

Date of Hearing:

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Rebecca Bauer-Kahan, Chair

AB 1831 (Berman) – As Amended March 21, 2024

AS PROPOSED TO BE AMENDED

SUBJECT: Crimes: child pornography

SYNOPSIS

As generative artificial intelligence (GenAI) becomes more effective and accessible, bad actors have increasingly been able use these technologies for nefarious purposes. Among the worst uses of GenAI is the creation of deepfake child pornography. GenAI can create child pornography in one of two ways: first, established GenAI training datasets have been found to contain child sexual abuse materials (CSAM). When a GenAI product is trained on CSAM imagery, the product becomes able to generate CSAM imagery itself. Second, GenAI is capable of combining disparate concepts in outputs; for example, a product may be trained on legal images of “children” and legal images of “pornography,” in order to output images containing “child pornography.”

The use of GenAI to produce deepfake child pornography is not currently illegal in California. Attempts to prohibit it elsewhere in the country have received pushback on a First Amendment basis. This bill attempts to thread a needle with respect to deepfake child pornography and the First Amendment. It would narrowly amend the Penal Code to align punishments associated with the creation and distribution of deepfake child pornography with the creation and distribution of child pornography involving real children.

This bill is sponsored by the California District Attorneys Association, Children’s Advocacy Institute, Common Sense Media, Orange County Sheriff’s Department, SAG-AFTRA, and the Ventura County District Attorney. It is opposed by ACLU California Action.

SUMMARY: Expands California’s child pornography laws to additionally cover child pornography that is generated by artificial intelligence. Specifically, **this bill:**

- 1) Defines “matter generated through the use of artificial intelligence” to mean an image that has been generated or modified by a machine-based system that can, for a given set of human-defined objectives, create visual content that is, or would falsely appear to a reasonable person to be, or to incorporate, actual photographs or recordings of a real human being actually engaging in the actions depicted.
- 2) Incorporates “matter generated through the use of artificial intelligence” into existing statutes that make it a crime to:
 - a) Knowingly produce, develop, duplicate, distribute, or possess, in various specified formats, obscene matter depicting a minor personally engaging in or simulating sexual conduct, with the intent to provide the obscene matter to others.
 - b) Engage in conduct under (a) for commercial consideration.

- c) Knowingly develop, duplicate, print, or exchange any representation of information, data, or image that depicts a minor engaged in an act of sexual conduct, regardless of whether the minor personally engaged in the sexual conduct or the depiction is obscene.
 - d) Knowingly employ, use, persuade, induce, or coerce—or in the case of parents or guardians, permit—a minor to engage or assist in posing or modeling in a performance involving sexual conduct, whether or not it is obscene or for a commercial purpose.
 - e) Knowingly possess or control any matter, representation of information, data, or image, in various specified formats, the production of which involves the use of a person under 18 years of age personally engaging in or simulating sexual conduct.
- 3) Incorporates “matter generated through the use of artificial intelligence” into existing provisions that (1) enhance penalties for criminal conduct involving minors when committed on government-owned property, (2) authorize forfeiture and destruction of matter or obscene matter. Removes from these provisions the requirement that a minor personally engaged in or simulated the sexual conduct depicted in the matter.

EXISTING LAW:

- 1) Establishes the standard for obscenity: “(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” (*Miller v. California* (1973) 414 U.S. 15, 24 [internal quotation marks and citations omitted].)
- 2) Defines various terms for purposes of child pornography statutes, including:
 - a) “Matter” means any book, magazine, newspaper, or other printed or written material, or any picture, drawing, photograph, 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 article, equipment, machine, or material. “Matter” also means live or recorded telephone messages if transmitted, disseminated, or distributed as part of a commercial transaction.
 - b) “Obscene matter” incorporates the *Miller v. California* standard in 1). (Pen. Code § 311(a), (b).)
- 3) Makes it a crime to do any of the following:
 - a) Knowingly produce, develop, duplicate, distribute, or possess, in various specified formats, obscene matter depicting a minor personally engaging in or simulating sexual conduct, with the intent to provide the obscene matter to others. (Pen. Code § 311.1(a).)
 - b) Engage in conduct under (a) for commercial consideration. (Pen. Code § 311.2(b).)
 - c) Knowingly develop, duplicate, print, or exchange any representation of information, data, or image that depicts a minor engaged in an act of sexual conduct, regardless of whether

the minor personally engaged in the sexual conduct or the depiction is obscene. (Pen. Code § 311.3(a).)

- d) Knowingly employ, use, persuade, induce, or coerce—or in the case of parents or guardians, permit—a minor to engage or assist in posing or modeling in a performance involving sexual conduct, regardless of whether it is obscene, for a commercial purpose (Pen. Code § 311.4(b)) or not for a commercial purpose. (Pen. Code § 311.4(c))
 - e) Knowingly possess or control any matter, representation of information, data, or image, in various specified formats, the production of which involves the use of a person under 18 years of age personally engaging in or simulating sexual conduct. (Pen. Code § 311.11(a).)
- 4) Provides an enhanced punishment for the crimes specified above, if the minor personally engages or simulates the sexual conduct, when committed on or via government-owned computers or property. (Pen. Code § 311.12(a).)
 - 5) Authorizes the forfeiture and destruction of matter or obscene matter depicting a minor personally engaging in or simulating sexual conduct, regardless of whether a conviction is sought or obtained. (Pen. Code § 312.3 (a), (f).)

FISCAL EFFECT: As currently in print, this bill is keyed fiscal.

COMMENTS:

1) **The threat posed by deepfake child pornography.** The authors provide a comprehensive overview of this threat:

Currently prosecution of the possession of child sexual abuse material (CSAM) and related crimes, requires proof that the material in question depicts a real child. However, advances in AI and computer technology have made it possible, cheap, and easy to create highly realistic deepfake content, including CSAM. For example, websites available to the general public offer services that modify images of real people, including children, to make them appear nude. Other websites will generate artificial images of children in any position or situation the user demands. The images are often so realistic that the human eye cannot tell they are fake.

Numerous free applications utilize generative AI technology to produce images and videos of humans that appear real. There are many sites that provide free “text-to-image” services that allow a user to generate an image (or series of images) based upon text input. Some of these services include Dall-E, Midjourney, and Kasper Art. With minimal input, a user can produce images of humans that appear to be real. This includes material that could involve children.

Countless AI-image generating services not only allow the generation of nude, not-safe-for-work, or underage imagery, but actually market themselves for that ability . . . Many of these services have basic free plans, but also paid plans that allow for more censor-free content generation. These services are not on the dark web, but within the open internet for anyone – including children – to find.

The wide availability and use of technology in this way is deeply troubling for a number of reasons. For example, as CSAM becomes more readily available, and simultaneously more difficult to prosecute, CSAM consumers will be able to view more volume and more explicit content than before. Viewers of CSAM can then become desensitized, they will seek more harmful materials and eventually are likely to escalate their conduct to physical child sexual abuse.

Direct harm to children is inherent as AI-generated CSAM can begin with an image of a real child. Child actors are particularly vulnerable, but influencers, everyday social media users, and all children are at risk of falling prey to this abuse. CSAM images that depict or appear to depict real children, place children that resemble those images at extreme risk of physical assault. CSAM users have been documented to become obsessed with the person they think they see in the image and seek them out in real life. Real children are victimized in the process of creating these AI-generated CSAM.

2) **Artificial Intelligence (AI) and Generative Artificial Intelligence (GenAI).** AI refers to the mimicking of human intelligence by artificial systems, such as computers. AI uses algorithms – sets of rules – to transform inputs into outputs. Inputs and outputs can be anything a computer can process: numbers, text, audio, video, or movement. AI that are trained on small, specific datasets in order to make recommendations and predictions are sometimes referred to as “predictive AI.” This differentiates them from GenAI, which are trained on massive datasets in order to produce detailed text and images. When Netflix suggests a TV show to a viewer, the recommendation is produced by predictive AI that has been trained on the viewing habits of Netflix users. When DALL-E generates high-resolution, lifelike images, it uses GenAI that has been trained on ~250 million text-image pairs.

3) **GenAI and child pornography.** GenAI can be used to generate child pornography. A joint 2023 report between the nonprofit Thorn and the Stanford Internet Observatory predicted that in 2024, technological advances would make it significantly easier to generate images that are indistinguishable from actual images – including child pornography that cannot be definitively distinguished as being photographic or computer-generated.¹ This study pertained to images that are generated entirely from scratch, through the combination of two “concepts” that exist in a model’s training dataset. For example: child pornography might be produced by combining the concepts of “children” and “pornography”.

The Stanford Internet Observatory recently discovered that GenAI products may not need to combine disparate concepts to produce pornographic images of children; child sexual abuse materials (CSAM) are already present in many training datasets. A study identified 3226 instances of suspected child pornography in common image training datasets, many of which were later confirmed as such by third parties.² These datasets were generated automatically by scraping the internet. Images containing child pornography were found to have originated from large, well-known websites such as Reddit, Twitter, Blogspot, and Wordpress, as well as mainstream adult sites such as XHamster and XVideos.

¹ David Thiel, Melissa Stroebel and Rebecca Portnoff, “Generative ML and CSAM: Implications and Mitigations,” *Thorn and Stanford Internet Observatory*, Jun. 24, 2023.

² David Thiel, “Identifying and Eliminating CSAM in Generative ML Training Data and Models,” *Stanford Internet Observatory*, Dec. 23, 2023.

4) **Child pornography in California law.** In their analysis of this bill, the Assembly Public Safety Committee describes how child pornography laws are structured in California:

Possession or distribution of child pornography is punishable as either a misdemeanor or felony, and in some cases, may be a state prison felony. Penal Code section 311.2, subdivision (a) criminalizes distribution or exhibition of obscene material, including child pornography, and requires a maximum sentence of one year in state prison. Additionally, Penal Code section 311.2 may be charged per image and, in some case, aggregated to increase the total sentence. (*People v. Haraszewski* (2012) 203 Cal.App.4th 924.) Penal Code section 311.2, subdivision (b) punishes exhibition or distribution of child pornography for commercial consideration as a felony subject to a maximum of six years in state prison. (Pen. Code, § 290, subd. (c).)

Penal Code section 311.2, subdivision (c) punishes exhibition or distribution of obscene matter to another person 18 and over knowing the material depicts a minor engaged in sexual conduct, may be sentenced to a maximum of 1 year in state prison. Penal Code section 311.2 subdivision (d) punishes distribution of obscene matter, including child pornography, to a person under the age of 18, by up to one year in county jail, or three years in state prison.

Penal Code section 311.3 criminalizes “sexual exploitation of a child” meaning knowingly developing or printing child pornography, as specified, and may be punished by up to one year in the county jail. (Pen. Code, § 311.3, subd. (d).)

Penal Code section 311.4, subdivision (a) punishes knowingly employing a minor to distribute obscenity or pornography, as specified, and is subject to a punishment of up to one year in state prison. Penal Code section 311.11, subdivision (a) criminalizes possession of child pornography which is mostly punishable as a felony.

5) **Author’s statement.** According to the author:

AB 1831, the Preventing AI-Enabled Child Exploitation Act, will modernize our laws to ensure AI-generated sexually explicit images of children are illegal to possess, distribute, and create. With the rapid advancement of AI, this technology is being used to create highly realistic images of child sexual abuse, which can be virtually indistinguishable from a real child. The process of creating AI-generated sexually explicit images of minors victimizes thousands of children because an AI program must first learn what these images look like by using existing real images of children. Law enforcement officers in California have already encountered instances of people in possession of AI-generated [CSAM] that could not be prosecuted due to the deficiency in current law. Therefore, it is critical that our laws keep up with evolving AI technology to ensure predators are being prosecuted and children are being protected.

6) **What this bill would do.** Section 311 of the Penal Code outlines penalties related to the creation and distribution of child pornography involving real children. This bill would amend Section 311 such that the same penalties would apply to the creation and distribution of child pornography involving artificial intelligence-generated depictions of children.

7) **Analysis.** There is no question that the creation and distribution of deepfake child pornography should be outlawed to the greatest extent possible. Exactly how to codify this prohibition without running afoul of the First Amendment remains an open question. This bill

attempts to thread a needle by banning all instances of “obscene” deepfake content involving children, while excluding non-obscene content. This effort is outlined below:

First amendment considerations. In their analysis of this bill, the Assembly Public Safety Committee discusses whether this bill is compatible with the First Amendment:

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” (U.S. Const, Amend. I, Section 1.) The California Constitution also protects free speech. “Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.” (Cal. Const. Art. I, § 2.) “[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” (*Ashcroft v. American Civil Liberties Union* (2002) 535 U.S. 564, 573.) Legislation that regulates the content of protected speech is subject to strict scrutiny, sometimes referred to by the courts as “exacting scrutiny” in this context. (*Reed v. Town of Gilbert, Ariz.* (2015) 135 S.Ct. 2218, 2226.) To survive strict scrutiny, state action must be narrowly tailored to address a compelling government interest. (*Ibid.*)

However, certain speech is not eligible for First Amendment protections. As a general principal, the First Amendment bars the government from dictating what we see or read or speak or hear. The First Amendment does not protect defamation, incitement, obscenity, and pornography produced with real children. (See *Simon & Schuster, Inc. v. New York State Crime Victims Bd.* (1991) 502 U.S. 105, 127.) *Miller v. California* (1973) 413 U.S. 15, 24 held “obscene material is unprotected by the First Amendment.”

...

New York v. Ferber (1982) 458 U.S. 747, 759-761 further defined the limits of child pornography when it held, “Generally, pornography can be banned only if it is obscene under *Miller v. California* [citation omitted], but pornography depicting actual children can be proscribed whether or not the images are obscene because of the State's interest in protecting the children exploited by the production process, and in prosecuting those who promote such sexual exploitation.”

...

In this instance, it is not clear this bill would run afoul of First Amendment standards. First, even if the image is not viewed as “child pornography” – which is unclear given the rapid rise of AI-generated CSAM - it seems unlikely, barring an overbreadth argument, that a court would not view it as obscene under *Miller*.

In their opposition letter, ACLU California Action raises First Amendment concerns related to Penal Code section 311.2:

We are concerned that some provisions of AB 1831 fall outside these exceptions. In particular, proposed Penal Code section 311.2 would impermissibly prohibit a person from distributing, intending to distribute, exhibiting, or exchanging:

- Non-obscene material generated by artificial intelligence that neither depicts a real child nor that was generated using images of real children, and
- Non-obscene material that depicts what “appears to be a person under 18 years of age” but is, in fact, a person over the age of 18.

With respect to ACLU’s first point, the author of this bill states:

This bill is drafted so that images generated by artificial intelligence which do not depict a real child are prohibited only if they are also obscene. In this way the proposed amendments to current law will not run afoul of the First Amendment.

“Obscene matter” is defined in California law, based on the standard set forth in *Miller v. California* (1973) 413 U.S. 15, 24, to mean “matter, taken as a whole, that to the average person, applying contemporary statewide standards, appeals to the prurient interest, that, taken as a whole, depicts or describes sexual conduct in a patently offensive way, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value.” Realistic deepfake child pornography would likely be considered “obscene matter” under this definition.

With respect to ACLU’s second point, a proposed committee amendment modifies the bill’s language to specifically target “computer-generated or artificial intelligence-generated” depictions of individuals appearing to be under 18 years of age. Real adults that appear to be under 18 years old are therefore excluded by virtue of not being computer-generated or artificial intelligence-generated.

Other considerations. The author’s placement of the phrase “or any matter generated through the use of artificial intelligence” should arguably be placed elsewhere in the structure of these provisions:

...including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated *or artificial intelligence-generated image matter* that contains or incorporates in any manner, ~~either any film or filmstrip, or any matter generated through the use of artificial intelligence,~~ with intent to distribute...

8) **Committee amendments.** This Committee has proposed a number of clarifying amendments throughout the document, which the author has accepted. These are divided into three main types:

Definition of artificial intelligence. The provided definition for “matter generated through artificial intelligence” will be replaced with a definition for “artificial intelligence.” Language has been updated accordingly throughout the bill:

~~(e) “Matter generated through the use of artificial intelligence” means an image that has been generated or modified by a machine-based system that can, for a given set of human-defined objectives, create visual content that is, or would falsely appear to a reasonable person to be, or to incorporate, actual photographs or recordings of a real human being actually engaging in the actions depicted.~~

(c) “Artificial intelligence” means an engineered or machine-based system that varies in its level of autonomy and that can, for explicit or implicit objectives, infer from the input it receives how to generate outputs that can influence physical or virtual environments.

Representation of information. The bill’s description of “matter generated through the use of artificial intelligence” as a medium for a representation of information has been updated in the following way:

~~...that contains or incorporates in any manner, either any film or filmstrip, or any matter generated through the use of artificial intelligence, with intent to distribute or to exhibit to...~~

...that contains or incorporates in any manner, any film, filmstrip, or computer-generated or artificial intelligence-generated matter, with intent to distribute or to exhibit to...

What appears to be a person under 18 years of age. The phrase “what appears to be a person under 18 years of age” is intended to describe digital facsimiles of minors, but unintentionally includes real adults who look younger than 18. This language has been updated as follows:

~~...knowing that the matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct, as defined in Section 311.4, or what appears to be a person under 18 years of age engaging in or simulating such sexual conduct, shall be punished...~~

...knowing that the matter depicts a person under the age of 18 years, or contains computer-generated or artificial intelligence-generated data depicting what appears to be a person under 18 years of age, personally engaging in or personally simulating sexual conduct, as defined in Section 311.4, shall be punished...

The phrase “computer-generated” has been included to capture CSAM created using digital editing tools that do not involve artificial intelligence.

9) **Related legislation.** AB 1856 (Ta, 2024) would provide that an individual who intentionally distributes nonconsensual deepfake pornography is subject to a misdemeanor. This bill is currently pending in this Committee.

AB 1873 (Sanchez, 2024) would provide that a person is guilty of sexual exploitation of a child if the person knowingly generates or exchanges data that depicts a person under the age of 18 years engaged in an act of sexual contact. This bill is currently pending in this Committee.

AB 3050 (Low, 2024) would make an AI-generating entity that creates a nonconsensual deepfake using a person’s name, voice, signature, photograph, or likeness, in any manner, liable for damages sustained as a result. This bill is currently pending in this Committee.

SB 1235 (Gonzalez, 2024) would convene a working group to study the impact of deepfakes on state and local government, businesses and the workforce, education, and residents of the state. This bill is currently pending in Senate Education Committee.

ARGUMENTS IN SUPPORT:

California District Attorneys Association, one of the sponsors of this bill, writes in support:

AB 1831 recognizes that the same longstanding protections afforded to children when it is a human being creating representations of their sexual exploitation should apply with no less force when an AI generates such images at a human being's instruction. No more, but no less. Importantly, AB 1831 addresses these concerns without infringing constitutional protections for free speech. Children are already at risk of exploitation online, and that risk is exacerbated as AI continues to advance. Now is the time for California to take the lead in protecting our children from the sickening and public sexualization of their appearances.

Technet writes:

AB 1831 adds “matter generated through the use of artificial intelligence” to existing statutes that criminalize the creation, possession, and distribution of CSAM. The horrific exploitation of children that CSAM perpetuates exists regardless of how CSAM is produced. We think this bill is a reasonable and necessary update to include what is clearly an abusive and criminal use of this new technology.

Snap Inc. writes:

AB 1831 represents a critical step in aligning the state's criminal code with emerging technologies, while holding individuals responsible for creating and spreading disturbing and harmful content. It is imperative that industry, law enforcement, and the legislature stand in lock-step to root out violative material and bad actors, and ensure platforms are safe for our youngest users.

ARGUMENTS IN OPPOSITION:

ACLU California Action writes:

“The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere.” *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 244. The U.S. Supreme Court has found statutes unconstitutional on their face when they prohibit “a substantial amount of protected expression.” *Id.* AB 1831 suffers from such overbreadth: The speech prohibited by AB 1831 includes matter that does not depict real children, as required to fall within the exception to First Amendment protection addressed in *Ashcroft v. Free Speech Coalition*, and that does not “appeal to the prurient interest in sex,” or “portray sexual conduct in a patently offensive way,” as required to fall within the exception to First Amendment protection addressed by *Miller v. California*.

REGISTERED SUPPORT / OPPOSITION:

Support

California District Attorneys Association (co-sponsor)
Children's Advocacy Institute (co-sponsor)
Common Sense Media (co-sponsor)
District Attorney of Ventura County (co-sponsor)
Orange County Sheriff's Department (co-sponsor)
SAG-AFTRA (co-sponsor)
Brea Police Department
CalChamber

California Association of Highway Patrolmen
California Federation of Teachers Afl-cio
California State Sheriffs' Association
Center for Public Interest Law/University of San Diego
City of Downey Police Department
County of Ventura Board of Supervisors
Crime Victims United of California
Jewish Family and Children's Services of San Francisco, the Peninsula, Marin and Sonoma
Counties
Los Angeles City Attorney's Office
Organization for Social Media Safety
Paul Joseph Acting Chief of Police of The City of San Jose
Peace Officers Research Association of California (PORAC)
San Diego County District Attorney's Office
San Diego Internet Crimes Against Children Task Force
San Jose Police Department
Simi Valley Police Department
SNAP INC.
Technet
The Child Abuse Prevention Council

Oppose Unless Amended

ACLU California Action

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