

WEST VIRGINIA LEGISLATURE

2024 REGULAR SESSION

Introduced

House Bill 5272

By Delegate W. Clark

[Introduced January 29, 2024; Referred to the
Committee on Technology and Infrastructure then the
Judiciary]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new chapter,
 2 designated §49A-1-101, §49A-1-102, §49A-1-103, §49A-1-104, and §49A-1-105, related
 3 to the creation of standards for the protection of children online; definitions; the liability of
 4 publishers and distributors of material harmful to minors; rule-making authority; and
 5 severability.

Be it enacted by the Legislature of West Virginia:

CHAPTER 49A. CHILD ONLINE PROTECTION AND LIABILITY.

**ARTICLE 1. LIABILITY FOR PUBLISHERS AND DISTRIBUTORS OF MATERIAL
HARMFUL TO MINORS.**

§49A-1-101. Legislative findings.

1 The Legislature finds that pornography is creating a public health crisis and is a corroding
 2 influence on minors and due to advances in technology, the widespread availability of the Internet,
 3 and limited age verification requirements, minors are exposed to pornography at too early of an
 4 age. Pornography contributes to the hyper-sexualization of minors. The Legislature finds that
 5 pornography may lead to low self-esteem, body image disorders, an increase in problematic
 6 sexual activity at younger ages, increased desire among minors to engage in risky sexual
 7 behavior, and difficulty in forming or maintaining positive, intimate relationships. The Legislature
 8 further finds that pornography may impact brain development and function, contribute to emotional
 9 and medical illnesses, shape deviant sexual arousal, and promote problematic or harmful sexual
 10 behaviors and addiction. It is the intent of the Legislature to provide a civil remedy for damages
 11 against commercial entities that distribute material harmful to minors.

§49A-1-102. Definitions.

1 As used in this chapter:

2 (1) "Commercial entity" includes corporations, limited liability companies, partnerships,
 3 limited partnerships, sole proprietorships, or other legally recognized entities.

4 (2) "Digitized identification card" means a data file available on any mobile device which
5 has connectivity to the Internet through a state-approved application that allows the mobile device
6 to download the data file from a state agency or an authorized agent of a state agency that
7 contains all of the data elements visible on the face and back of a license or identification card and
8 displays the current status of the license or identification card.

9 (3) "Distribute" means to issue, sell, give, provide, deliver, transfer, transmute, circulate, or
10 disseminate by any means.

11 (4) "Internet" means the international computer network of both federal and non-federal
12 interoperable packet switched data networks.

13 (5) "Material harmful to minors" is defined as all of the following:

14 (A) any material that the average person, applying contemporary community standards,
15 would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is
16 designed to pander to, the prurient interest;

17 (B) material that exploits, is devoted to, or principally consists of descriptions of actual,
18 simulated, or animated display or depiction of any of the following, in a manner patently offensive
19 with respect to minors:

20 (i) pubic hair, anus, vulva, genitals, or nipple of the female breast;

21 (ii) touching, caressing, or fondling of nipples, breasts, buttocks, anuses, or genitals; or

22 (iii) sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation,
23 excretory functions, exhibitions, or any other sexual act; and

24 (C) the material taken as a whole lacks serious literary, artistic, political, or scientific value
25 for minors.

26 (6) "Minor" means any person under 18 years old.

27 (7) "News-gathering organization" means any of the following:

28 (A) an employee of a newspaper, news publication, or news source, printed or on an online
29 or mobile platform, of current news and public interest, while operating as an employee as

30 provided in this subsection, who can provide documentation of such employment with the
31 newspaper, news publication, or news source; or

32 (B) an employee of a radio broadcast station, television broadcast station, cable television
33 operator, or wire service while operating as an employee as provided in this subsection, who can
34 provide documentation of such employment.

35 (8) "Publish" means to communicate or make information available to another person or
36 entity on a publicly available Internet website.

37 (9) "Reasonable age verification methods" means verifying that the person seeking to
38 access the material is 18 years old or older by using any of the following methods:

39 (A) use of a digitized identification card as defined in this section;

40 (B) verification through an independent, third-party age verification service that compares
41 the personal information entered by the individual who is seeking access to the material that is
42 available from a commercially available database, or aggregate of databases, that is regularly
43 used by government agencies and businesses for the purpose of age and identity verification; or

44 (C) any commercially reasonable method that relies on public or private transactional data
45 to verify the age of the person attempting to access the material.

46 (10) "Substantial portion" means more than 33-1/3% of total material on a website, which
47 meets the definition of "material harmful to minors" as defined in this section.

48 (11) "Transactional data" means a sequence of information that documents an exchange,
49 agreement, or transfer between an individual, commercial entity, or third party used for the
50 purpose of satisfying a request or event. Transactional data includes records from mortgage,
51 education, and employment entities.

§49A-1-103. Liability for publishers and distributors; age verification; retention of data;
exceptions; cause of action allowed by Attorney General; statute of limitations.

1 (a) A commercial entity that knowingly and intentionally publishes or distributes material
2 harmful to minors on the Internet from a website that contains a substantial portion of such

3 material shall be held liable if the entity fails to perform reasonable age verification methods to
4 verify the age of an individual attempting to access the material.

5 (b) A commercial entity or third party that performs the required age verification shall not
6 retain any identifying information of the individual after access has been granted to the material.

7 (c) A commercial entity that is found to have violated this section shall be liable to an
8 individual for damages resulting from a minor's accessing the material, including court costs and
9 reasonable attorney fees as ordered by the court. An express civil cause of action for individuals
10 harmed by a violation of the requirements of this article is hereby created.

11 (d) A commercial entity that is found to have knowingly retained, used, shared, or sold any
12 identifying information, or other data, of the individual after access has been granted to the
13 individual shall be liable to the individual for damages resulting from retaining the identifying
14 information, including court costs and reasonable attorney fees as ordered by the court.

15 (e) This section shall not apply to any bona fide news or public interest broadcast, website
16 video, report, or event and shall not be construed to affect the rights of a news-gathering
17 organization.

18 (f) No Internet service provider, affiliate or subsidiary of an Internet service provider, search
19 engine, or cloud service provider shall be held to have violated the provisions of this section solely
20 for providing access or connection to or from a website or other information or content on the
21 Internet, or a facility, system, or network not under that provider's control, including transmission,
22 downloading, storing, or providing access, to the extent that such provider is not responsible for
23 the creation of the content of the communication that constitutes material harmful to minors.

24 (g) The Attorney General may bring a civil action against a commercial entity or other
25 person to recover damages or a civil penalty for violating this article, and if a court of competent
26 jurisdiction finds that the defendant has engaged in a violation of this article, it may assess a civil
27 penalty of not less than \$25,000 for each violation of this article in addition to any other damages
28 that may have been incurred.

29 (h) The Legislature hereby creates a statute of limitation for the filing of any civil action
30 under this section of five years after the discovery of the violation of the provisions of this article.
31 No civil penalty pursuant to this section may be imposed for violations occurring more than five
32 years before the action is brought.

§49A-1-104. Rule-making authority.

1 (a) The Secretary of the Department of Human Services is authorized to propose rules for
2 legislative approval necessary to implement this article in accordance with §29A-3-1 et seq. of this
3 code.

4 (b) The rules:

5 (1) Shall establish processes or means by which a commercial entity may meet the age
6 verification requirements of this article;

7 (2) Shall establish requirements for providing confirmation of the receipt of any information
8 provided by a person seeking to verify age under this article;

9 (3) Shall establish requirements for retaining, protecting, and securely disposing of any
10 information obtained by a commercial entity or its agent as a result of compliance with the
11 requirements of this article;

12 (4) Shall require that information obtained by a commercial entity or its agent in order to
13 comply with the requirements of this article are only retained for the purpose of compliance and
14 may not be used for any other purpose;

15 (5) Shall require if the department permits an agent to process verification requirements
16 required by this article, that the agent have its principal place of business in the United States of
17 America.

§49A-1-105. Severability.

1 If any provision or clause of this article or its application to any person or circumstance is
2 held invalid, the invalidity does not affect other provisions or applications of this article which can
3 be given effect without the invalid provision or application, and to this end the provisions of this

4 article are severable.

NOTE: The purpose of this bill is to create standards for the protection of children online.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.