fine and imprisonment.

7 (b) Every person who commits a violation of subdivision (a),
8 and who has been previously convicted of a violation of this
9 section, an offense requiring registration under the Sex Offender
10 Registration Act, or an attempt to commit any of the
11 above-mentioned offenses, is guilty of a felony and shall be
12 punished by imprisonment in the state prison for two, four, or six
13 years.

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

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

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

23 SEC. 10. It is the intent of the Legislature in enacting Sections
24 2 to 9, inclusive, of this act to abrogate the ~~holding~~ *holdings* in
25 *People v. Hertzig* (2007) 156 Cal.App.4th 398 and *People v.*
26 *Manfredi* (2008) 169 Cal.App.4th 622.

27 SEC. 11. No reimbursement is required by this act pursuant to
28 Section 6 of Article XIII B of the California Constitution because
29 the only costs that may be incurred by a local agency or school
30 district will be incurred because this act creates a new crime or
31 infraction, eliminates a crime or infraction, or changes the penalty
32 for a crime or infraction, within the meaning of Section 17556 of
33 the Government Code, or changes the definition of a crime within
34 the meaning of Section 6 of Article XIII B of the California
35 Constitution.