

ANALYSIS OF UTAH HOUSE BILL 260 AS PASSED BY THE LEGISLATURE ON MARCH 2, 2005

The Center for Democracy & Technology (CDT) has reviewed Utah House Bill 260, entitled “Amendments Relating to Pornographic and Harmful Materials,” as passed by the Utah Legislature on March 2, 2005. CDT is a non-profit, public interest organization dedicated to promoting civil liberties and democratic values online. It was a plaintiff (and lead counsel) in the recent federal district court case of *CDT v. Pappert*, 337 F. Supp. 2d 606 (E.D. Pa. 2004), in which the court struck down as unconstitutional, on numerous independent grounds, a Pennsylvania state child pornography law that was very similar in approach to that contained in H.B. 260. Detailed information about the case, with links to the decision, expert witness reports, and key litigation documents, can be found at <http://www.cdt.org/speech/pennwebblock/>.

Although we appreciate and applaud the goal of keeping children safe on the Internet, **CDT believes that very serious constitutional problems are raised by H.B. 260, and that if enacted the bill would be unlikely to withstand a legal challenge.** In addition, the bill is very likely to cause economic harm to Utah businesses that provide Internet and World Wide Web hosting services. Among the constitutional and other problems raised by H.B. 260 are:

- **The Adult Content Registry created in Section 67-5-19 will be found to be unconstitutional because it fails to provide the judicially supervised procedures that are constitutionally required under the First Amendment.** Notwithstanding the fact that H.B. 260 would require blocking of access only by those who request blocking, the statute would nevertheless be a government-imposed censorship of speech, speech which by definition is *lawful* for adults to access. As such, it must comply with the rigorous procedural requirements of the First Amendment. H.B. 260 does not provide such procedures.
- **The obligation in Sections 76-10-1231 and 76-10-1232 that ISPs block access to certain content will be found to be unconstitutional.** These sections give ISPs a choice of either blocking certain content or providing filtering software to users. If any ISPs block access to content, the sections will encounter serious constitutional problems:
 - **Blockage of innocent and unrelated web sites.** Any of the technically and economically feasible methods that most ISPs could use to attempt to comply

with H.B. 260 would almost unavoidably lead to the blockage (and thus the censorship) of innocent web sites that are wholly unrelated to the web sites targeted by the bill. Similar blocking orders in Pennsylvania were declared unconstitutional in *CDT v. Pappert* after the court determined that the orders led to the blocking of more than one million innocent web sites. The blocking obligation in H.B. 260 would have the same unconstitutional impact.

- **Blockage of access to web sites by customers who do not request blocking.** Given the technical and economic realities of the operations of the major ISPs in the country, it is highly likely that the blocking actions of some if not most major ISPs would block access to specified web sites by *all* of the ISP's customers, both in and outside of Utah. This would be in plain violation of both the First Amendment and the Commerce Clause of the U.S. Constitution.
- **Failure to survive substantive First Amendment analysis.** Under appropriate First Amendment analysis, to withstand scrutiny H.B. 260 would have to substantially further a governmental interest, and do be the least restrictive means to achieve that interest. Because Utah citizens can obtain the same protection afforded by H.B. 260 through the purely voluntary use of filtering software (as H.B. 260 itself recognizes), H.B. 260 would not be held to be the least restrictive means to further the governmental interest.
- **If ISPs provide filtering software instead of blocking access to content, then H.B. will be duplicative of a federal obligation to make filtering software available.** Moreover, in such case, the \$100,000 spent to create and maintain the adult content registry will have been wasted.
- **Section 76-10-1206 concerning “dealing in material harmful to a minor” will be found to be unconstitutional under the analysis found in the Supreme Court’s 1997 *Reno v. ACLU* decision, as well as applicable decisions of the U.S. Court of Appeals for the Tenth Circuit.** The Supreme Court struck down the Communications Decency Act in part because web publishers have no effective means to determine who on the Internet is a minor. This section is equally unconstitutional.
- **Section 76-10-1233 requiring content providers to label their content will be found to be unconstitutional under the First Amendment.** Speakers cannot constitutionally be required to self-evaluate their speech and declare it to be “harmful to minors.” Moreover, given the broad range of completely lawful content that arguably is “harmful to minors,” Utah’s many web hosting companies will certainly lose customers who do not want to face an unconstitutional labeling requirement;

most customers, rather than challenging the law and remaining with the Utah web host, will simply move their content out of state.

- **H.B. 260 will increase the cost of doing business in Utah for ISPs, and will almost certainly reduce the number of ISPs competing for the business of Utah citizens.** This harm will have its greatest impact on medium sized ISPs that are struggling to remain competitive in an era of ISP consolidation. In the end, Utah citizens will have fewer choices and face higher costs for Internet access.
- **H.B. 260 will very likely lead to a costly litigation in which Utah will be forced to pay both its own attorneys fees as well as those of plaintiffs who challenge the law.** In the case of the very similar Pennsylvania law, the citizens of that state ultimately footed an aggregate bill for attorneys' fees and costs of almost \$1 million. Utah's funds would be much more wisely spent promoting awareness of the great diversity of filtering tools that are available to parents and other Internet users today.
- **Consumer education provision sends wrong message to Utah citizens.** Although we applaud the consumer education proposed in Section 13-2-9, the education effort should promote the safe and appropriate use of the Internet, rather than having a focus of warning about the "dangers" of the Internet. To suggest to Utah citizens that they should not use the Internet because of its dangers is to encourage Utah citizens to be left behind in the twenty-first century economy.