

Senator Darin G. Peterson proposes the following substitute bill:

MATERIAL HARMFUL TO MINORS

AMENDMENTS

2006 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: David L. Hogue

Senate Sponsor: Darin G. Peterson

LONG TITLE

General Description:

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

Highlighted Provisions:

This bill:

- ▶ amends the definition of material that is harmful to a minor to include inappropriate violence;
- ▶ provides a definition of inappropriate violence;
- ▶ makes the following repeals and amendments:
 - 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



26 recklessly to a standard of the exercise of reasonable care; and

27 • amends the provisions regarding charging the consumer for software that blocks
28 material harmful to minors.

29 **Monies Appropriated in this Bill:**

30 None

31 **Other Special Clauses:**

32 This bill provides a severability clause.

33 **Utah Code Sections Affected:**

34 AMENDS:

35 **76-10-1201**, as last amended by Chapter 9, Laws of Utah 2001

36 **76-10-1204**, as last amended by Chapter 281, Laws of Utah 2005

37 **76-10-1205**, as last amended by Chapter 281, Laws of Utah 2005

38 **76-10-1206**, as last amended by Chapter 281, Laws of Utah 2005

39 **76-10-1230**, as enacted by Chapter 281, Laws of Utah 2005

40 **76-10-1231**, as enacted by Chapter 281, Laws of Utah 2005

41 REPEALS:

42 **67-5-19**, as enacted by Chapter 281, Laws of Utah 2005

43 **76-10-1232 (Effective 05/01/06)**, as enacted by Chapter 281, Laws of Utah 2005



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

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

47 **76-10-1201. Definitions.**

48 For the purpose of this part:

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

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

53 (3) "Exhibit" means to show.

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

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

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

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

62 (b) "Harmful to minors" means that quality of any description or representation, in
63 whatsoever form, of inappropriate violence.

64 (5) "Inappropriate violence" means any description or representation, in an interactive
65 video or electronic game, of violence when it:

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

68 (b) taken as a whole, does not have serious literary, artistic, political, or scientific value
69 for minors, based on but not limited to, the following criteria:

70 (i) is glamorized or gratuitous;

71 (ii) is graphic violence used to shock or stimulate;

72 (iii) is graphic violence that is not contextually relevant to the material;

73 (iv) is so pervasive that it serves as the thread holding the plot of the material together;

74 (v) trivializes the serious nature of realistic violence;

75 (vi) does not demonstrate the consequences or effects of realistic violence;

76 (vii) uses brutal weapons designed to inflict the maximum amount of pain and damage;

77 (viii) endorses or glorifies torture or excessive weaponry; or

78 (ix) depicts lead characters who resort to violence freely.

79 ~~[(5)]~~ (6) "Knowingly" means an awareness, whether actual or constructive, of the
80 character of material or of a performance. A person has constructive knowledge if a reasonable
81 inspection or observation under the circumstances would have disclosed the nature of the
82 subject matter and if a failure to inspect or observe is either for the purpose of avoiding the
83 disclosure or is criminally negligent.

84 ~~[(6)]~~ (7) "Material":

85 (a) means anything printed or written or any picture, drawing, photograph, motion
86 picture, or pictorial representation, or any statue or other figure, or any recording or
87 transcription, or any mechanical, chemical, or electrical reproduction, or anything which is or

88 may be used as a means of communication[~~. Material~~]; and

89 (b) includes undeveloped photographs, molds, printing plates, and other latent
90 representational objects.

91 [~~(7)~~] (8) "Minor" means any person less than [~~eighteen~~] 18 years of age.

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

94 [~~(8)~~] (10) "Nudity" means the showing of the human male or female genitals, pubic
95 area, or buttocks, with less than an opaque covering, or the showing of a female breast with
96 less than an opaque covering, or any portion thereof below the top of the nipple, or the
97 depiction of covered male genitals in a discernibly turgid state.

98 [~~(9)~~] (11) "Performance" means any physical human bodily activity, whether engaged
99 in alone or with other persons, including but not limited to singing, speaking, dancing, acting,
100 simulating, or pantomiming.

101 [~~(10)~~] (12) "Public place" includes a place to which admission is gained by payment of
102 a membership or admission fee, however designated, notwithstanding its being designated a
103 private club or by words of like import.

104 [~~(11)~~] (13) "Sado-masochistic abuse" means flagellation or torture by or upon a person
105 who is nude or clad in undergarments, a mask, or in a revealing or bizarre costume, or the
106 condition of being fettered, bound, or otherwise physically restrained on the part of one so
107 clothed.

108 [~~(12)~~] (14) "Sexual conduct" means acts of masturbation, sexual intercourse, or any
109 touching of a person's clothed or unclothed genitals, pubic area, buttocks, or, if the person is a
110 female, breast, whether alone or between members of the same or opposite sex or between
111 humans and animals in an act of apparent or actual sexual stimulation or gratification.

112 [~~(13)~~] (15) "Sexual excitement" means a condition of human male or female genitals
113 when in a state of sexual stimulation or arousal, or the sensual experiences of humans engaging
114 in or witnessing sexual conduct or nudity.

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

116 **76-10-1204. Distributing pornographic material.**

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

118 (a) sends or brings any pornographic material into the state with intent to distribute or

119 exhibit it to others;

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

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

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

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

126 or

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

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

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

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

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

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

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

139 (ii) incarceration, without suspension of sentence in any way, for a term of not less than
140 30 days.

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

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

144 (5) This section does not apply to an Internet service provider as defined in Section
145 76-10-1230.

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

147 **76-10-1205. Inducing acceptance of pornographic material.**

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

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

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

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

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

160 (ii) incarceration, without suspension of sentence in any way, for a term of not less than
161 30 days.

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

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

165 (3) This section does not apply to an Internet service provider as defined in Section
166 76-10-1230.

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

168 **76-10-1206. Dealing in material harmful to a minor.**

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

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

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

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

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

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

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

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

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

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

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

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

189 (4) (a) A service provider, as defined in Section 76-10-1230, [~~complies with~~] is not
190 negligent under this section if it complies with [~~Sections~~] Section 76-10-1231 [~~and~~
191 ~~76-10-1232~~].

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

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

195 **76-10-1230. Definitions.**

196 As used in Sections 76-10-1231[~~,76-10-1232,~~] and 76-10-1233:

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

199 (a) properly rating content;

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

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

204 [~~(2) "Adult content registry" means the adult content registry created by Section~~
205 ~~67-5-19.~~]

206 [~~(3)~~] (2) "Consumer" means a natural person residing in this state who subscribes to a
207 service provided by a service provider for personal or residential use.

208 [~~(4)~~] (3) "Content provider" means a person [~~that~~] domiciled in Utah or that generates
209 or hosts content in Utah, and that creates, collects, acquires, or organizes electronic data for
210 electronic delivery to a consumer with the intent of making a profit.

211 [~~(5)~~] (4) (a) "Hosting company" means a person that provides services or facilities for

212 storing or distributing content over the Internet without editorial or creative alteration of the
213 content.

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

216 [~~(6)~~] (5) (a) "Internet service provider" means a person engaged in the business of
217 providing a computer and communications facility, with the intent of making a profit, through
218 which a consumer may obtain access to the Internet.

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

221 (6) "Material harmful to minors" does not include material defined in Subsection
222 76-10-1201(4)(b).

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

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

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

229 (8) (a) Except as provided in Subsection (8)(b), "service provider" means:

230 (i) an Internet service provider; or

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

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

234 (i) a wire;

235 (ii) a cable; or

236 (iii) an antenna.

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

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

241 **76-10-1231. Data service providers -- Internet content harmful to minors.**

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

243 the transmission of material harmful to minors to the consumer.

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

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

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

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

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

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

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

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

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

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

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

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

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

274 (b) guilty of a class A misdemeanor if:
275 (i) the service provider knowingly or intentionally fails to comply with Subsection (1);
276 or
277 (ii) the service provider fails to provide the notice required by Subsection (2).
278 (6) A proceeding to impose a civil fine under Subsection (5)(a) may only be brought by
279 the attorney general in a court of competent jurisdiction.

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

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

- 286 (i) the service provider that is the subject of the test; and
- 287 (ii) the public.

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

290 **Section 7. Repealer.**

291 This bill repeals:

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

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

295 **Section 8. Severability clause.**

296 If any provision of this bill, or the application of any provision to any person or
297 circumstance is held invalid, the remainder of this bill shall be given effect without the invalid
298 provision or application.