

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1250

SPONSOR: Comprehensive Planning Committee and Senator Wise

SUBJECT: Obscenity

DATE: April 14, 2003

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>White</u>	<u>Wilson</u>	<u>GO</u>	<u>Favorable</u>
2.	<u>Herrin</u>	<u>Yeatman</u>	<u>CP</u>	<u>Fav/CS</u>
3.	_____	_____	<u>CJ</u>	_____
4.	_____	_____	<u>CU</u>	_____
5.	_____	_____	<u>RC</u>	_____
6.	_____	_____	_____	_____

I. Summary:

The committee substitute (CS) requires county and municipal libraries, which make computer on-line, Internet, or local bulletin-board service available for public use, to install and maintain software or equivalent technology on any computer available to persons under 18 years of age. The software or technology must prohibit access to obscene material. If only one computer is made available for public use, the CS provides that it is within the discretion of the library to determine whether to install the software or technology.

The CS provides a legislative finding that prohibiting minors from accessing computer obscenity fulfills an important state interest. Also, the CS amends eligibility requirements for single library administrative units receiving operating grants.

This CS creates a new section of the Florida Statutes and amends section 257.17, Florida Statutes.

II. Present Situation:

State regulation of Internet access in public libraries: Currently, Florida law does not require libraries to install and maintain software or equivalent technology that prohibits access to obscene material on library computers. Such technology is commonly called “blocking” or “filtering” software. Blocking or filtering software works in different ways. Some software programs block all Internet sites unless the administrator specifically permits access to that site. Other software programs maintain a continually updated list of sites and blocks those sites, or categories of sites, selected by the subscriber. Other filtering software works by filtering certain words and/or graphic depictions. Additionally, the software may be terminal-based, i.e., it is

installed on each individual computer's hard drive, or it may be server-based, i.e., it is installed on the server and used by each computer on the server network.

According to the Department of State (DOS), as of March 2003, each of the library systems with countywide responsibilities in Florida's 67 counties has public access Internet Use Policies. These policies vary from county to county, but can be categorized as follows:

- 56 counties prohibit the display of obscene images;
- 5 counties prohibit the display of images offensive to others;
- 2 counties prohibit minors from accessing obscene images; and
- 4 counties do not prohibit the display of obscene images.

Twenty-eight counties filter access to obscene images on all computers and 6 counties filter computers used by children. Thirty-three counties do not filter Internet access.

Federal regulation of Internet access in public libraries: The Children's Internet Protection Act (CIPA) and Neighborhood Internet Protection Act were passed by Congress as part of H.R. 4577 on December 15, 2000. The CS was signed into law (Public Law 106-554) on December 21, 2000, and became effective April 20, 2001.

Under the new law, K-12 schools and libraries that receive E-rate discounts for Internet access¹ must block or filter all access to visual depictions (not text) that are obscene, child pornography, or in the case of minors, harmful to minors.² The blocking or filtering software may be disabled for adults for "bona fide research or other lawful purpose."³

The libraries must also adopt an Internet Safety Policy that addresses the following issues:

- Access by minors to inappropriate matter on the Internet;
- Safety and security of minors when using e-mail, chat rooms, and other forms of direct electronic communication;
- Unauthorized access, including hacking and other unlawful online activities by minors; and
- Measures designed to restrict minors' access to harmful materials.

The determination of what matter is inappropriate for minors is to be made by the school board, local educational agency, library, or other authority responsible for making the determination.⁴

Materials which are deemed harmful to minors are defined as:

- Any picture, image, graphic image file, or other visual depiction that:

¹ Libraries that receive E-rate funds only for non-Internet-related "telecommunications services" need not comply with the act.

² The CIPA contains statutory references to the definitions of the terms "obscene" and "child pornography," and provides a definition for the phrase "harmful to minors." 47 U.S.C. s. 1703(3).

³ The act does not define this phrase.

⁴ 47 U.S.C. s. 254(1)(2).

- Taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;
- Depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and
- Taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.⁵

The CIPA also applies to libraries that do not receive E-rate funds, but do receive funds pursuant to the Elementary and Secondary Education Act of 1965 and the Museum and Library Services Act. The requirements for these libraries are substantially similar to those for libraries receiving E-rate funds.

Representatives of the DOS estimated in 2002 that 80 percent of Florida libraries benefit directly or indirectly from E-rate funding. Further, DOS representatives estimated that 90 percent of libraries that benefit from E-rate are subject to the requirements of the CIPA.

In May 2002, the United States (U.S.) District Court for the Eastern District of Pennsylvania considered a constitutional challenge to CIPA brought by the American Library Association and other plaintiffs.⁶ Specifically challenged in the suit were the provisions of the CIPA, discussed above, which require filtering technology.⁷ The plaintiffs argued that these provisions placed content-based restrictions on library patrons' access to constitutionally protected speech, and as such were subject to strict scrutiny analysis, which requires that the restrictions be narrowly tailored to serve a compelling government interest and that no less restrictive alternatives be available to further that interest.⁸

The court, agreeing with the plaintiffs, held that the CIPA's filtering requirements were subject to strict scrutiny. Although the court found that preventing minors from accessing obscene material is a compelling governmental interest, it also found that the CIPA's mandated use of filtering software was not narrowly tailored to achieve that interest, "[b]ecause the filtering software mandated by the CIPA will block access to substantial amounts of constitutionally protected speech whose suppression serves no legitimate government interest"⁹ Further, the court ruled that mandated filtering was not the least restrictive alternative available, given that the following options exist:

- Libraries may enforce Internet use policies that prohibit patrons from accessing illegal speech, e.g., obscenity and child pornography. Penalties for violations of such policies could range from a warning to notification of law enforcement when appropriate.
- Libraries may require parental consent or presence for minors accessing the Internet.

⁵ 20 U.S.C. s. 3601; 20 U.S.C. 9134; 147 U.S.C. s. 254.

⁶ *American Library Association v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002).

⁷ *American Library Association*, 201 F. Supp. 2d at 407.

⁸ *Id.*

⁹ *Id.* at 410.

- Libraries may provide optional filtering, privacy screens, recessed monitors, and placement of unfiltered terminals outside of sight-lines to prevent patrons from unwillingly being exposed to sexually explicit Internet content.¹⁰

Finally, the court noted that the fact that the CIPA permits disabling of the filtering software if a permissible site is improperly blocked was insufficient to save the statute from its fatal constitutional problems because: (a) requiring a library patron to request the unblocking of a site may cause the patron embarrassment or to forgo his or her anonymity; and (b) disabling of the software may take days or in some cases be unavailable due to library understaffing.¹¹

The U.S. Supreme Court accepted jurisdiction and the *American Library Association* case is on review.¹² The court recently heard oral argument in this appeal on March 5, 2003, and this case remains pending as of the date of this analysis.

Currently, as a result of the *American Library Association* case, the provisions of the CIPA requiring public and private libraries to install filtering devices have been suspended. The CIPA's filtering requirements for schools and school libraries, however, remain effective as these provisions were not challenged in the case. Likewise, the provisions of the CIPA requiring libraries to adopt Internet Safety Policies remain effective.

State Aid to Libraries Program: The Department of State, Division of Library and Information Services (division), administers the State Aid to Libraries program, which provides operating grants to public libraries. (ss. 257.14 – 25, F.S.) Such grants may be no more than 25 percent of local funds expended to operate and maintain a public library. The Legislature annually appropriates funds for grants, which are prorated among eligible recipients. The division notes that with the exception of the first year of grants in 1962/63, annual appropriations have not been sufficient to meet the 25 percent match authorized in law.

All 67 counties now meet the statutory requirements to receive grants under the State Aid to Libraries program.

Section 257.17, F.S., provides that a political subdivision that has been designated by a county as the single library administrative unit is eligible to receive from the state an annual operating grant of not more than 25 percent of all local funds expended by that political subdivision during the second preceding fiscal year for the operation and maintenance of a library, provided they meet certain conditions.

First, the political subdivisions must be:

- A county that establishes or maintains a library or that gives or receives free library service by contract with a municipality or nonprofit library corporation or association within such county;

¹⁰ *Id.* at 410-411.

¹¹ *Id.* at 411.

¹² *U.S. v. American Library Ass'n*, 123 S. Ct. 551 (Mem) (Nov. 12, 2002).

- A county that joins with one or more counties to establish or maintain a library or contracts with another county, a special district, a special tax district, or one or more municipalities in another county to receive free library service;
- A special district or special tax district that establishes or maintains a library and provides free library service; or
- A municipality with a population of 200,000 or more that establishes or maintains a library and gives free library service.

Second, the library established or maintained by the political subdivision must:

- Be operated under a single administrative head and expend its funds centrally;
- Have an operating budget of at least \$20,000 per year from local sources; and
- Give free library service to all residents of the county or residents of the special district or special tax district.

III. Effect of Proposed Changes:

Section 1 requires a public library, which makes computer on-line service, Internet service, or local bulletin-board service available for public use, to install and maintain software or equivalent technology on any computer made available to persons under 18 years of age. The software or other technology must prohibit access to obscene material. If only one computer is made available for public use, it is within the discretion of the library to determine whether to install the software or technology.

Section 2 provides a legislative finding that prohibiting persons under 18 years of age from accessing computer obscenity fulfills an important state interest.

Section 3 amends s. 257.17(2), F.S., to change the eligibility requirements for a municipality designated as the single library administrative unit to receive an annual operating grant. Under this CS, a library maintained by a municipality receiving such a grant is required be operated under a single administrative head who is employed by, or designated by, the administrative unit and must have completed a library education program accredited by the American Library Association. Further, the CS requires the single administrative head to have at least 2 years of full-time paid professional experience, after completing the library education program, in a public library that is open to the public for a minimum of 40 hours per week. This CS eliminates the requirement that a library have an annual operating budget of at least \$20,000 from local sources.

Section 4 provides the CS takes effect October 1, 2003.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The CS requires county and municipal libraries to purchase software or equivalent technology that prohibits access to obscene material on the Internet. The CS does not fund this requirement.

Pursuant to Art. VII, s. 18 of the Florida Constitution, the provision concerning local mandates, the Legislature may not pass a law requiring a county or municipality to spend funds unless an appropriation of sufficient funding is provided. The CS, however, is anticipated to have an insignificant fiscal impact, i.e., less than \$1.6 million, based on the DOS's estimate that this CS's fiscal impact is \$250,000.¹³ Thus, the CS appears to be exempt from the constitutional mandate funding requirements.

Further, in the unlikely event that the fiscal impact of this CS would exceed \$1.6 million, the CS may be excepted from the constitutional mandate funding requirements, given its legislative finding that it fulfills an important state interest, if it is passed by two-thirds of the membership in both houses of the Legislature.¹⁴

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

As discussed in the "Present Situation" section of this analysis, the Court for the Eastern District of Pennsylvania in *American Library Association*¹⁵ recently held that the mandatory filtering requirements of the CIPA for public libraries violated the First Amendment of the U.S. Constitution because current filtering technology blocks not only illegal material, i.e., child pornography and obscenity, but also blocks constitutionally protected speech. Additionally, the court found that mandatory filtering is not the least restrictive alternative available to achieve the compelling interest of preventing minors from accessing obscene material.

In a nearly identical case, the Court for the Eastern District of Virginia in *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*,¹⁶ held in 1998 that the mandatory filtering requirements of a Virginia county library policy were unconstitutional for reasons similar to those provided in *American Library Association*.¹⁷

Both Courts in *American Library Association* and *Loudon* suggested alternative measures less restrictive than mandatory filtering that would assist in achieving the government's

¹³ Article VII, s. 18(d) of the Florida Constitution, provides that laws having an "insignificant fiscal impact" are exempt from the constitutional mandate funding requirements. The term "insignificant fiscal impact" means the aggregate total of the impact is less than the average state population for a fiscal year times ten cents. In April 2001, the state population was 16,331,739; thus, fiscal impacts less than \$1.6 million are deemed insignificant. See "2002 Intergovernmental Impact Report," Florida Legislative Committee on Intergovernmental Relations, February 2003.

¹⁴ See Article VII, s. 18(a) of the Florida Constitution.

¹⁵ 201 F. Supp. 2d 401 (E.D. Pa. 2002).

¹⁶ 24 F. Supp. 2d 552 (E.D. Va. 1998).

¹⁷ *Id.* at 565-570.

compelling interests of protecting children. These measures included: (1) establishing library Internet use policies that prohibit patrons from accessing illegal speech; (2) patron Internet education; (3) requiring parental consent or presence for minors accessing the Internet; (4) providing optional filtering; (5) relocating terminals; and (6) using privacy screens.^{18 19}

Although neither of the above cited federal cases are binding precedent in Florida, arguments like those made in these cases might be made to challenge this CS; i.e., it might be argued that the CS is a content-based restriction on speech and that it violates the free speech provisions of the First Amendment of the U.S. Constitution and Art. I, s. 4 of the Florida Constitution.

Unlike the laws challenged in *American Library Association* and *Loudoun*, the statute created by the CS differs in that it only requires filtering of computers utilized by minors and only requires the blocking of obscene material. Obscene material is not protected by the First Amendment; thus, the blocking of obscene material is permissible.^{20 21} However, a successful constitutional challenge might be made to the extent that the CS's mandatory filtering requirement results in overblocking constitutionally protected speech.²² As discussed extensively in *American Library Association*, it does not appear that technology currently exists that blocks only obscene material.²³

The *American Library Association* case is currently pending on appeal before the U.S. Supreme Court. Until the decision in that case is rendered, it is legally unclear as to precisely what, if any, types of public library Internet filtering are constitutionally permissible.

¹⁸ *Loudoun*, 24 F.Supp. 2d at 566; *American Library Association*, 201 F. Supp. 2d at 410-411.

¹⁹ Both courts noted, however, that they were not determining whether these less restrictive measures were constitutional. *Loudoun*, 24 F.Supp.2d at 567; *American Library Association*, 201 F. Supp. 2d at 482. Instead, the courts were merely finding that these measures were less restrictive than mandatory filtering. *Loudoun*, 24 F.Supp.2d at 567; *American Library Association*, 201 F. Supp. 2d at 482. Consequently, it cannot be unequivocally stated that these measures could not be successfully challenged on First Amendment grounds.

²⁰ See *Reno v. ACLU*, 521 U.S. 844 (1997).

²¹ In *Miller v. California*, 413 U.S. 15, 24 (1973), the U.S. Supreme Court provided the following test for determining "obscenity": (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest ...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

²² The U.S. Supreme Court has consistently held that government cannot justify restrictions on constitutionally protected speech as necessary to suppress constitutionally unprotected speech. *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002). See also *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

²³ *American Library Ass'n*, 201 F. Supp. 2d at 427-50. The Court in the *American Library Association* case noted that existing technology may block between 6 and 15 percent of web pages that do not contain any material meeting the filtering product's own definition of obscene material and child pornography.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The CS will limit the type of Internet content that may be accessed at county and municipal libraries by persons under 18 years of age.

C. Government Sector Impact:

The DOS has indicated that it is impossible to determine the precise fiscal impact of this CS because libraries may comply with the CS in a variety of ways, e.g., libraries may filter all computers, libraries may filter only computers used by minors, libraries may prohibit minors from using computers, and libraries with only one computer may choose to filter or not filter its computer. Additionally, there are a variety of filtering programs available. Some are provided free by a library's Internet Service Provider, while others are available for a range of prices.

The DOS estimates that 139 library administrative units would be affected by this CS and that 75 of these units currently filter all or some of the unit's computers. For the remaining 64 units that currently do not filter, the DOS estimates that it would cost these units approximately \$250,000 to comply with this CS by installing filtering technology. This projected cost is based on information indicating that it costs the units, which currently utilize the server based WebSense filter, approximately \$250,000 per year for the filter. The DOS states that the estimated \$250,000 fiscal impact is exclusive of costs for servers and personnel to install and maintain the filtering products.

The DOS has indicated that the 64 library units, which currently do not filter, have approximately 2,293 computers. Kidsnet, Inc. provides an Internet filtering product called LibraryNet that sells for \$12 per computer. If this product were purchased by the 64 library units, the cost would be a total of \$27,516.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The CS does not contain an enforcement provision. It does, however, appear to create a statutory duty for county and municipal libraries to install filtering technology. Thus, if the library fails to comply with this duty, it may be sued civilly for that failure.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
