

STORAGE NAME: h0933a.ca

DATE: April 1, 1999

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
COMMUNITY AFFAIRS
ANALYSIS**

BILL #: HB 933

RELATING TO: Obscenity/Library Computers

SPONSOR(S): Rep. Ryan & others

COMPANION BILL(S): SB 0964(i)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) JUDICIARY YEAS 9 NAYS 0
- (2) COMMUNITY AFFAIRS YEAS 10 NAYS 0
- (3) CRIME & PUNISHMENT
- (4) CRIMINAL JUSTICE APPROPRIATIONS
- (5)

I. SUMMARY:

An amendment was adopted by the Committee on Judiciary removing the mandating of filtering software. See Section VI. Amendments Or Committee Substitute Changes.

This bill requires public libraries that make available for public use computer on-line or Internet service, or local bulletin-board service to install and maintain computer software that prohibits access to materials containing obscene descriptions, photographs, or depictions. Such software must be installed and maintained on at least one-half of the library's computers that are available for public use. The bill provides that if a public library only has one computer available to the public, the software must be installed and maintained on that computer.

This bill defines the term "sexually explicit image" and provides a penalty for knowingly sending, transmitting, distributing, or exchanging sexually explicit images to any child of less than 18 years of age.

This bill amends the Computer Pornography and Child Exploitation Prevention Act of 1986. Specifically, the bill provides that any person who knowingly uses a computer or other electronic device to send, transmit, distribute, or dispense sexually explicit images to a child of less than 18 years of age commits a felony of the third degree.

There will be a fiscal impact on public libraries to come into compliance with the provisions of this bill, although the actual impact is indeterminable at this time.

The bill provides for an effective date of October 1, 1999.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Library Computers

Under current law, there are no uniform statewide standards for decisions related to Internet access and public library patrons. Some local governments have elected to use filters on their computers, while others have not.

Sexually Explicit Images and the Use of Electronic Devices to Transmit These Images to Children

The transmission of adult "erotica" within Florida is currently legal. Further, the transmission of such material constitutes free speech so long as the conduct contained therein is not "obscene". "Obscene" is defined as material which:

- The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
- Depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and
- Taken as a whole, lacks serious literary, artistic, political, or scientific value.

[s. 847.001(7), F.S. (1997)].

While Florida law does prohibit the sending of any image of children engaged in sexual conduct, there is no prohibition on sending images of sexual conduct between adults, by any means or in any form, to minors. "Sexual conduct" is defined in subsection 847.001(11), F.S.

Proponents of this bill maintain that adults intent upon seducing, coercing, enticing, soliciting or luring children into committing illegal acts relating to sexual battery, lewdness, indecent exposure, or child abuse, first send pictures of sexual activity, including cartoon characters, between adults in an effort to reduce the inhibitions of the child.

B. EFFECT OF PROPOSED CHANGES:

Library Computers

All public libraries providing Internet access to the public will be required to place filters on at least one-half of the computers provided. If only one computer is provided, that computer must have a filter.

Sexually Explicit Images and the Use of Electronic Devices to Transmit These Images to Children

Under the provisions of this bill, the term "sexually explicit image" is defined as any visual depiction, image, characterization, or representation, including any cartoon, caricature, video, or still photograph, of an animal, human, or animate figure, either adult or child, engaged in sexual conduct, as defined by Florida law. Further, a person is prohibited from knowingly sending, transmitting, distributing, or exchanging by mail, facsimile, distribution, or other means of communication, a sexually explicit image to any child whom the person either knows, should know, or has reason to believe is less than 18 years of age. The bill makes a violation of this provision a third degree felony.

The Computer Pornography and Child Exploitation Prevention Act of 1986 is codified in s. 847.0135, F.S. This bill amends this act to provide a new offense with an accompanying penalty. Under this provision of the bill, any person who knowingly uses a computer or electronic device to send, transmit, distribute, or dispense by means of computer or other electronic device or transmission (including a facsimile machine that sends or receives transmissions in a digitally encoded manner)

any "sexually explicit image," as defined in this bill, to any child whom the person either knows, should know, or has reason to believe is less than 18 years of age commits a third degree felony.

Proponents of this bill advocate that the prohibitions and penalties set forth in this bill will curtail inappropriate conduct between adults and unsuspecting child victims. Further, they maintain that prohibiting an adult from sending any form of sexually explicit images to children will deter related crimes against children.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

Section 1: Yes. Local public libraries will be required to have a policy on Internet access and select filter software and the options available within that software.

Sections 2 & 3: Yes. It will be necessary to make determinations on certain depictions of sexually explicit conduct.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Section 1: Yes, local public libraries will be required to select, implement, and maintain computer filtering software.

Sections 2 & 3: Yes, law enforcement will be charged with enforcing the provisions of this bill.

(3) any entitlement to a government service or benefit?

N/A

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

N/A

b. Does the bill require or authorize an increase in any fees?

N/A

c. Does the bill reduce total taxes, both rates and revenues?

N/A

d. Does the bill reduce total fees, both rates and revenues?

N/A

e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Yes. To the extent that those public libraries in which there is only one computer available to the public, the information available will be limited to the filtered information.

The transmission of sexually explicit images to children will become a criminal offense.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

The legislature decides whether there is a need for filters on public library computers and the administrators of public libraries will be responsible for selecting appropriate software.

This legislation is designed to assist families and law enforcement officials in protecting children.

(2) Who makes the decisions?

Public library administrators as to the software chosen and how the policies are to be implemented.

Local law enforcement officials will be responsible for enforcing the provisions of this bill.

(3) Are private alternatives permitted?

No.

(4) Are families required to participate in a program?

No.

(5) Are families penalized for not participating in a program?

No.

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

No.

(2) service providers?

Yes, to the extent a library is a service provider.

(3) government employees/agencies?

Yes, to the extent that library employees are employees of local governments.

D. STATUTE(S) AFFECTED:

Sections 827.071 and 847.0135, F.S., are amended.

E. SECTION-BY-SECTION ANALYSIS:

See II.B. above

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

Purchase of computer software. Cost has not been determined at this time.

2. Recurring Effects:

Maintenance of the computer software.

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

Opponents of this bill consider the required purchase and maintenance of the filters as an unfunded mandate.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

LIBRARY COMPUTERS

Freedom of speech

To the extent that this bill limits access to information, it may be challenged as an unlawful restraint on the First Amendment right to free speech. A court reviewing a challenge to a law invoking the First Amendment, or the similar state constitutional provision, Article I, Section 9, Florida Constitution, would have to balance the State's interest advanced by the law with the guarantees of free speech.

The two cases most on point both involve the Loudoun County Library: Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, 2 F. Supp.2d 783 (E.D. Va. 1998), hereinafter referred to as Mainstream Loudoun I, and Mainstream Loudoun v. Board of Trustees of Loudoun County Library, 24 F. Supp.2d 552 (E.D. Va. 1998), hereinafter referred to as Mainstream Loudoun II. The blocking software in this county was applied to all computers and did not provide adult users access to the Internet without the blocking software, under any circumstances. The District Court held that "the First Amendment applies to, and limits, the discretion of a public library to place content based restrictions on access to constitutionally protected materials within its collection." Mainstream Loudoun I, at 794.

The court also found that policies which place restrictions on the receipt and communication of information in a limited public forum, based on content of the information, will be reviewed against the strict scrutiny standard and can only withstand constitutional muster if the policy: (1) serves a compelling public purpose; (2) the policy is necessary to further that interest; and (3) the policy is narrowly drawn to achieve that interest.

The court in Mainstream Loudoun II, for analysis purposes, assumed that minimizing access to illegal pornography is a compelling governmental interest. Nonetheless, the court failed to find a record of sufficient complaints relating to unfiltered Internet access to warrant the library's restriction policy; in other words, the policy was not necessary to further the compelling state interest. The court further found that the interest could be achieved with less restrictive means, including: (1) privacy screens; (2) library staff monitoring; (3) filtering software installed on some Internet terminals with minors limited to using those terminals; and (4) filtering software installed on all terminals and turned off when adults use the terminals. Mainstream Loudoun II, at 15-16. The court cautioned that, "[w]hile we find that all of these alternatives are less restrictive than the policy, we do not find that any of them would necessarily be constitutional if implemented. Thus, only requiring one-half of the computers available to the public in a public library to possess filtering software may not be sufficient to withstand constitutional scrutiny.

Prior Restraint

The court also considered the issue of prior restraint. Preventing the prior restraint of speech is an essential component of First Amendment free speech guarantees. Freedman v. Maryland, 380 U.S. 51 (1965). The U.S. Supreme Court has required the following procedural safeguards: "(1) any restraint prior to judicial review can be imposed only for a specific brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of proof once in court." Freedman at 996. It is important to note that the District Court found that the Loudoun County Library policy lacked any provision for prior judicial determination before material was censored and lacked sufficient standards and adequate procedural safeguards. The policy applicable in the Loudoun County library cases speaks only in the broadest terms about child pornography, obscenity, and materials deemed harmful to juveniles, failing to include any guidelines whatsoever to help librarians determine what falls in this broad category. There were no standards by which a reviewing authority could determine if the decision made was appropriate.

Based upon the foregoing, the legislation proposed in this bill might benefit from more specific standards, or a delegation of authority to the local libraries to develop their own specific policies. As long as adults have reasonable access to unfiltered information, adult prior restraint becomes less of an issue.

THE TRANSMISSION OF SEXUALLY EXPLICIT IMAGES TO CHILDREN

The federal government has recognized a compelling public purpose in protecting children from Sexual Exploitation¹ and this compelling public purpose supports Florida's current child pornography laws.² The sections presumably having met the compelling public purpose test, it is necessary to determine if the policy proposed is necessary to protect the governmental interest. It has been related from the Broward County's Sheriff's Office that the sending of adult pornography is the precursor of many sex crimes involving children, and it is likely that sufficient need can be demonstrated to permit the law to stand. The next analysis would be whether it was as narrowly drawn as possible, and the law does not prohibit the sending of these images to all persons, just to children. This should likely satisfy constitutional concerns.

The statute also requires intent, which presumably would protect non-intentional transmission.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

Amendment 1(b) was adopted by the Judiciary Committee at its meeting on March 18, 1999. It sets forth legislative intent and entitles the first section, the "Safe Child Internet Access Law". Instead of mandating filtering software, the amendment encourages public libraries that provide Internet access to the public to develop specific policies which address such access, and policies which restrict children's access to sexually explicit images and other unlawful materials.

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

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¹ See Protection of Children Against Sexual Exploitation Act, 18 U.S.C. §§ 2251 - 2260 (1984 and Supp. 1998 (criminalizing activities related to child pornography); 18 U.S.C. §1465 (1984 and Supp. 1998) (criminalizing transportation of obscene materials in interstate commerce).

² See Computer Pornography and Child Exploitation Act of 198C:\DATA\WP61\h0933.caC:\DATA\WP61\h0933.ca6, Section 847.0135 *et seq*, F.S.