ICLE tl;dr

AB 2408: California's Effort to Combat Social Media 'Addiction'

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tl;dr

Background: California's state Assembly earlier this year passed A.B. 2408, which would impose a duty of care on social-media platforms for "any design, feature, or affordance that causes a child user… to become addicted to the platform." The bill, which has also cleared the state Senate Judiciary Committee, would empower parents to bring class-action suits against Big Tech platforms, with minimum statutory damages set at $1,000 per class member. California prosecutors also could seek damages of $25,000 per violation, or $250,000 for knowing and willful violations. Liability would attach when a platform becomes aware that an algorithm is potentially addictive.

But… Not only is the theory of social-media addiction strongly contested, but it would be difficult, if not unconstitutional, to enforce the bill's terms. The line differentiating fomenting user addiction and making a platform more attractive to users is exceedingly blurry. Moreover, a strong case can be made that A.B. 2408 violates the First Amendment.

KEY TAKEAWAYS

DEFINING SOCIAL MEDIA 'ADDICTION'

A.B. 2408 relies on studies that purport to show that social-media companies are aware that some of their users have "problematic" levels of use and that, among teenagers, such use is correlated with poor mental wellbeing.

But it is notoriously difficult to reliably delineate use that constitutes "addiction." Most social-media companies rely on targeted advertising to generate revenue. Thus, firms seek to make their apps as engaging as possible in order to attract as much user attention as possible. How does one draw the line between simply being very engaging and impermissibly addictive?

The bill refers to the Bergen Social Media Addiction Scale, a self-reported test, to quantify the prevalence of social-media addiction in the general population. Empirical studies, however, have called into question whether the Bergen scale's threshold for defining addiction is overly broad. Moreover, even if the scale were determined to be a valid measure of addiction, the private right of action A.B. 2408 would create offers plaintiffs the opportunity to self-report fraudulently high values in order to bring frivolous litigation.

AB 2408 implicitly acknowledges the difficulty involved in defining addiction, as it offers no clarification for when a user should be considered addicted. The bill thus provides companies with little to no clarity as to what practices are and are not allowed.

INSUFFICIENT SAFE HARBORS

AB 2408 contains a safe harbor for firms that institute quarterly audits and correct any features discovered to potentially "cause or contribute to the addiction of child users." But that safe harbor is either underinclusive or overinclusive, depending on how it is read by courts.

On the one hand, it could be interpreted so broadly that even *de minimis* investigation would be sufficient to comply. The law would thus become just another costly regulatory overlay. On the other hand, it's possible that the standards will be interpreted stringently, resulting in ongoing liability when the merest possibility of foreseeable "addictiveness" is discovered.

TRAMPLING THE FIRST AMENDMENT

Under the 1974 precedent of *Miami Herald v. Tornillo*, social-media platforms (like newspapers) have a First Amendment right to editorial discretion. They can arrange and promote content as a basic exercise of their editorial control. To overcome this, California would have to establish that the law is narrowly tailored to a compelling state interest.

In this case, the asserted state interest is to protect teenagers' mental health. While that may be a compelling interest, there would also need to be sufficient findings to show causation between social-media addiction and poor mental health. This may prove similar to the U.S. Supreme Court's 2011 decision in *Brown v. Entertainment Merchants Association*, which struck down a California law banning the sale of violent video games to children without parental supervision. While a correlation was found between violent video games and harm to minors, there was insufficient evidence to show an actual causal link.

There remains the further question of whether A.B. 2408 is a narrowly tailored solution to the state's compelling interest. A.B. 2408 defines a "child" as any individual under age 18. In order to identify a user as under the age of 18, platforms would need to use some form of age verification. However, in 2002's *Ashcroft v. ACLU*, the Supreme Court found that age-verification systems , such as identification through a credit card, run into constitutional issues.

A more tailored solution might be to provide a means for parents to monitor their children's use of an app and to set limits at healthy amounts. This is similar to what Facebook and Instagram offer with their time-management tools.

For more on the law & economics of platform moderation, see the ICLE working paper "Who Moderates the Moderators?: A Law & Economics Approach to Holding Online Platforms Accountable Without Destroying the Internet."

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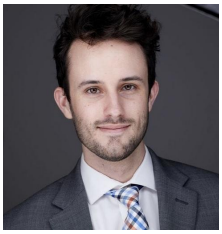

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