

Representative Paul Ray proposes the following substitute bill:

MATERIAL HARMFUL TO MINORS

AMENDMENTS

2008 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Paul Ray

Senate Sponsor: _____

LONG TITLE

General Description:

This bill modifies the Criminal Code regarding materials harmful to minors. harmful to minors.

Highlighted Provisions:

This bill:

- ▶ amends the intent of a person dealing with material harmful to minors to include persons who believe the victim is a minor;
- ▶ modifies the definition of "restrict" regarding access to material harmful to minors by removing "age verification mechanism" as a form of restriction;

⚡→ ▶ amends the definition of "service provider" to include only Internet service providers;

▶ allows a provider to comply with the requirement to provide filtering for users by referring users to a third party that provides filtering software; ⚡← and

removes certain criminal penalties, imposes the standard of intentionally and knowingly, and imposes civil financial penalties regarding failure to comply with requirements that Internet service providers:

- provide information about filtering content; and
- restrict access to material harmful to minors.

Monies Appropriated in this Bill:

None

Other Special Clauses:

1st Sub. H.B. 18



26 None

27 **Utah Code Sections Affected:**

28 AMENDS:

29 **76-10-1201**, as last amended by Laws of Utah 2007, Chapters 123, and 337

30 **76-10-1206**, as last amended by Laws of Utah 2007, Chapter 337

31 **76-10-1230**, as last amended by Laws of Utah 2007, Chapter 337

32 **76-10-1231**, as last amended by Laws of Utah 2007, Chapter 337

33 **76-10-1233**, as last amended by Laws of Utah 2007, Chapter 322



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

36 Section 1. Section **76-10-1201** is amended to read:

37 **76-10-1201. Definitions.**

38 For the purpose of this part:

39 (1) "Blinder rack" means an opaque cover that covers the lower 2/3 of a material so
40 that the lower 2/3 of the material is concealed from view.

41 (2) "Contemporary community standards" means those current standards in the
42 vicinage where an offense alleged under this part has occurred, is occurring, or will occur.

43 (3) "Distribute" means to transfer possession of materials whether with or without
44 consideration.

45 (4) "Exhibit" means to show.

46 (5) (a) "Harmful to minors" means that quality of any description or representation, in
47 whatsoever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse when
48 it:

49 (i) taken as a whole, appeals to the prurient interest in sex [~~with~~] of minors;

50 (ii) is patently offensive to prevailing standards in the adult community as a whole with
51 respect to what is suitable material for minors; and

52 (iii) taken as a whole, does not have serious value for minors.

53 (b) Serious value includes only serious literary, artistic, political or scientific value for
54 minors.

55 (6) (a) "Knowingly," regarding material or a performance, means an awareness,
56 whether actual or constructive, of the character of the material or [~~of a~~] performance. [~~A~~]

57 **(b) As used in this Subsection (6),** a person has constructive knowledge if a reasonable
58 inspection or observation under the circumstances would have disclosed the nature of the
59 subject matter and if a failure to inspect or observe is either for the purpose of avoiding the
60 disclosure or is criminally negligent as described in Section 76-2-103.

61 (7) "Material" means anything printed or written or any picture, drawing, photograph,
62 motion picture, or pictorial representation, or any statue or other figure, or any recording or
63 transcription, or any mechanical, chemical, or electrical reproduction, or anything which is or
64 may be used as a means of communication. Material includes undeveloped photographs,
65 molds, printing plates, and other latent representational objects.

66 (8) "Minor" means any person less than 18 years of age.

67 (9) "Negligently" means simple negligence, the failure to exercise that degree of care
68 that a reasonable and prudent person would exercise under like or similar circumstances.

69 (10) "Nudity" means:

70 (a) the showing of the human male or female genitals, pubic area, or buttocks, with less
71 than an opaque covering;

72 (b) the showing of a female breast with less than an opaque covering, or any portion of
73 the female breast below the top of the areola; or

74 (c) the depiction of covered male genitals in a discernibly turgid state.

75 (11) "Performance" means any physical human bodily activity, whether engaged in
76 alone or with other persons, including singing, speaking, dancing, acting, simulating, or
77 pantomiming.

78 (12) "Public place" includes a place to which admission is gained by payment of a
79 membership or admission fee, however designated, notwithstanding its being designated a
80 private club or by words of like import.

81 (13) "Sado-masochistic abuse" means:

82 (a) flagellation or torture by or upon a person who is nude or clad in undergarments, a
83 mask, or in a revealing or bizarre costume; or

84 (b) the condition of being fettered, bound, or otherwise physically restrained on the part
85 of a person clothed as described in Subsection (13)(a).

86 (14) "Sexual conduct" means acts of masturbation, sexual intercourse, or any touching
87 of a person's clothed or unclothed genitals, pubic area, buttocks, or, if the person is a female,

88 breast, whether alone or between members of the same or opposite sex or between humans and
89 animals in an act of apparent or actual sexual stimulation or gratification.

90 (15) "Sexual excitement" means a condition of human male or female genitals when in
91 a state of sexual stimulation or arousal, or the sensual experiences of humans engaging in or
92 witnessing sexual conduct or nudity.

93 Section 2. Section **76-10-1206** is amended to read:

94 **76-10-1206. Dealing in material harmful to a minor -- Exemptions for Internet**
95 **service providers and hosting companies.**

96 (1) A person is guilty of dealing in material harmful to minors when, knowing or
97 believing that a person is a minor, or having negligently failed to determine the proper age of a
98 minor, the person intentionally ~~§→~~ [or knowingly] ~~←§~~ :

99 (a) [intentionally] distributes or offers to distribute, exhibits or offers to exhibit, to a
100 minor or a person the actor believes to be a minor, any material harmful to minors;

101 (b) [intentionally] produces, ~~§→~~ [presents] performs ~~←§~~ , or directs any performance,
101a before a minor[;] or
102 a person the actor believes to be a minor, that is harmful to minors; or

103 (c) [intentionally] participates in any performance, before a minor[;] or a person the
104 actor believes to be a minor, that is harmful to minors.

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

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

108 (ii) incarceration, without suspension of sentence, for a term of not less than 14 days.

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

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

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

114 (ii) incarceration, without suspension of sentence, for a term of not less than one year.

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

116 (c) (i) This section does not apply to an Internet service provider, as defined in Section
117 **76-10-1230** ~~§→~~ **, a provider of an electronic communications service as defined in 18 U.S.C.**
117a **2510, a telecommunications service, information service, or mobile service as defined in 47**
117b **U.S.C. 153 ,including a commercial mobile service as defined in 47 U.S.C. § 332(d), or a cable**
117c **operator as defined in 47 U.S.C. 522** ~~←§~~ , if:

118 (A) the distribution of pornographic material by the Internet service provider occurs

119 only incidentally through the ~~§~~→ [Internet service] ←~~§~~ provider's function of:

120 (I) transmitting or routing data from one person to another person; or

121 (II) providing a connection between one person and another person;

122 (B) the ~~§~~→ [Internet service] ←~~§~~ provider does not intentionally aid or abet in the
122a distribution of

123 the pornographic material; and

124 (C) the ~~§~~→ [Internet service] ←~~§~~ provider does not knowingly receive ~~§~~→ [funds] ←~~§~~
124a from or through a

125 person who distributes the pornographic material ~~§~~→ [in exchange] a fee greater than the fee
125a generally charged by the provider, as a specific condition ←~~§~~ for permitting the person to
126 distribute the pornographic material.

127 (ii) This section does not apply to a hosting company, as defined in Section
128 76-10-1230, if:

129 (A) the distribution of pornographic material by the hosting company occurs only
130 incidentally through the hosting company's function of providing data storage space or data
131 caching to a person;

132 (B) the hosting company does not intentionally engage, aid, or abet in the distribution
133 of the pornographic material; and

134 (C) the hosting company does not knowingly receive ~~§~~→ [funds] ←~~§~~ from or through a
134a person

135 who distributes the pornographic material ~~§~~→ [in exchange] a fee greater than the fee generally
135a charged by the provider, as a specific condition ←~~§~~ for permitting the person to distribute,
136 store, or cache the pornographic material.

137 ~~§~~→ [F] (4) [(a)] [F] A service provider, as defined in Section 76-10-1230, is not negligent under
138 this section if it complies with Section 76-10-1231.[F] ←~~§~~

139 [~~(b) A content provider, as defined in Section 76-10-1230, is not negligent under this~~
140 ~~section if it complies with Section 76-10-1233.~~]

141 Section 3. Section **76-10-1230** is amended to read:

142 **76-10-1230. Definitions.**

143 As used in Sections 76-10-1231 and 76-10-1233:

144 [~~(1) "Access restricted" means that a content provider limits access to material harmful~~
145 ~~to minors by:]~~

146 [~~(a) properly rating content;~~]

147 [~~(b) providing an age verification mechanism designed to prevent a minor's access to~~
148 ~~material harmful to minors, including requiring use of a credit card, adult access code, or~~
149 ~~digital certificate verifying age; or]~~

150 ~~[(c) any other reasonable measures feasible under available technology.]~~

151 ~~[(2)]~~ (1) "Consumer" means a natural person residing in this state who subscribes to a
152 service provided by a service provider for personal or residential use.

153 ~~[(3)]~~ (2) "Content provider" means a person domiciled in Utah or that generates or
154 hosts content in Utah, and that creates, collects, acquires, or organizes electronic data for
155 electronic delivery to a consumer with the intent of making a profit.

156 ~~[(4)]~~ (3) (a) "Hosting company" means a person that provides services or facilities for
157 storing or distributing content over the Internet without editorial or creative alteration of the
158 content.

159 (b) A hosting company may have policies concerning acceptable use without becoming
160 a content provider under Subsection ~~[(3)]~~ (2).

161 ~~[(5)]~~ (4) (a) "Internet service provider" means a person engaged in the business of
162 providing a computer communications facility in Utah, with the intent of making a profit,
163 through which a consumer may obtain access to the Internet.

164 (b) "Internet service provider" does not include a common carrier if it provides only
165 telecommunications service.

166 ~~[(6)]~~ (5) "Properly rated" means content using a labeling system to label material
167 harmful to minors provided by the content provider in a way that:

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

169 (b) allows the consumer the ability to control access to material harmful to minors
170 based on the material's rating by use of reasonably priced commercially available software,
171 including software in the public domain.

172 (6) "Restrict" means to limit access to material harmful to minors by:

173 (a) properly rating content; or

174 (b) any other reasonable measures feasible under available technology.

175 (7) (a) Except as provided in Subsection (7)(b), "service provider" means ~~Ŝ→~~ [:

176 ~~—(i) ←Ŝ~~ an Internet service provider ~~Ŝ→~~ [; or

177 ~~—(ii) a person who otherwise provides an Internet access service to a consumer in Utah~~
178 ~~with the intent of making a profit] ←Ŝ .~~

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

- 181 (i) a wire;
 182 (ii) a cable; or
 183 (iii) an antenna.
 184 (c) "Service provider," notwithstanding Subsection (7)(b), includes a person who meets
 185 the requirements of Subsection (7)(a) and leases or rents a wire or cable for the transmission of
 186 data.

187 Section 4. Section **76-10-1231** is amended to read:

188 **76-10-1231. Data service providers -- Internet content harmful to minors.**

189 (1) (a) Upon request by a consumer, a service provider shall filter content to prevent
 190 the transmission of material harmful to minors to the consumer.

191 (b) A service provider complies with Subsection (1)(a) if it uses a generally accepted
 192 and commercially reasonable method of filtering.

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

198 (3) (a) A service provider may comply with Subsection (1) by:

199 (i) providing in-network filtering to prevent receipt of material harmful to minors,
 200 provided that the filtering does not affect or interfere with access to Internet content for
 201 consumers who do not request filtering under Subsection (1); or

202 (ii) providing software, ~~§~~ ~~or~~ ~~§~~ engaging a third party to provide software, ~~§~~ or
 202a referring users to a third party that provides filtering software, by providing a clear and
 202b conspicuous hyperlink or written statement, ~~§~~ for

203 ~~§~~ [contemporaneous] ~~§~~ installation on the consumer's computer that blocks, in an
 203a easy-to-enable and

204 commercially reasonable manner, receipt of material harmful to minors.

205 (b) A service provider may charge a consumer for providing filtering under Subsection
 206 (3)(a).

207 (4) If the attorney general determines that a service provider violates Subsection (1) or
 208 (2), the attorney general shall:

209 (a) notify the service provider that the service provider is in violation of Subsection (1)
 210 or (2); and

211 (b) notify the service provider that the service provider has 30 days to comply with the

212 provision being violated or be subject to Subsection (5).

213 (5) A service provider that intentionally or knowingly violates Subsection (1) or (2) is[
214 ~~(a)~~] subject to a civil fine of \$2,500 for each separate violation of Subsection (1) or (2), up to
215 \$10,000 per day[~~; and~~].

216 [~~(b) guilty of a class A misdemeanor if:~~

217 [~~(i) the service provider knowingly or intentionally fails to comply with Subsection (1);~~
218 ~~or]~~

219 [~~(ii) the service provider fails to provide the notice required by Subsection (2):]~~

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

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

226 (b) The results of testing by the Division of Consumer Protection under Subsection
227 (7)(a) shall be made available to:

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

229 (ii) the public.

230 (c) The Division of Consumer Protection shall make rules in accordance with Title 63,
231 Chapter 46a, Utah Administrative Rulemaking Act, to fulfil its duties under this section.

232 Section 5. Section ~~76-10-1233~~ is amended to read:

233 **76-10-1233. Content providers -- Material harmful to minors.**

234 (1) A content provider that is domiciled in Utah, or generates or hosts content in Utah,
235 shall restrict access to material harmful to minors.

236 (2) If the attorney general determines that a content provider violates Subsection (1),
237 the attorney general shall:

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

240 (b) notify the content provider that the content provider has 30 days to comply with
241 Subsection (1) or be subject to Subsection (3).

242 (3) (a) If a content provider intentionally or knowingly violates this section more than

243 30 days after receiving the notice provided~~[in]~~ under Subsection (2), the content provider [is
244 ~~guilty of a third degree felony.]~~ subject to a civil fine of \$2,500 for each separate violation of
245 Subsection (1), up to \$10,000 per day.

246 (b) A proceeding to impose the civil fine under this section may be brought only by the
247 state attorney general and shall be brought in a court of competent jurisdiction.

H.B. 18 1st Sub. (Buff) - Material Harmful to Minors Amendments

Fiscal Note

2008 General Session

State of Utah

State Impact

Enactment of this bill will not require additional appropriations.

Individual, Business and/or Local Impact

Enactment of this bill likely will not result in direct, measurable costs and/or benefits for individuals, businesses, or local governments.
