Sb Date of Hearing: July 2, 2024

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION
Rebecca Bauer-Kahan, Chair
SB 933 (Wahab) – As Introduced January 16, 2024

SENATE VOTE: 37-0

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 synthetic child pornography with images of children who never existed. 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 does not address the issue of deepfake child pornography. Its effect is simply to clarify that "computer-generated imagery" includes "artificial intelligence-generated imagery" – a clarification that appears unnecessary, given the plain meaning of the term "computer-generated." It would not expand the Penal Code to cover AI-generated depictions of children that appear real, but are actually fake. At the same time, the bill in print does not weaken existing law. Committee amendments would add a reporting requirement for violations of the Penal Code involving AI-generated CSAM, granting the Department of Justice a valuable resource in its struggle against child pornography. A second amendment would add a definition for "artificial intelligence" into the relevant Penal Code statute.

This bill is sponsored by the California Police Chiefs Association and the Los Angeles County District Attorney's Office. It is supported by a variety of police organizations and cities, as well as Common Sense Media, Roblox, Technet, and Snap Inc. If passed out of this Committee, this bill will next be heard by the Assembly Appropriations Committee.

SUMMARY: For the purposes of Penal Code statutes that criminalize child pornography, clarifies that computer-generated images include images generated through the use of AI.

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).)

6) Declares the duty of the Department of Justice to:

 a) Collect data necessary for the work of the department from various persons and agencies, as well as from any other appropriate source.

   b) Recommend the form and content of records that must be kept by those persons and agencies in order to ensure the correct reporting of data to the department.

   c) Instruct those persons and agencies in the installation, maintenance, and use of those records and in the reporting of data therefrom to the department.

   d) Process, tabulate, analyze, and interpret the data collected from those persons and agencies.

   e) Make available to the public, through the department's OpenJustice Web portal, information relating to criminal statistics, to be updated at least once per year, and to present at other times as the Attorney General may approve reports on special aspects of criminal statistics. (Pen. Code § 13010.)

7) Declares it to be the duty of every person or agency dealing with crimes or criminals or with delinquency or delinquents, to do all of the following when requested by the Attorney General:

   a) Install and maintain records needed for the correct reporting of statistical data required by the Attorney General.

   b) Report statistical data to the department at those times and in the manner that the Attorney General prescribes.

   c) Give to the Attorney General, or their accredited agent, access to statistical data for the purpose of carrying out specified statutory duties. (Pen. Code § 13020.)

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

COMMENTS:

1) **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.

2) **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

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

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.

3) **Child pornography in California law.** In their analysis of AB 1831 (Berman, 2024), 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.

4) **What this bill would do.** This bill would, for the purposes of Penal Code statutes criminalizing child pornography, clarify that computer-generated images include images generated through the use of AI.

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

5) **Author's statement:**

Our laws need to keep up with technology. New artificial intelligence (AI) tools allow anyone to create convincing images by typing a short description of what they want to see. The landscape of possibilities presented by artificial intelligence is changing rapidly. We must protect children from new forms of exploitation and ensure perpetrators are held responsible for their actions. As technology evolves, our laws must keep up to ensure children are safe.

6) **Analysis.** The version of this bill that appears in print does only one thing: it clarifies that "computer-generated images" include "images generated through the use of artificial intelligence." However, the bill does not provide a definition of "artificial intelligence" that expands the phrase "computer-generated" beyond its common definition. As "computer-generated" manifestly includes images "generated through the use of artificial intelligence" (because all advanced AI currently runs on computers), the version of the bill in print does not actually expand existing protections for minors.

Furthermore, the addition of the phrase "generated through the use of artificial intelligence" appears to be inserted incorrectly into the relevant Penal Code statutes. Section 311 of the Penal Code is unpleasant to read – both in terms of its content, and in terms of its structure – but its various statutes tend to break down as follows:

"Every person who knowingly [possesses or distributes] any [physical or digital form of media used to store pre-existing content] that incorporates [the original form of the generated content] with intent to distribute the matter, and knowing that the matter [depicts a minor engaging in sexual conduct] shall be punished by [penalty]."

When AI is used to generate child pornography, the AI-generated content is the "original form of the generated content" referenced above. This bill instead asserts that AI-generated content is the "physical or digital form of media used to store pre-existing content":

Every person who knowingly sends . . . any representation of information, data, or image, 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 image*, **including an image generated through the use of artificial intelligence,*** that contains or incorporates in any manner…

AB 1831 (Berman, 2024) amends the same sections of code as this bill, with the same intended effect, but correctly asserts that AI-generated content is the "original form of the generated content":

…contains or incorporates in any manner, any film, filmstrip, ***or any digitally altered or artificial-intelligence-generated matter,*** with intent to distribute…

The current bill has one other major issue: Section 311 of the Penal Code only covers materials depicting "a person under the age of 18 years personally engaging in or personally simulating sexual conduct" – in other words, it only covers depictions of real minors. If this bill were amended as described above, it would still only cover AI-generated depictions of real minors. It

is not immediately obvious whether this would meaningfully expand existing law. Consider three scenarios involving a known use of AI, face-swapping:

1) The face of an adult is swapped onto the body of another adult engaging in sexual conduct. This would not result in a violation of these statutes, as the portrayed individual is not a minor.

2) The face of a minor is swapped onto the body of another minor engaging in sexual conduct. This would result in a violation of these statutes under existing law, as the template minor is "a person under the age of 18 personally engaging in or personally simulating sexual conduct."

3) The face of a minor is swapped onto a body of an adult engaging in sexual conduct. This is the scenario most likely to be captured by this bill, were it to be amended as described above – but even then, it is not clear that the face-swapped minor would be "personally" engaging in sexual conduct.

Face-swapping aside, this bill fails entirely to cover another pressing issue: the *de novo* creation of child pornography involving fake children through the use of AI. In their letter of support for AB 1831, the California District Attorneys Association explains why the *de novo* creation of child pornography is a critical issue:

The threat posed by AI generated CSAM is real now and emerging quickly as a serious impediment to protecting our 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.

In 2020 investigators in Ventura County investigating the possession and transfer of CSAM amongst three individuals determined that one of the suspects was using his computer to create CSAM images. He confessed to creating and distributing these made-to-order sexually explicit images of children for financial gain. However, despite the obscene nature of the images and the fact that they appeared to depict young children, he could not be prosecuted.

AB 1831 deals with this issue by expanding the relevant Penal Code statues to include "digitally altered or artificial-intelligence-generated data depicting what appears to be a person under 18 years of age". The current bill includes no such language.

Given that this bill does not actually change the scope of existing law, it is not actively harmful. It is also completely consistent with AB 1831 – no issues would emerge as a result of both becoming law. Understanding this, two amendments are proposed by this Committee. One simply adds a definition for "artificial intelligence" into the bill. The other creates a reporting requirement for violations involving AI-generated materials, in order that California's legal system might better understand the scope of this issue.

7) Committee amendments. Two committee amendments are proposed for this bill. The first would provide a definition for "artificial intelligence" sourced from AB 2885 (Bauer-Kahan, 2024):

SEC. 9. Section 311 of the Penal code is amended to read:

311. As used in this chapter, the following definitions apply:

(a) "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.

The second would create a reporting requirement for violations of Section 311 of the Penal Code that involve AI-generated materials. This requirement would be consistent with existing reporting requirements, laid out in the **EXISTING LAW** section of this analysis:

SEC. 8. Section 13012.9 of the Penal Code is added to read:

13012.9. (a) The annual report published by the department pursuant to Section 13010 shall include information concerning violations of Chapter 7.5 (commencing with Section 311) of Title 9 of Part 1 of this code that involve materials generated through the use of artificial intelligence.

(b) For purposes of this section, "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.

8) **Related legislation.** AB 1831 (Berman, 2024) amends the same statutes as this bill, and would expand laws against child pornography to include AI-generated matter. This bill is currently pending in Senate Appropriations Committee.

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 Senate Appropriations Committee.

SB 926 (Wahab, 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.

ARGUMENTS IN SUPPORT:

The California District Attorneys Association writes:

> CSAM created using AI is harmful in many of the same ways as CSAM which depicts an actual child. Persons who consume artificially created CSAM will become desensitized to its content, just as individuals who consume CSAM of actual children. Desensitization, in turn, can lead the individual to seek out more graphic content and eventually may lead to physical assaultive behaviors against real children. Importantly, the very creation of CSAM by artificial intelligence relies on existing images of CSAM depicting real children, revictimizing thousands of exploited children. Criminalizing CSAM, even when it is entirely created by artificial intelligence, makes children safer.

TechNet and the California Chamber of Commerce writes:

SB 933 adds "image 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.

REGISTERED SUPPORT / OPPOSITION:

Support

California Police Chiefs Association (co-sponsor)
Los Angeles County District Attorney's Office (co-sponsor)
Arcadia Police Officers' Association
Burbank Police Officers' Association
California Chamber of Commerce
California Coalition of School Safety Professionals
California District Attorneys Association
California Narcotic Officers' Association
California Reserve Peace Officers Association
California State Sheriffs' Association
Children's Advocacy Institute
City of San Jose
City of Santa Clara
Claremont Police Officers Association
Common Sense
Common Sense Media
Corona Police Officers Association
Culver City Police Officers' Association
Deputy Sheriffs' Association of Monterey County
Fullerton Police Officers' Association
Junior Leagues of California State Public Affairs Committee
Los Angeles School Police Management Association
Los Angeles School Police Officers Association
Murrieta Police Officers' Association
Newport Beach Police Association
Novato Police Officers Association
Palos Verdes Police Officers Association
Perk Advocacy
Placer County Deputy Sheriffs' Association
Pomona Police Officers' Association
Riverside Police Officers Association
Riverside Sheriffs' Association
Roblox, INC.
Sacramento County Sheriff Jim Cooper
Santa Ana Police Officers Association
SNAP INC.
Technet
Upland Police Officers Association

Opposition

None on file.

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