

Senate Bill No. 18

(By Senators Fitzsimmons, Cookman and Yost)

[Introduced January 8, 2014; referred to the Committee on the
Judiciary.]

A BILL to amend and reenact §61-8A-1, §61-8A-2, §61-8A-3, §61-8A-4 and §61-8A-5 of the Code of West Virginia, 1931, as amended, all relating generally to prohibition on preparation, distribution or exhibition of harmful matter to minors; revising definition of "obscene matter" to contain specific matter that is harmful to minors; and revising article to reflect definitional change.

Be it enacted by the Legislature of West Virginia:

That §61-8A-1, §61-8A-2, §61-8A-3, §61-8A-4 and §61-8A-5 of the Code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

**ARTICLE 8A. PREPARATION, DISTRIBUTION OR EXHIBITION OF HARMFUL MATTER
TO MINORS.**

§61-8A-1. Definitions.

When used in this article, the following words, and any variations thereof required by the context, shall have the meaning ascribed to them in this section:

(a) "Adult" means a person eighteen years of age or older.

(b) "Computer" means an electronic, magnetic, optical, electrochemical or other high-speed data processing device performing logical, arithmetic or storage functions and includes any data storage facility or communication facility directly related to or operating in conjunction with such device. As used in this article, computer includes file servers, mainframe systems, desktop personal computers, laptop personal computers, tablet personal computers, cellular telephones, game consoles and any electronic data storage device or equipment. The term "computer" includes any connected or directly related device, equipment or facility which enables the computer to store, retrieve or communicate computer programs, computer data or the results of computer operations to or from a person, another computer or another device, but such term does not include an automated typewriter or typesetter, a portable hand-held calculator or other similar device.

(c) "Computer network" means the interconnection of hardware or wireless communication lines with a computer through remote terminals, or a complex consisting of two or more interconnected computers.

(d) "Display" means to show, exhibit or expose matter, in a manner visible to general or invited public, including minors. As used in this article, display shall include the placing or exhibiting of matter on or in a billboard, viewing screen, theater, marquee, newsstand, display rack, window, showcase, display case or similar public place.

(e) "Distribute" means to transfer possession, transport, transmit, sell or rent, whether with or without consideration.

(f) "Employee" means any individual who renders personal services in the course of a business, who receives compensation and who has no financial interest in the ownership or operation of the business other than his or her salary or wages.

(g) "Internet" means the international computer network of both federal and nonfederal interoperable packet switched data networks.

(h) "Knowledge of the character of the matter" means having awareness of or notice of the overall sexual content and character of matter as depicting, representing or describing ~~obscene~~ harmful matter.

(i) "Matter" means any visual, audio, or physical item, article, production transmission, publication, exhibition, or live performance, or reproduction thereof, including any two- or three- dimensional visual or written material, film, picture, drawing, video, graphic, or

computer generated or reproduced image; or any book, magazine, newspaper or other visual or written material; or any motion picture or other pictorial representation; or any statue or other figure; or any recording, transcription, or mechanical, chemical, or electrical reproduction; or any other articles, video laser disc, computer hardware and software, or computer generated images or message recording, transcription, or object, or any public or commercial live exhibition performed for consideration or before an audience of one or more.

(j) "Minor" means an unemancipated person under eighteen years of age.

(k) ~~Obscene~~ "Harmful matter" means any matter, however produced, containing any representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors, and any matter, however produced, containing explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to minors.

~~(1) An average person, applying contemporary adult community standards, would find, taken as a whole, appeals to the prurient interest, is intended to appeal to the prurient interest, or is~~

~~pandered to a prurient interest;~~

~~(2) An average person, applying community standards, would find depicts or describes, in a patently offensive way, sexually explicit conduct; and~~

~~(3) A reasonable person would find, taken as a whole, lacks serious literary, artistic, political or scientific value.~~

(1) "Parent" includes a biological or adoptive parent, legal guardian or legal custodian.

(m) "Person" means any adult, partnership, firm, association, corporation or other legal entity.

(n) "Sexually explicit conduct" means an ultimate sexual act, normal or perverted, actual or simulated, including sexual intercourse, sodomy, oral copulation, sexual bestiality, sexual sadism and masochism, masturbation, excretory functions and lewd exhibition of the genitals.

**§61-8A-2. Distribution and display to minor of harmful matter;
penalties; defenses.**

(a) Any adult, with knowledge of the character of the matter, who knowingly and intentionally distributes, offers to distribute, or displays to a minor any ~~obscene~~ harmful matter, is guilty of a felony and, upon conviction thereof, shall be fined not more than \$25,000, or confined in a state correctional facility for not more than five

years, or both.

(b) It is a defense to a prosecution under the provisions of this section that the ~~obscene~~ harmful matter:

(1) Was displayed in an area from which minors are physically excluded and the matter so located cannot be viewed by a minor from nonrestricted areas; or

(2) Was covered by a device, commonly known as a "blinder rack," such that the lower two thirds of the cover of the material is not exposed to view; or

(3) Was enclosed in an opaque wrapper such that the lower two thirds of the cover of the material was not exposed to view; or

(4) Was displayed or distributed after taking reasonable steps to receive, obtain or check an adult identification card, such as a driver's license or other technically or reasonably feasible means of verification of age.

(c) It is a defense to an alleged violation under this section that a parent had taken reasonable steps to limit the minor's access to the ~~obscene~~ harmful matter.

§61-8A-3. Exemptions from criminal liability.

The criminal provisions of section two of this article do not apply to:

(a) A bona fide school, in the presentation of local or state

approved curriculum;

(b) A public library, or museum, which is displaying or distributing any ~~obscene~~ harmful matter to a minor only when the minor was accompanied by his or her parent;

(c) A licensed medical or mental health care provider, or judicial or law-enforcement officer, during the course of medical, psychiatric, or psychological treatment or judicial or law-enforcement activities;

(d) A person who did not know or have reason to know, and could not reasonably have learned, that the person to whom the ~~obscene~~ harmful matter was distributed or displayed was a minor and who took reasonable measures to ascertain the identity and age of the minor;

(e) A person who routinely distributes ~~obscene~~ harmful matter by the use of telephone, computer network or the Internet and who distributes such matter to any minor under the age of eighteen years after the person has taken reasonable measures to prevent access by minors to the ~~obscene~~ harmful matter; or

(f) A radio or television station, cable television service or other telecommunications service regulated by the federal communications commission.

§61-8A-4. Use of harmful matter with intent to seduce minor.

Any adult, having knowledge of the character of the matter, who knows that a person is a minor and distributes, offers to distribute

or displays by any means any ~~obscene~~ harmful matter to the minor, and such distribution, offer to distribute, or display is undertaken with the intent or for the purpose of facilitating the sexual seduction or abuse of the minor, is guilty of a felony and, upon conviction thereof, shall be fined not more than \$25,000, or confined in a state correctional facility for not more than five years, or both. For a second and each subsequent commission of such offense, such person is guilty of a felony and, upon conviction, shall be fined not more than \$50,000 or confined in a state correctional facility for not more than ten years, or both.

§61-8A-5. Employment or use of minor to produce harmful matter or assist in doing sexually explicit conduct; penalties.

Any adult who, with knowledge that a person is a minor or who fails to exercise reasonable care in ascertaining the age of a minor, hires, employs or uses such minor to produce ~~obscene~~ harmful matter or to do or assist in doing any sexually explicit conduct, is guilty of a felony and, upon conviction thereof, shall be fined not more than \$50,000 or confined in a state correctional facility for not more than ten years, or both.

NOTE: The purpose of this bill is to revise the definition of obscene matter to contain specific matter that is harmful to minors for the purposes of the article preventing the preparation, distribution or exhibition of such matter to minors, and to revise the article to reflect the definitional change.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.