

# 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 1552

SPONSOR: Governmental Oversight and Productivity Committee and Senator Wise

SUBJECT: Internet Screening in Public Libraries

DATE: March 11, 2004

REVISED: \_\_\_\_\_

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

## I. Summary:

The Committee Substitute (CS) requires local public libraries to enforce an Internet safety policy that provides for the installation of a technology protection measure, e.g., Internet filtering software, on public computers that blocks access to visual depictions that are obscene or child pornography, and additionally, in the case of minors, that are harmful to minors. The bill also provides that the technology protection measure must be disabled upon an adult's request to use the computer for bona fide research or other lawful purpose.

Two enforcement mechanisms are provided by the bill. The first permits a civil enforcement action to be brought by the Attorney General or a citizen, and requires the court to assess fines and reasonable attorney's fees and costs against libraries found to have violated the bill's requirements. The second requires compliance with the bill's requirements as a condition of the receipt of state funding distributed pursuant to ch. 257, F.S.

The CS provides a legislative finding that use of such technology protection measures in public libraries fulfills an important state interest.

This CS creates a new section of the 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 six 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 access<sup>1</sup> 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.<sup>2</sup> The blocking or filtering software may be disabled for adults for "bona fide research or other lawful purpose."<sup>3</sup>

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.<sup>4</sup>

Materials which are deemed harmful to minors are defined as:

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

<sup>2</sup> 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).

<sup>3</sup> The act does not define this phrase.

<sup>4</sup> 47 U.S.C. s. 254(1)(2).

- 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
  - Taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.<sup>5</sup>

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 that in 2003, 80 percent of Florida libraries benefited directly or indirectly from E-rate funding, and that 90 percent of these libraries would have been subject to CIPA requirements.

**State Aid to Libraries Program:** The Division of Library and Information Services within the DOS administers the State Aid to Libraries program, which provides operating grants to public libraries.<sup>6</sup> 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.

According to the Division, the following libraries received state operating grant funds for FY 2003-2004: (a) libraries in all 67 counties; and (b) libraries in 11 municipalities. Libraries in 16 other municipalities were eligible for the grants, but did not apply.

### III. Effect of Proposed Changes:

**Section 1** requires a public library to enforce an Internet safety policy that provides for the installation of a technology protection measure on public computers that protects against access to visual depictions that are obscene or child pornography, and in the case of minors, that are harmful to minors. Additionally, the bill provides that the technology protection measure must be disabled upon an adult's request to use the computer for bona fide research or other lawful purpose.

The term "public library" is defined to mean libraries established by counties, municipalities, consolidated city-county governments, special districts, and special tax districts. The term "harmful to minors" is defined to mean any image that: (1) taken as a whole and with respect to

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<sup>5</sup> 20 U.S.C. s. 3601; 20 U.S.C. 9134; 147 U.S.C. s. 254.

<sup>6</sup> Sections 257.14 through 257.25, F.S.

minors, appeals to a prurient interest in nudity, sex, or excretion; (2) 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, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals; and (3) taken as a whole, lack serious literary, artistic, political, or scientific value as to minors. This definition is identical to the definition of “harmful to minors” contained in the CIPA.

The CS also defines the terms, “administrative unit,” “child pornography,” “minor,” “obscene,” “public computer,” and “technology protection measure.”

The CS provides in subsection (3) that the Attorney General or a citizen may seek enforcement of its provisions in the event a public library does not comply with the bill’s Internet Safety Policy requirements. The process provided for is as follows:

- The Attorney General or citizen must notify the administrative unit responsible for the public library implicated of the facts and circumstances constituting the alleged violation, and must provide the library with 15 days to comply or to make reasonable efforts toward compliance.
- If the library fails to comply or make reasonable efforts, the Attorney General or citizen may file a civil cause of action in circuit court to enforce the bill’s requirements.
- If the court finds that a public library has failed to comply, the court is required to impose a fine of \$100 per day per library location beginning from the date that non-compliance was first noticed, and in the event of a citizen suit, the court must award reasonable attorney’s fees and costs to be paid to the prevailing citizen by the administrative unit.

The Clerk of the Circuit Court is directed to collect fines that are assessed and is permitted to retain \$1 of each payment as a service charge. The clerk is directed to transfer these moneys on a monthly basis to the Department of Revenue for deposit in the Records Management Trust Fund within the Department of State.

The CS directs the Division of Library and Information Services within the DOS in subsection (4) to adopt rules that require the head of each administrative unit to annually attest in writing, under penalty of perjury, that all public library locations within the unit are in compliance with the bill’s Internet Safety Policy requirements as a condition of the receipt of state funds distributed under ch. 257, F.S.

The CS states in subsection (5) that no cause of action, other than that authorized in subsection (3), shall arise in favor of any person due to a public library’s failure to comply with the bill’s Internet Safety Policy requirements.

**Section 2** provides a legislative finding that use of technology protection measures in public libraries to protect against access to visual depictions that are obscene or child pornography and, in the case of minors, that are harmful to minors fulfills an important state interest.

**Section 3** provides that the bill takes effect on July 1, 2004.

#### IV. Constitutional Issues:

##### A. Municipality/County Mandates Restrictions:

The CS requires local public libraries to purchase technology protection measures that prohibit Internet access to visual depictions that are obscene, child pornography, and harmful to minors. 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 is anticipated to have an insignificant fiscal impact, i.e., less than \$1.73 million, based on the DOS's estimate that this bill's fiscal impact is \$220,000 for the first year and \$560,000 for future years.<sup>7</sup>

In the event that the fiscal impact of this bill would exceed \$1.73 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.<sup>8</sup>

##### B. Public Records/Open Meetings Issues:

None.

##### C. Trust Funds Restrictions:

None.

##### D. Other Constitutional Issues:

The CIPA was enacted by Congress in 2000. As discussed in the "Present Situation" section, *supra*, the Act requires public libraries that receive specified federal funding to install technology protection measures that block visual depictions that are obscene or constitute child pornography, and in the case of minors, that are harmful to minors.

In 2002, the American Library Association and the American Civil Liberties Union filed suit against the federal government, challenging the constitutionality of CIPA. The Court for the Eastern District of Pennsylvania held that the CIPA's mandatory filtering requirements 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.<sup>9</sup>

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<sup>7</sup> 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 \$1.73 million are deemed insignificant. *See* "2002 Intergovernmental Impact Report," Florida Legislative Committee on Intergovernmental Relations, February 2003.

<sup>8</sup> *See* Article VII, s. 18(a) of the Florida Constitution.

<sup>9</sup> 201 F. Supp. 2d 401 (E.D. Pa. 2002).

On June 23, 2003, the U.S. Supreme Court reversed, holding that the CIPA does not violate the First Amendment and does not impose an impermissible condition on libraries that received federal funding.<sup>10</sup> In a plurality opinion, Chief Justice Rehnquist found that Congress may attach conditions to federal funding in order to compel certain behavior so long as that behavior is constitutional.<sup>11</sup> <sup>12</sup> Chief Justice Rehnquist found Internet filtering to be constitutional behavior, given that the goal of libraries is not to provide "universal coverage" of all materials. Chief Justice Rehnquist found that libraries make content-based decisions when collecting materials.<sup>13</sup> For example, most libraries exclude pornography from their collections. Moreover, any concerns over filtering software's tendency to erroneously overblock access to constitutionally protected speech is alleviated by the fact that adult patrons may have the filtering software disabled.<sup>14</sup> Accordingly, the Chief Justice held that libraries were likewise entitled to make content-based decisions regarding materials collected from the Internet.<sup>15</sup>

The bill's requirement that Florida public libraries install technology protection measures is substantively identical to that contained in the CIPA. Accordingly, it appears the bill would withstand the constitutional challenges resolved by the U.S. Supreme Court in the *American Library Association* case.

## 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 by the public at county and municipal libraries. The bill will permit citizens to bring enforcement actions in civil court against public libraries that fail to comply with the bill's Internet Safety Policy requirements.

### C. Government Sector Impact:

**Cost associated with filtering software:** The DOS has indicated that it is impossible to determine the precise fiscal impact of this bill because some libraries may have access to free filtering products provided by their Internet Service Provider, while others will have purchase such products.

<sup>10</sup> *U.S. v. American Library Ass'n, Inc.*, 123 S.Ct. 2297 (2003).

<sup>11</sup> Justices O'Connor, Scalia, and Thomas joined the plurality opinion drafted by Chief Justice Rehnquist. Justices Kennedy and Breyer concurred separately, and Justices Stevens, Souter, and Ginsburg dissented.

<sup>12</sup> *Id.* at 2303.

<sup>13</sup> *Id.* at 2304.

<sup>14</sup> *Id.* at 2306.

<sup>15</sup> *Id.*

The DOS estimates that 133 library administrative units would be affected by the bill and that 74 of these units currently filter all or some of the unit's computers. These libraries pay approximately \$340,000 per year for server based filtering. For the remaining 59 units that do not filter, the DOS estimates that it would cost these units approximately \$220,000 to comply with the bill if they installed server based filtering technology. Accordingly, the total annual recurring costs to libraries would be \$560,000. The DOS also indicates that these costs are based on utilization of Websense, a server based filtering technology, and are exclusive of costs for servers and personnel to install and maintain the filtering products. In some cases, when utilizing server based filtration systems, in order for the filter to be disabled it would be necessary to manually disconnect cables from the computer and reconnect these cables to an alternate server. This could be difficult if library employees were not adequately trained in the removal and installation of hardware components on a computer.

There appears to be a wide range of pricing for Internet filtering software. Server based technology appears more expensive than terminal based filtering technology that is installed individually on each computer. During the 2003 Legislative Session when SB 1250, a bill which required county and municipal libraries to install filtering technology, was considered, Kidsnet, Inc. indicated that its Internet filtering product called LibraryNet sold for \$12 per computer. The DOS indicated at that time approximately 2,293 public library computer units were not being filtered. Accordingly, if the LibraryNet product had been purchased the total cost for libraries not yet filtering would have been \$27,516.

**Fines and attorney's fees and costs:** Public libraries that fail to comply with the bill's Internet Safety Policy requirements are subject to civil enforcement suits by the Attorney General or a citizen. If a library is found by the court to be in non-compliance, the court is required to order assessment of a fine of \$100 per day per library location beginning from the date that non-compliance was first noticed. Additionally, the court is required to award reasonable attorney's fees and costs to be paid to prevailing citizens by losing administrative units. The fiscal impact of the fines, fees, and costs is indeterminate as the number of public libraries that will fail to comply with the bill and that will be sued is unknown.

**State funding:** The bill provides that the head of each administrative unit must annually attest in writing, under penalty of perjury, that all public library locations within the unit are in compliance with the bill's Internet Safety Policy requirements as a condition of the receipt of state funds distributed under ch. 257, F.S. The varying organizational structures in some administrative units may interfere with the administrative head's ability to attest in writing to the compliance of all locations within the unit. Public libraries failing to comply with the bill will not be eligible for funds provided by the Division of Library and Information Services within the DOS through the State Aid to Libraries Program in ch. 257, F.S.

## VI. Technical Deficiencies:

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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

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