

State Legislation: Suggested Act 1

Act 1: Designation of Community Conscious Service Providers.

- a. **Legislative Findings.** The legislature of STATE¹ finds that:
- i. [Proponents may include here any or all of the “Whereas” clauses from the Suggested State Resolution or other findings of fact applicable to a particular state.]
 - ii. Many individuals and businesses residing in STATE are deeply concerned about the lack of effective regulation of Pornography on the Internet and its easy accessibility to children and to employees during work hours or using employer equipment;
 - iii. Many individuals and businesses residing in STATE are consumers of Internet access services;
 - iv. Many individuals and businesses residing in STATE want to be informed consumers of Internet access services but cannot effectively determine the policies of an Internet Service Provider (ISP) with respect to Pornography without investing substantial time and effort on an individual and ad hoc basis; and
 - v. ISPs who are domiciled in STATE or who conduct business in State (either, a STATE Provider) and have policies that adhere to higher standards regarding Pornography deserve recognition for their efforts.
- b. **STATE Community Conscious Internet Provider Designation.** A STATE Provider may voluntarily apply, as provided in section (d), to be a recipient of the STATE Community Conscious Internet Provider Seal (the “Seal”). If awarded the Seal, as provided in section (e), the STATE Provider may include in its advertising materials, whether written, digital or verbal, the phrase “STATE Community Conscious Internet Provider”² and an image designated by STATE to represent the Seal.
- c. **Qualifications.** To be awarded a Seal:
- i. **Policy Requirements.** The STATE Provider must agree to:
 1. Prohibit, by contract, its Customers from Publishing any Communication that is Obscene or Harmful to Minors (together, Prohibited Communication);
 2. Take Down any Prohibited Communication using its service within a reasonable time following the STATE Provider’s receipt of notice of the existence of such Communication;³
 3. Comply with a court order to Take Down any Prohibited Communication;
 4. Keep a record, for two years following any Allocation of an IP Address under its control, excluding Private and Non-Routable IP Address(es), sufficient to reasonably identify:

- (A) Each IP Address Allocated by or to the STATE Provider;
 - (B) The date and time when such IP Address was Allocated; and
 - (C) The Internet User who obtained such IP Address;
5. Cooperate with law enforcement in providing records sufficient to identify a Customer, upon official request and reasonable proof of the commission of a crime involving such Customer's use of the STATE Provider's Services;
 6. Reasonably respond to the State Attorney General, the STATE [agency, office or commission] or any Customer domiciled in STATE who makes a complaint to the STATE Provider regarding the existence of a Prohibited Communication on any Internet Location using the State Provider's Service.
 7. Provide upon request by the STATE [agency, office or commission], with reasonable promptness, sufficient information to verify its compliance with the terms of this Act.
- ii. **Notice.** The STATE Provider must include in its User Agreement with its Customers a conspicuous statement that:
1. Publishing a Communication that is Obscene or Harmful to Minors as defined in this Act is prohibited.
 2. The STATE Provider will take down any Prohibited Communication after it receives notice of the existence of such Communication.
 3. The STATE Provider will comply with a court order to take down any Prohibited Communication.
 4. The STATE Provider will keep a record, for two years following any Allocation of an IP Address under its control, excluding Private and Non-Routable IP Address(es), sufficient to reasonably identify:
 - (A) Each IP Address Allocated by or to the STATE Provider;
 - (B) The date and time when such IP Address was Allocated; and
 - (C) The Internet User who obtained such IP Address.
 5. The STATE Provider will cooperate with law enforcement in providing records sufficient to identify a Customer, upon official request and reasonable proof of the commission of a crime involving such Customer's use of the STATE Provider's Services.

6. The STATE Provider will reasonably respond to the State Attorney General, the STATE [agency, office or commission] or any Customer domiciled in the state who makes a complaint to the STATE Provider regarding the existence of a Prohibited Communication on any Internet Location using the State Provider's Service.

d. **Application for the Seal.**

- i. **Completed Application Form.** To apply for the Seal, the owner or an officer of a STATE Provider must sign and complete the application form provided by the STATE [agency, office or commission]. An application for the Seal may be filed during normal business hours with the STATE [agency, office or commission].
- ii. **Signed Statement.** Such application must be accompanied by a statement signed, under penalty of perjury, by the owner or an officer of a STATE Provider stating that the STATE Provider:
 1. Agrees to conform fully to the requirements set forth in Section (c) of this Act within one month following the date on which the application is filed; and
 2. Agrees to stay in conformity with the requirements set forth in Section (c) for at least one year following the date on which the application is filed, unless the application is denied.
 3. **Renewal.** A STATE Provider may apply using a form provided by the STATE [agency, office or commission] for a renewal of the award of the Seal for additional one-year periods.
- e. **Approval.** The STATE [agency, office or commission] shall approve applications that conform to the standards of this Act. The STATE [agency, office or commission] shall promptly inform an applicant whether its application has been approved or denied.
- f. **Penalty.** A STATE Provider who has not been awarded the Seal or who at any time does not meet the requirements set forth in subsection (c) and nonetheless uses the phrase "STATE Community Conscious Internet Provider," or any part of that phrase or any misleadingly similar phrase, or an image of the Seal or any misleadingly similar image will be subject to a fine in the following amount: _____.⁴
- g. **Notice.** The STATE [agency, office or commission] will make available at its offices and on its website the requirements for being awarded the Seal and a list of those STATE Providers who have been awarded the Seal and the date of their award or renewal.
- h. **Definitions.**⁵
 - i. **Allocat(e)(es)(ed)(ion).** The term "Allocat(e)(es)(ed)(ion)" means distribute, delegate, lease, sublease, grant a license, give or any other means by which a Service Provider allows another person to use an IP Address.

- ii. **Caches.** The term “Caches” means utilizing the process whereby an Internet Communication is duplicated or mirrored at an Internet Location other than the location of its origination.
- iii. **Communication(s).** The term “Communication(s)” includes all Internet Protocol (IP) and Transmission Control Protocol (TCP) Packet transmissions and includes all data types and materials transmitted via the Internet. Such data types and materials include text, images, graphics, simulations, animations, video and audio. A response from an IP Address to any single request for an Internet Communication is considered a separate Communication for purposes of this Act.
- iv. **Customer(s).** The term “Customer(s)” means any person or entity that subscribes to or purchases from a STATE Provider any Internet Service.
- v. **Equipment Owner(s).** The term “Equipment Owner(s)” means any person who provides equipment for use in Hosting or Publishing content over the Internet.
- vi. **Harmful To Minors.⁶** The term “Harmful to Minors” means any Communication that:
 - 1. the average adult, applying a contemporary community standard, would find, taking the Communication as a whole, is designed to appeal to, or is designed to pander to, prurient interest, or describes or depicts Sexually Explicit Conduct;
 - 2. depicts, describes, or represents, in a manner patently offensive with respect to Minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
 - 3. taken as a whole, lacks serious literary, artistic, political, or scientific value for Minors.
- vii. **Hoster.** The term “Hoster” means any person who provides an Internet Location to one or more Customers.
- viii. **Internet.** The term “Internet” means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide networks that employ the Transmission Control Protocol/Internet Protocol (TCP/IP) or a successor protocol to transmit information.
- ix. **Internet Location(s).** The term “Internet Location(s)” means any site, destination, or other environment that can be accessed by means of the Internet.
- x. **Internet Protocol.** The term “Internet Protocol” means a data-oriented protocol used for communicating data across a packet-switched network.

- xv. **Internet Service(s)**: The term “Internet Service(s)” means any functionality provided to a Customer for the purpose of accessing Internet Communications or Publishing Communications to the Internet.
- xii. **Internet Service Provider(s)**. The term “Internet Service Provider(s)” means any person who is providing Internet access; an Equipment Owner; a Host; or who Allocates an IP Address.
- xiii. **Internet User**. The term “Internet User” means any person who receives or transmits any Communication over the Internet.
- xiv. **IP Address**. The term “IP Address” means a number that uniquely identifies a device that is connected to a computer network that is Internet Protocol based.
- xv. **Link(s)**. The term “Link(s)” means functionality integrated into an Internet Location whereby an Internet User can easily move to another Internet Location.
- xvi. **Obscene**.⁷ The term “Obscene” means any Communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that:
1. the average person, applying contemporary community standards,
 2. would find, taking the material as a whole is designed to appeal to, or is designed to pander to, the prurient interest;
 3. depicts, describes, or represents, in a manner patently offensive, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
 4. taken as a whole, lacks serious literary, artistic, political, or scientific value.
- xvii. **Minor**.⁸ The term “Minor” means any person who is under seventeen (17) years of age and above fourteen (14) years of age.
- xviii. **Private and Non-Routable IP Address(es)**. The term “Private and Non-Routable IP Address(es)” means the IP Address ranges defined by Y. Rekhter et al., Best Current Practice: Address Allocation for Private Internets, RFC 1918 (1996), available at <http://www.ietf.org/rfc/rfc1918.txt?number=1918>, or any subsequent convention.
- xix. **Pornography**. The term “Pornography” means any Communication that is Obscene or Harmful to Minors.
- xx. **Post(s)**. The term “Post(s)” means uses a process whereby a Communication enters the Internet.

- xxi. **Prohibited Communication(s).** The term “Prohibited Communication(s)” means any Communication that is either Obscene or Harmful to Minors.
- xxii. **Proxy.** The term “Proxy” means a process whereby an Internet Communication is processed by an intermediary as a means of masking the identity of any Internet User or permitting access to an Open Port from any device set to receive only Community Ports.
- xxiii. **Publishing.** The term “Publishing” means to broadcast, Post, Link, Cache, or uses an IP Address to make or Proxy a Communication.
- xxiv. **Sexually Explicit Conduct.** The term “Sexually Explicit Conduct” has the meaning given that term in Title 42, Section 13031(c)(5) of the United States Code.⁹
- xxv. **Take Down.** The term “Take Down” means to remove, disable, block or otherwise restrict access to a Communication by Internet users.
- xxvi. **Transmission Control Protocol.** The term “Transmission Control Protocol” means the protocol used as part of the Internet Protocol suite to facilitate the transmission of data packets from sender to receiver in a reliable and ordered delivery method.
- xxvii. **User Agreement.** The term “User Agreement” means any contract, including but not limited to as a licensing, service or billing contract, between an Internet Service Provider and its Customers.

Discussion of Act 1:

Purpose. This program provides a market boost to those STATE Providers who are committed to reducing Internet pornography by giving such Providers a “seal of approval.” STATE residents, once aware of the importance of the issues and the meaning of the Community Conscious designation, may then vote with their dollars to support those STATE Providers who are willing to assist in keeping pornography off the Internet. This marketing opportunity should provide incentives for STATE Providers to voluntarily comply with the statutory standards regarding the use of their services.

Precedent. The notion that the state has an interest in providing product information for consumers is consistent with the extensive systems of licensing, such as Utah’s licensing and registration requirements for asphalt paving contractors and pesticide applicators, and with state labeling and product safety regulations. But rather than take a prohibitive approach, many states have instead taken affirmative steps to encourage certain kinds of business practices based on the values of the state by offering tax incentives and endorsements. For instance, a state may provide endorsements for business that recycle or are otherwise environmentally friendly.

A very comparable program to the Community Conscious Provider concept is the “Utah’s Own” designation. A statement of the reasons to designate certain business and producers as qualifying to be “Utah’s Own” is found at http://utahsown.utah.gov/comp_home.php, reproduced below. The designation includes the right to use the phrase and a visual symbol, and the qualifying companies are listed on the website.

WELCOME TO UTAH'S OWN - KEEPING IT HERE AT HOME

The Utah's Own program was established to create a consumer culture of choosing Utah products at grocery stores, restaurants; everywhere consumers shop. When Utah consumers purchase locally produced products it builds our Utah economy. A dollar spent on a Utah product creates the effect of adding \$1.50 to \$2.50 to our Utah economy. In addition, when Utah consumers purchase locally grown products it enhances our Utah environment.

Our land is our heritage. We raise on the land that which supports our farmers and ranchers, our children and families, our jobs, our way of life, us.

When you buy Utah products, you choose to embrace our land, our schools, and our families. So next time you're shopping, look for the Utah's Own label. These products are the life blood of Utah.

REMEMBER - BUYING LOCAL MEANS BUYING PRODUCTS PRODUCED IN UTAH.

YOU BENEFIT BECAUSE:

1. You contribute to a healthier local economy - you become a part of the solution to our economic challenges
2. Your money stays at home when you spend it on Utah's Own food products at the supermarket, in restaurants and institutions. This money "sticks," multiplying its value to our local economy and helps to reduce hidden taxes.
3. You employ friends and neighbors
4. You enhance our tax base You get the best possible flavor, texture and quality on fresh products produced locally
5. You bolster the health of our rural economies You help maintain a safer food supply while helping to make nutritious food available to all Utahns in need
6. You preserve open spaces
7. You enhance water quality
8. You promote cleaner air
9. You preserve your farm heritage, including heirloom products raised for generations
10. You provide better access to healthy foods, including organic foods You sustain our Utah rural lifestyle while enhancing food security for your family

Constitutionality. Compliance with these provisions is entirely voluntary; there is no penalty for choosing not to be involved in the program. There should be no constitutional issues. In the remote possibility that someone challenges Act 1 on free speech grounds, this statute would be subject only to "intermediate scrutiny" under the First Amendment. Advertising has been identified by the Supreme Court as "Commercial Speech" for constitutional purposes. Since states' interests in protecting both morals and minors are compelling, and this statute is reasonably related to meeting those objectives, this Act will survive under intermediate scrutiny.

Preemption. Because this provision is 1) similar to other valid state designations, 2) is entirely voluntary, and 3) does not address any issue currently covered by a federal statute, it does not create preemption problems. See, e.g., *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 53 Env't. Rep. Cas. (BNA) 1385, 32 Env'tl. L. Rep. 20272 (2d Cir. 2001), cert. denied, 536 U.S. 905, 122 S. Ct. 2358, 153 L. Ed. 2d 180, 55 Env't. Rep. Cas. (BNA) 1160 (2002) (upholding state product labeling requirements against Commerce Clause and Free Speech objections).

Footnotes:

1. Insert appropriate state name.
2. Or a similar term or designation.
3. Compliance with the requirement does not oblige the STATE Provider constantly to search its Internet Locations for Prohibited Communications; instead, the provider need only remove a Prohibited Communication once it receives notice of the existence of such a communication.

4. Each state may decide on appropriate fines or penalties.
5. As with the ICPA, this suggested statute includes extensive definitions, especially of technical terms, to assure the statute not be found vague. A state may decide that all or some of such definitions are unnecessary.
6. This is the COPA definition with the exception of the phrase “or describes or depicts Sexually Explicit Conduct.” COPA derived this definition from the test for obscenity announced by the Supreme Court in *Miller v. California*.
7. This is the traditional *Miller v. California* definition used by the Supreme Court.
8. The designation of a person under age seventeen is taken from Supreme Court language in *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)
9. The actual text of the federal statute referenced is as follows:

(5) the term "sexually explicit conduct" means actual or simulated--
(A) sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or of opposite sex; sexual contact means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person;
(B) bestiality;
(C) masturbation;
(D) lascivious exhibition of the genitals or pubic area of a person or animal; or
(E) sadistic or masochistic abuse