

Representative Brady Brammer proposes the following substitute bill:

WARNING LABELS AMENDMENTS

2020 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Brady Brammer

Senate Sponsor: Todd Weiler

LONG TITLE

General Description:

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

Highlighted Provisions:

This bill:

- ▶ allows the attorney general or a member of the public to bring an action against a person who distributes pornography without a visible warning;
- ▶ requires an individual person to first notify the attorney general before bringing an action;
- ▶ allows for a civil penalty of up to \$2,500 for each violation;
- ▶ requires that a portion of any recovery be provided to the Crime Victims Reparations Fund;
- ▶ provides a process for curing the violation and paying a reduced penalty; and
- ▶ requires the Judicial Council to adjust the penalty every five years.

Money Appropriated in this Bill:

None

Other Special Clauses:

None



26 **Utah Code Sections Affected:**

27 AMENDS:

28 **78B-6-2103**, as enacted by Laws of Utah 2017, Chapter 464

29 **78B-6-2104**, as enacted by Laws of Utah 2017, Chapter 464

30 ENACTS:

31 **78B-6-2105**, Utah Code Annotated 1953



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

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

35 **78B-6-2103. Liability -- Safe harbor.**

36 (1) A person who predominately distributes or otherwise predominately provides
37 pornographic material to consumers is liable to a person if:

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

39 and

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

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

45 (3) Notwithstanding Subsection (1), a person who distributes or otherwise provides
46 pornographic material is not liable under this section if the person who distributes or otherwise
47 provides pornographic material:

48 (a) provides a warning that:

49 (i) is conspicuous;

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

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

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

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

57 (5) (a) Notwithstanding Section 78B-6-2105, a person who predominately distributes
 58 or otherwise predominately provides pornographic material to consumers without a warning
 59 label is not liable if the person demonstrates reasonable efforts to determine the location of
 60 recipients of pornographic material within the state and the placement of warning labels on
 61 material that enters the state. Reasonable efforts shall result in a compliance rate that exceeds
 62 75% of the content believed to enter the state.

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

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

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

69 **78B-6-2104. Damages -- Class action.**

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

72 (a) actual damages; and

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

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

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

77 **78B-6-2105. Civil action for enforcement -- Penalties.**

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

84 STATE OF UTAH WARNING

85 Exposing minors to pornography is known to the state of Utah to cause negative impacts to
 86 brain development, emotional development, and the ability to maintain intimate relationships.

87 Such exposure may lead to harmful and addictive sexual behavior, low self-esteem, and the

88 improper objectification of and sexual violence towards others, among numerous other harms.

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

92 (b) For digital publications, the warning in Subsection (1) shall be displayed in
93 searchable text format and for at least 15 seconds prior to the display of any video or each
94 image which includes material as defined in Section [76-10-1201](#).

95 (3) A person who violates this section shall be liable for a civil penalty not to exceed
96 \$2,500 per violation, plus filing fees and attorney fees, in addition to any other penalty
97 established by law, and enjoined from further violations. The civil penalty may be assessed and
98 recovered in a civil action brought in any court of competent jurisdiction. Each violation shall
99 be the sale or display of potentially harmful content without the warning required in Subsection
100 (1), in accordance with Subsection (2).

101 (4) The determination by a court as to whether a person is distributing material the
102 state considers to be pornographic material or performance as defined in Section [78B-6-1203](#)
103 shall be proven by clear and convincing evidence. All other elements of proof shall be proven
104 by a preponderance of the evidence.

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

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

109 (a) the nature and extent of the violation;

110 (b) the number and severity of the violations;

111 (c) the economic effect of the penalty on the violator;

112 (d) whether the violator took good faith measures to comply with this chapter and
113 when those measures were taken;

114 (e) the willfulness of the violator's misconduct;

115 (f) the deterrent effect that the imposition of the penalty would have on both the
116 violator and the regulated community as a whole; and

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

118 (7) Actions pursuant to this section may be brought by the attorney general's office in

119 the name of the people of the state or by a private person in accordance with Subsection (8).

120 (8) A private person may bring an action in the public interest pursuant to this section
121 if:

122 (a) the person has served notice of an alleged violation of Section 78B-6-2103 on the
123 alleged violator and the attorney general's office;

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

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

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

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

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

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

136 (a) state that the person executing the notice believes that there is a violation; and

137 (b) provide factual information sufficient to establish the basis for the alleged violation.

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

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

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

147 (i) corrected the alleged violation and all similar violations known to the alleged
148 violator;

149 (ii) agreed to pay a penalty for the alleged violation in the amount of \$500 per

150 violation; and

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

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

156 (13) The attorney general shall review the notice of alleged violation and may confer
157 with the noticing party. If the attorney general believes there is no merit to the action, the
158 attorney general shall, within 45 days of receipt of the notice of alleged violation, provide a
159 letter to the noticing party and the alleged violator stating that the attorney general believes
160 there is no merit to the action.

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

163 Date:

164 Name of Noticing Party or attorney for Noticing Party:

165 Address:

166 Phone number:

167 SPECIAL COMPLIANCE PROCEDURE

168 PROOF OF COMPLIANCE

169 You are receiving this form because the Noticing Party listed above has alleged that you are in
170 violation of Utah Code Section [78B-6-2103](#).

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

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

174 (2) the Noticing Party has not received this form at the address shown above, accurately
175 completed by you, postmarked within 14 days of your receiving this notice; and

176 (3) the Noticing Party does not receive the required \$500 penalty payment for each violation
177 alleged from you at the address shown above postmarked within 30 days of your receiving this
178 notice.

179 PART 1: TO BE COMPLETED BY THE NOTICING PARTY OR ATTORNEY FOR THE
180 NOTICING PARTY

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

184 Date:

185 Name of Noticing Party or attorney for Noticing Party:

186 Address:

187 Phone number:

188 PART 2: TO BE COMPLETED BY THE ALLEGED VIOLATOR OR AUTHORIZED

189 REPRESENTATIVE

190 Certification of Compliance

191 Accurate completion of this form will demonstrate that you are now in compliance with Utah

192 Code Section [78B-6-2103](#), for the alleged violation listed above. You must complete and

193 submit the form below to the Noticing Party at the address shown above, postmarked within 14

194 days of you receiving this notice.

195 I hereby agree to pay, within 30 days of receipt of this notice, a penalty of \$500 for each

196 violation alleged to the Noticing Party only and certify that I have complied with by (check

197 only one of the following):

198 [] Posting a warning or warnings, and attaching a copy of that warning and a photograph

199 accurately showing its placement on the print or digital publication.

200 [] Eliminating the alleged exposure, and attaching a statement accurately describing how the

201 alleged exposure has been eliminated.

202 CERTIFICATION

203 My statements on this form, and on any attachments to it, are true, complete, and correct to the

204 best of my knowledge and belief and are made in good faith. I have carefully read the

205 instructions to complete this form. I understand that if I make a false statement on this form, I

206 may be subject to additional penalties under Utah Code Section [76-10-1206](#).

207 Signature of alleged violator or authorized representative:

208 Date:

209 Name and title of signatory:

210 (15) An alleged violator may satisfy the conditions set forth in Subsection (14) only

211 one time for a specific violation.

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

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

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

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

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

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

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

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

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

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

236 (a) maintain a record of documents and payments submitted pursuant to Subsections
237 (18), (19), and (20);

238 (b) create and provide to the Legislature in odd-numbered years beginning November
239 2021, a report containing the following for the previous two years:

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

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

243 (iii) the total amount received and deposited into the Crime Victim Reparations Fund.
244 (22) Beginning May 1, 2025, and at each five-year interval, the dollar amount of the
245 civil penalty provided in Subsection (3) shall be adjusted by the Judicial Council based on the
246 change in the annual Consumer Price Index for the most recent five-year period ending on
247 December 31 of the previous year, and rounded to the nearest five dollars. The attorney general
248 shall publish the dollar amount of the civil penalty together with the date of the next scheduled
249 adjustment.