

**MATERIAL HARMFUL TO MINORS**

**AMENDMENTS**

2008 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Paul Ray**

Senate Sponsor: Darin G. Peterson

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**LONG TITLE**

**General Description:**

This bill modifies the Criminal Code regarding materials 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:**

None

30 **Utah Code Sections Affected:**

31 AMENDS:

32 **76-10-1201**, as last amended by Laws of Utah 2007, Chapters 123, and 337

33 **76-10-1206**, as last amended by Laws of Utah 2007, Chapter 337

34 **76-10-1230**, as last amended by Laws of Utah 2007, Chapter 337

35 **76-10-1231**, as last amended by Laws of Utah 2007, Chapter 337

36 **76-10-1233**, as last amended by Laws of Utah 2007, Chapter 322



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

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

40 **76-10-1201. Definitions.**

41 For the purpose of this part:

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

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

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

48 (4) "Exhibit" means to show.

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

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

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

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

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

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

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

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

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

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

72 (10) "Nudity" means:

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

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

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

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

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

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

85 (a) flagellation or torture by or upon a person who is nude or clad in undergarments, a

86 mask, or in a revealing or bizarre costume; or

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

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

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

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

97 **76-10-1206. Dealing in material harmful to a minor -- Exemptions for Internet**  
98 **service providers and hosting companies.**

99 (1) A person is guilty of dealing in material harmful to minors when, knowing or  
100 believing that a person is a minor, or having negligently failed to determine the proper age of a  
101 minor, the person intentionally:

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

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

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

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

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

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

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

113 (3) (a) If a defendant has already been convicted once under this section, each separate

114 further offense is a second degree felony punishable by:

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

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

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

119 (c) (i) This section does not apply to an Internet service provider, as defined in Section  
120 76-10-1230, a provider of an electronic communications service as defined in 18 U.S.C. Sec.  
121 2510, a telecommunications service, information service, or mobile service as defined in 47  
122 U.S.C. Sec. 153, including a commercial mobile service as defined in 47 U.S.C. Sec. 332(d), or  
123 a cable operator as defined in 47 U.S.C. Sec. 522, if:

124 (A) the distribution of pornographic material by the Internet service provider occurs  
125 only incidentally through the [~~Internet service~~] provider's function of:

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

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

128 (B) the [~~Internet service~~] provider does not intentionally aid or abet in the distribution  
129 of the pornographic material; and

130 (C) the [~~Internet service~~] provider does not knowingly receive [~~funds~~] from or through  
131 a person who distributes the pornographic material [~~in exchange~~] a fee greater than the fee  
132 generally charged by the provider, as a specific condition for permitting the person to distribute  
133 the pornographic material.

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

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

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

141 (C) the hosting company does not knowingly receive [~~funds~~] from or through a person

142 who distributes the pornographic material [~~in exchange~~] a fee greater than the fee generally  
143 charged by the provider, as a specific condition for permitting the person to distribute, store, or  
144 cache the pornographic material.

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

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

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

150 **76-10-1230. Definitions.**

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

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

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

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

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

159 [~~(2)~~] (1) "Consumer" means a natural person residing in this state who subscribes to a  
160 service provided by a service provider for personal or residential use.

161 [~~(3)~~] (2) "Content provider" means a person domiciled in Utah or that generates or  
162 hosts content in Utah, and that creates, collects, acquires, or organizes electronic data for  
163 electronic delivery to a consumer with the intent of making a profit.

164 [~~(4)~~] (3) (a) "Hosting company" means a person that provides services or facilities for  
165 storing or distributing content over the Internet without editorial or creative alteration of the  
166 content.

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

169 [~~(5)~~] (4) (a) "Internet service provider" means a person engaged in the business of

170 providing a computer communications facility in Utah, with the intent of making a profit,  
171 through which a consumer may obtain access to the Internet.

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

174 ~~[(6)]~~ (5) "Properly rated" means content using a labeling system to label material  
175 harmful to minors provided by the content provider in a way that:

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

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

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

181 (a) properly rating content; or

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

183 (7) (a) Except as provided in Subsection (7)(b), "service provider" means~~[-(i)]~~ an  
184 Internet service provider~~[-; or (ii) a person who otherwise provides an Internet access service to~~  
185 ~~a consumer in Utah with the intent of making a profit].~~

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

188 (i) a wire;

189 (ii) a cable; or

190 (iii) an antenna.

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

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

195 **76-10-1231. Data service providers -- Internet content harmful to minors.**

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

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

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

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

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

209 (ii) providing software, ~~or~~ engaging a third party to provide software, or referring  
210 users to a third party that provides filtering software, by providing a clear and conspicuous  
211 hyperlink or written statement, for ~~contemporaneous~~ installation on the consumer's computer  
212 that blocks, in an easy-to-enable and commercially reasonable manner, receipt of material  
213 harmful to minors.

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

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

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

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

222 (5) A service provider that intentionally or knowingly violates Subsection (1) or (2) is[  
223 ~~(a)~~] subject to a civil fine of \$2,500 for each separate violation of Subsection (1) or (2), up to  
224 \$10,000 per day[~~; and~~].

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



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

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

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

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

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

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

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

241 Section 5. Section **76-10-1233** is amended to read:

242 **76-10-1233. Content providers -- Material harmful to minors.**

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

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

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

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

251 (3) (a) If a content provider intentionally or knowingly violates this section more than  
252 30 days after receiving the notice provided~~[in]~~ under Subsection (2), the content provider is  
253 ~~[guilty of a third degree felony.]~~ subject to a civil fine of \$2,500 for each separate violation of

254 Subsection (1), up to \$10,000 per day.

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