

HOUSE BILL 1208

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2004 Regular Session
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By: **Delegates Shank, Amedori, Donoghue, Dwyer, Kelly, Lee, McComas,
O'Donnell, Simmons, Sophocleus, and Zirkin**

Introduced and read first time: February 13, 2004

Assigned to: Judiciary

Committee Report: Favorable with amendments

House action: Adopted

Read second time: March 23, 2004

CHAPTER _____

1 AN ACT concerning

2 **Crimes - Internet Child Pornography - Removal**

3 FOR the purpose of requiring an investigative or law enforcement officer who receives
4 information that an item of alleged child pornography resides on a server or
5 other storage device controlled or owned by an interactive computer service
6 provider to contact the provider and request the provider's voluntary compliance
7 in removing the item within a certain period of time; requiring the officer to
8 apply for a court order if the provider does not voluntarily remove the item;
9 specifying certain information to be included in the application for a court order;
10 establishing the provider's right to a hearing on the application; requiring a
11 provider who is served with a court order that a certain item of child
12 pornography residing on its service to persons in the State shall be removed to
13 comply with the order within a certain period; specifying the content of the court
14 order; establishing a procedure for issuing and serving the court order;
15 authorizing a provider to petition the court for relief for cause from the order on
16 certain grounds; requiring a provider who has notice that an item of child
17 pornography resides on a server or other storage device controlled or owned by
18 the provider and located in the State or pertains to a user residing in the State
19 to report the item's location to the State Police; providing a certain exception to
20 the reporting requirement; providing a criminal penalty for willful failure to
21 provide certain information to the State Police; providing a criminal penalty for
22 failure to remove a certain item of child pornography from a certain server or
23 other storage device; providing that this Act does not impose a certain duty on
24 the provider actively to monitor its server or other storage device for a certain
25 item of child pornography; providing that this Act does not apply to the
26 transmission, routing, or temporary storage of certain images or information by
27 a provider; providing an interactive computer service provider with immunity

1 from certain civil liability for complying with certain provisions of law; providing
2 venue for the prosecution of an action against a provider; defining certain terms;
3 and generally relating to interactive computer service providers and child
4 pornography.

5 BY repealing and reenacting, without amendments,
6 Article - Courts and Judicial Proceedings
7 Section 10-402(c)(2)(i) and 10-406(b)
8 Annotated Code of Maryland
9 (2002 Replacement Volume and 2003 Supplement)

10 BY repealing and reenacting, with amendments,
11 Article - Courts and Judicial Proceedings
12 Section 10-402(c)(2)(ii)1.F. and 10-406(a)(3)
13 Annotated Code of Maryland
14 (2002 Replacement Volume and 2003 Supplement)

15 BY repealing and reenacting, without amendments,
16 Article - Criminal Law
17 Section 11-207 and 11-208
18 Annotated Code of Maryland
19 (2002 Volume and 2003 Supplement)

20 BY adding to
21 Article - Criminal Law
22 Section 11-208.1
23 Annotated Code of Maryland
24 (2002 Volume and 2003 Supplement)

25 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF
26 MARYLAND, That the Laws of Maryland read as follows:

27 **Article - Courts and Judicial Proceedings**

28 10-402.

29 (c) (2) (i) This paragraph applies to an interception in which:

30 1. The investigative or law enforcement officer or other
31 person is a party to the communication; or

32 2. One of the parties to the communication has given prior
33 consent to the interception.

34 (ii) It is lawful under this subtitle for an investigative or law
35 enforcement officer acting in a criminal investigation or any other person acting at

1 the prior direction and under the supervision of an investigative or law enforcement
2 officer to intercept a wire, oral, or electronic communication in order to provide
3 evidence:

4 1. Of the commission of:

5 F. Child pornography under [§ 11-207 or § 11-208] § 11-207,
6 § 11-208, OR § 11-208.1 of the Criminal Law Article;

7 10-406.

8 (a) The Attorney General, State Prosecutor, or any State's Attorney may apply
9 to a judge of competent jurisdiction, and the judge, in accordance with the provisions
10 of § 10-408 of this subtitle, may grant an order authorizing the interception of wire,
11 oral, or electronic communications by investigative or law enforcement officers when
12 the interception may provide or has provided evidence of the commission of:

13 (3) Child pornography under [§ 11-207 or § 11-208] § 11-207, § 11-208,
14 OR § 11-208.1 of the Criminal Law Article;

15 (b) No application or order shall be required if the interception is lawful under
16 the provisions of § 10-402(c) of this subtitle.

17 **Article - Criminal Law**

18 11-207.

19 (a) A person may not:

20 (1) cause, induce, solicit, or knowingly allow a minor to engage as a
21 subject in the production of obscene matter or a visual representation or performance
22 that depicts a minor engaged as a subject in sadomasochistic abuse or sexual conduct;

23 (2) photograph or film a minor engaging in an obscene act,
24 sadomasochistic abuse, or sexual conduct;

25 (3) use a computer to depict or describe a minor engaging in an obscene
26 act, sadomasochistic abuse, or sexual conduct;

27 (4) knowingly promote, distribute, or possess with the intent to
28 distribute any matter, visual representation, or performance that depicts a minor
29 engaged as a subject in sadomasochistic abuse or sexual conduct; or

30 (5) use a computer to knowingly compile, enter, transmit, make, print,
31 publish, reproduce, cause, allow, buy, sell, receive, exchange, or disseminate any
32 notice, statement, advertisement, or minor's name, telephone number, place of
33 residence, physical characteristics, or other descriptive or identifying information for
34 the purpose of engaging in, facilitating, encouraging, offering, or soliciting unlawful
35 sadomasochistic abuse or sexual conduct of or with a minor.

1 (b) A person who violates this section is guilty of a felony and on conviction is
2 subject to:

3 (1) for a first violation, imprisonment not exceeding 10 years or a fine
4 not exceeding \$25,000 or both; and

5 (2) for each subsequent violation, imprisonment not exceeding 20 years
6 or a fine not exceeding \$50,000 or both.

7 (c) (1) (i) This paragraph applies only if the minor's identity is unknown
8 or the minor is outside the jurisdiction of the State.

9 (ii) In an action brought under this section, the State is not
10 required to identify or produce testimony from the minor who is depicted in the
11 obscene matter or in any visual representation or performance that depicts the minor
12 engaged as a subject in sadomasochistic abuse or sexual conduct.

13 (2) The trier of fact may determine whether an individual who is
14 depicted in an obscene matter, or any visual representation or performance as the
15 subject in sadomasochistic abuse or sexual conduct, was a minor by:

16 (i) observation of the matter depicting the individual;

17 (ii) oral testimony by a witness to the production of the matter,
18 representation, or performance;

19 (iii) expert medical testimony; or

20 (iv) any other method authorized by an applicable provision of law
21 or rule of evidence.

22 11-208.

23 (a) A person may not knowingly possess a film, videotape, photograph, or
24 other visual representation depicting an individual under the age of 16 years:

25 (1) engaged as a subject of sadomasochistic abuse;

26 (2) engaged in sexual conduct; or

27 (3) in a state of sexual excitement.

28 (b) A person who violates this section is guilty of a misdemeanor and on
29 conviction is subject to:

30 (1) for a first violation, imprisonment not exceeding 1 year or a fine not
31 exceeding \$2,500 or both; and

32 (2) for each subsequent violation, imprisonment not exceeding 2 years or
33 a fine not exceeding \$5,000 or both.

1 (c) Nothing in this section may be construed to prohibit a parent from
2 possessing visual representations of the parent's own child in the nude unless the
3 visual representations depict the child engaged:

4 (1) as a subject of sadomasochistic abuse; or

5 (2) in sexual conduct and in a state of sexual excitement.

6 11-208.1.

7 (A) (1) IN THIS SECTION THE FOLLOWING WORDS HAVE THE MEANINGS
8 INDICATED.

9 (2) "CHILD PORNOGRAPHY" MEANS ANY ELECTRONIC IMAGE OR VISUAL
10 DEPICTION THAT IS UNLAWFUL UNDER § 11-207 OR § 11-208 OF THIS SUBTITLE.

11 (3) "CONTROLLED OR OWNED", WITH RESPECT TO A SERVER OR OTHER
12 STORAGE DEVICE, MEANS TO BE ENTIRELY OWNED BY AN INTERACTIVE COMPUTER
13 SERVICE PROVIDER OR TO BE SUBJECT TO EXCLUSIVE MANAGEMENT BY AN
14 INTERACTIVE COMPUTER SERVICE PROVIDER BY AGREEMENT OR OTHERWISE.

15 (4) "INTERACTIVE COMPUTER SERVICE PROVIDER" MEANS AN ENTITY
16 THAT PROVIDES A SERVICE THAT PROVIDES OR ENABLES COMPUTER ACCESS VIA
17 THE INTERNET BY MULTIPLE USERS TO A COMPUTER SERVER OR SIMILAR DEVICE
18 USED FOR THE STORAGE OF GRAPHICS, VIDEO, OR IMAGES.

19 (B) AN INVESTIGATIVE OR LAW ENFORCEMENT OFFICER WHO RECEIVES
20 INFORMATION THAT AN ITEM OF ALLEGED CHILD PORNOGRAPHY RESIDES ON A
21 SERVER OR OTHER STORAGE DEVICE CONTROLLED OR OWNED BY AN INTERACTIVE
22 COMPUTER SERVICE PROVIDER SHALL:

23 (1) CONTACT THE INTERACTIVE COMPUTER SERVICE PROVIDER THAT
24 CONTROLS OR OWNS THE SERVER OR OTHER STORAGE DEVICE WHERE THE ITEM OF
25 ALLEGED CHILD PORNOGRAPHY IS LOCATED;

26 (2) INFORM THE INTERACTIVE COMPUTER SERVICE PROVIDER OF THE
27 PROVISIONS OF THIS SECTION; AND

28 (3) REQUEST THAT THE INTERACTIVE COMPUTER SERVICE PROVIDER
29 VOLUNTARILY COMPLY WITH THIS SECTION AND REMOVE THE ITEM OF ALLEGED
30 CHILD PORNOGRAPHY FROM ITS SERVER OR OTHER STORAGE DEVICE, IF
31 PRACTICABLE, WITHIN 5 BUSINESS DAYS.

32 (C) (1) IF THE INTERACTIVE COMPUTER SERVICE PROVIDER DOES NOT
33 VOLUNTARILY REMOVE THE ITEM OF ALLEGED CHILD PORNOGRAPHY WITHIN THE
34 TIME PERIOD ESTABLISHED IN SUBSECTION (B) OF THIS SECTION, THE
35 INVESTIGATIVE OR LAW ENFORCEMENT OFFICER SHALL APPLY FOR A COURT ORDER
36 OF AUTHORIZATION TO REMOVE THE ITEM OF ALLEGED CHILD PORNOGRAPHY IN
37 ACCORDANCE WITH TITLE 10, SUBTITLE 4 OF THE COURTS ARTICLE.

1 (2) THE APPLICATION FOR A COURT ORDER SHALL:

2 (I) IDENTIFY THE ITEM OF ALLEGED CHILD PORNOGRAPHY
3 DISCOVERED ON THE SERVER OR OTHER STORAGE DEVICE CONTROLLED OR OWNED
4 BY AN INTERACTIVE COMPUTER SERVICE PROVIDER;

5 (II) PROVIDE ITS LOCATION ON THE SERVER OR OTHER STORAGE
6 DEVICE IN THE FORM OF AN INTERNET PROTOCOL (IP) ADDRESS OR UNIFORM
7 RESOURCE LOCATOR (URL);

8 (III) STATE THE GROUNDS FOR THE ISSUANCE OF THE ORDER;

9 (IV) VERIFY THAT THE ITEM OF ALLEGED CHILD PORNOGRAPHY
10 RESIDES ON THE SERVER OR OTHER STORAGE DEVICE CONTROLLED OR OWNED BY
11 THE INTERACTIVE COMPUTER SERVICE PROVIDER;

12 (V) DESCRIBE THE STEPS TAKEN TO OBTAIN VOLUNTARY
13 COMPLIANCE OF THE INTERACTIVE COMPUTER SERVICE PROVIDER WITH THIS
14 SECTION;

15 (VI) INFORM THE INTERACTIVE COMPUTER SERVICE PROVIDER OF
16 ITS RIGHT TO REQUEST A HEARING ON THE APPLICATION; AND

17 (VII) STATE THE NAME AND TITLE OF THE AFFIANT.

18 (3) THE INVESTIGATIVE OR LAW ENFORCEMENT OFFICER SHALL SERVE
19 THE APPLICATION ON THE INTERACTIVE COMPUTER SERVICE PROVIDER.

20 (4) THE INTERACTIVE COMPUTER SERVICE PROVIDER HAS THE RIGHT
21 TO REQUEST A HEARING BEFORE THE COURT IMPOSES ANY PENALTY UNDER THIS
22 SECTION.

23 (D) THE COURT SHALL REVIEW THE APPLICATION AND TESTIMONY, IF
24 OFFERED, AND, UPON A FINDING OF PROBABLE CAUSE, ISSUE AN ORDER THAT:

25 (1) AN ITEM OF CHILD PORNOGRAPHY RESIDES ON A SERVER OR OTHER
26 STORAGE DEVICE CONTROLLED OR OWNED BY THE INTERACTIVE COMPUTER
27 SERVICE PROVIDER OR IS ACCESSIBLE TO PERSONS LOCATED IN THE STATE;

28 (2) THERE IS PROBABLE CAUSE TO BELIEVE THAT THE ITEM VIOLATES §
29 11-207 OR § 11-208 OF THIS SUBTITLE;

30 (3) THE INTERACTIVE COMPUTER SERVICE PROVIDER SHALL REMOVE
31 THE ITEM RESIDING ON A SERVER OR OTHER STORAGE DEVICE CONTROLLED OR
32 OWNED BY THE INTERACTIVE COMPUTER SERVICE PROVIDER WITHIN 5 BUSINESS
33 DAYS AFTER RECEIVING THE ORDER, IF PRACTICABLE;

34 (4) FAILURE OF THE INTERACTIVE COMPUTER SERVICE PROVIDER TO
35 COMPLY WITH THE COURT'S ORDER IS A VIOLATION OF THIS SECTION;

1 (5) THE REMOVAL OF THE ITEM ON THE SERVER OR OTHER STORAGE
2 DEVICE CONTROLLED OR OWNED BY THE INTERACTIVE COMPUTER SERVICE
3 PROVIDER MAY NOT UNREASONABLY INTERFERE WITH A REQUEST BY A LAW
4 ENFORCEMENT AGENCY TO PRESERVE RECORDS OR OTHER EVIDENCE;

5 (6) THE PROCESS OF REMOVAL SHALL BE CONDUCTED IN A MANNER
6 THAT PREVENTS THE REMOVAL OF IMAGES, INFORMATION, OR DATA NOT
7 OTHERWISE SUBJECT TO REMOVAL UNDER THIS SECTION; AND

8 (7) PROVIDES THE INTERACTIVE COMPUTER SERVICE PROVIDER
9 NOTICE AND OPPORTUNITY FOR A HEARING BEFORE THE COURT IMPOSES ANY
10 PENALTY UNDER THIS SECTION.

11 (E) (1) THE OFFICE OF THE STATE'S ATTORNEY SHALL SERVE THE COURT'S
12 ORDER ON THE INTERACTIVE COMPUTER SERVICE PROVIDER.

13 (2) THE ORDER SHALL BE ACCOMPANIED BY:

14 (I) THE APPLICATION MADE UNDER SUBSECTION (C) OF THIS
15 SECTION;

16 (II) NOTIFICATION REQUIRING THE INTERACTIVE COMPUTER
17 SERVICE PROVIDER TO REMOVE THE ITEM RESIDING ON A SERVER OR OTHER
18 STORAGE DEVICE CONTROLLED OR OWNED BY THE INTERACTIVE COMPUTER
19 SERVICE PROVIDER, IF PRACTICABLE, WITHIN 5 BUSINESS DAYS AFTER RECEIVING
20 THE ORDER;

21 (III) NOTIFICATION OF THE CRIMINAL PENALTIES FOR FAILURE TO
22 REMOVE THE ITEM OF CHILD PORNOGRAPHY;

23 (IV) NOTIFICATION OF THE RIGHT TO APPEAL THE COURT'S ORDER;
24 AND

25 (V) CONTACT INFORMATION FOR THE OFFICE OF THE STATE'S
26 ATTORNEY.

27 (F) AN INTERACTIVE COMPUTER SERVICE PROVIDER WHO IS SERVED WITH A
28 COURT ORDER UNDER SUBSECTION (E) OF THIS SECTION SHALL REMOVE THE ITEM
29 OF CHILD PORNOGRAPHY THAT IS THE SUBJECT OF THE ORDER WITHIN 5 BUSINESS
30 DAYS AFTER RECEIVING THE COURT ORDER, IF PRACTICABLE.

31 (G) (1) AN INTERACTIVE COMPUTER SERVICE PROVIDER MAY PETITION THE
32 COURT FOR RELIEF FOR CAUSE FROM AN ORDER ISSUED UNDER SUBSECTION (D) OF
33 THIS SECTION.

34 (2) THE PETITION MAY BE BASED ON CONSIDERATIONS OF:

35 (I) THE COST OR TECHNICAL FEASIBILITY OF COMPLIANCE WITH
36 THE ORDER; OR

1 (II) THE INABILITY OF THE INTERACTIVE COMPUTER SERVICE
2 PROVIDER TO COMPLY WITH THE ORDER WITHOUT ALSO REMOVING DATA, IMAGES,
3 OR INFORMATION THAT ARE NOT SUBJECT TO THIS SECTION.

4 (H) (1) (I) SUBJECT TO SUBPARAGRAPH (II) OF THIS PARAGRAPH, AN
5 INTERACTIVE COMPUTER SERVICE PROVIDER SHALL REPORT THE LOCATION OF AN
6 ITEM OF CHILD PORNOGRAPHY TO THE STATE POLICE IF THE ITEM OF CHILD
7 PORNOGRAPHY:

8 1. RESIDES ON A SERVER OR OTHER STORAGE DEVICE THAT
9 IS:

10 A. CONTROLLED OR OWNED BY THE INTERACTIVE
11 COMPUTER SERVICE PROVIDER; AND

12 B. LOCATED IN THE STATE; OR

13 2. BASED ON INFORMATION APPARENT TO THE PROVIDER
14 AT THE TIME OF THE REPORT OR DISCOVERY OF AN ITEM OF CHILD PORNOGRAPHY,
15 PERTAINS TO A SUBSCRIBER OR USER OF THE INTERACTIVE COMPUTER SERVICE
16 WHO RESIDES IN THE STATE.

17 (II) SUBPARAGRAPH (I) OF THIS PARAGRAPH DOES NOT APPLY TO
18 AN INTERACTIVE COMPUTER SERVICE PROVIDER IF:

19 1. FEDERAL LAW EXPRESSLY PROVIDES FOR OR PERMITS
20 THE REFERRAL OF A REPORT OF AN ITEM OF CHILD PORNOGRAPHY TO A STATE OR
21 LOCAL LAW ENFORCEMENT AGENCY; AND

22 2. THE INTERACTIVE COMPUTER SERVICE PROVIDER
23 COMPLIES WITH THE FEDERAL LAW.

24 (2) AN INTERACTIVE COMPUTER SERVICE PROVIDER WHO KNOWINGLY
25 AND WILLFULLY FAILS TO REPORT THE INFORMATION REQUIRED UNDER
26 PARAGRAPH (1) OF THIS SUBSECTION IS GUILTY OF A MISDEMEANOR AND ON
27 CONVICTION IS SUBJECT TO:

28 (I) FOR A FIRST VIOLATION, A FINE NOT EXCEEDING \$5,000;

29 (II) FOR A SECOND VIOLATION, A FINE NOT EXCEEDING \$20,000;
30 AND

31 (III) FOR EACH SUBSEQUENT VIOLATION, A FINE NOT EXCEEDING
32 \$30,000.

33 (I) AN INTERACTIVE COMPUTER SERVICE PROVIDER WHO WILLFULLY
34 VIOLATES SUBSECTION (F) OF THIS SECTION IS GUILTY OF A MISDEMEANOR AND ON
35 CONVICTION IS SUBJECT TO:

36 (1) FOR A FIRST VIOLATION, A FINE NOT EXCEEDING \$5,000;

1 (2) FOR A SECOND VIOLATION, A FINE NOT EXCEEDING \$20,000; AND

2 (3) FOR EACH SUBSEQUENT VIOLATION, A FINE NOT EXCEEDING
3 \$30,000.

4 (J) AN INTERACTIVE COMPUTER SERVICE PROVIDER WHO WILLFULLY
5 VIOLATES SUBSECTION (F) OR (H) OF THIS SECTION MAY BE PROSECUTED, INDICTED,
6 TRIED, AND CONVICTED IN ANY COUNTY IN OR THROUGH WHICH:

7 (1) THE INTERACTIVE COMPUTER SERVICE PROVIDER PROVIDES
8 ACCESS TO THE INTERNET;

9 (2) ANY COMMUNICATION FROM THE INTERACTIVE COMPUTER
10 SERVICE PROVIDER TRAVELED; OR

11 (3) THE COMMUNICATION FROM THE INTERACTIVE COMPUTER
12 SERVICE PROVIDER ORIGINATED OR TERMINATED.

13 (K) (1) THIS SECTION DOES NOT IMPOSE A DUTY ON AN INTERACTIVE
14 COMPUTER SERVICE PROVIDER ACTIVELY TO MONITOR ITS SERVICE OR
15 AFFIRMATIVELY TO SEEK EVIDENCE OF AN ITEM OF CHILD PORNOGRAPHY ON ITS
16 SERVICE.

17 (2) THIS SECTION DOES NOT APPLY TO THE INTERACTIVE COMPUTER
18 SERVICE PROVIDER'S TRANSMISSION OR ROUTING OF, OR INTERMEDIATE
19 TEMPORARY STORAGE OR CACHING OF, AN IMAGE, INFORMATION, OR DATA THAT
20 OTHERWISE IS SUBJECT TO THIS SECTION.

21 (L) AN INTERACTIVE COMPUTER SERVICE PROVIDER MAY NOT BE HELD
22 LIABLE FOR ANY ACTION TAKEN IN GOOD FAITH TO COMPLY WITH THIS SECTION.

23 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect
24 October 1, 2004.