

WEST VIRGINIA LEGISLATURE

2024 REGULAR SESSION

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 §49-A-1-101 Liability for Publishers and Distributors of Material Harmful
4 to Minors, by adding thereto new sections designated §49-A-1-101, §49-A-1-102, §49-A-1-
5 103, §49-A-1-104, all relating to creating liability for publishers and distributors of material
6 harmful to minors; providing definitions; requiring a commercial entity that provides
7 pornography and other materials defined as being harmful to minors as a substantial
8 portion of the entity's content to verify the age of individuals accessing the material;
9 establishing requirements and liability for the retention of data; imposing liability for
10 publishers and distributors of material harmful to minors who fail to comply with verification
11 requirements; and providing that an internet service provider or hosting entity is not liable
12 for hosting or transmitting material harmful to minors to the extent that it is not the creator of
13 the material, relating to certain civil actions allowable by the Attorney General, relating to
14 remedy of civil penalties, relating to how amount of civil penalties are to be based; relating
15 to a five year statute of limitations for civil actions relating to this article, relating to rule-
16 making authority of the Secretary of the Department of Human Services relating to
17 enforcement of the provisions of this article.

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, its
16 website video, its report, or its event and shall not be construed to affect the rights of a news-
17 gathering 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 an action in the circuit court of Kanawha County
25 against a commercial entity or other person to enjoin the violation, recover a civil penalty, and
26 obtain other relief the court considers appropriate for violating this article, and if a court of
27 competent jurisdiction finds that the defendant has engaged in a violation of this article, it may
28 assess a civil penalty for each violation of this article in addition to any other damages that may
29 have been incurred, as follows:

30 (1) \$10,000 per day that the entity operates an Internet website in violation of the age
31 verification requirements of this article;

32 (2) \$10,000 per instance when the entity retains identifying information in violation of
33 subsection (b) of this section; and

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

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

38 (1) the seriousness of the violation, including the nature, circumstances, extent, and
39 gravity of the violation;

40 (2) the history of previous violations;

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

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

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

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

45 (i) The Legislature hereby creates a statute of limitation for the filing of any civil action
46 under this section of five years after the discovery of the violation of the provisions of this article.

47 No civil penalty pursuant to this section may be imposed for violations occurring more than five
48 years before the action is brought. The Attorney General may recover reasonable and necessary
49 attorney's fees and costs incurred in a civil action under this article.

§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.

NOTE: The purpose of this bill is to create liability for publishers and distributors of material harmful to minors. The bill provides definitions. The bill requires any commercial entity that provides pornography and other materials defined as being harmful to minors as a substantial portion of the entity's content to verify the age of individuals accessing the material. The bill establishes requirements and liability for the retention of data. The bill imposes liability for publishers and distributors of material harmful to minors who fail to comply with verification requirements. The bill provides that an internet service provider or hosting entity is not liable for hosting or transmitting material harmful to minors to the extent that it is not the creator of the material. The bill also allows for the Attorney General to file certain civil actions for enforcement of the provisions of this article.. The bill establishes rule-making authority with the Secretary of the Department of Human Services in relation to enforcement of the provisions of this article. Lastly, there is a severability section.

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