

AMENDED IN ASSEMBLY JUNE 30, 2010
AMENDED IN ASSEMBLY JUNE 7, 2010
AMENDED IN SENATE JANUARY 15, 2010
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, Conway, DeVore,
Fletcher, Harkey, Jeffries, Niello, and Smyth)

February 23, 2009

An act to amend Section 311 of, and to add Section 312.8 to, the Penal Code, relating to child pornography.

LEGISLATIVE COUNSEL'S DIGEST

SB 203, as amended, Harman. Child pornography: Internet distribution.

Existing law includes provisions criminalizing conduct involving obscene matter and child pornography, including making the distribution of this material criminal. Existing law defines the term "distribute" for purposes of crimes relating to obscene matter.

This bill would include within this definition of "distribute" making available for access or possession over the Internet. The bill would also provide that nothing in the provisions criminalizing conduct involving obscene matter and child pornography shall be construed to permit an action against an interactive computer service, electronic communication service, or remote computing service, as defined, that is inconsistent

with specified provisions of federal law. 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.

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

9 (c) “Person” means any individual, partnership, firm,
10 association, corporation, limited liability company, or other legal
11 entity.

12 (d) “Distribute” means transfer possession of, whether with or
13 without consideration, including making available for access or
14 possession over the Internet. “Distribute” does not include the
15 actions of a ~~distribution entity~~, *an* interactive computer service; or
16 Internet service provider used by another party to distribute the
17 obscene matter or obscene live conduct.

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

20 (f) “Exhibit” means show.

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

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

35 (2) In prosecutions under this chapter, if circumstances of
36 production, presentation, advertising, or exhibition indicate that
37 live conduct is being commercially exploited by the defendant for
38 the sake of its prurient appeal, that evidence is probative with
39 respect to the nature of the conduct and may justify the conclusion

1 that the conduct lacks serious literary, artistic, political, or scientific
2 value.

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

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

15 SEC. 2. Section 312.8 is added to the Penal Code, to read:

16 312.8. (a) Nothing in this chapter shall be construed to permit
17 an action against an interactive computer service that is inconsistent
18 with subsection (c) of Section 230 of Title 47 of the United States
19 Code, or an action against an electronic communication service
20 or remote computing service that is inconsistent with Section
21 2258A or 2258B of Title 18 of the United States Code.

22 (b) For the purposes of this section, “interactive computer
23 service” shall be defined as specified in subsection (f) of Section
24 230 of Title 47 of the United States Code, “electronic
25 communication service” shall be defined as specified in paragraph
26 (15) of Section 2510 of Title 18 of the United States Code, and
27 “remote computing service” shall be defined as specified in
28 paragraph (2) of Section 2711 of Title 18 of the United States
29 Code.

30 SEC. 3. No reimbursement is required by this act pursuant to
31 Section 6 of Article XIII B of the California Constitution because
32 the only costs that may be incurred by a local agency or school
33 district will be incurred because this act creates a new crime or
34 infraction, eliminates a crime or infraction, or changes the penalty
35 for a crime or infraction, within the meaning of Section 17556 of
36 the Government Code, or changes the definition of a crime within
37 the meaning of Section 6 of Article XIII B of the California
38 Constitution.

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