

LEGISLATIVE BILL 728

Approved by the Governor April 5, 2010

Introduced by Lautenbaugh, 18.

FOR AN ACT relating to offenses against children; to amend section 29-119, Reissue Revised Statutes of Nebraska; to adopt the Exploited Children's Civil Remedy Act; to redefine a term with respect to plea agreements; and to repeal the original section.

Be it enacted by the people of the State of Nebraska,

Section 1. Sections 1 to 7 of this act shall be known and may be cited as the Exploited Children's Civil Remedy Act.

Sec. 2. For purposes of the Exploited Children's Civil Remedy Act:

(1) Access software provider means a provider of software, including client or server software, or enabling tools that do any one or more of the following: (a) Filter, screen, allow, or disallow content; (b) pick, choose, analyze, or digest content; or (c) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content;

(2) Aid or assist another with the creation, distribution, or active acquisition of child pornography means help a principal in some appreciable manner with the creation, distribution, or active acquisition of a visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers. The term also includes knowingly employing, forcing, authorizing, inducing, or otherwise causing a child to engage in any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers. No parent, stepparent, legal guardian, or person with custody and control of a child, knowing the content thereof, may consent to such child engaging in any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers;

(3) Cable operator means any person or group of persons (a) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system or (b) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system;

(4) Child has the same meaning as in section 28-1463.02;

(5) Create means to knowingly create, make, manufacture, direct, publish, finance, or in any manner generate;

(6) Distribute means the actual, constructive, or attempted transfer from one person, source, or location to another person, source, or location. The term includes, but is not limited to, renting, selling, delivering, displaying, advertising, trading, mailing, procuring, circulating, lending, exhibiting, transmitting, transmuting, transferring, disseminating, presenting, or providing any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers;

(7) Interactive computer service means any information service system or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions;

(8) Participant means a child who appears in any visual depiction of sexually explicit conduct and is portrayed or actively engaged in acts of sexually explicit conduct appearing therein;

(9) Portrayed observer means a child who appears in any visual depiction where sexually explicit conduct is likewise portrayed or occurring within the child's presence or in the child's proximity;

(10) Sexually explicit conduct has the same meaning as in section 28-1463.02;

(11) Telecommunications service means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used; and

(12) Visual depiction has the same meaning as in section 28-1463.02.

Sec. 3. (1) Any participant or portrayed observer in a visual depiction of sexually explicit conduct or his or her parent or legal guardian who suffered or continues to suffer personal or psychological injury as a result of such participation or portrayed observation may bring a civil action against any person who knowingly and willfully (a) created, distributed, or actively acquired such visual depiction while in this state or (b) aided or assisted with the creation, distribution, or active acquisition of such visual

depiction while such person or the person aided or assisted was in this state.

(2) A plaintiff who prevails in a civil action brought pursuant to the Exploited Children's Civil Remedy Act may recover his or her actual damages, which are deemed to be a minimum of one hundred fifty thousand dollars, plus any and all attorney's fees and costs reasonably associated with the civil action. In addition to all other remedies available under the act, the court may also award temporary, preliminary, and permanent injunctive relief as the court deems necessary and appropriate.

(3) This section does not create a cause of action if the participant was sixteen years of age or older at the time the visual depiction was created and the participant willfully and voluntarily participated in the creation of the visual depiction.

(4) No law enforcement officer engaged in his or her law enforcement duties, governmental entity, provider of interactive computer service, provider of telecommunications service, or cable operator is subject to a civil action under the Exploited Children's Civil Remedy Act.

Sec. 4. Notwithstanding any other provisions of law, any action to recover damages under the Exploited Children's Civil Remedy Act shall be filed within three years after the later of:

(1) The conclusion of any related criminal prosecution against the person or persons from whom recovery is sought;

(2) The receipt of actual or constructive notice sent or given to the participant or portrayed observer or his or her parent or legal guardian by a member of a law enforcement entity informing the participant or portrayed observer or his or her parent or legal guardian that the entity has identified the person:

(a) Who created, distributed, or actively acquired the visual depiction of sexually explicit conduct containing the participant or portrayed observer; or

(b) Who aided or assisted another person with the creation, distribution, or active acquisition of the visual depiction of sexually explicit conduct containing the participant or portrayed observer; or

(3) The participant or portrayed observer reaching the age of eighteen years.

Sec. 5. In any action brought pursuant to the Exploited Children's Civil Remedy Act, a plaintiff may request to use a pseudonym instead of his or her legal name in all court proceedings and records. Upon finding that the use of a pseudonym is proper, the court shall ensure that the pseudonym is used in all court proceedings and records.

Sec. 6. It is not a defense to a cause of action brought pursuant to the Exploited Children's Civil Remedy Act that the defendant:

(1) Did not know the participant or portrayed observer appearing in the visual depiction of sexually explicit conduct;

(2) Did not appear in the visual depiction of sexually explicit conduct containing the participant or portrayed observer; or

(3) Did not commit, assist with the commission of, or personally observe the commission of acts of sexually explicit conduct portrayed in the visual depiction containing the participant or portrayed observer.

Sec. 7. To prevent ongoing and further exploitation of any person who was a participant or portrayed observer or his or her parent or legal guardian, the Attorney General, upon request, may pursue cases on behalf of any participant or portrayed observer or his or her parent or legal guardian who has a bona fide cause of action under the Exploited Children's Civil Remedy Act. All damages obtained shall go to the plaintiff or plaintiffs. For his or her role in pursuing a civil action under the act, the Attorney General may seek all of his or her reasonable attorney's fees and costs associated with the civil action.

Sec. 8. Section 29-119, Reissue Revised Statutes of Nebraska, is amended to read:

29-119 For purposes of this section and sections 23-1201, 29-120, and 29-2261, unless the context otherwise requires:

(1) A plea agreement means that as a result of a discussion between the defense counsel and the prosecuting attorney:

(a) A charge is to be dismissed or reduced; or

(b) A defendant, if he or she pleads guilty to a charge, may receive less than the maximum penalty permitted by law; and

~~(2)~~ (2)(a) Victim means a person who, as a result of a homicide as defined in under sections 28-302 to 28-306, a first degree sexual assault as defined in under section 28-319, a first degree assault as defined in under section 28-308, a sexual assault of a child in the second or third degree as defined in under section 28-320.01, a sexual assault of a child in the first degree as defined in under section 28-319.01, a second degree assault as

~~defined in under~~ section 28-309, a first degree false imprisonment ~~as defined in under~~ section 28-314, a second degree sexual assault ~~as defined in under~~ section 28-320, or a robbery ~~as defined in under~~ section 28-324, has had a personal confrontation with the offender and also includes a person who has suffered serious bodily injury as defined in section 28-109 as a result of a motor vehicle accident when the driver was charged with a violation of section 60-6,196 or 60-6,197 or with a violation of a city or village ordinance enacted in conformance with either section.

(b) In the case of a homicide, victim means the nearest surviving relative under the law as provided by section 30-2303 but does not include the alleged perpetrator of the homicide.

(c) In the case of a violation of section 28-813.01, 28-1463.03, 28-1463.04, or 28-1463.05, victim means a person who was a child as defined in section 28-1463.02 and a participant or portrayed observer in the visual depiction of sexually explicit conduct which is the subject of the violation and who has been identified and can be reasonably notified.

(d) In the case of a sexual assault of a child, a possession offense of a visual depiction of sexually explicit conduct, or a distribution offense of a visual depiction of sexually explicit conduct, victim means the child victim and the parents, guardians, or duly appointed legal representative of the child victim but does not include the alleged perpetrator of the ~~sexual assault.~~ crime.

Sec. 9. Original section 29-119, Reissue Revised Statutes of Nebraska, is repealed.