

**CRIMINAL LAW AMENDMENTS**

2006 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: John Dougall**

Senate Sponsor: \_\_\_\_\_

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**LONG TITLE****General Description:**

This bill modifies Title 76, Chapter 10, Part 12, Pornographic and Harmful Materials and Performances.

**Highlighted Provisions:**

This bill:

► makes the following repeals and amendments ~~H→ [in response to a current lawsuit] ←H~~ :

- repeals the section establishing an adult content registry;
- repeals the section requiring that an Internet services provider must provide to consumers the service of blocking material on the adult content registry;
- provides a definition of "negligent" regarding material harmful to minors;
- removes two references to the adult content registry regarding Internet service providers;
- changes the standard applicable to conduct of content providers and Internet service providers regarding material harmful to minors from negligently or recklessly to a standard of the exercise of reasonable care; and
- amends the provisions regarding charging the consumer for software that blocks material harmful to minors.

**Monies Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:****AMENDS:**

**76-10-1201**, as last amended by Chapter 9, Laws of Utah 2001

**76-10-1204**, as last amended by Chapter 281, Laws of Utah 2005

**76-10-1205**, as last amended by Chapter 281, Laws of Utah 2005

**76-10-1206**, as last amended by Chapter 281, Laws of Utah 2005

**76-10-1230**, as enacted by Chapter 281, Laws of Utah 2005

**76-10-1231**, as enacted by Chapter 281, Laws of Utah 2005

**REPEALS:**

**67-5-19**, as enacted by Chapter 281, Laws of Utah 2005

**76-10-1232 (Effective 05/01/06)**, as enacted by Chapter 281, Laws of Utah 2005

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

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

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

For the purpose of this part:

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

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

(3) "Exhibit" means to show.

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

(a) taken as a whole, appeals to the prurient interest in sex of minors;

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

(c) taken as a whole, does not have serious value for minors. Serious value includes only serious literary, artistic, political, or scientific value for minors.

(5) "Knowingly" means an awareness, whether actual or constructive, of the character

of material or of a performance. A person has constructive knowledge if a reasonable inspection or observation under the circumstances would have disclosed the nature of the subject matter and if a failure to inspect or observe is either for the purpose of avoiding the disclosure or is criminally negligent.

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

(7) "Minor" means any person less than ~~[eighteen]~~ 18 years of age.

(8) "Negligently" means simple negligence, the failure to exercise that degree of care that reasonable and prudent persons exercise under like or similar circumstances.

~~[(8)]~~ (9) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks, with less than an opaque covering, or the showing of a female breast with less than an opaque covering, or any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

~~[(9)]~~ (10) "Performance" means any physical human bodily activity, whether engaged in alone or with other persons, including but not limited to singing, speaking, dancing, acting, simulating, or pantomiming.

~~[(10)]~~ (11) "Public place" includes a place to which admission is gained by payment of a membership or admission fee, however designated, notwithstanding its being designated a private club or by words of like import.

~~[(11)]~~ (12) "Sado-masochistic abuse" means flagellation or torture by or upon a person who is nude or clad in undergarments, a mask, or in a revealing or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed.

~~[(12)]~~ (13) "Sexual conduct" means acts of masturbation, sexual intercourse, or any touching of a person's clothed or unclothed genitals, pubic area, buttocks, or, if the person is a female, breast, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent or actual sexual stimulation or gratification.

~~[(13)]~~ (14) "Sexual excitement" means a condition of human male or female genitals

when in a state of sexual stimulation or arousal, or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity.

Section 2. Section **76-10-1204** is amended to read:

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

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

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

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

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

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

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

or

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

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

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

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

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

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

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

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

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

~~[(5) A service provider, as defined in Section 76-10-1230, complies with this section if it complies with Sections 76-10-1231 and 76-10-1232.]~~

Section 3. Section **76-10-1205** is amended to read:

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

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

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

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

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

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

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

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

~~[(3) A service provider, as defined in Section 76-10-1230, complies with this section if it complies with Sections 76-10-1231 and 76-10-1232.]~~

Section 4. Section **76-10-1206** is amended to read:

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

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

(a) intentionally distributes or offers to distribute, exhibits or offers to exhibit to a minor any material harmful to minors;

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

(c) intentionally participates in any performance before a minor, that is harmful to minors.

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

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

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

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

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

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

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

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

(4) (a) A service provider, as defined in Section 76-10-1230, ~~[complies with]~~ is not negligent under this section if it complies with ~~[Sections]~~ Section 76-10-1231 ~~[and 76-10-1232]~~.

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

Section 5. Section **76-10-1230** is amended to read:

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

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

(1) "Access restricted" means that a content provider limits access to material harmful to minors by:

(a) properly rating content;

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

(c) any other reasonable measures feasible under available technology.

~~[(2) "Adult content registry" means the adult content registry created by Section 67-5-19.]~~

~~[(3)]~~ (2) "Consumer" means a natural person residing in this state who subscribes to a service provided by a service provider for personal or residential use.

~~[(4)]~~ (3) "Content provider" means a person ~~[that]~~ domiciled in Utah or that generates or hosts content in Utah, and that creates, collects, acquires, or organizes electronic data for

electronic delivery to a consumer with the intent of making a profit.

~~[(5)]~~ (4) (a) "Hosting company" means a person that provides services or facilities for storing or distributing content over the Internet without editorial or creative alteration of the content.

(b) A hosting company may have policies concerning acceptable use without becoming a content provider under Subsection ~~[(4)]~~ (3).

~~[(6)]~~ (5) (a) "Internet service provider" means a person engaged in the business of providing a computer and communications facility, with the intent of making a profit, through which a consumer may obtain access to the Internet.

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

~~[(7)]~~ (6) "Properly rated" means content using a labeling system to label material harmful to minors provided by the content provider in a way that:

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

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

~~[(8)]~~ (7) (a) Except as provided in Subsection ~~[(8)]~~ (7)(b), "service provider" means:

(i) an Internet service provider; or

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

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

(i) a wire;

(ii) a cable; or

(iii) an antenna.

(c) "Service provider," notwithstanding Subsection ~~[(8)]~~ (7)(b), includes a person who meets the requirements of Subsection ~~[(8)]~~ (7)(a) and leases or rents a wire or cable for the transmission of data.

Section 6. Section **76-10-1231** is amended to read:

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

(1) (a) Upon request by a consumer, a service provider shall filter content to prevent

the transmission of material harmful to minors to the consumer.

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

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

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

(i) providing in-network filtering to prevent receipt of material harmful to minors; or

(ii) providing software for contemporaneous installation on the consumer's computer that blocks, in an easy-to-enable and commercially reasonable manner, receipt of material harmful to minors.

~~[(b) (i) Except as provided in Subsection (3)(b)(ii), a service provider may not charge a consumer for blocking material or providing software under this section, except that a service provider may increase the cost to all subscribers to the service provider's services to recover the cost of complying with this section.]~~

~~[(ii) A service provider with fewer than 7,500 subscribers may charge a consumer for providing software under Subsection (3)(a)(ii) if the charge does not exceed the service provider's cost for the software.]~~

(b) A service provider may charge a consumer for providing software under Subsection (3)(a)(ii).

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

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

(b) notify the service provider that the service provider has 30 days to comply with the provision being violated or be subject to Subsection (5).

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

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

(b) guilty of a class A misdemeanor if:

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

or

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

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

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

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

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

(ii) the public.

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

#### Section 7. **Repealer.**

This bill repeals:

Section **67-5-19, Adult content registry.**

Section **76-10-1232 (Effective 05/01/06), Data service providers -- Adult content registry.**

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#### Legislative Review Note

as of 2-7-06 2:49 PM

Based on a limited legal review, this legislation has not been determined to have a high probability of being held unconstitutional.

Office of Legislative Research and General Counsel

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**Fiscal Note**  
**Bill Number HB0187**

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**Criminal Law Amendments***13-Feb-06**10:56 AM*

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**State Impact**

Provisions of this bill will lead to ongoing cost savings within the budgets of the Attorney General (\$70,000) and the Department of Commerce (\$50,000).

	<u>FY 2007</u> <u>Approp.</u>	<u>FY 2008</u> <u>Approp.</u>	<u>FY 2007</u> <u>Revenue</u>	<u>FY 2008</u> <u>Revenue</u>
General Fund	(\$120,000)	(\$120,000)	\$0	\$0
<b>TOTAL</b>	<b>(\$120,000)</b>	<b>(\$120,000)</b>	<b>\$0</b>	<b>\$0</b>

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**Individual and Business Impact**

No significant fiscal impact.

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**Office of the Legislative Fiscal Analyst**