

ASSEMBLY BILL

No. 295

Introduced by Assembly Member Baldwin

February 7, 1995

An act to amend Sections 311, 311.3, 311.4, 311.11, and 312.3 of the Penal Code, relating to pornography.

LEGISLATIVE COUNSEL'S DIGEST

AB 295, as introduced, Baldwin. Pornography.

Existing law defines the term “matter” for purposes of provisions governing obscene matter and child pornography. A violation of these provisions is a crime.

This bill would expand the definition of the term “matter” to include, among other things, various types of film and computer media. Because the bill would incorporate this expanded definition into these criminal provisions, it would change the definitions of various crimes, thereby imposing 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
 2 amended to read:

3 311. As used in this chapter, the following definitions
 4 ~~shall control the meaning of the respective terms~~ *apply*:

5 (a) “Obscene matter” means matter, taken as a whole,
 6 ~~which that~~ to the average person, applying contemporary
 7 statewide standards, appeals to the prurient interest, ~~and~~
 8 ~~is matter which that~~, taken as a whole, depicts or
 9 describes *sexual conduct* in a patently offensive way
 10 ~~sexual conduct,~~ and ~~which that~~, taken as a whole, lacks
 11 serious literary, artistic, political, or scientific value.

12 (1) ~~When~~ *If* it appears from the nature of the matter
 13 or the circumstances of its dissemination, distribution, or
 14 exhibition that it is designed for clearly defined deviant
 15 sexual groups, the appeal of the matter shall be judged
 16 with reference to its intended recipient group.

17 (2) In prosecutions under this chapter, ~~where if~~
 18 circumstances of production, presentation, sale,
 19 dissemination, distribution, or publicity indicate that
 20 matter is being commercially exploited by the defendant
 21 for the sake of its prurient appeal, ~~such this~~ evidence is
 22 probative with respect to the nature of the matter and
 23 ~~can~~ *may* justify the conclusion that the matter lacks
 24 serious literary, artistic, political, or scientific value.

25 (3) In determining whether the matter taken as a
 26 whole lacks serious literary, artistic, political, or scientific
 27 value in description or representation of ~~such those~~
 28 matters, the fact that the defendant knew that the matter
 29 depicts persons under the age of 16 years engaged in
 30 sexual conduct, as defined in subdivision (c) of Section
 31 311.4, is a factor ~~which can~~ *that may* be considered in
 32 making that determination.

33 (b) “Matter” means any book, magazine, newspaper,
 34 or other printed or written material, or any picture,
 35 drawing, photograph, motion picture, or other pictorial
 36 representation, or any statue or other figure, or any
 37 recording, transcription, or mechanical, chemical, or
 38 electrical reproduction, or any other ~~articles~~ *article*,



1 equipment, ~~machines~~ *machine*, or ~~materials~~ *material*.
2 “Matter” also means live or recorded telephone messages
3 ~~when~~ *if* transmitted, disseminated, or distributed as part
4 of a commercial transaction. “Matter” also means any
5 *film, filmstrip, photograph, negative, slide, photocopy,*
6 *videotape, video laser disc, computer hardware,*
7 *computer software, computer floppy disc, or any other*
8 *computer-related equipment or computer-generated*
9 *image that contains or incorporates in any manner; any*
10 *film, filmstrip, photograph, negative, slide, photocopy,*
11 *videotape, or video laser disc.*

12 (c) “Person” means any individual, partnership, firm,
13 association, corporation, limited liability company, or
14 other legal entity.

15 (d) “Distribute” means ~~to~~ transfer possession of,
16 whether with or without consideration.

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

19 (f) “Exhibit” means ~~to~~ show.

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

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

36 (2) In prosecutions under this chapter, ~~where~~ *if*
37 circumstances of production, presentation, advertising,
38 or exhibition indicate that live conduct is being
39 commercially exploited by the defendant for the sake of
40 its prurient appeal, that evidence is probative with



1 respect to the nature of the conduct and ~~can~~ *may* justify
2 the conclusion that the conduct lacks serious literary,
3 artistic, political, or scientific value.

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

12 SEC. 2. Section 311.3 of the Penal Code is amended to
13 read:

14 311.3. (a) A person is guilty of sexual exploitation of
15 a child ~~when if~~ he or she knowingly ~~develop~~ *develops*,
16 ~~duplicate~~ *duplicates*, ~~print~~ *prints*, or ~~exchange~~ *exchanges*
17 any film, *filmstrip*, photograph, ~~video~~ *tape* *videotape*,
18 negative, ~~or~~ slide, *photocopy*, *video laser disc*, *computer*
19 *hardware*, *computer software*, *computer floppy disc*, or
20 *any other computer-related equipment* or
21 *computer-generated image that contains or incorporates*
22 *in any manner; any film, filmstrip, photograph, negative,*
23 *slide, photocopy, videotape, or video laser disc* in which
24 a person under the age of 18 years *is* engaged in an act of
25 sexual conduct.

26 (b) As used in this section, “sexual conduct” means any
27 of the following:

28 (1) Sexual intercourse, including genital-genital,
29 oral-genital, anal-genital, or oral-anal, whether between
30 persons of the same or opposite sex or between humans
31 and animals.

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

33 (3) Masturbation, for the purpose of sexual stimulation
34 of the viewer.

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

37 (5) Exhibition of the genitals; *or* pubic or rectal areas
38 of any person for the purpose of sexual stimulation of the
39 viewer.



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

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

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

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

23 SEC. 3. Section 311.4 of the Penal Code is amended to
24 read:

25 311.4. (a) Every person who, with knowledge that a
26 person is a minor, or who, while in possession of any facts
27 on the basis of which he or she should reasonably know
28 that the person is a minor, hires, employs, or uses the
29 minor to do or assist in doing any of the acts described in
30 Section 311.2, is, for a first offense, guilty of a
31 misdemeanor. If the person has previously been
32 convicted of any violation of this section, the court may,
33 in addition to the punishment authorized in Section 311.9,
34 impose a fine not exceeding fifty thousand dollars
35 (\$50,000).

36 (b) Every person who, with knowledge that a person
37 is a minor under the age of 18 years, or who, while in
38 possession of any facts on the basis of which he or she
39 should reasonably know that the person is a minor under
40 the age of 18 years, knowingly promotes, employs, uses,



1 persuades, induces, or coerces a minor under the age of
2 18 years, or any parent or guardian of a minor under the
3 age of 18 years under his or her control who knowingly
4 permits the minor, to engage in or assist others to engage
5 in either posing or modeling alone or with others for
6 purposes of preparing a ~~film, photograph, negative, slide,~~
7 *matter* or a live performance involving sexual conduct by
8 a minor under the age of 18 years alone or with other
9 persons or animals, for commercial purposes, is guilty of
10 a felony and shall be punished by imprisonment in the
11 state prison for three, six, or eight years.

12 (c) Every person who, with knowledge that a person
13 is a minor under the age of 18 years, or who, while in
14 possession of any facts on the basis of which he or she
15 should reasonably know that the person is a minor under
16 the age of 18 years, knowingly promotes, employs, uses,
17 persuades, induces, or coerces a minor under the age of
18 18 years, or any parent or guardian of a minor under the
19 age of 18 years under his or her control who knowingly
20 permits the minor, to engage in or assist others to engage
21 in either posing or modeling alone or with others for
22 purposes of preparing a ~~film, photograph, negative, slide,~~
23 *matter* or a live performance involving sexual conduct by
24 a minor under the age of 18 years alone or with other
25 persons or animals, is guilty of a felony. It ~~shall~~ is not ~~be~~
26 necessary to prove commercial purposes in order to
27 establish a violation of this subdivision.

28 (d) (1) As used in subdivisions (b) and (c), “sexual
29 conduct” means any of the following, whether actual or
30 simulated: sexual intercourse, oral copulation, anal
31 intercourse, anal oral copulation, masturbation, bestiality,
32 sexual sadism, sexual masochism, penetration of the
33 vagina or rectum by any object in a lewd or lascivious
34 manner, exhibition of the genitals; *or* pubic; or rectal area
35 for the purpose of sexual stimulation of the viewer, any
36 lewd or lascivious sexual act as defined in Section 288, or
37 excretory functions performed in a lewd or lascivious
38 manner, whether or not any of the above conduct is
39 performed alone or between members of the same or
40 opposite sex or between humans and animals. An act is



1 simulated when it gives the appearance of being sexual
2 conduct.

3 (2) *As used in subdivisions (b) and (c), "matter"*
4 *means any film, filmstrip, photograph, negative, slide,*
5 *photocopy, videotape, video laser disc, computer*
6 *hardware, computer software, computer floppy disc, or*
7 *any other computer-related equipment or*
8 *computer-generated image that contains or incorporates*
9 *in any manner; any film, filmstrip, photograph, negative,*
10 *slide, photocopy, videotape, or video laser disc.*

11 (e) This section ~~shall~~ *does* not apply ~~where the~~ *to a*
12 *legally emancipated minor is—legally—emancipated,*
13 ~~including or to~~ *lawful conduct between spouses—when if*
14 *one or both are under the age of 18.*

15 (f) In every prosecution under this section involving
16 a minor under the age of 14 years at the time of the
17 offense, the age of the victim shall be pled and proven for
18 the purpose of the enhanced penalty provided in Section
19 647a. Failure to plead and prove that the victim was
20 under the age of 14 years at the time of the offense ~~shall~~
21 *is not* be a bar to prosecution under this section if it is
22 proven that the victim was under the age of 18 years at
23 the time of the offense.

24 SEC. 4. Section 311.11 of the Penal Code is amended
25 to read:

26 311.11. (a) Every person who knowingly possesses or
27 controls any matter, the production of which involves the
28 use of a person under the age of 18 years, knowing that the
29 matter depicts a person under the age of 18 years
30 personally engaging in or simulating sexual conduct, as
31 defined in subdivision (d) of Section 311.4, is guilty of a
32 public offense and shall be punished by imprisonment in
33 the county jail for up to one year, or by a fine not
34 exceeding two thousand five hundred dollars (\$2,500), or
35 by both the fine and imprisonment.

36 (b) If a person has been previously convicted of a
37 violation of this section, he or she is guilty of a felony and
38 shall be punished by imprisonment ~~of~~ *for* two, four, or six
39 years.



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

3 (d) ~~For purposes of this section, matter as defined in~~
4 ~~subdivision (b) of Section 311, also includes developed or~~
5 ~~undeveloped film, negatives, photocopies, filmstrips,~~
6 ~~slides, and videotapes, the production of which involves~~
7 ~~the use of a child under the age of 18 years.~~ This section
8 ~~shall~~ *does* not apply to drawings, figurines, statues, or any
9 film rated by the Motion Picture Association of America,
10 nor ~~shall~~ *does* it apply to live or recorded telephone
11 messages when transmitted, disseminated, or distributed
12 as part of a commercial transaction.

13 SEC. 5. Section 312.3 of the Penal Code is amended to
14 read:

15 312.3. (a) Matter ~~which~~ *that* depicts a person under
16 the age of 18 years personally engaging in or personally
17 simulating sexual conduct as defined in Section 311.4 and
18 ~~which~~ *that* is in the possession of any city, county, city and
19 county, or state official or agency is subject to forfeiture
20 pursuant to this section.

21 (b) An action to forfeit matter described in subdivision
22 (a) may be brought by the Attorney General, the district
23 attorney, county counsel, or the city attorney.
24 Proceedings shall be initiated by a petition of forfeiture
25 filed in the superior court of the county in which the
26 matter is located.

27 (c) The prosecuting agency shall make service of
28 process of a notice regarding that petition upon every
29 individual who may have a property interest in the
30 alleged proceeds, ~~which~~. *The* notice shall state that any
31 interested party may file a verified claim with the
32 superior court stating the amount of their claimed
33 interest and an affirmation or denial of the prosecuting
34 agency's allegation. If the ~~notices~~ *notice* cannot be given
35 by registered mail or personal delivery, the notice shall be
36 published for at least three successive weeks in a
37 newspaper of general circulation in the county where the
38 property is located. All notices shall set forth the time
39 within which a claim of interest in the property seized is
40 required to be filed.



1 (d) (1) Any person claiming an interest in the
2 property or proceeds may, at any time within 30 days
3 from the date of the first publication of the notice of
4 seizure, or within 30 days after receipt of actual notice, file
5 with the superior court of the county in which the action
6 is pending a verified claim stating his or her interest in the
7 property or proceeds. A verified copy of the claim shall
8 be given by the claimant to the Attorney General or
9 district attorney, county counsel, or city attorney, as
10 appropriate.

11 (2) If, at the end of the time set forth in paragraph (1),
12 an interested person has not filed a claim, the court, upon
13 motion, shall declare that the person has defaulted upon
14 his or her alleged interest, and it shall be subject to
15 forfeiture upon proof of compliance with subdivision (c).

16 (e) The burden ~~shall be~~ *is* on the petitioner to prove
17 beyond a reasonable doubt that matter is subject to
18 forfeiture pursuant to this section.

19 (f) It ~~shall~~ *is* not ~~be~~ necessary to seek or obtain a
20 criminal conviction prior to the entry of an order for the
21 destruction of matter pursuant to this section. Any matter
22 described in subdivision (a) ~~which~~ *that* is in the possession
23 of any city, county, city and county, or state official or
24 agency, including found property, or property obtained
25 as the result of a case in which no trial was had or ~~which~~
26 *that* has been disposed of by way of dismissal or otherwise
27 than by way of conviction may be ordered destroyed.

28 (g) A court order for destruction of matter described
29 in subdivision (a) may be carried out by a police or
30 sheriff's department or by the Department of Justice. The
31 court order shall specify the agency responsible for the
32 destruction.

33 (h) As used in this section, "matter" means any book,
34 magazine, newspaper, or other printed or written
35 material or any picture, drawing, photograph, motion
36 picture, or other pictorial representation, or any statue or
37 other figure, or any recording, transcription or
38 mechanical, chemical or electrical reproduction, or any
39 other articles, equipment, machines, or materials.
40 "*Matter*" also means any *film, filmstrip, photograph,*



1 *negative, slide, photocopy, videotape, video laser disc,*
2 *computer hardware, computer software, computer*
3 *floppy disc, or any other computer-related equipment or*
4 *computer-generated image that contains or incorporates*
5 *in any manner, any film, filmstrip, photograph, negative,*
6 *slide, photocopy, videotape, or video laser disc.*

7 (i) This section ~~shall~~ *does not apply where—* ~~the~~ *to a*
8 *depiction of a legally emancipated minor depicted—is*
9 ~~lawfully emancipated, including or to~~ *lawful conduct*
10 *between spouses when if one or more both* are under the
11 age of 18.

12 (j) It ~~shall be~~ *is* a defense in any forfeiture proceeding
13 that the matter seized was lawfully possessed in aid of
14 legitimate scientific or educational purposes.

15 SEC. 6. No reimbursement is required by this act
16 pursuant to Section 6 of Article XIII B of the California
17 Constitution because the only costs that may be incurred
18 by a local agency or school district will be incurred
19 because this act creates a new crime or infraction,
20 eliminates a crime or infraction, or changes the penalty
21 for a crime or infraction, within the meaning of Section
22 17556 of the Government Code, or changes the definition
23 of a crime within the meaning of Section 6 of Article
24 XIII B of the California Constitution.

25 Notwithstanding Section 17580 of the Government
26 Code, unless otherwise specified, the provisions of this act
27 shall become operative on the same date that the act
28 takes effect pursuant to the California Constitution.

