

Senator Todd Weiler proposes the following substitute bill:

WARNING LABELS AMENDMENTS

2020 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Brady Brammer

Senate Sponsor: Todd Weiler

LONG TITLE

General Description:

This bill creates a cause of action that may be brought against a person who distributes pornography without a visible warning.

Highlighted Provisions:

This bill:

- ▶ allows the attorney general or a member of the public to bring an action against a person who distributes pornography without a visible warning or specific searchable text for a website;
- ▶ requires an individual person to first notify the attorney general before bringing an action;
- ▶ allows for a civil penalty of up to \$2,500 for each violation;
- ▶ requires that a portion of any recovery be provided to the Crime Victims Reparations Fund;
- ▶ provides a process for curing the violation and paying a reduced penalty; and
- ▶ requires the Judicial Council to adjust the penalty every five years.

Money Appropriated in this Bill:

None

Other Special Clauses:



None

Utah Code Sections Affected:

AMENDS:

78B-6-2103, as enacted by Laws of Utah 2017, Chapter 464

78B-6-2104, as enacted by Laws of Utah 2017, Chapter 464

ENACTS:

78B-6-2105, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **78B-6-2103** is amended to read:

78B-6-2103. Liability -- Safe harbor.

(1) A person who is not exempt under Section **78B-6-2102**, and who predominately distributes or otherwise predominately provides pornographic material to consumers is liable to a person if:

(a) at the time the pornographic material is viewed by the person, the person is a minor;
and

(b) the pornographic material is the proximate cause for the person being harmed physically or psychologically, or by emotional or medical illnesses as a result of that pornographic material.

(2) Nothing in this part affects any private right of action existing under other law, including contract.

(3) Notwithstanding Subsection (1), a person who distributes or otherwise provides pornographic material is not liable under this section if the person who distributes or otherwise provides pornographic material:

(a) provides a warning that:

(i) is conspicuous;

(ii) appears before the pornographic material can be accessed; and

(iii) consists of a good faith effort to warn persons accessing the pornographic material that the pornographic material may be harmful to minors; and

(b) makes a good faith effort to verify the age of a person accessing the pornographic material.

(4) Subsection (3) may not be interpreted as exempting a person from complying with Title 13, Chapter 39, Child Protection Registry.

(5) (a) Notwithstanding Section 78B-6-2105, a person who is not exempt under Section 78B-6-2102, and who predominately distributes or otherwise predominately provides obscene material to consumers without a warning label or without the metadata described in Subsection 78B-6-2105(3)(b) is not liable if the person demonstrates reasonable efforts to determine the location of recipients of obscene material within the state and the placement of warning labels on material that enters the state. Reasonable efforts shall result in a compliance rate that exceeds 75% of the content believed to enter the state within the shorter of six months prior to any claim, or from May 12, 2020 to the time of the claim. Proof of reasonable efforts shall remove liability only for the type of compliance for which reasonable efforts have been proven.

(b) The use of virtual private networks or similar technology by the consumer to hide the consumer's location may not be included in a compliance rate calculation.

(6) Notwithstanding Section 78B-6-2105, a video game without a warning label is not liable if it has a rating of the Entertainment Software Rating Board or equivalent, as long as it also explicitly provides notice of the content as part of the rating.

Section 2. Section 78B-6-2104 is amended to read:

78B-6-2104. Damages -- Class action.

(1) If a court finds that a person [~~violates~~] is violating Section 78B-6-2103, the court may award the plaintiff:

(a) actual damages; and

(b) punitive damages, if it is proven that the person targeted minors.

(2) A class action may be brought under this part in accordance with Utah Rules of Civil Procedure, Rule 23.

Section 3. Section 78B-6-2105 is enacted to read:

78B-6-2105. Civil action for enforcement -- Penalties.

(1) A person who predominately distributes or otherwise predominately provides pornographic material to consumers with the intent to earn revenue or profit directly or indirectly from the distribution may not distribute any obscene material or performance as defined in Section 76-10-1203 without first giving a clear and reasonable warning of the

harmful impact of exposing minors to the material or performance. The warning of the harm shall be prominently displayed in the following form:

STATE OF UTAH WARNING

Exposing minors to obscene material may damage or negatively impact minors.

(2) (a) For print publications created after May 12, 2020, the warning in Subsection (1) shall be placed in clear, readable type on the cover of each publication which includes material as defined in Section [76-10-1201](#).

(b) For digital publications:

(i) the warning in Subsection (1) shall be displayed in searchable text format and for at least five seconds prior to the display of any video or each image which includes material as defined in Section [76-10-1201](#); or

(ii) if the website complies with Subsection [78B-6-2103](#)(3), it is not required to display the warning in Subsection (1) prior to each video or image contained on the website.

(3) A person who violates this section shall be liable for a civil penalty not to exceed \$2,500 per violation, plus filing fees and attorney fees, in addition to any other penalty established by law, and enjoined from further violations. The civil penalty may be assessed and recovered in a civil action brought in any court of competent jurisdiction. Each of the following violations shall create a separate liability per violation:

(a) ~~§~~ **→ [be]** ~~← §~~ the sale or display of potentially harmful content without the warning required in

Subsection (1), in accordance with Subsection (2); or

(b) the absence of the following searchable text within the website's metadata - [utahobscenitywarning](#).

(4) The determination by a court as to whether a person is distributing material the state considers to be obscene material or performance as defined in Section [78B-6-1203](#) shall be proven by clear and convincing evidence. All other elements of proof shall be proven by a preponderance of the evidence.

(5) The court, in ordering payment, shall specify each amount for the civil penalty, filing fees, and attorney fees.

(6) In assessing the amount of a civil penalty for a violation of this chapter, the court shall consider all of the following:

(a) the nature and extent of the violation;

119 (b) the number and severity of the violations;
120 (c) the economic effect of the penalty on the violator;
121 (d) whether the violator took good faith measures to comply with this chapter and
122 when those measures were taken;
123 (e) the willfulness of the violator's misconduct;
124 (f) the deterrent effect that the imposition of the penalty would have on both the
125 violator and the regulated community as a whole; and
126 (g) any other factor that the court determines justice requires.
127 (7) Actions pursuant to this section may be brought by the attorney general's office in
128 the name of the people of the state or by a private person in accordance with Subsection (8).
129 (8) A private person may bring an action in the public interest pursuant to this section
130 if:
131 (a) the person has served notice of an alleged violation of Section [78B-6-2103](#) on the
132 alleged violator and the attorney general's office;
133 (b) the attorney general's office has not provided a letter to the noticing party within 60
134 days of receipt of the notice of an alleged violation indicating that:
135 (i) an action is currently being pursued or will be pursued by the attorney general's
136 office regarding the violation; or
137 (ii) the attorney general believes that there is no merit to the action; and
138 (c) the alleged violator has not responded to the notice of alleged violation or returned
139 the proof of compliance form provided in Subsection (14).
140 (9) If a lawsuit is commenced, the plaintiff may include additional violations in the
141 claim that are discovered through the discovery process.
142 (10) Notice of the alleged violation shall be executed by the attorney for the noticing
143 party, or by the noticing party, if the noticing party is not represented by an attorney, and
144 include a notice of alleged violation. The notice of alleged violation shall:
145 (a) state that the person executing the notice believes that there is a violation; and
146 (b) provide factual information sufficient to establish the basis for the alleged violation.
147 (11) A person who serves a notice of alleged violation identified in Subsection (10)
148 shall complete and provide to the alleged violator at the time the notice of alleged violation is
149 served, a notice of special compliance procedure and proof of compliance form pursuant to

Subsection (14). The person may file an action against the alleged violator, or recover from the alleged violator if:

(a) the notice of alleged violation alleges that the alleged violator failed to provide a clear and reasonable warning as required under Subsection (1); and

(b) within 14 days after receipt of the notice of alleged violation, the alleged violator has not:

(i) corrected the alleged violation and all similar violations known to the alleged violator;

(ii) agreed to pay a penalty for the alleged violation in the amount of \$500 per violation; and

(iii) notified, in writing, the noticing party that the violation has been corrected.

(12) The written notice required in Subsection (11)(b)(iii) shall be the notice of special compliance procedure and proof of compliance form specified in Subsection (14). The alleged violator shall deliver the civil penalty to the noticing party within 30 days of receipt of the notice of alleged violation.

(13) The attorney general shall review the notice of alleged violation and may confer with the noticing party. If the attorney general believes there is no merit to the action, the attorney general shall, within 45 days of receipt of the notice of alleged violation, provide a letter to the noticing party and the alleged violator stating that the attorney general believes there is no merit to the action.

(14) The notice required to be provided to an alleged violator pursuant to Subsection (11) shall be presented as follows:

Date:

Name of Noticing Party or attorney for Noticing Party:

Address:

Phone number:

SPECIAL COMPLIANCE PROCEDURE

PROOF OF COMPLIANCE

You are receiving this form because the Noticing Party listed above has alleged that you are in violation of Utah Code Section [78B-6-2103](#).

The Noticing Party may bring legal proceedings against you for the alleged violation checked

below if:

(1) you have not actually taken the corrective steps that you have certified in this form;

(2) the Noticing Party has not received this form at the address shown above, accurately completed by you, postmarked within 14 days of your receiving this notice; and

(3) the Noticing Party does not receive the required \$500 penalty payment for each violation alleged from you at the address shown above postmarked within 30 days of your receiving this notice.

PART 1: TO BE COMPLETED BY THE NOTICING PARTY OR ATTORNEY FOR THE NOTICING PARTY

This notice of alleged violation is for failure to warn against an exposure to minors of materials considered harmful to minors. (provide complete description of violation, including when and where observed)

Date:

Name of Noticing Party or attorney for Noticing Party:

Address:

Phone number:

PART 2: TO BE COMPLETED BY THE ALLEGED VIOLATOR OR AUTHORIZED REPRESENTATIVE

Certification of Compliance

Accurate completion of this form will demonstrate that you are now in compliance with Utah Code Section [78B-6-2103](#), for the alleged violation listed above. You must complete and submit the form below to the Noticing Party at the address shown above, postmarked within 14 days of you receiving this notice.

I hereby agree to pay, within 30 days of receipt of this notice, a penalty of \$500 for each violation alleged to the Noticing Party only and certify that I have complied with by (check only one of the following):

☐ Posting a warning or warnings, and attaching a copy of that warning and a photograph accurately showing its placement on the print or digital publication.

☐ Eliminating the alleged exposure, and attaching a statement accurately describing how the alleged exposure has been eliminated.

CERTIFICATION

My statements on this form, and on any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I have carefully read the instructions to complete this form. I understand that if I make a false statement on this form, I may be subject to additional penalties under Utah Code Section [76-10-1206](#).

Signature of alleged violator or authorized representative:

Date:

Name and title of signatory:

(15) An alleged violator may satisfy the conditions set forth in Subsection (14) only one time for a specific violation.

(16) Notwithstanding Subsection (14), the attorney general may file an action pursuant to Subsection (7) against an alleged violator. In any action, the amount of any civil penalty for a violation shall be reduced to reflect any payment made by the alleged violator to a private person in accordance with Subsection (14) for the same alleged violation.

(17) Payments shall be made in accordance with this section.

(a) A civil penalty ordered by the court shall be paid to the plaintiff as directed by the court.

(b) A penalty paid in accordance with the special compliance procedure in Subsection (14) shall be made directly to the noticing party.

(18) The Utah Office for Victims of Crime shall receive 50% of any penalty paid in accordance with this section. Funds received shall be deposited in the Crime Victim Reparations Fund created in Section [51-9-404](#). The penalty amount upon which the 50% is calculated may not include attorney fees or costs awarded by the court.

(a) If the penalty is paid to a noticing party in accordance with Subsection (14), the noticing party shall remit the required amount along with a copy of the Special Compliance Procedure document.

(b) If a civil penalty is ordered by the court, the plaintiff shall remit the required amount along with a copy of the court order.

(19) The attorney general's office shall provide to the Utah Office for Victims of Crime a copy of all notices of alleged violations to which the attorney general's office did not respond with a letter of no merit in accordance with Subsection (13).

(20) The court shall provide to the Utah Office for Victims of Crime a copy of the

243 court's order for payment.

244 (21) The Utah Office for Victims of Crime shall:

245 (a) maintain a record of documents and payments submitted pursuant to Subsections
246 (18), (19), and (20);

247 (b) create and provide to the Legislature in odd-numbered years beginning November
248 2021, a report containing the following for the previous two years:

249 (i) the number of notices of alleged violations received from the attorney general's
250 office;

251 (ii) the number of court orders received; and

252 (iii) the total amount received and deposited into the Crime Victim Reparations Fund.

252a **§→ (22) This section does not apply to:**

252b **(a) a person portrayed in obscene or pornographic material that is created, duplicated,**
252c **or distributed without the person's knowledge or consent; or**

252d **(b) a person who is coerced or blackmailed into distributing obscene or pornographic**
252e **material.** ←§

253 **§→ [(22)] (23) ←§** Beginning May 1, 2025, and at each five-year interval, the dollar amount
253a of the

254 civil penalty provided in Subsection (3) shall be adjusted by the Judicial Council based on the
255 change in the annual Consumer Price Index for the most recent five-year period ending on

256 December 31 of the previous year, and rounded to the nearest five dollars. The attorney general
257 shall publish the dollar amount of the civil penalty together with the date of the next scheduled
258 adjustment.