WEST VIRGINIA CODE CHAPTER 49A ARTICLE 1

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§49A-1-101. Definitions.

As used in this article:

"Application" means, as used in this article, a computer software program designed to run on a smartphone, computer tablet, mobile device, smart television, desktop, or other application enabled devices.

"Child pornography" is defined as any material visually portraying a minor engaged in any sexually explicit conduct as those terms are used in §61-8C-1 of this code.

“Commercial entity" includes a corporation, limited liability company, partnership, limited partnership, sole proprietorship, or other legally recognized entity.

"Digital identification" means information stored on a digital network that may be accessed by a commercial entity and that serves as proof of the identity of an individual. "Digital identification" shall include, but not be limited to, the West Virginia Mobile ID.

"Distribute" means to issue, sell, give, provide, deliver, transfer, transmute, circulate, or disseminate by any means.

"Intentionally" means conduct that is willfully engaged in and the consequences of such conduct results in a violation of this article.

"Internet" means the international computer network of both federal and non-federal interoperable packet switched data networks.

"Knowingly" means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware by documentation or action that the person's conduct is of that nature or that the circumstance exists.

"Minor" means any person under 18 years old.

"News-gathering organization" means any of the following:

An employee of a newspaper, news publication, or news source, printed or on an online or mobile platform, of current news and public interest, while operating as an employee as provided in this subsection, who can provide documentation of employment with the newspaper, news publication, or news source; or

An employee of a radio broadcast station, television broadcast station, cable television operator, or wire service while operating as an employee as provided in this subsection, who can provide documentation of employment.

"Personally identifiable information" means any information about an individual maintained by an agency, including:

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Any information that can be used to distinguish or trace an individual's identity, such as name, social security number, date and place of birth, mother's maiden name, or biometric records; and

Any other information that is linked or linkable to an individual, such as medical, educational, financial, and employment information.

"Obscene material" is defined as all of the following:

Any material that the average person, applying contemporary community standards, would find, taking the material as a whole, is designed to appeal to, or is designed to pander to, the prurient interest;

Material that exploits, is devoted to, or principally consists of descriptions of actual, simulated, or animated display or depiction of any of the following, in a manner that is patently and sexually offensive:

Pubic hair, anus, vulva, genitals, or nipple of the female breast;

Touching, caressing, or fondling of nipples, breasts, buttocks, anuses, or genitals; or

Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions, exhibitions, or any other sexual act; and

The material taken as a whole lacks serious literary, artistic, political, medical, therapeutic, or scientific value.

"Publish" means to communicate or make information available to another person or entity on a publicly available Internet website or application.

"Sexual material harmful to minors" includes any material that:

The average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

In a manner that is patently and sexually offensive in respect to minors, exploits, is devoted to, or principally consists of descriptions of actual, simulated, or animated display or depiction of:

Pubic hair, anus, vulva, genitals, or nipple of the female breast;

Touching, caressing, or fondling of nipples, breasts, buttocks, anuses, or genitals; or

Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions, exhibitions, or any other sexual act; and

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Taken as a whole lacks serious literary, artistic, political, medical, therapeutic, or scientific value for minors.

"Substantial portion" means more than 33.33% of total material on a website or application, which meets the definition of "sexual material harmful to minors" as defined in this section.

"Transactional data" means a sequence of information that documents an exchange, agreement, or transfer between an individual, commercial entity, or third party used for the purpose of satisfying a request or event. Transactional data includes records from mortgage, education, and employment entities.

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§49A-1-102. Reasonable age verification methods.

(a) A commercial entity that knowingly and intentionally publishes or distributes sexual material harmful to minors on an Internet website or application, or a third party that performs age verification under this article, shall in order to prove that an individual is 18 years of age or older require an individual to:

(1) Provide digital identification; or

(2) Comply with a commercial or governmental age verification system that verifies age using:

(A) Government-issued identification which may be digital identification; or

(B) A commercially reasonable method that relies on public or private transactional data to verify the age of an individual.

(b) A commercial entity, or third party, that performs the required age verification shall not retain any identifying information of the individual after access has been granted to the material: Provided, That nothing in this subsection shall be interpreted to require the deletion of data that was otherwise held or obtained by a commercial entity or third party, which the commercial entity, or third party, held prior to the age verification or which is, or was, otherwise held by a commercial entity, or third party, and was not gained or compiled as a part of the age verification process.

(c) A commercial entity, or third party, shall implement best practices to comply with the current standards of the National Institute of Standards and Technology to limit the amount of personally identifiable information transferred between entities while effectively accomplishing the age verification requirements of this section.

(d) A commercial entity shall not publish or distribute material that the entity knows is obscene, or material that the entity knows depicts, describes, or promotes child pornography, on the Internet or via an application.

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§49A-1-103. Applicability of article.

(a) This article does not apply to a website, video, report, or event of a bona fide news gathering organization or public interest broadcast. This article may not be construed to affect the rights of a news-gathering organization.

(b) An Internet service provider or its affiliates or subsidiaries, a search engine, an application distribution provider, web browser provider, or a cloud service provider may not be held to have violated this article for providing access or connection to or from a website or other information or content on the Internet or on a facility, system, or network, including transmission, downloading, intermediate storage, access software, or other services to the extent the provider or search engine is not responsible for the creation of the content that constitutes sexual material harmful to minors.

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§49A-1-104. Liability for failing to perform reasonable age verification for sexual material harmful to minors; damages; liability for retention of data; damages; creation of cause of action; and statute of limitations.

(a) A commercial entity that knowingly and intentionally publishes or distributes sexual material harmful to minors on the internet from a website, or through an application, that contains a substantial portion of such sexual material harmful to minors shall be held liable if the entity fails to perform reasonable age verification methods to verify the age of an individual attempting to access the material. A commercial entity that is found to have violated this section is liable to an individual, as defined in subsection (d) of this section, for damages resulting from a minor child accessing the material, and the individual who brings an action under this subsection is entitled to:

(1) An award of reasonable attorney fees and court costs;

(2) $10,000 per each incident of violation; and

(3) Actual damages for financial, physical, and emotional harm incurred by the person bringing the action, if the court determines that the harm is a direct consequence of the violation or violations.

(b) A commercial entity that knowingly and intentionally publishes or distributes obscene material, or material that depicts or promotes child pornography, on the Internet may be held liable to an individual for nominal damages, actual damages, court costs, and reasonable attorney fees as ordered by the court.

(c) A commercial entity that is found to have violated this section is liable to an individual for damages resulting from retaining, using, sharing, or selling any identifying information, or other data, of the individual after access has been granted to the individual. An individual who brings an action under this subsection is entitled to:

(1) An award of reasonable attorney fees and court costs;

(2) $10,000 per each incident of violation; and

(3) Actual damages for financial, physical, and emotional harm incurred by the person bringing the action, if the court determines that the harm is a direct consequence of the violation or violations.

(d) The Legislature hereby expressly creates the causes of action described in subsections (a), (b), and (c) of this section for a minor child, parent, guardian, or other person legally permitted to act on the minor child’s behalf, that is harmed by a violation of the requirements of §49A-1-102(a) or §49A-1-102(d) of this code.

(e) The statute of limitation for the filing of any civil action under this section shall be within five years after the discovery of the violation, or in the exercise of reasonable diligence

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should have known of the violation of this section.

(f) An award of damages pursuant to this section may not be imposed for any violation that occurred prior to the effective date of this article.

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§49A-1-105. Injunction by action of Attorney General; civil penalties; basis of civil penalties; and statute of limitations.

(a) If the Attorney General believes that a commercial entity is knowingly and intentionally violating or has knowingly violated this article, and the action is in the public interest, the Attorney General may bring an action in the circuit court located where a minor child, or individual, has accessed the obscene material, sexual material harmful to minors, or child porn or in the circuit court located where an individual resides who has had any identifiable information improperly retained, used, shared, or sold, against a commercial entity or other person to enjoin the violation and recover a civil penalty for violating this article. If a court of competent jurisdiction finds that the commercial entity has engaged in a violation of this article, it may assess a civil penalty for each violation of this article in addition to any other damages that may have been incurred, as follows:

(1) $10,000 per day that the entity operates an Internet website in violation of the age verification requirements of this article;

(2) $10,000 per instance when the entity retains identifying information in violation of §49A-1-102(b) of this code; and

(3) If, because of the entity's violation of the age verification requirements of this article, one or more minors accesses sexual material harmful to minors, an additional amount of not more than $250,000.

(b) The amount of a civil penalty under this section shall be based on:

(1) The seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation;

(2) The history of previous violations;

(3) The amount necessary to deter a future violation;

(4) The economic effect of a penalty on the entity on whom the penalty will be imposed; and

(5) The entity's knowledge that the act constituted a violation of this article.

(c) The statute of limitation for the filing of any civil action under this section shall be within five years after the discovery of the violation, or in the exercise of reasonable diligence should have known of the violation of this section.

(d) An award of damages pursuant to this section may not be imposed for any violation that occurred prior to the effective date of this article.

(e) The Attorney General may recover reasonable and necessary attorney fees and costs incurred in a civil action under this article.

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§49A-1-106. Rule-making authority.

(a) The Office of Technology, under the Department of Administration, may propose rules for legislative approval necessary to implement this article in accordance with §29A-3-1 *et seq*. of this code.

(b) The rules shall:

(1) Establish processes or means by which a commercial entity may meet the age verification requirements of this article;

(2) Establish requirements for providing confirmation of the receipt of any information provided by a person seeking to verify age under this article;

(3) Establish requirements for retaining, protecting, and securely disposing of any information obtained by a commercial entity or its agent as a result of compliance with the requirements of this article;

(4) Require that information obtained by a commercial entity or its agent in order to comply with the requirements of this article are only retained for the purpose of compliance and may not be used for any other purpose;

(5) Require if the Office of Technology permits an agent to process verification requirements required by this article, that the agent have its principal place of business in the United States of America.

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