

Department of Legislative Services
Maryland General Assembly
2004 Session

FISCAL AND POLICY NOTE
Revised

House Bill 1208
Judiciary

(Delegate Shank, *et al.*)

Judicial Proceedings

Crimes - Internet Child Pornography - Removal

This bill provides for the removal from the Internet of items of child pornography by an interactive computer service provider (ISP).

Fiscal Summary

State Effect: The State Police and District Court could handle the bill's requirements using existing budgeted resources. The criminal monetary penalty provisions of this bill are not expected to significantly affect State finances or operations.

Local Effect: Law enforcement agencies and State's Attorneys could handle the bill's requirements using existing budgeted resources. The criminal monetary penalty provisions of this bill are not expected to significantly affect local finances or operations.

Small Business Effect: Minimal.

Analysis

Bill Summary: This bill requires an investigative or law enforcement officer who receives information that an item of alleged child pornography resides on a server or other storage device controlled or owned by an interactive computer service ISP to contact the ISP and request the ISP's voluntary compliance in removing the item within five business days. If the ISP does not voluntarily remove the item, the officer is required to apply for a court order. The bill specifies the information to be included in the application for a court order. The ISP has a right to a hearing on the application.

The bill specifies the content of the court order and establishes a procedure for issuing and serving the order. A State's Attorney must serve the court order, in a specified manner. An ISP served with a court order is required to comply with removal of the item within five business days, if practicable.

An ISP is authorized to petition the court for relief for cause from the order on grounds relating to the cost or technical feasibility of removal or the inability of the ISP to comply without also removing data, images, or information not subject to these provisions. An ISP must report the location of an item of child pornography to the State Police, under certain circumstances including that the server or other storage device is located in Maryland.

An ISP who knowingly and willfully fails to report the required information, or who willfully does not remove the item in a timely fashion, is guilty of a misdemeanor and subject to a maximum fine of \$5,000 for a first offense, \$20,000 for a second violation, and \$30,000 for each subsequent violation. Such a violator may be prosecuted, indicted, tried, and convicted in any county in or through which the ISP provides Internet access, any communication from the ISP traveled, or the communication from the ISP originated or was terminated.

These provisions do not impose a duty on an ISP to actively monitor its service or to affirmatively seek evidence of child pornography on its service. These provisions do not apply to the ISP's transmission or routing of, or intermediate temporary storage or caching of, an image, information, or data that is otherwise subject to these provisions.

An ISP may not be held liable for any good faith action taken to comply with these provisions.

Current Law: No provision specifically requires an interactive computer service ISP to remove or disable access to an item of child pornography.

A person may not: (1) cause, induce, solicit, or knowingly allow a minor to engage as a subject in the production of obscene matter or a visual representation or performance that depicts a minor engaged as a subject in sadomasochistic abuse or sexual conduct; (2) photograph or film a minor engaging in an obscene act, sadomasochistic abuse, or sexual conduct; (3) use a computer to depict or describe a minor engaging in an obscene act, sadomasochistic abuse, or sexual conduct; (4) knowingly promote, distribute, or possess with intent to distribute a depiction of a minor engaged in sadomasochistic abuse or sexual conduct; or (5) use a computer to knowingly compile, enter, transmit, make, print, publish, reproduce, cause, allow, buy, sell, receive, exchange, or disseminate any notice, statement, advertisement, or minor's name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information for the purpose of

engaging in, facilitating, encouraging, offering, or soliciting unlawful sadomasochistic abuse or sexual conduct of or with a minor.

Violators are guilty of a felony and subject to maximum penalties of a fine of \$25,000 and/or imprisonment for 10 years for a first violation. Second and subsequent violators are subject to maximum penalties of a fine of \$50,000 and/or imprisonment for 20 years.

A person may not knowingly possess a film, videotape, photograph, or other visual representation depicting an individual under age 16: (1) engaged in sadomasochistic abuse or sexual conduct; or (2) in a state of sexual excitement. Violators are guilty of a misdemeanor and subject to maximum penalties of a fine of \$2,500 and/or imprisonment for one year for a first violation. Second and subsequent violators are subject to maximum penalties of a fine of \$5,000 and/or imprisonment for two years.

An investigative or law enforcement officer acting in a criminal investigation, or a person acting under the officer's direction, may intercept a wire, oral, or electronic communication in order to prove evidence of child pornography. The Attorney General, the State Prosecutor, or a State's Attorney may apply to a judge and the judge may grant an order authorizing the interception of wire, oral, or electronic communications by investigative or law enforcement officers when the interception may provide or has provided evidence of a child pornography offense.

Background: Pennsylvania and Oklahoma have adopted similar provisions. Similar bills were offered in Georgia and Missouri in 2003 – both failed.

The Pennsylvania law, enacted in 2002, has been challenged as unconstitutional in a suit filed by the Center for Democracy and Technology (CDT), the ACLU of Pennsylvania and a Pennsylvania ISP. It requires ISPs to remove or disable access to child pornography when notified by the Commonwealth Attorney General that such materials have been identified on their networks.

The challenge, filed in the U.S. District Court of the Eastern District of Pennsylvania, argues that the statute violates constitutional principles of free speech and due process and the U.S. Commerce Clause. The challengers argue that requiring ISPs to block such sites may result in blocking web sites completely unrelated to child pornography sites, because many Internet web sites share their Internet protocol addresses with many other unrelated web sites.

A temporary restraining order has been issued preventing the Pennsylvania Attorney General from imposing additional blocking orders on ISPs until final disposition of the case.

In a denial to an administrative appeal requesting disclosure of the Internet web sites blocked, the Pennsylvania Attorney General noted that the law was enacted specifically to address the difficulty of identifying and prosecuting a child pornography web site and its operators, since the web site can be located anywhere in the world and can change computers and locations anytime.

CDT's web site indicates that since enactment of the Pennsylvania law, the Attorney General issued over 300 orders requesting ISPs to block sites.

The Oklahoma law, enacted in 2003, allows the state Attorney General or other law enforcement official to have an ISP remove child pornography when it is brought to the attention of law enforcement that child pornography is located on a server or is stored on a device controlled by the ISP. If the ISP fails to remove the child pornography in a timely manner, the Attorney General or other law enforcement official must apply for a court order forcing the removal of the pornography. Failure of the ISP to comply with the court order is a misdemeanor punishable by a fine of \$1,000. A second offense is a misdemeanor punishable by a fine of \$5,000. A third or subsequent offense is a felony, punishable by a fine of \$30,000 and up to five years imprisonment.

Additional Information

Prior Introductions: In 2003, a similar bill, HB 661, passed the House, received a hearing before the Senate Judicial Proceedings Committee, and had no further action taken on it.

Cross File: SB 720 (Senator Forehand) – Judicial Proceedings.

Information Source(s): Department of Public Safety and Correctional Services (Division of Correction), National Conference of State Legislatures, Department of Legislative Services

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