

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 1628 (Ramos)
Version: May 4, 2022
Hearing Date: June 28, 2022
Fiscal: No
Urgency: No
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SUBJECT

Online platforms: electronic content management: controlled substances

DIGEST

This bill requires online platforms to create and post a policy that includes policies regarding distribution of controlled substances and its prevention, reporting mechanisms, and resources.

EXECUTIVE SUMMARY

The author points to testimonials from people who are active drug users and parents of people who have overdosed on fentanyl that cite social media as an often used platform to advertise and sell drugs. Evidence shows that social media platforms have in fact become an increasingly popular avenue for the distribution and sale of illegal drugs, especially to younger generations. This includes fentanyl, a synthetic opioid that is 50 to 100 times stronger than morphine.

The author argues that while social media companies have introduced new policies to address drug distribution through their platform, this practice is not required and there is no oversight. This bill requires online platforms, as defined, to create and post a policy statement that includes various elements. This includes the policy on the use of the platform to illegally distribute controlled substances, a general description of the moderation practices used to prevent such distribution, and links to reporting mechanisms and resources. The bill sunsets January 1, 2028.

This bill is author sponsored. It is supported by the County of Orange and the Orange County District Attorney's Office. There is no known opposition.

PROPOSED CHANGES TO THE LAW

Existing federal law:

- 1) Provides a right to free speech and expression. (U.S. Const., 1st amend; Cal. Const., art 1, § 2.)
- 2) Provides, in federal law, that a provider or user of an interactive computer service shall not be treated as the publisher or speaker of any information provided by another information content provider. (47 U.S.C. § 230(c)(2).)
- 3) Provides that a provider or user of an interactive computer service shall not be held liable on account of:
 - a) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
 - b) any action taken to enable or make available to information content providers or others the technical means to restrict access to such material. (47 U.S.C. § 230(c)(2).)

Existing state law:

- 4) Requires an operator of a commercial website or online service that collects personally identifiable information about consumers to conspicuously post its privacy policy on its website and include specified disclosures. (Bus. & Prof. Code § 22575.)
- 5) Requires, pursuant to the California Consumer Protection Act of 2018 (CCPA), businesses, as defined, to include specified information in their privacy policies, such as a description of consumer rights, the categories of personal information the business collects about consumers, and a list of the categories it has sold about consumers in the preceding 12 months. (Civ. Code § 1798.130.)
- 6) Defines “controlled substance” as a drug, substance, or immediate precursor which is listed in any schedule I through V. (Health & Saf. Code § 11007.)
- 7) Provides that every person who possesses for sale or purchases for purposes of sale any specified controlled substance, as defined, shall be punished by imprisonment in a county jail for two, three, or four years pursuant to existing law pertaining to felony sentencing, except as otherwise provided. (Health & Saf. Code § 11351.)

- 8) Provides that every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport, any specified controlled substance shall be punished by imprisonment in a county jail for two, three, or four years pursuant to existing law pertaining to felony sentencing, except as otherwise provided. (Health & Saf. Code § 11352.)
- 9) Establishes the California Electronic Communications Privacy Act (CalECPA), which prohibits a government entity from compelling the production of or access to electronic communication information from a service provider, as defined, except as specified. (Pen. Code § 1546.1.)
- 10) Defines “electronic communication information,” for purposes of CalECPA, to mean any information about an electronic communication or the use of an electronic communication service, including, but not limited to, the contents, sender, recipients, format, or location of the sender or recipients at any point during the communication, the time or date the communication was created, sent, or received, or any information pertaining to any individual or device participating in the communication, including, but not limited to, an IP address. (Pen. Code § 1546.)

This bill:

- 1) Requires an online platform to create, and publicly post on the online platform’s internet website, a policy statement that includes all of the following:
 - a) the online platform’s policy on the use of the platform to illegally distribute a controlled substance;
 - b) a general description of the platform’s moderation practices that are employed to prevent users from posting or sharing electronic content pertaining to the illegal distribution of a controlled substance, not to include information that might compromise operational efforts to identify prohibited content or user activity, or otherwise endanger user safety;
 - c) a link to the California Department of Public Health (CDPH) Overdose Prevention Initiative’s “Substance Basics: Fentanyl” educational resource;
 - d) a link to the online platform’s reporting mechanism for illegal or harmful content or behavior on the online platform; and
 - e) a general description of the online platform’s policies and procedures for responding to law enforcement inquiries, including warrants, subpoenas, and other court orders compelling the production of or access to electronic communication information, as defined in CalECPA.
- 2) Allows these disclosures to be posted separately or incorporated within another document or post, including the terms of service or the community guidelines.

- 3) Requires a person or entity operating an online platform to update the policy statement as necessary and encourages platforms to consult with specified stakeholders to assist in developing and supporting the policy statement.
- 4) Defines “online platform” to mean an internet-based service that allows users to carry out specified activity. The bill provides a series of exemptions, including exempting out businesses that generated less than \$100,000,000 in gross revenue during the preceding calendar year.
- 5) Provides that it only remains in effect until January 1, 2028, and as of that date is repealed.

COMMENTS

1. Issues with illegal online drug activity

This bill is motivated by the increase in the use of social media to buy and sell illegal drugs. One tragic example:

Last winter, Megan Macintosh found her 18-year-old son Chase unconscious after she says he experimented with pills. He died just over a month later, likely from a pill laced with fentanyl from an unknown source.

Macintosh turned to his social media for answers. Looking through her son's Snapchat, she said she saw bags of pills and mushrooms. "I felt really helpless like there's really nothing I can do when I saw how prevalent it was, how many people were in his feed," she said.

The drug trade is booming on social media, according to Kathleen Miles, who works for the Center on Illicit Networks and Transnational Organized Crime. "I think social media can be great, but it also has a really dark side of it," Miles said.

With fentanyl in high circulation, the risks are often deadly. The U.S. recorded more than 100,000 drug overdose deaths in a 12-month period for the first time, according to the Centers for Disease Control and Prevention. It's the highest number of drug overdose deaths ever recorded in a year.¹

¹ Tom Hanson, *Teens have easier access to drugs as illegal trade booms on social media* (November 30, 2021) CBS News, <https://www.cbsnews.com/news/social-media-teens-drug-access/>. All internet citations are current as of June 13, 2022.

The Drug Enforcement Administration has warned of the alarming increase in the availability and lethality of fake prescription pills containing fentanyl and methamphetamine and issued a public safety alert that “warns Americans that counterfeit pills, often sold on social media or e-commerce websites, increasingly contain fentanyl or sometimes methamphetamine, posing health risks beyond the dangers of buying prescription pills.”²

2. Drug Safety Policies on Online Platforms

This bill attempts to tackle the incidence of drug distribution online by requiring “online platforms” to post a policy statement. The statement must include the platform’s policy on the use of the platform to illegally distribute a controlled substance, which in most cases will likely be to disallow it. The statement must describe the platform’s policies for responding to law enforcement inquiries, but does not require any specific policy. This publicly-posted policy statement must include a link to CDPH’s primer on fentanyl. Concerns have been raised that this specific of a link is overly prescriptive. In response, the author has agreed to an amendment that requires a link “to mental health and drug education resources provided by governmental public health authorities.”

The statement must also include a general description of the online platform’s moderation practices that are geared toward preventing content related to the illegal distribution of drugs as well as a link to the platform’s reporting mechanism for illegal or harmful content. The author indicates that this provision is not intended to require such a reporting mechanism, just that a link be provided if one exists. To ensure the language effectuates that intent, the author has agreed to an amendment that makes it clearer that a link is not required.

Importantly, the bill does not require any specific content moderation in this space or any at all. It simply requires disclosure of them in a way that does not reveal “information that the online platform believes might compromise operational efforts to identify prohibited content or user activity, or otherwise endanger user safety.”

Therefore, it is unlikely that these provisions run afoul of the First Amendment or Section 230 of the Communications Decency Act.

Commercial speech is protected under the state and federal guarantees of free speech, but to a lesser degree than noncommercial speech.³ Generally speaking, requiring a commercial actor to provide factual, uncontroversial product information is permissible

² Devlin Barrett & Elizabeth Dwozkin, *With overdose deaths soaring, DEA warns about fentanyl-, meth-laced pills* (September 27, 2021) The Washington Post, https://www.washingtonpost.com/national-security/dea-warning-counterfeit-drugs/2021/09/27/448fcb18-1f27-11ec-b3d6-8cdebe60d3e2_story.html.

³ See *Gerawan Farming, Inc. v. Lyons* (2004) 33 Cal.4th 1, 22.

“as long as the disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”⁴ California currently imposes similar disclosure requirements on companies doing business online, such as the provision of the California Consumer Privacy Act of 2018 that requires a company to inform consumers about the categories of personal information it collects and the purposes for which the information is collected.⁵ Accordingly, it appears that the bill’s requirement that an online platform post what their policies are, without dictating them, does not impede their First Amendment rights.

The crux of Section 230 is laid out in two parts. The first provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁶ The second provides a safe harbor for content moderation by stating that no provider or user shall be held liable because of good-faith efforts to restrict access to material that is “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”⁷

Together, these two provisions give platforms immunity from any civil or criminal liability that could be incurred by user statements, while explicitly authorizing platforms to engage in their own content moderation without risking that immunity. Section 230 specifies that “[n]o cause of action may be brought and no liability may be imposed under any State law that is inconsistent with this section.”⁸ Courts have applied Section 230 in a vast range of cases to immunize internet platforms from “virtually all suits arising from third-party content.”⁹

As this bill does not require any content moderation policies or subject platforms to liability for failing to take down certain content, the provisions discussed above are likely not susceptible to a challenge on Section 230 preemption grounds.

It should be noted that the bill explicitly allows placement of this policy statement in the platform’s terms of service or community guidelines. Most major platforms likely already include these policies therein and unfortunately, there is evidence that such documents are seldom read by consumers.

⁴ *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* (1985) 471 U.S. 626, 651.

⁵ *See* Civ. Code, § 1798.100.

⁶ *Id.*, § 230(c)(1).

⁷ *Id.*, § 230(c)(1) & (2).

⁸ *Id.*, § 230(e)(1) & (3).

⁹ Koseff, *supra*, fn. 13, at pp. 94-95; *see, e.g., Doe v. MySpace Inc.* (5th Cir. 2008) 528 F.3d 413, 421-422; *Carfano v. Metrosplash.com, Inc.* (9th Cir. 2003) 339 F.3d 1119, 1125; *Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327, 333-334.

According to the author:

AB 1628 would require social media platforms to submit policies regarding preventing illegal activity to the Attorney General's office. This would create an oversight relationship between the platform and the Department of Justice and the Attorney General's office to ensure that illegal activity is not conducted on their platform.

Writing in support, the Orange County Board of Supervisors states:

As you are aware, social media platforms are increasingly becoming the setting of illegal drug transactions. Despite this concerning trend, there continues to be a need for the implementation of protocols to help hold social media companies more accountable and deter drug distribution on their platforms. AB 1628 would serve as a tool in the fight against the illicit fentanyl sales by additionally compelling social media companies to post resources for mental health and drug education, resources for law enforcement officials, and a link to the platform's mechanism for reporting illegal or harmful content on the platform.

3. Definition of online platform

In an effort to harmonize the various pieces of legislation working their way through the process that seek to regulate social media/online platforms, the author has agreed to remove the definition and references to "online platforms" and amend in a definition of social media platform that will be used in many if not all of these bills.

Amendment

(2)(A) "Content" means statements or comments made by users and media that are created, posted, shared, or otherwise interacted with by users on an internet-based service or application.

(B) "Content" does not include media put online exclusively for the purpose of cloud storage, transmitting documents, or file collaboration.

(3) "Social media platform" means a public or semipublic internet-based service or application that has users in California and that meets all of the following criteria:

(A) (i) A substantial function of the service or application is to connect users in order to allow users to interact socially with each other within the service or application.

(ii) A service or application that provides email or direct messaging services shall not be considered to meet this criterion on the basis of that function alone.

(B) The service or application allows users to do all of the following:

(i) Construct a public or semipublic profile for purposes of signing into and using the service.

(B) Populate a list of other users with whom an individual shares a social connection within the system.

(ii) Create or post content viewable by other users, including, but not limited to, on message boards, in chat rooms, or through a landing page or main feed that presents the user with content generated by other users.

(4) “Public or semipublic internet-based service or application” excludes a service or application used to facilitate communication within a business or enterprise among employees or affiliates of the business or enterprise, provided that access to the service or application is restricted to employees or affiliates of the business or enterprise using the service or application.

The author wishes to continue to limit the application of the bill to only businesses that generated at least \$100,000,000 in gross revenue during the preceding calendar year, so that exemption will continue to apply.

SUPPORT

County of Orange
Orange County District Attorney’s Office

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation:

SB 1056 (Umberg, 2022) requires a social media platform, as defined, to clearly and conspicuously state whether it has a mechanism for reporting violent posts, as defined; and allows a person who is the target, or who believes they are the target, of a violent post to seek an injunction to have the violent post removed. This bill is currently in the Assembly Judiciary Committee.

AB 587 (Gabriel, 2022) requires social media companies, as defined, to post their terms of service and report certain information to the Attorney General on a quarterly basis. This bill is currently pending before this Committee and is being heard the same day as this bill.

AB 2273 (Wicks, 2022) establishes the California Age-Appropriate Design Code Act, placing a series of obligations and restriction on businesses that provide online services, products, or features likely to be accessed by a child. The bill tasks the California

Privacy Protection Agency with establishing a taskforce to evaluate best practice and to adopt regulations. This bill is currently pending before this Committee and is being heard the same day as this bill.

AB 2408 (Cunningham, 2022) establishes a negligence cause of action for a platform's use of any design, feature, or affordance that causes a child user to become addicted to the platform. It also provides for heightened civil penalties in actions brought by public prosecutors. This bill is currently pending before this Committee and is being heard the same day as this bill.

AB 2879 (Low, 2022) requires social media platforms to implement a mechanism by which school administrators can report instances of cyberbullying, and to disclose specified data related to reported instances of cyberbullying and the platform's response. This bill is currently pending before this Committee and is being heard the same day as this bill.

Prior Legislation: None known.

PRIOR VOTES:

Assembly Floor (Ayes 64, Noes 0)

Assembly Privacy and Consumer Protection Committee (Ayes 9, Noes 0)
