

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: SB 1250

SPONSOR: Senator Wise

SUBJECT: Obscenity

DATE: March 4, 2003

REVISED: _____

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

I. Summary:

The bill 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 bill provides that it is within the discretion of the library to determine whether to install the software or technology.

The bill provides a legislative finding that prohibiting minors from accessing computer obscenity fulfills an important state interest.

This bill creates a new section of the Florida Statutes.

II. Present Situation:

State regulation of Internet access in public libraries: Currently, no Florida statute requires 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 and provide 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 bill 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. The blocking or filtering software may be disabled for adults for "bona fide research or other lawful purpose."²

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.³

Materials which are deemed harmful to minors are defined as:

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

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

² The act does not define this phrase.

³ 47 U.S.C. s. 254(1)(2).

- Taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.⁴

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.⁵ Specifically challenged in the suit were the provisions of the CIPA, discussed above, which require filtering technology.⁶ 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.⁷

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"⁸ 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.
- 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

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

⁵ *American Library Association v. United States*, 201 F. Supp. 2d 401 (E.D. Pennsylvania 2002).

⁶ *American Library Association*, 201 F.Supp. at 407.

⁷ *Id.*

⁸ *Id.* at 410.

⁹ The court extensively analyzed Internet filtering technology currently available, and concluded that it was impossible for current technology to determine whether a visual depiction fits the legal definitions of obscenity, child pornography, or harmful to minors. *Id.* at 427-450.

¹⁰ *Id.* at 410-411.

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. has obtained review of the Court's decision in the *American Library Association* case. The U.S. Supreme Court 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.

III. Effect of Proposed Changes:

The bill 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.

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

The bill takes effect October 1, 2003.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill requires county and municipal libraries to purchase software or equivalent technology that prohibits access to obscene material on the Internet. The bill 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 bill, however, is anticipated to have an insignificant fiscal impact, i.e., less than \$1.6 million, based on the DOS's estimate that this bill's fiscal impact is \$250,000.¹² Thus, the bill appears to be exempt from the constitutional mandate funding requirements.

¹¹ *Id.* at 411.

¹² 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

Further, in the unlikely event that the fiscal impact of this bill would exceed \$1.6 million, the bill 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.¹³

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*¹⁴ 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*,¹⁵ 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*.¹⁶

Both Courts in *American Library Association* and *Loudoun* suggested alternative measures less restrictive than mandatory filtering that would assist in achieving the government’s 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.^{17 18}

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.

¹³ See Article VII, s. 18(a) of the Florida Constitution.

¹⁴ 201 F. Supp. 2d 401 (E.D. Pennsylvania 2002).

¹⁵ 24 F. Supp. 2d 552 (E.D. Virginia 1998).

¹⁶ *Id.* at 565-570.

¹⁷ *Loudoun*, 24 F.Supp.2d at 566; *American Library Association*, 201 F. Supp. 2d at 410-411.

¹⁸ 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*

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 bill; i.e., it might be argued that the bill 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 bill 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.^{19 20} However, a successful constitutional challenge might be made to the extent that the bill's mandatory filtering requirement results in overblocking constitutionally protected speech. As discussed extensively in *American Library Association*, it does not appear that technology currently exists that blocks only obscene material.²¹

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.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill 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 bill because libraries may comply with the bill 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

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.

¹⁹ See *Reno v. ACLU*, 521 U.S. 844 (1997).

²⁰ 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.

²¹ *American Library Association*, 201 F. Supp. 2d at 427-450.

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 bill 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 bill 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.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill 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.