

1 **AMENDMENTS RELATED TO PORNOGRAPHIC**
2 **AND HARMFUL MATERIALS**

3 2005 GENERAL SESSION

4 STATE OF UTAH

5 **Sponsor: John Dougall**

7 **LONG TITLE**

8 **General Description:**

9 This bill addresses pornographic materials and material harmful to minors.

10 **Highlighted Provisions:**

11 This bill:

- 12 ▶ requires the Division of Consumer Protection to make public service
13 announcements;
- 14 ▶ requires the attorney general to establish and maintain a database, called the adult
15 content registry, of certain Internet sites containing material harmful to minors;
- 16 ▶ defines terms;
- 17 ▶ subjects a person dealing in material harmful to minors to criminal liability for
18 certain distributions of material harmful to minors if the person negligently or
19 recklessly fails to determine the proper age of a minor;
- 20 ▶ increases criminal penalties for distributing and inducing acceptance of
21 pornographic materials;
- 22 ▶ requires a service provider to inquire concerning whether a minor has access to a
23 consumer's computer;
- 24 ▶ requires a service provider to prevent certain access to Internet material harmful to
25 minors, if requested by the consumer;
- 26 ▶ requires the Division of Consumer Protection to test the effectiveness of a service
27 provider's procedures to block material harmful to minors at least annually;



- 28 ▶ requires a service provider, under certain circumstances, to block material on the
- 29 adult content registry;
- 30 ▶ requires Internet content providers that create or host data in Utah to properly rate
- 31 the data;
- 32 ▶ allows the attorney general to seek a civil fine against a service provider that fails to
- 33 properly block material harmful to minors;
- 34 ▶ provides criminal penalties for certain violations of the provisions requiring a
- 35 service provider to block material harmful to minors;
- 36 ▶ provides a criminal penalty for a content provider's failure to properly rate content;
- 37 and
- 38 ▶ makes technical changes.

39 Monies Appropriated in this Bill:

40 This bill appropriates:

- 41 ▶ \$100,000 from the General Fund to the Division of Consumer Protection, for fiscal
- 42 year 2005-06 only, for public service announcements;
- 43 ▶ \$50,000 from the General Fund to the Division of Consumer Protection, for fiscal
- 44 year 2005-06 only, to conduct a research project; and
- 45 ▶ \$100,000 from the General Fund to the attorney general, for fiscal year 2005-06
- 46 only, to establish the adult content registry.

47 Other Special Clauses:

48 This bill provides an effective date.

49 Utah Code Sections Affected:

50 AMENDS:

- 51 **76-10-1204**, as last amended by Chapters 93 and 163, Laws of Utah 1990
- 52 **76-10-1205**, as last amended by Chapter 163, Laws of Utah 1990
- 53 **76-10-1206**, as last amended by Chapter 53, Laws of Utah 2000

54 ENACTS:

- 55 **13-2-9**, Utah Code Annotated 1953
- 56 **67-5-19**, Utah Code Annotated 1953
- 57 **76-10-1230**, Utah Code Annotated 1953
- 58 **76-10-1231**, Utah Code Annotated 1953

59 76-10-1232, Utah Code Annotated 1953

60 76-10-1233, Utah Code Annotated 1953



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

63 Section 1. Section 13-2-9 is enacted to read:

64 **13-2-9. Internet -- Consumer education.**

65 (1) The Division of Consumer Protection shall, subject to appropriation, contract with
66 a person to make public service announcements advising consumers about the dangers of the
67 Internet, especially:

68 (a) material harmful to minors;

69 (b) steps a consumer may take to learn more about the dangers of using the Internet;

70 (c) information about how a service provider can help a consumer learn more about the
71 dangers of using the Internet, including the service provider's duties created by this bill; and

72 (d) how a consumer can monitor the Internet usage of family members.

73 (2) Monies appropriated under Subsection (1) shall be paid by the Division of
74 Consumer Protection to a person only if:

75 (a) the person is a nonprofit organization; and

76 (b) the person agrees to spend private monies amounting to two times the amount of
77 monies provided by the Division of Consumer Protection during each fiscal year in accordance
78 with Subsection (1).

79 (3) In administering any monies appropriated for use under this section, the Division of
80 Consumer Protection shall comply with Title 63, Chapter 56, Utah Procurement Code.

81 Section 2. Section 67-5-19 is enacted to read:

82 **67-5-19. Adult content registry.**

83 (1) As used in this section:

84 (a) "Consumer" means a consumer as defined in Section 76-10-1230.

85 (b) "Content provider" means a content provider as defined in Section 76-10-1230.

86 (c) "Hosting company" means a hosting company as defined in Section 76-10-1230.

87 (d) "Service provider" means a service provider as defined in Section 76-10-1230.

88 (e) "Properly rated" means properly rated as defined in Section 76-10-1230.

89 (2) The attorney general, in consultation with other entities as the attorney general

90 considers appropriate, shall:

91 (a) create a database, called the adult content registry, consisting of a list of content
92 providers, that shall be based on a Uniform Resource Locator address, domain name, and
93 Internet Protocol address or a similar addressing system, that:

94 (i) are added to the database under Subsection (2)(b); and

95 (ii) provide material harmful to minors that is not properly rated;

96 (b) add a content provider to the adult content registry only if the attorney general
97 determines that the content provider is providing content that contains material harmful to
98 minors that is not properly rated;

99 (c) when the attorney general determines that a content provider should be placed on
100 the adult content registry, if the content provider lists e-mail contact information, the attorney
101 general shall notify the content provider and hosting company, if available, by e-mail:

102 (i) that the content provider is providing content that contains material harmful to
103 minors that is not properly rated;

104 (ii) that the attorney general will place the content provider on the adult content registry
105 within two business days of the notice;

106 (iii) that the content provider can avoid being placed on the adult content registry if any
107 material harmful to minors is properly rated; and

108 (iv) of the steps necessary for the content provider or hosting company to apply to be
109 removed from the adult content registry;

110 (d) (i) if notification is required under Subsection (2)(c), place a content provider on
111 the adult content registry within two business days of the day on which the division makes the
112 required notification; or

113 (ii) if notification is not required under Subsection (2)(c), place a content provider on
114 the adult content registry within two business days of the day on which the attorney general
115 determines that the content provider should be placed on the adult content registry; and

116 (e) if requested by a content provider, remove a content provider from the adult content
117 registry within two business days from the day on which the attorney general determines that
118 the content provider no longer provides material harmful to minors that is not properly rated.

119 (3) The attorney general shall make the adult content registry available for public
120 dissemination in a readily accessible electronic format.

121 (4) The attorney general shall establish a system for the reporting of material
122 transmitted to a consumer in violation of Section 76-10-1232.

123 Section 3. Section **76-10-1204** is amended to read:

124 **76-10-1204. Distributing pornographic material.**

125 (1) A person is guilty of distributing pornographic material when he knowingly:

126 (a) sends or brings any pornographic material into the state with intent to distribute or
127 exhibit it to others;

128 (b) prepares, publishes, prints, or possesses any pornographic material with intent to
129 distribute or exhibit it to others;

130 (c) distributes or offers to distribute, exhibits or offers to exhibit any pornographic
131 material to others;

132 (d) writes, creates, or solicits the publication or advertising of pornographic material;

133 (e) promotes the distribution or exhibition of material he represents to be pornographic;

134 or

135 (f) presents or directs a pornographic performance in any public place or any place
136 exposed to public view or participates in that portion of the performance which makes it
137 pornographic.

138 (2) Each distributing of pornographic material as defined in Subsection (1) is a separate
139 offense.

140 (3) It is a separate offense under this section for:

141 (a) each day's exhibition of any pornographic motion picture film; and

142 (b) each day in which any pornographic publication is displayed or exhibited in a
143 public place with intent to distribute or exhibit it to others.

144 [~~(4) Each separate offense under this section is a class A misdemeanor punishable by:]~~

145 [~~(a) a minimum mandatory fine of not less than \$100 plus \$10 for each article~~
146 ~~exhibited up to the maximum allowed by law; and]~~

147 [~~(b) incarceration, without suspension of sentence in any way, for a term of not less~~
148 ~~than seven days, notwithstanding any provisions of Section 77-18-1.]~~

149 [~~(5) If a defendant has already been convicted once under this section, each separate~~
150 ~~further offense]~~

151 (4) (a) An offense under this section is a third degree felony punishable by:

152 (i) a minimum mandatory fine of not less than \$1,000 plus \$10 for each article
153 exhibited up to the maximum allowed by law; and [by]

154 (ii) incarceration, without suspension of sentence in any way, for a term of not less than
155 30 days.

156 (b) This Subsection (4) supersedes Section 77-18-1.

157 Section 4. Section 76-10-1205 is amended to read:

158 **76-10-1205. Inducing acceptance of pornographic material.**

159 (1) A person is guilty of inducing acceptance of pornographic material when he
160 knowingly:

161 (a) requires or demands as a condition to a sale, allocation, consignment, or delivery
162 for resale of any newspaper, magazine, periodical, book, publication, or other merchandise that
163 the purchaser or consignee receive any pornographic material or material reasonably believed
164 by the purchaser or consignee to be pornographic; or

165 (b) denies, revokes, or threatens to deny or revoke a franchise, or to impose any
166 penalty, financial or otherwise, because of the failure or refusal to accept pornographic material
167 or material reasonably believed by the purchaser or consignee to be pornographic.

168 [~~(2) A violation of this section is a class A misdemeanor punishable by a fine of not
169 less than \$500 and by incarceration, without suspension of sentence in any way, for a term of
170 not less than 14 days.]~~

171 (2) (a) An offense under this section is a third degree felony punishable by:

172 (i) a minimum mandatory fine of not less than \$1,000 plus \$10 for each article
173 exhibited up to the maximum allowed by law; and

174 (ii) incarceration, without suspension of sentence in any way, for a term of not less than
175 30 days.

176 (b) This Subsection (2) supersedes Section 77-18-1.

177 Section 5. Section 76-10-1206 is amended to read:

178 **76-10-1206. Dealing in material harmful to a minor.**

179 (1) A person is guilty of dealing in material harmful to minors when, knowing that a
180 person is a minor, or having negligently or recklessly failed to [~~exercise reasonable care in~~
181 ~~ascertaining~~] determine the proper age of a minor, he:

182 (a) [~~intentionally~~] distributes or offers to distribute, exhibits or offers to exhibit to a

183 minor any material harmful to minors;

184 (b) [~~intentionally~~] produces, presents, or directs any performance before a minor, that is
185 harmful to minors; or

186 (c) [~~intentionally~~] participates in any performance before a minor, that is harmful to
187 minors.

188 (2) (a) Each separate offense under this section is a third degree felony punishable by:

189 (i) a minimum mandatory fine of not less than \$300 plus \$10 for each article exhibited
190 up to the maximum allowed by law; and [~~by~~]

191 (ii) incarceration, without suspension of sentence [~~in any way~~], for a term of not less
192 than 14 days.

193 (b) This section supersedes Section 77-18-1.

194 (3) (a) If a defendant has already been convicted once under this section, each separate
195 further offense is a second degree felony punishable by:

196 (i) a minimum mandatory fine of not less than \$5,000 plus \$10 for each article
197 exhibited up to the maximum allowed by law; and [~~by~~]

198 (ii) incarceration, without suspension of sentence [~~in any way~~], for a term of not less
199 than one year.

200 (b) This section supersedes Section 77-18-1.

201 Section 6. Section **76-10-1230** is enacted to read:

202 **76-10-1230. Definitions.**

203 As used in Sections 76-10-1231, 76-10-1232, and 76-10-1233:

204 (1) "Adult content registry" means the adult content registry created by Section
205 67-5-19.

206 (2) "Consumer" means a natural person residing in this state who subscribes to a
207 service provided by a service provider.

208 (3) "Content provider" means a person that creates electronic data for electronic
209 delivery to a consumer.

210 (4) (a) "Hosting company" means a person in this state that provides services or
211 facilities for storing or distributing content over the Internet without editorial or creative
212 alteration of the content.

213 (b) A hosting company may have policies concerning the content it hosts without

214 becoming a content provider under Subsection (3).

215 (5) "Properly rated" means content using a labeling system to label the material
216 provided by the content provider in a way that:

217 (a) accurately apprises a consumer of the presence of material harmful to minors; and

218 (b) allows the consumer the ability to control access to the material based on the
219 material's rating by use of commercially available software, including software in the public
220 domain.

221 (6) (a) Except as provided in Subsection (6)(b), "service provider" means:

222 (i) an Internet service provider; or

223 (ii) a person who otherwise provides an Internet access service to a consumer.

224 (b) "Service provider" does not include a person who does not terminate a service in
225 this state, but merely transmits data through:

226 (i) a wire;

227 (ii) a cable; or

228 (iii) an antenna.

229 (c) "Service provider," notwithstanding Subsection (6)(b), includes a person who meets
230 the requirements of Subsection (6)(a) and leases or rents a wire or cable for the transmission of
231 data.

232 Section 7. Section **76-10-1231** is enacted to read:

233 **76-10-1231. Data service providers -- Internet content harmful to minors.**

234 (1) Upon request by a consumer, a service provider shall use a generally accepted and
235 commercially reasonable method of filtering to prevent the transmission of material harmful to
236 minors to the consumer at no additional cost to the consumer.

237 (2) At the time of a consumer's subscription to a service provider's service, or at the
238 time this section takes effect if the consumer subscribes to the service provider's service at the
239 time this section takes effect, the service provider shall notify the consumer in a conspicuous
240 manner that the consumer may request to have material harmful to minors blocked under
241 Subsection (1).

242 (3) (a) A service provider with fewer than 5,000 subscribers may comply with
243 Subsection (1) by recommending software designed to block material harmful to minors that
244 the consumer can purchase from the service provider and install on the consumer's computer.

245 (b) If a consumer requests software under Subsection (3)(a), the service provider shall
246 provide the software to the consumer at the service provider's cost.

247 (4) After December 31, 2005, a service provider that violates Subsection (1) or (2) is:

248 (a) subject to a civil fine of \$2,500 for each separate violation of Subsection (1) or (2),
249 up to \$10,000 per day; and

250 (b) guilty of a class A misdemeanor if:

251 (i) the service provider knowingly or intentionally fails to comply with Subsection (1);

252 or

253 (ii) the service provider fails to provide the notice required by Subsection (2).

254 (5) A proceeding to impose a civil fine under Subsection (4)(a) may only be brought by
255 the attorney general in a court of competent jurisdiction.

256 (6) (a) The Division of Consumer Protection within the Department of Commerce
257 shall, in consultation with other entities as the Division of Consumer Protection considers
258 appropriate, test the effectiveness of a service provider's system for blocking material harmful
259 to minors under Subsection (1) at least annually.

260 (b) The results of testing by the Division of Consumer Protection under Subsection
261 (3)(a) shall be made available to:

262 (i) the service provider that is the subject of the test; and

263 (ii) the public.

264 Section 8. Section **76-10-1232** is enacted to read:

265 **76-10-1232. Data service providers -- Adult content registry.**

266 (1) (a) A service provider may not transmit material from a content provider listed on
267 the adult content registry created by Section 67-5-19 to a consumer if the consumer notifies the
268 service provider that the consumer requests that the service provider prevent the consumer's
269 receipt of material from a content provider listed on the adult content registry created by
270 Section 67-5-19.

271 (b) At the time of a consumer's subscription to a service provider's service, or at the
272 time this section takes effect if the consumer subscribes to the service provider's service at the
273 time this section takes effect, the service provider shall notify the consumer that:

274 (i) the consumer may request to have material on the adult content registry blocked
275 under Subsection (1)(a); and

276 (ii) the consumer's request to have material harmful to minors blocked under
277 Subsection (1)(a) may result in the service provider blocking material that is not harmful to
278 minors because of limitations in technology.

279 (2) (a) (i) A service provider that uses a generally accepted and commercially
280 reasonable method to prevent a consumer's access under Subsection (1) is not guilty of
281 violating this section.

282 (ii) A service provider may block material from the adult content registry by domain
283 name or Internet protocol address.

284 (b) A service provider may not charge a consumer for blocking material under this
285 section.

286 (c) A service provider shall coordinate the service provider's list of content providers
287 on the adult content registry with the attorney general's list of content providers on the adult
288 content registry at least weekly.

289 (3) A service provider that violates Subsection (1) or (2) is:

290 (a) subject to a civil fine of \$2,500 for each separate violation of Subsection (1) or (2),
291 up to \$10,000 per day; and

292 (b) guilty of a class A misdemeanor if the service provider knowingly or intentionally
293 fails to comply with Subsection (1) or (2).

294 (4) A proceeding to impose a civil fine under Subsection (4)(a) may only be brought by
295 the attorney general in a court of competent jurisdiction.

296 Section 9. Section **76-10-1233** is enacted to read:

297 **76-10-1233. Content providers -- Internet content harmful to minors.**

298 (1) A content provider that generates or hosts content in Utah shall properly rate, under
299 Subsection 76-10-1231(1)(d), material harmful to minors that is generated or hosted in Utah.

300 (2) The Division of Consumer Protection shall make rules in accordance with Title 63,
301 Chapter 46a, Utah Administrative Rulemaking Act, to establish acceptable rating methods to
302 be implemented by a content provider under Subsection (1).

303 (3) If the attorney general determines that a content provider violates Subsection (1),
304 the attorney general shall:

305 (a) notify the content provider that the content provider is in violation of Subsection
306 (1); and

307 (b) notify the content provider that the content provider has 30 days to comply with
308 Subsection (1) or be subject to Subsection (4).

309 (4) Beginning on September 1, 2005, if a content provider violates this section more
310 than 30 days after receiving the notice provided in Subsection (3), the content provider is guilty
311 of a third degree felony.

312 **Section 10. Appropriation.**

313 (1) (a) There is appropriated for fiscal year 2005-06 only, \$100,000 from the General
314 Fund to the Division of Consumer Protection for public service announcements advising
315 consumers about the dangers of the Internet.

316 (b) It is the intent of the Legislature that the money appropriated in Subsection (1)(a)
317 shall be used to publicize in various forms of media:

318 (i) the dangers of using the Internet, especially Internet pornography;

319 (ii) steps a consumer may take to learn more about the dangers of using the Internet;

320 (iii) information about how a service provider can help a consumer learn more about

321 the dangers of using the Internet, including the service provider's duties created by this bill; and

322 (iv) how a consumer can monitor the Internet usage of family members.

323 (2) There is appropriated for fiscal year 2005-06 only, \$100,000 from the General Fund
324 to the attorney general to establish the Adult Content Registry created by this bill.

325 (3) (a) There is appropriated for fiscal year 2005-06 only, \$50,000 from the General
326 Fund to the Division of Consumer Protection to conduct a research project.

327 (b) It is the intent of the Legislature that the Division of Consumer Protection use the
328 monies appropriated in Subsection (3)(a) to research the effectiveness of:

329 (i) existing technology for limiting access to material harmful to minors on the
330 Internet;

331 (ii) obstacles to consumer use of existing technology that limits access to material
332 harmful to minors on the Internet; and

333 (iii) methods of educating the public about the dangers of using the Internet.

334 (c) The Division of Consumer Protection shall report the findings of the research for
335 which monies under Subsection (3)(a) are appropriated to the Utah Technology Commission
336 before December 1, 2005.

337 **Section 11. Effective date.**

338 If approved by two-thirds of all the members elected to each house, this bill takes effect
339 upon approval by the governor, or the day following the constitutional time limit of Utah
340 Constitution Article VII, Section 8, without the governor's signature, or in the case of a veto,
341 the date of veto override, except that Section 76-10-1232 takes effect on July 1, 2007.

Legislative Review Note
as of 2-17-05 1:56 PM

This legislation regulates the dissemination of certain material through the Internet, much of which is likely to be constitutionally protected speech under the First Amendment to the United States Constitution. Although the regulation of material that is harmful to minors is constitutionally permissible, problems may arise if the regulation suppresses speech between adults that is otherwise permissible. This is particularly true when the method of regulation chosen is not the least restrictive alternative to achieve the legislative purpose. See, e.g. Ashcroft v. Am. Civ. Liberties Union, 124 S. Ct. 2783 (2004).

The chosen method of preventing access under the adult content registry imposes significant limitations on protected speech. The adult content registry is likely to block access to significant amounts of constitutionally protected material hosted on proxy servers that also contain material harmful to minors. Although the limitations on protected speech are somewhat mitigated by allowing a service provider to block content based on domain name and by providing notice to the consumer that protected material may be blocked, the significant restrictions placed on constitutionally protected speech suggest that the adult content registry has a high probability of being held unconstitutional.

Office of Legislative Research and General Counsel

State Impact

This bill appropriates \$250,000 in one-time General Fund resources for FY 2006. In addition, the Attorney General anticipates an annual cost of \$70,000 per year to operate and maintain a database mandated by the bill.

The Office of Legislative Research and General Counsel has noted that provisions of this bill may be challenged on constitutionality. If the bill is challenged in court, the state may incur additional costs defending the law.

Local governments may see cost increases associated with jailing individuals convicted of a felony as opposed to what, absent this bill, is usually Class A probation.

	<u>FY 2006</u> <u>Approp.</u>	<u>FY 2007</u> <u>Approp.</u>	<u>FY 2006</u> <u>Revenue</u>	<u>FY 2007</u> <u>Revenue</u>
General Fund	\$250,000	\$70,000	\$0	\$0
TOTAL	\$250,000	\$70,000	\$0	\$0

Individual and Business Impact

Private businesses must absorb incremental costs associated with limiting access to material harmful to a minor.

Office of the Legislative Fiscal Analyst