

1                   **WARNING LABELS AMENDMENTS**

2                   2020 GENERAL SESSION

3                   STATE OF UTAH

4                   **Chief Sponsor: Brady Brammer**

5                   Senate Sponsor: Todd Weiler

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9     Melissa G. Ballard	Karianne Lisonbee	Steve Waldrip
10    Kay J. Christofferson	Calvin R. Musselman	
11    Joel Ferry	Derrin R. Owens	
	Timothy D. Hawkes	

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**LONG TITLE**

13                **General Description:**

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

16                **Highlighted Provisions:**

17                This bill:

18                ▶ allows the attorney general or a member of the public to bring an action against a  
19                person who distributes pornography without a visible warning or specific searchable  
20                text for a website;

21                ▶ requires an individual person to first notify the attorney general before bringing an  
22                action;

23                ▶ allows for a civil penalty of up to \$2,500 for each violation;

24                ▶ requires that a portion of any recovery be provided to the Crime Victims  
25                Reparations Fund;

- 27       ► provides a process for curing the violation and paying a reduced penalty; and  
28       ► requires the Judicial Council to adjust the penalty every five years.

29 **Money Appropriated in this Bill:**

30       None

31 **Other Special Clauses:**

32       None

33 **Utah Code Sections Affected:**

34 **AMENDS:**

35       **78B-6-2103**, as enacted by Laws of Utah 2017, Chapter 464

36       **78B-6-2104**, as enacted by Laws of Utah 2017, Chapter 464

37 **ENACTS:**

38       **78B-6-2105**, Utah Code Annotated 1953

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

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

42       **78B-6-2103. Liability -- Safe harbor.**

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

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

47 and

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

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

53       (3) Notwithstanding Subsection (1), a person who distributes or otherwise provides

54 pornographic material is not liable under this section if the person who distributes or otherwise  
55 provides pornographic material:

56 (a) provides a warning that:

57 (i) is conspicuous;

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

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

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

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

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

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

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

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

81           **78B-6-2104. Damages -- Class action.**

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

84           (a) actual damages; and

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

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

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

89           **78B-6-2105. Civil action for enforcement -- Penalties.**

90           (1) A person who predominately distributes or otherwise predominately provides  
91 pornographic material to consumers with the intent to earn revenue or profit directly or  
92 indirectly from the distribution may not distribute any obscene material or performance as  
93 defined in Section 76-10-1203 without first giving a clear and reasonable warning of the  
94 harmful impact of exposing minors to the material or performance. The warning of the harm  
95 shall be prominently displayed in the following form:

96           STATE OF UTAH WARNING

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

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

101           (b) For digital publications:

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

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

107           (3) A person who violates this section shall be liable for a civil penalty not to exceed

108    \$2,500 per violation, plus filing fees and attorney fees, in addition to any other penalty  
109    established by law, and enjoined from further violations. The civil penalty may be assessed and  
110    recovered in a civil action brought in any court of competent jurisdiction. Each of the following  
111    violations shall create a separate liability per violation:

112        (a) the sale or display of potentially harmful content without the warning required in  
113        Subsection (1), in accordance with Subsection (2); or

114        (b) the absence of the following searchable text within the website's metadata -  
115        utahobscenitywarning.

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

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

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

124              (a) the nature and extent of the violation;  
125              (b) the number and severity of the violations;  
126              (c) the economic effect of the penalty on the violator;  
127              (d) whether the violator took good faith measures to comply with this chapter and  
128        when those measures were taken;

129              (e) the willfulness of the violator's misconduct;  
130              (f) the deterrent effect that the imposition of the penalty would have on both the  
131        violator and the regulated community as a whole; and

132              (g) any other factor that the court determines justice requires.

133            (7) Actions pursuant to this section may be brought by the attorney general's office in  
134        the name of the people of the state or by a private person in accordance with Subsection (8).

135       (8) A private person may bring an action in the public interest pursuant to this section

136       if:

137           (a) the person has served notice of an alleged violation of Section [78B-6-2103](#) on the  
138       alleged violator and the attorney general's office;

139           (b) the attorney general's office has not provided a letter to the noticing party within 60  
140       days of receipt of the notice of an alleged violation indicating that:

141              (i) an action is currently being pursued or will be pursued by the attorney general's  
142       office regarding the violation; or

143              (ii) the attorney general believes that there is no merit to the action; and

144              (c) the alleged violator has not responded to the notice of alleged violation or returned  
145       the proof of compliance form provided in Subsection (14).

146       (9) If a lawsuit is commenced, the plaintiff may include additional violations in the  
147       claim that are discovered through the discovery process.

148       (10) Notice of the alleged violation shall be executed by the attorney for the noticing  
149       party, or by the noticing party, if the noticing party is not represented by an attorney, and  
150       include a notice of alleged violation. The notice of alleged violation shall:

151           (a) state that the person executing the notice believes that there is a violation; and  
152           (b) provide factual information sufficient to establish the basis for the alleged violation.

153       (11) A person who serves a notice of alleged violation identified in Subsection (10)  
154       shall complete and provide to the alleged violator at the time the notice of alleged violation is  
155       served, a notice of special compliance procedure and proof of compliance form pursuant to  
156       Subsection (14). The person may file an action against the alleged violator, or recover from the  
157       alleged violator if:

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

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

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

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

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

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

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

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

178        Date:

179        Name of Noticing Party or attorney for Noticing Party:

180        Address:

181        Phone number:

182        **SPECIAL COMPLIANCE PROCEDURE**

183        **PROOF OF COMPLIANCE**

184        You are receiving this form because the Noticing Party listed above has alleged that you are in  
185        violation of Utah Code Section 78B-6-2103.

186        The Noticing Party may bring legal proceedings against you for the alleged violation checked  
187        below if:

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

189    (2) the Noticing Party has not received this form at the address shown above, accurately  
190    completed by you, postmarked within 14 days of your receiving this notice; and  
191    (3) the Noticing Party does not receive the required \$500 penalty payment for each violation  
192    alleged from you at the address shown above postmarked within 30 days of your receiving this  
193    notice.

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

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

199    Date:

200    Name of Noticing Party or attorney for Noticing Party:

201    Address:

202    Phone number:

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

205    **Certification of Compliance**

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

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

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

215     Eliminating the alleged exposure, and attaching a statement accurately describing how the

216 alleged exposure has been eliminated.

217 CERTIFICATION

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

222 Signature of alleged violator or authorized representative:

223 Date:

224 Name and title of signatory:

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

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

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

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

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

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

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

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

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

248       (20) The court shall provide to the Utah Office for Victims of Crime a copy of the  
249 court's order for payment.

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

251       (a) maintain a record of documents and payments submitted pursuant to Subsections  
252 (18), (19), and (20);

253       (b) create and provide to the Legislature in odd-numbered years beginning November  
254 2021, a report containing the following for the previous two years:

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

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

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

259       (22) This section does not apply to:

260       (a) a person portrayed in obscene or pornographic material that is created, duplicated,  
261 or distributed without the person's knowledge or consent; or

262       (b) a person who is coerced or blackmailed into distributing obscene or pornographic  
263 material.

264       (23) Beginning May 1, 2025, and at each five-year interval, the dollar amount of the  
265 civil penalty provided in Subsection (3) shall be adjusted by the Judicial Council based on the  
266 change in the annual Consumer Price Index for the most recent five-year period ending on  
267 December 31 of the previous year, and rounded to the nearest five dollars. The attorney general  
268 shall publish the dollar amount of the civil penalty together with the date of the next scheduled  
269 adjustment.

270