

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 takes advantage of legal loopholes to avoid verifying users’ 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 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 *Ashcroft v. ACLU* (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

Nationally, 83% of voters support a national mandate on age verification for porn sites.¹³

To respond to this crisis and to the national mandate by voters, fifteen states, beginning with Louisiana, have passed age verification requirements for pornography sites with a substantial portion of material harmful to minors, and nineteen more have introduced similar legislation.

After the Louisiana law was enacted in 2023, Pornhub complied. A Pornhub spokesperson told CNN that since Pornhub complied with the Louisiana law in January 2023, traffic from that state has fallen 80%.¹⁴ They have since voluntarily shut down in states which passed these child protection laws, and instead brought court cases against the bills.

The Fifth Circuit Court of Appeals reviewed Texas’ version of the bill, HB1181, on the merits and found

“[T]he age-verification requirement is rationally related to the government’s legitimate interest in preventing minors’ access to pornography. Therefore, the age-verification requirement does not violate the First Amendment. Further, Section 230 does not preempt H.B. 1181.”¹⁵

Free Speech Coalition v. Paxton (5th Cir. 2024)

Age Verification legislation is constitutional, does not conflict with Section 230, and can 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, or who regularly distribute such material with the objective of earning a profit 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.

Additional Steps and Information

Although minors were protected on sites which chose to implement age verification technology after the original 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 Texas' bill, which was found constitutional in *Free Speech Coalition v. Paxton* does the same, and also gives an Attorney General the ability to enjoin the site from continued violation.

Notably, this method of enforcement has allowed Texas' Attorney General to sue Pornhub for \$1.6M+¹⁸

One portion of the bill, which requires sites to display health warnings to visitors was found to compel speech and therefore be unconstitutional. In all other aspects, the court agreed with Texas' interest in protecting the well-being of minors through the use of age-verification on sites with a substantial portion of sexual material harmful to minors under rational-basis review.

Improving the Bill

What follows is a brief introduction to language which can improve future bills in the case of strict scrutiny review, a higher standard than rational-basis review, or options which better tailor law directly to the harmful content.

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.¹⁹ Adults must have access to speech which is not legally obscene.²⁰ Therefore, allowing multiple methods of age verification is important.

Virginia's bill does this 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.²¹"

The SCREEN Act, a proposed national bill to mandate age verification on porn sites, does this by defining age verification as:

“Age verification measure.” Technology that employs a system or process to determine whether it is more likely than not that a user attempting to access content on a website is a minor; and prevents access by minors to any content that meets the definition of [material] harmful to minors.’

Further, it avoids the “substantial portion” threshold by instead setting requirements on entities in the business of creating, hosting, or making available material harmful to minors:

“Any commercial entity for which it is in the regular course of the trade or business of the entity to create, host, or make available content that meets the definition of harmful to minors and that is provided by the entity with the objective of earning a profit shall adopt and utilize age verification measures to ensure that minors are prevented from accessing any content created, hosted, or made available on a website by the entity that is harmful to minors.”²²

Our proposed definition of commercial entity blends the SCREEN Act and the original state bill:

“Commercial entity.” A corporation, limited liability company, partnership, limited partnership, sole proprietorship, or other legally recognized entity that is engaged in commerce in the [State]; or purposefully avails itself of the [State] market or a portion thereof.’

This is intended to avoid challenges or arguments from the aspect of interstate commerce.

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.²³

Section 230 had previously been argued to conflict with these bills, but this argument was defeated in *Free Speech Coalition v. Paxton* (5th Cir. 2024).

On Enforcement Mechanisms

Civil liability with a private right of action by a parent or guardian is the most common enforcement mechanism. The downside is that only minors which have been exposed to pornography and their guardians can bring cases.

Enforcement using the Attorney General allows for states to ensure compliance.

The Texas enforcement language, adapted slightly for easier adaption to existing bill language is as follows:

“(1) If the attorney general believes that an entity is knowingly violating or has knowingly violated this chapter and the action is in the public interest, the attorney general may bring an action in a [County of State AG office] district court or the district court in the county in which the principal place of business of the entity is located in this state to enjoin the violation, recover a civil penalty, and obtain other relief the court considers appropriate.

(2) A civil penalty imposed under this section for a violation of subsection (a) or (b) may be in an amount equal to not more than the total, if applicable, of:

(i) \$10,000 per day that the entity is in violation of subsection (a) of this chapter;

(ii) \$10,000 per instance when the entity retains or shares identifying information in violation of subsection (b); and

(iii) if, because of the entity's violation of subsection (a) of this chapter, one or more minors accesses material harmful to minors, an additional amount of not more than \$250,000.

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

- (i) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation;*
- (ii) the history of previous violations;*
- (iii) the amount necessary to deter a future violation;*
- (iv) the economic effect of a penalty on the entity on whom the penalty will be imposed;*
- (v) the entity's knowledge that the act constituted a violation of this chapter; and*
- (vi) any other matter that justice may require.*

(4) The attorney general may recover reasonable and necessary attorney's fees and costs incurred in an action under this section.”²⁴

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. Violations of requirements are considered an unfair or deceptive trade practice. See the SCREEN Act for a carefully crafted example of this.²⁵

Criminal penalties such as misdemeanors, felonies and excessive criminal fines are generally looked at with scrutiny and have historically been less effective at enforcing obscenity statutes.²⁶

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.

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.²⁷

Germany²⁸, France²⁹ and the UK³⁰ 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.³¹

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- ¹ Kraus & Rosenberg, 2014; Rothman, 2021, https://www.researchgate.net/publication/259956202_The_Pornography_Craving_Questionnaire_Psychometric_Properties
- ² Bravehearts, *An Overview of Research on the Impact that Viewing Pornography has on Children, Pre-Teens, and Teenagers*, July 2017, https://bravehearts.org.au/wp-content/uploads/2018/01/Research-Report_Overview-of-research-into-the-effects-of-viewing-pornography-on-children....pdf
- ³ Love, T., Laier, C., Brand, M., Hatch, L., & Hajela, R. (2015). *Neuroscience of internet pornography addiction: A Review and update. Behavioral Sciences*, (5), 388-423.
- ⁴ <https://soundinvestigations.com/pornhub-exec-attacks-porn/>
- ⁵ American Journal of Public Health, *Should Public Health Professionals Consider Pornography a Public Health Crisis?*, February 2020, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6951382/>
- ⁶ Pub. L. 105–277, div. C, title XIV, § 1402, Oct. 21, 1998, 112 Stat. 2681–736
- ⁷ *Ashcroft v. ACLU*, 542 U.S. 656 (2004), <https://supreme.justia.com/cases/federal/us/542/656/>
- ⁸ Barna, *Teens and young Adults Use Porn More Than Anyone Else*, January 28, 2016, <https://www.barna.com/research/teens-young-adults-use-porn-more-than-anyone-else/>
- ⁹ The Pew Research Center, January 7, 2016, <https://www.pewresearch.org/internet/2016/01/07/parents-teens-and-digital-monitoring/>
- ¹⁰ The Porn Phenomenon Study, 2016, 41, <https://www.barna.com/the-porn-phenomenon>
- ¹¹ Elena Martellozzo, Andy Monaghan, Joanna R. Adler, Julia Davidson, Rodolfo Leyva and Miranda A.H. Horvath, *A quantitative and qualitative examination of the impact of online pornography on the values attitudes, beliefs and behaviours of children and young people*, Middlesex University London, https://www.mdx.ac.uk/__data/assets/pdf_file/0021/223266/MDX-NSPCC-OCCpornography-report.pdf
- ¹² BBFC. (2020). *Young people, pornography & age-verification*. <https://www.revealingreality.co.uk/wp-content/uploads/2020/01/BBFC-Young-people-and-pornography-Final-report-2401.pdf>
- ¹³ RMG Research, August 16th 2023, <https://catholicvote.org/over-80-percent-voters-support-age-verification/>
- ¹⁴ CBS News, May 2, 2023, <https://www.cbsnews.com/atlanta/news/pornhub-blocks-access-in-utah-over-age-verification-law/>
- ¹⁵ *Free Speech Coalition v. Paxton*, No. 23-50627 (5th Cir. 2024)
- ¹⁶ PAVE Act, HB77, 2023 Regular Session, Louisiana, <https://legis.la.gov/legis/BillInfo.aspx?i=243916>
- ¹⁷ PAVE Act, HB77, 2023 Regular Session, Louisiana, <https://legis.la.gov/legis/BillInfo.aspx?i=243916>
- ¹⁸ <https://www.fox4news.com/news/ken-paxton-sues-pornhub-age-verification>
- ¹⁹ *Ginsberg v. New York*, 390 U.S. 629 (1968)
- ²⁰ *Ashcroft v. ACLU*, 535 U.S. 564 (2002)
- ²¹ SB 1515, 2023 Session, Virginia, <https://lis.virginia.gov/cgi-bin/legp604.exe?231+ful+SB1515>
- ²² SCREEN Act, H.R.6429, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/house-bill/6429/all-info>.
- ²³ Innocence Act, HB 295, Ohio, <https://www.legislature.ohio.gov/legislation/135/HB295>
- ²⁴ Texas HB1181, 2023-2024, 88th Legislature, Enrolled, <https://legiscan.com/TX/text/HB1181/id/2819916>
- ²⁵ SCREEN Act, H.R.6429, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/house-bill/6429/all-info>.
- ²⁶ *Reno v. ACLU*, 521 U.S. 844 (1997)
- ²⁷ VG Dusseldorf, April 27, 2023 - 27 K 3605/20, https://www.vg-duesseldorf.nrw.de/behoerde/presse/pressemitteilungen/2023/07_23/index.php
- ²⁸ Interstate Treaty on the protection of minors – JMStV, https://www.kjm-online.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/Interstate_Treaty_on_the_Protection_of_Minors_in_the_Media_JMStV_in_English_19th_Interstate_Broadcasting_Treaty.pdf
- ²⁹ LAW no. 2020-936, Chapter IX: Provisions relating to the protection of minors (Articles 21 to 24), <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042176652>
- ³⁰ Online Safety Act 2023, <https://bills.parliament.uk/bills/3137>
- ³¹ <https://www.theverge.com/2023/12/20/24009125/eu-dsa-pornhub-xvideos-stripchat-digital-services-act-age-verification>