
Age Verification for Porn

The average age of first pornography exposure is between 11 and 12 years old.¹

Porn has been shown to raise the risk of depression, anxiety and low self-esteem.² Studies examining the neuroimaging results of subjects who viewed internet pornography reveal brain region activation similar to craving and drug cue reactions for alcohol, cocaine, and nicotine.³

A Pornhub executive was recently caught on undercover camera saying that porn “Can’t be normal,” “Can’t be healthy,” and “I hope they all ban us.”⁴ When asked why Pornhub doesn’t want to verify age, he said “Because it costs money. It would be counterintuitive to the business.”

The harmful effects of pornography on adolescents have spurred 17 states to recognize pornography as a public health hazard leading to a broad range of individual harms, societal harms, and public health impacts.⁵

Congress has legislatively established the compelling government interest of protecting minors from pornographic content at the national level, and passed the Child Online Protection Act in 1998.⁶ The Supreme Court upheld this compelling interest, but ruled in 2004 that personal blocking and filtering software was a less restrictive means of achieving it.⁷

Since this decision, such technology has proven to be insufficient.

Nearly 80% of U.S. youth in late adolescence report having accessed pornography⁸, while only 39% of parents use devices or software to block such content.⁹ In fact, 71% of teenagers ages 13 to 17 come across internet porn without looking for it.¹⁰ Children in the youngest age-group (11 to 13) were the most likely to say that their viewing of this content was mostly or all unintentional, and 22% reported that it was shown to them by someone else without them expecting it.¹¹

75% of parents surveyed felt their child would not have seen pornography online, but of those children, 53% said they had in fact seen pornography.¹²

Age Verification legislation is now the least restrictive means available to achieve the compelling government interest of protecting children from pornographic content online.

State Bill Specifics

The Act provides a civil remedy for damages against commercial entities who knowingly distribute harmful materials to minors on the internet without reasonable age verification methods.

The Act forbids websites to retain any personal identifying information of the user.

Only commercial entities whose websites contains a substantial portion of such material are affected.

The Act provides exceptions to news or public interest broadcasts, website videos, reports, or events and would not be construed to affect the rights of any news-gathering organizations.

The Act provides exceptions to internet service providers, search engines and cloud service providers.

The Progress of Other States

77% of swing state voters support laws requiring age verification for accessing online pornography.¹³

In 2022, Louisiana was the first to pass a bill requiring commercial entities with a substantial amount of material harmful to minors to verify the age of users, or be subject to liability for negligent harm.

A Pornhub spokesperson told CNN that since Pornhub complied with the Louisiana law in January 2023, traffic from that state has fallen 80%.¹⁴

As of today, nineteen states have introduced legislation to achieve this compelling government interest,¹⁵ and eight have passed this bill into law.

Additional Steps and Information

Although minors were protected on sites which chose to implement age verification technology after the Louisiana bill of 2022 went into effect, not all websites were compliant. Louisiana chose to add a new enforcement arm with the PAVE Act in 2023.¹⁶ This bill allowed the Attorney General to bring action against non-compliant sites and collect civil penalties per day of violation in an amount determined by the court.¹⁷

What About Court Cases?

The only states which have been challenged are the original Louisiana bill (*Free Speech Coal. v. LeBlanc*), Utah (*Free Speech Coalition et al v. Anderson*), and Texas (*Free Speech Coalition, Inc. v. Paxton*).

The Louisiana and Utah bills, which have nearly identical language, both had their cases dismissed for lack of subject matter jurisdiction.

The Texas bill, a heavily amended version of Louisiana's bill, was initially enjoined from enforcement. A last-minute switch to David Ezra, to a judge with a history of extreme rulings¹⁸, may have contributed to this. This injunction has been stayed and ruling reversed by the appellate court, pending a hearing in July.¹⁹ Still, this case offers insight into how child protection laws are attacked or an injunction justified. Large penalties for enforcement, vague language and compelled speech may make bills more difficult to defend.

Pornhub, Brazzers and many other pornographers fund the Free Speech Coalition.²⁰ Their lawyers attack small technicalities in language to strike down laws in Europe and the United States which could impact their business.

For example, in *Free Speech Coal. v. Ashcroft* (2002), the group successfully removed two provisions of the Child Pornography Prevention Act of 1996, making prosecutions for child porn much more difficult.²¹

Therefore we welcome you to consider the following when preparing a bill.

Drafting Bills

Material harmful to minors is the most restricted form of obscenity, precisely because it is inappropriate for children. However, it may be permitted for adults.²² Adults must have access to speech which is not legally obscene.²³ Virginia's bill ensures this succinctly with the following:

B. Any commercial entity that knowingly or intentionally publishes or distributes material harmful to minors on the Internet from a website that contains a substantial portion of such material shall, through the use of

(i) a commercially available database that is regularly used by businesses or governmental entities for the purpose of age and identity verification or

*(ii) another commercially reasonable method of age and identity verification, verify that any person attempting to access such material harmful to minors is 18 years of age or older.*²⁴

Section 230 is claimed to conflict with requirements on platforms verifying the age of users. Virginia's law has faced no legal challenge, and was the first to include the following exception:

*D. Nothing in this section shall be construed to impose liability on a provider or user of an interactive computer service on the Internet.*²⁵

Defining a covered platform as having a "substantial portion" of material harmful to minors has been argued to be vague, overbroad, or underinclusive. Another optional definition for covered platforms is attempted in Kentucky HB 241²⁶ and the SCREEN Act²⁷. Ohio's bill HB 295 avoids this definition entirely, and simply states that no entity shall recklessly fail to verify the age of a user and provide material harmful to minors.²⁸

If your team chooses to experiment with additional requirements or methods of enforcement, which you fear may fail scrutiny, or you expect the case to be heard in a hostile court, adding a severability clause allows you to protect the majority of the bill in the case of an attempted injunction.²⁹

On Enforcement Mechanisms

Civil liability with a private right of action, the most common enforcement mechanism, has never been successfully challenged by the Free Speech Coalition.³⁰³¹ However, courts may construe this to conflict with Section 230, so we encourage adding an exception, such as Virginia Code § 8.01-40.5 (D).³² The downside to only using civil liability to private action is that only minors and their guardians can bring cases.

Enforcement using the Attorney General allows for states to ensure compliance. Excessively large and explicit fines are looked at with scrutiny, which is why, in the PAVE Act, fines are reasonable and determined by the courts.

Criminal penalties such as misdemeanors, felonies and excessive criminal fines are generally looked at with scrutiny.³³

Rule setting with an agency, such as by the Federal Trade Commission, allows for audit procedures and guidelines for wide enforcement in the interest of consumer protection. See the SCREEN Act for a carefully crafted example of this.³⁴

The introduced bills in Ohio³⁵ and Florida³⁶ have broken new ground with enforcement, and are worth review.

The Foundations of Modern Obscenity Law and the Internet

Roth v. United States, 354 U.S. 476 (1957) - Holding that obscenity is not protected by the First Amendment

Ginsberg v. New York, 390 U.S. 629 (1968) - Material that is not obscene may still be harmful for children, and its marketing may be regulated

Miller v. California, 413 U.S. 15 (1973) - Ruled that obscenity is not protected by the First Amendment and can be regulated by the states. Also provided a three-part test for determining whether material is obscene.

New York v. Ferber, 458 U.S. 747 (1982) - Children as subjects of pornographic material is harmful to the physiological, emotional, and mental health of the child and totally outside of the scope of First Amendment protection.

Sable Communications v. FCC, 492 U.S. 115 (1989) - If the government wants to protect children from obscenity or indecency, it must do so by technological means, rather than a total ban on transmission

Reno v. ACLU, 521 U.S. 844 (1997) – Holding that children have a right to be protected from explicit content, but not if a large amount of legal speech for adults is also prohibited. Judge O'Connor opined that one day an "adult-only zone" on the internet may make this possible.

Ashcroft v. ACLU, 535 U.S. 564 (2002) - Holding that parental filters would serve the compelling government interest of protecting children from pornography.

Hope Abroad

In Germany, Pornhub, Youporn and MyDirtyHobby brought a case to strike down the age-verification requirements for porn sites. They argued that because they were headquartered outside of Germany, this violated inter-country commerce in the European Union. Their case failed in April of 2023. A court in Dusseldorf ruled that, due to the grave harms caused by pornography on minors, and the fact that 50% of minors had watched porn, but only 25% of parents used filters, age-verification rules in Germany must stand.³⁷

Germany³⁸, France³⁹ and the UK⁴⁰ all have laws and agencies enforcing age verification requirements on sites with material harmful to minors. Pornhub, XVideos and Stripchat are also now required to age-verify users across all of Europe as Very Large Platforms under the new Digital Services Act.⁴¹

Original Louisiana Bill

AN ACT

To enact R.S. 9:2800.28, relative to material harmful to minors; to provide for liability for the publishing or distribution of material harmful to minors on the internet; to provide for reasonable age verification; to provide for legislative intent; to provide for individual rights of action; to provide for attorney fees, court costs, and punitive damages; to provide for exceptions; to provide for definitions; to provide for an effective date; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 9:2800.28 is hereby enacted to read as follows:

§2800.28. Liability for publishers and distributors of material harmful to minors

A. The provisions of this Section are intended to provide a civil remedy for damages against commercial entities who distribute material harmful to minors. As recognized in House Concurrent Resolution No. 100 of the 2017 Regular Session of the Legislature and Senate Concurrent Resolution No. 56 of the 2019 Regular Session of the Legislature, pornography is creating a public health crisis and having a corroding influence on minors. Due to advances in technology, the universal availability of the internet, and limited age verification requirements, minors are exposed to pornography earlier in age. Pornography contributes to the hyper-sexualization of teens and prepubescent children and may lead to low self-esteem, body image disorders, an increase in problematic sexual activity at younger ages, and increased desire among adolescents to engage in risky sexual behavior. Pornography may also impact brain development and functioning, contribute to emotional and medical illnesses, shape deviant sexual arousal, and lead to difficulty in forming or maintaining positive, intimate relationships, as well as promoting problematic or harmful sexual behaviors and addiction.

B.(1) Any commercial entity that knowingly and intentionally publishes or distributes material harmful to minors on the internet from a website that contains a substantial portion of such material shall be held liable if the entity fails to perform reasonable age verification methods to verify the age of individuals attempting to access the material.

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

(3)(a) Any commercial entity that is found to have violated this Section shall be liable to an individual for damages resulting from a minor's accessing the material, including court costs and reasonable attorney fees as ordered by the court.

(b) A commercial entity that is found to have knowingly retained identifying information of the individual after access has been granted to the individual shall be liable to the individual for damages resulting from retaining the identifying information, including court costs and reasonable attorney fees as ordered by the court.

C.(1) This Section shall not apply to any bona fide news or public interest broadcast, website video, report, or event and shall not be construed to affect the rights of any news-gathering organizations.

(2) No internet service provider, or its affiliates or subsidiaries, search engine, or cloud service provider shall be held to have violated the provisions of this Section solely for providing access or connection to or from a website or other information or content on the internet or a facility, system, or network not under that provider's control including transmission, downloading, intermediate storage, access software, or other to the extent such provider is not responsible for the creation of the content of the communication that constitutes material harmful to minors.

D. For purposes of this Section:

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

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

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

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

(a) Any material that the average person, applying contemporary community standards would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest.

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

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

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

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

(c) The material taken as a whole lacks serious literary, artistic, political, or scientific value for minors.

(5) "Minor" means any person under the age of eighteen years.

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

(a) An employee of a newspaper, news publication, or news source, printed or on an online or mobile platform, of current news and public interest, while operating as an employee as provided in this Subparagraph, who can provide documentation of such employment with the newspaper, news publication, or news source.

(b) An employee of a radio broadcast station, television broadcast station, cable television operator, or wire service while operating as an employee as provided in this Subparagraph, who can provide documentation of such employment.

(7) "Publish" means to communicate or make information available to another person or entity on a publicly available internet website.

(8) "Reasonable age verification methods" include verifying that the person seeking to access the material is eighteen years of age or older by using any of the following methods:

(a) Provide a digitized identification card as defined in R.S. 51:3211.

(b) Require the person attempting to access the material to comply with a commercial age verification system that verifies in one or more of the following ways:

(i) Government-issued identification.

(ii) Any commercially reasonable method that relies on public or private transactional data to verify the age of the person attempting to access the information is at least eighteen years of age or older.

(9) "Substantial portion" means more than thirty-three and one-third percent of total material on a website, which meets the definition of "material harmful to minors" as defined by this Section.

(10) "Transactional data" means a sequence of information that documents an exchange, agreement, or transfer between an individual, commercial entity, or third party used for the purpose of satisfying a request or event. Transactional data can include but is not limited to records from mortgage, education, and employment entities.

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