

WEST VIRGINIA LEGISLATURE

2024 REGULAR SESSION

ENGROSSED

Committee Substitute

for

House Bill 4867

By Delegates Chiarelli, Pinson, Coop-Gonzalez,
Mallow, Martin, Brooks, Kimble, Kelly, McGeehan,
and Young

[Originating in the Committee on the Judiciary;

Reported on January 29, 2024]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new chapter,
2 designated chapter 49A. Child Online Protection and Liability, by adding thereto a new
3 article, designated §49A-1-101 Liability for Publishers and Distributors of Sexual Material
4 Harmful to Minors, by adding thereto new sections designated §49A-1-101, §49A-1-102,
5 §49A-1-103, §49A-1-104, §49A-1-105, §49A-1-106, and §49A-1-107 all relating to
6 creating liability for publishers and distributors of sexual material harmful to minors;
7 providing definitions; relating to what constitutes reasonable age verification; providing
8 exceptions to applicability of this article; requiring a commercial entity that provides
9 pornography and other materials defined as being harmful to minors as a substantial
10 portion of the entity's content to verify the age of individuals accessing the material, relating
11 to liability, and establishing a cause of action; establishing requirements, liability, and
12 establishing a cause of action, for the retention of data; imposing liability for publishers
13 and distributors of material harmful to minors who fail to comply with verification
14 requirements; imposing liability for publishers and distributors of material that is obscene
15 or child pornography; and providing that an internet service provider or hosting entity is not
16 liable for hosting or transmitting material harmful to minors to the extent that it is not the
17 creator of the material; providing a five year statute of limitations to these civil actions;
18 relating to certain civil actions allowable by the Attorney General, relating to remedy of civil
19 penalties, relating to how amount of civil penalties are to be based; relating to a five year
20 statute of limitations for civil actions relating for attorney general civil actions; relating to
21 rule-making authority of the Office of Technology; relating to enforcement of the provisions
22 of this article; and relating to a severability section.

Be it enacted by the Legislature of West Virginia: _

CHAPTER 49A. CHILD ONLINE PROTECTION AND LIABILITY.

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

§49A-1-101. Definitions.

1 As used in this chapter:

2 (1) "Application" means, as used in this section, a computer software program designed to
3 run on a smartphone, computer tablet, mobile device, smart television, desktop, or other
4 application enabled devices.

5 (2) "Child pornography" is defined as any material visually portraying a minor engaged in
6 any sexually explicit conduct as those terms are used in West Virginia Code §61-8C-1.

7 (3) "Commercial entity" includes a corporation, limited liability company, partnership,
8 limited partnership, sole proprietorship, or other legally recognized entity.

9 (4) "Digital identification" means information stored on a digital network that may be
10 accessed by a commercial entity and that serves as proof of the identity of an individual. "Digital
11 identification" shall include but not be limited to the West Virginia Mobile ID.

12 (5) "Distribute" means to issue, sell, give, provide, deliver, transfer, transmute, circulate, or
13 disseminate by any means.

14 (6) "Intentionally" means conduct that is willfully engaged and the consequences of such
15 conduct results in a violation of this article.

16 (7) "Internet" means the international computer network of both federal and non-federal
17 interoperable packet switched data networks.

18 (8) "Knowingly" means, with respect to conduct or to a circumstance described by a statute
19 defining an offense, that a person is aware by documentation or action that the person's conduct is
20 of that nature or that the circumstance exists.

21 (9) "Minor" means any person under 18 years old.

22 (10) "News-gathering organization" means any of the following:

23 (A) an employee of a newspaper, news publication, or news source, printed or on an online
24 or mobile platform, of current news and public interest, while operating as an employee as
25 provided in this subsection, who can provide documentation of such employment with the
26 newspaper, news publication, or news source; or

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

30 (11) “Personally identifiable information” means any information about an individual
31 maintained by an agency, including:

32 (A) any information that can be used to distinguish or trace an individual’s identity, such as
33 name, social security number, date and place of birth, mother’s maiden name, or biometric
34 records; and

35 (B) any other information that is linked or linkable to an individual, such as medical,
36 educational, financial, and employment information.

37 (12) “Obscene material” is defined as all of the following:

38 (a) Any material that the average person, applying contemporary community standards,
39 would find, taking the material as a whole, is designed to appeal to, or is designed to pander to, the
40 prurient interest;

41 (b) Material that exploits, is devoted to, or principally consists of descriptions of actual,
42 simulated, or animated display or depiction of any of the following, in a manner that is patently and
43 sexually offensive:

44 (i) Pubic hair, anus, vulva, genitals, or nipple of the female breast;

45 (ii) Touching, caressing, or fondling of nipples, breasts, buttocks, anuses, or genitals; or

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

48 (c) The material taken as a whole lacks serious literary, artistic, political, medical,
49 therapeutic or scientific value.

50 (13) "Publish" means to communicate or make information available to another person or
51 entity on a publicly available Internet website or application.

52 (14) "Sexual material harmful to minors" includes any material that:

53 (A) the average person, applying contemporary community standards, would find, taking
54 the material as a whole and with respect to minors, is designed to appeal to, or is designed to
55 pander to, the prurient interest;

56 (B) in a manner that is patently and sexually offensive in respect to minors, exploits, is
57 devoted to, or principally consists of descriptions of actual, simulated, or animated display or
58 depiction of:

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

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

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

63 (C) taken as a whole lacks serious literary, artistic, political, medical, therapeutic, or
64 scientific value for minors.

65 (15) "Substantial portion" means more than 33-1/3% of total material on a website or
66 application, which meets the definition of "sexual material harmful to minors" as defined in this
67 section.

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

§49A-1-102. Reasonable age verification methods.

2 (a) A commercial entity that knowingly and intentionally publishes or distributes sexual
3 material harmful to minors on an Internet website, or application, or a third party that performs age
4 verification under this article, shall in order to prove that an individual is 18 years of age or older
5 require an individual to:

6 (1) provide digital identification; or

7 (2) comply with a commercial or governmental age verification system that verifies age
8 using:

9 (A) government-issued identification which may be digital identification; or

10 (B) a commercially reasonable method that relies on public or private transactional data to
11 verify the age of an individual.

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

14 Provided, That nothing in this subsection shall be interpreted to require the deletion of data that
15 was otherwise held or obtained by a commercial entity, or third party, which the commercial entity,
16 or third party, held prior to the age verification or which is, or was, otherwise held by a commercial
17 entity, or third party, and was not gained or compiled as a part of the age verification process.

18 (c) A commercial entity, or third party, shall implement best practices to comply with the
19 current standards of the National Institute of Standards and Technology to limit the amount of
20 personally identifiable information transferred between entities while effectively accomplishing the
21 age verification requirements of this section.

22 (d) A commercial entity shall not publish or distribute obscene material, or material that
23 depicts, describes or promotes child pornography, on the Internet or via an application.

§49A-1-103. Applicability of Article.

1 (a) This article does not apply to a website, video, report, or event of a bona fide news
2 gathering organization or public interest broadcast. This article may not be construed to affect the
3 rights of a news-gathering organization.

4 (b) An Internet service provider, or its affiliates or subsidiaries, a search engine, or a cloud
5 service provider may not be held to have violated this article for providing access or connection to
6 or from a website or other information or content on the Internet or on a facility, system, or network,
7 including transmission, downloading, intermediate storage, access software, or other services to
8 the extent the provider or search engine is not responsible for the creation of the content that
9 constitutes sexual material harmful to minors.

§49A-1-104. Liability for failing to perform reasonable age verification for sexual material
harmful to minors; damages; liability for retention of data; damages; creation of
cause of action; and statute of limitations.

1 (a) A commercial entity that knowingly and intentionally publishes or distributes sexual
2 material harmful to minors on the internet from a website, or through an application, that contains a
3 substantial portion of such sexual material harmful to minors shall be held liable if the entity fails to
4 perform reasonable age verification methods to verify the age of an individual attempting to access
5 the material. A commercial entity that is found to have violated this section shall be liable to an
6 individual, as defined in subsection (d) of this section, for damages resulting from a minor child's
7 accessing the material, and the individual who brings an action under this subsection is entitled to:

8 (1) an award of reasonable attorney fees and court costs;

9 (2) \$10,000 per each incident of violation; and

10 (3) actual damages for financial, physical, and emotional harm incurred by the person
11 bringing the action, if the court determines that the harm is a direct consequence of the violation or
12 violations.

13 (b) A commercial entity that knowingly and intentionally publishes or distributes obscene
14 material, or material that depicts, describes or promotes child pornography, on the Internet may be
15 held liable to an individual for nominal damages, actual damages, court costs and reasonable
16 attorney fees as ordered by the court.

17 (c) A commercial entity that is found to have violated this section shall be liable to an
18 individual for damages resulting from retaining, using, sharing, or selling any identifying
19 information, or other data, of the individual after access has been granted to the individual. An
20 individual who brings an action under this subsection is entitled to:

21 (1) an award of reasonable attorney fees and court costs;

22 (2) \$10,000 per each incident of violation; and

23 (3) actual damages for financial, physical, and emotional harm incurred by the person
24 bringing the action, if the court determines that the harm is a direct consequence of the violation or
25 violations.

26 (d) The Legislature hereby expressly creates the cause of action described in subsection
27 (a) for a minor child, parent, guardian, or other person legally permitted to act on the minor child's
28 behalf, that are harmed by a violation of the requirements of §49A-1-102(a) of the code. The
29 Legislature hereby expressly creates the cause of action described in subsection (b) of this section
30 for any person harmed by a violation of the requirements of §49A-1-102(d) of the code. The statute
31 of limitation for the filing of any civil action under this section shall be within five years after the
32 discovery of the violation, or in the exercise of reasonable diligence should have known of the
33 violation of this section. No award of damages pursuant to this section may be imposed for
34 violations occurring more than five years before the action is brought and no award of damages
35 may be imposed for any violation that occurred prior to the enactment of this section during the
36 2024 Regular Session of the West Virginia Legislature.

**§49A-1-105. Injunction by action of attorney general; civil penalties; basis of civil penalties;
and statute of limitations.**

1 (a) If the attorney general believes that a commercial entity is knowingly and intentionally
2 violating or has knowingly violated this article, and the action is in the public interest, the attorney
3 general may bring an action in the circuit court located where a minor child, or individual, has
4 accessed the obscene material, or sexual material harmful to minors, or in the circuit court located

5 where an individual resides who has had any identifiable information improperly retained, used,
6 shared, or sold, against a commercial entity or other person to enjoy the violation, recover a civil
7 penalty for violating this article. If a court of competent jurisdiction finds that the commercial entity
8 has engaged in a violation of this article, it may assess a civil penalty for each violation of this
9 article in addition to any other damages that may have been incurred, as follows:

10 (1) \$10,000 per day that the entity operates an Internet website in violation of the age
11 verification requirements of this article;

12 (2) \$10,000 per instance when the entity retains identifying information in violation of
13 subsection (b) of this section; and

14 (3) if, because of the entity's violation of the age verification requirements of this chapter,
15 one or more minors accesses sexual material harmful to minors, an additional amount of not more
16 than \$250,000.

17 (h) The amount of a civil penalty under this section shall be based on:

18 (1) the seriousness of the violation, including the nature, circumstances, extent, and
19 gravity of the violation;

20 (2) the history of previous violations;

21 (3) the amount necessary to deter a future violation;

22 (4) the economic effect of a penalty on the entity on whom the penalty will be imposed;

23 (5) the entity's knowledge that the act constituted a violation of this chapter; and

24 (6) any other matter that justice may require.

25 (i) The Legislature hereby creates a statute of limitation for the filing of any civil action
26 under this section and an action shall be filed within five years after the discovery of the violation of
27 the provisions of this section, or in the exercise of reasonable diligence should have known of the
28 violation of the provisions of this section. No civil penalty pursuant to this section may be imposed
29 for violations occurring more than five years before the action is brought and no civil penalty may
30 be imposed for any violation that occurred prior to the enactment of this section during the 2024

31 Regular Session of the West Virginia Legislature. The attorney general may recover reasonable
32 and necessary attorney's fees and costs incurred in a civil action under this article.

§49A-1-106. Rule-making authority.

1 (a) The Office of Technology, under the Department of Administration, is authorized to
2 propose rules for legislative approval necessary to implement this article in accordance with §29A-
3 3-1 et seq. of this 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 Office of Technology permits an agent to process verification
16 requirements required by this article, that the agent have its principal place of business in the
17 United States of America.

§49A-1-107. Severability.

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