

**PORNOGRAPHIC AND HARMFUL MATERIALS
AND PERFORMANCES AMENDMENTS**

2007 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Bradley M. Daw

Senate Sponsor: _____

LONG TITLE

General Description:

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

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ repeals provisions related to the adult content registry;
- ▶ provides that an Internet service provider is not guilty of criminal conduct involving distributing pornographic material, inducing acceptance of pornographic material, or dealing in material harmful to a minor, if the Internet service provider's involvement is only incidental to its service of transferring data between parties and the Internet service provider does not intentionally aid or abet, and does not receive funds for permitting, a person to engage in such criminal conduct;
- ▶ modifies certain provisions of Title 76, Chapter 10, Part 12, Pornographic and Harmful Materials and Performances, that provide that compliance with one or more sections constitutes compliance with one or more other sections, by deleting the provision, or replacing the provision with a negligence standard;
- ▶ provides that a service provider may charge a consumer for providing software that blocks receipt of material that is harmful to minors; and



28 ▶ makes technical changes.

29 **Monies Appropriated in this Bill:**

30 None

31 **Other Special Clauses:**

32 None

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

58 (b) is patently offensive to prevailing standards in the adult community as a whole with

59 respect to what is suitable material for minors; and

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

62 (5) "Knowingly" means an awareness, whether actual or constructive, of the character
63 of material or of a performance. A person has constructive knowledge if a reasonable
64 inspection or observation under the circumstances would have disclosed the nature of the
65 subject matter and if a failure to inspect or observe is either for the purpose of avoiding the
66 disclosure or is criminally negligent, as described in Section 76-2-103.

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

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

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

75 ~~[(8)]~~ (9) "Nudity" means the showing of the human male or female genitals, pubic area,
76 or buttocks, with less than an opaque covering, or the showing of a female breast with less than
77 an opaque covering, or any portion thereof below the top of the nipple, or the depiction of
78 covered male genitals in a discernibly turgid state.

79 ~~[(9)]~~ (10) "Performance" means any physical human bodily activity, whether engaged
80 in alone or with other persons, including but not limited to singing, speaking, dancing, acting,
81 simulating, or pantomiming.

82 ~~[(10)]~~ (11) "Public place" includes a place to which admission is gained by payment of
83 a membership or admission fee, however designated, notwithstanding its being designated a
84 private club or by words of like import.

85 ~~[(11)]~~ (12) "Sado-masochistic abuse" means flagellation or torture by or upon a person
86 who is nude or clad in undergarments, a mask, or in a revealing or bizarre costume, or the
87 condition of being fettered, bound, or otherwise physically restrained on the part of one so
88 clothed.

89 ~~[(12)]~~ (13) "Sexual conduct" means acts of masturbation, sexual intercourse, or any

90 touching of a person's clothed or unclothed genitals, pubic area, buttocks, or, if the person is a
91 female, breast, whether alone or between members of the same or opposite sex or between
92 humans and animals in an act of apparent or actual sexual stimulation or gratification.

93 ~~[(13)]~~ (14) "Sexual excitement" means a condition of human male or female genitals
94 when in a state of sexual stimulation or arousal, or the sensual experiences of humans engaging
95 in or witnessing sexual conduct or nudity.

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

97 **76-10-1204. Distributing pornographic material.**

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

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

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

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

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

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

107 or

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

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

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

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

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

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

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

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

121 30 days.

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

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

125 (5) This section does not apply to an Internet service provider, as defined in Section
126 76-10-1230, if:

127 (a) the distribution of pornographic material by the Internet service provider occurs
128 only incidentally through the Internet service provider's function of transferring data from one
129 person to another person;

130 (b) the Internet service provider does not intentionally aid or abet in the distribution of
131 the pornographic material; and

132 (c) the Internet service provider does not receive funds from or through the person who
133 distributes the pornographic material in exchange for permitting the person to distribute the
134 pornographic material.

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

136 **76-10-1205. Inducing acceptance of pornographic material.**

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

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

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

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

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

149 (ii) incarceration, without suspension of sentence in any way, for a term of not less than
150 30 days.

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

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

154 (3) This section does not apply to an Internet service provider, as defined in Section
155 76-10-1230, if:

156 (a) the inducement to accept pornographic material by the Internet service provider
157 occurs only incidentally through the Internet service provider's function of transferring data
158 from one person to another person;

159 (b) the Internet service provider does not have a contractual or business relationship
160 with the person who induces a purchaser or consignee to accept pornographic material through
161 the Internet service provider;

162 (c) the Internet service provider does not intentionally aid or abet in the inducement to
163 accept pornographic material; and

164 (d) the Internet service provider does not receive funds from or through the person who
165 induces a purchaser or consignee to accept pornographic material in exchange for permitting
166 the inducement.

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~~] the person:

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 (c) This section does not apply to an Internet service provider, as defined in Section
190 76-10-1230, if:

191 (i) the dealing in material harmful to a minor by the Internet service provider occurs
192 only incidentally through the Internet service provider's function of transferring data from one
193 person to another person;

194 (ii) the Internet service provider does not have a contractual or business relationship
195 with the person who deals in material harmful to a minor;

196 (iii) the Internet service provider does not intentionally aid or abet a person in dealing
197 in material harmful to a minor; and

198 (iv) the Internet service provider does not receive funds from or through the person
199 who deals in material harmful to a minor in exchange for permitting a person to deal in
200 material harmful to a minor.

201 (4) (a) A service provider, as defined in Section 76-10-1230, [~~complies with~~] is not
202 negligent under this section if it complies with [~~Sections~~] Section 76-10-1231 [~~and~~
203 ~~76-10-1232~~].

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

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

207 **76-10-1230. Definitions.**

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

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

211 (a) properly rating content;

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

214 digital certificate verifying age; or

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

216 [~~(2)~~] "~~Adult content registry~~" means the adult content registry created by Section
217 ~~67-5-19.~~]

218 [~~(3)~~] (2) "Consumer" means a natural person residing in this state who subscribes to a
219 service provided by a service provider for personal or residential use.

220 [~~(4)~~] (3) "Content provider" means a person domiciled in Utah or that generates or
221 hosts content in Utah, and that creates, collects, acquires, or organizes electronic data for
222 electronic delivery to a consumer with the intent of making a profit.

223 [~~(5)~~] (4) (a) "Hosting company" means a person that provides services or facilities for
224 storing or distributing content over the Internet without editorial or creative alteration of the
225 content.

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

228 [~~(6)~~] (5) (a) "Internet service provider" means a person engaged in the business of
229 providing a computer and communications facility, with the intent of making a profit, through
230 which a consumer may obtain access to the Internet.

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

233 [~~(7)~~] (6) "Properly rated" means content using a labeling system to label material
234 harmful to minors provided by the content provider in a way that:

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

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

239 [~~(8)~~] (7) (a) Except as provided in Subsection [~~(8)~~] (7)(b), "service provider" means:

240 (i) an Internet service provider; or

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

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

244 (i) a wire;

245 (ii) a cable; or

246 (iii) an antenna.

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

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

251 **76-10-1231. Data service providers -- Internet content harmful to minors.**

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

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

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

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

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

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

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

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

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

275 (4) If the attorney general determines that a service provider violates Subsection (1) or

276 (2), the attorney general shall:

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

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

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

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

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

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

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

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

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

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

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

297 (ii) the public.

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

300 Section 7. **Repealer.**

301 This bill repeals:

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

303 Section **76-10-1232, Data service providers -- Adult content registry.**

Legislative Review Note

as of 1-23-07 10:41 AM

Office of Legislative Research and General Counsel

H.B. 330 - Pornographic and Harmful Materials and Performances Amendments

Fiscal Note

2007 General Session

State of Utah

State Impact

Enactment of this bill will provide \$120,000 in ongoing cost savings to the state from the Attorney General (\$70,000) and the Department of Commerce (\$50,000) from repeal of the adult content registry.

	<u>FY 2007</u> <u>Approp.</u>	<u>FY 2008</u> <u>Approp.</u>	<u>FY 2009</u> <u>Approp.</u>	<u>FY 2007</u> <u>Revenue</u>	<u>FY 2008</u> <u>Revenue</u>	<u>FY 2009</u> <u>Revenue</u>
General Fund	\$0	(\$120,000)	(\$120,000)	\$0	\$0	\$0
Total	\$0	(\$120,000)	(\$120,000)	\$0	\$0	\$0

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.
