

STORAGE NAME: h0933e.cp

DATE: April 15, 1999

**HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY THE COMMITTEE ON
CRIME AND PUNISHMENT
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 AND PUNISHMENT YEAS 6 NAYS 0
- (4) CRIMINAL JUSTICE APPROPRIATIONS
- (5)

I. SUMMARY:

This bill requires public libraries that make available for public use computer on-line or internet service, to install and maintain computer software that prohibits access to obscene materials. 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. **Note: An amendment was adopted by the Committee on Judiciary removing the requirement that libraries install software which prohibits access to obscene materials on the internet.**

This bill defines the term "sexually explicit image" and provides a penalty for knowingly sending, transmitting, distributing, or exchanging by mail, fax or other means of communication, a sexually explicit image to a child under 18 years of age.

This bill amends the Computer Pornography and Child Exploitation Prevention Act of 1986 to provide that any person who knowingly uses a computer or other electronic device to send a sexually explicit image to a child under 18 years of age commits a third degree felony.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Library Computers

There is currently no law requiring libraries to install software which prohibits access to obscene materials on the internet. **Note: An amendment has been adopted removing the requirement that libraries install software which prohibits access to obscene materials on the internet.**

Transmitting Obscene Materials to Minors

Section 847.0133 provides that it is unlawful for any person to knowingly sell, rent, distribute, transmit or show any obscene material to a minor. Section 847.013 prohibits exposing minors to "harmful" motion pictures which depict nudity or sexual conduct.

Sexual Performance by a Child

Section 827.071 prohibits the following conduct:

- Provides that a person is guilty of the use of a child in a sexual performance, a second degree felony, if the person employs or induces a child less than 18 years of age to engage in a sexual performance.
- Provides that a person is guilty of the second degree felony of promoting a sexual performance by a child when he or she produces, directs or promotes any performance which includes sexual conduct by a child less than 18 years of age.
- Provides that it is a second degree felony for any person to possess with the intent to promote any photograph or motion picture which includes any sexual conduct by a child. The possession of three or more copies of such items is prima facie evidence of intent to promote.
- Provides that it is a third degree felony for any person to knowingly possess a photograph or motion picture he or she knows to include any sexual conduct by a child.

Computer Pornography

Section 847.0135 creates the "Computer Pornography and Child Exploitation Prevention Act of 1986". The act was promulgated "to prohibit the transmission of computer pornography involving minors". State v. Cohen, 696 So.2d 435 (Fla. 1997). The act prohibits the following conduct:

- Provides that a person who:
 1. Knowingly compiles, enters into, or transmits by use of computer;
 2. Makes, prints, publishes, or reproduces by other computer means;
 3. Knowingly causes or allows to be entered into or transmitted by means of computer; or
 4. Buys, sells, receives, exchanges, or disseminates,any notice, statement, or advertisement, or any minor's name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information, for purposes of facilitating, encouraging, offering or soliciting sexual conduct of or with any minor, or the visual depiction of such conduct commits a third degree felony.
- Provides that any person who knowingly utilizes a computer on-line service, internet service, or local bulletin board service to seduce, solicit, lure or entice or attempt to seduce, solicit, lure or entice a child in order to commit a sexual battery, to commit a lewd act or to commit child abuse commits a third degree felony.

- Provides that it is unlawful for any owner or operator of a computer online service to permit a subscriber to utilize the service to commit a violation of this section.

Definition of Obscene Material

Section 847.001(7), F.S. defines "obscene" 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.

B. EFFECT OF PROPOSED CHANGES:

Library Computers

The bill requires all public libraries providing internet access to install software that prohibits access to materials that contain obscene descriptions, photographs or depictions on at least one-half of their computers. If the library only has one computer available for public use, the software must be installed and maintained on that computer.

Transmission of Sexually Explicit Image to Minor

The bill adds a paragraph to section 847.071 which provides that a person may not knowingly send, transmit, distribute or exchange by mail, facsimile, distribution or other means of communication, a sexually explicit image to any child whom the person knows, should know or has reason to believe is less than 18 years old. A violation of this section is a third degree felony.

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.

"Sexual conduct" is currently defined by s. 827.071(g). to include:

actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse, actual lewd exhibition of the genitals, actual physical contact with a person's clothes or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.

Computer Images of Sexually Explicit Image

The bill amends 847.0135, F.S to provide a new offense with an accompanying penalty. Under this provision of the bill, any person who: 1) knowingly uses a computer or electronic device to; 2) 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); 3) any "sexually explicit image," as defined in this bill; 4) 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.

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?

None.

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

No.

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

No.

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?

No.

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

No.

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

No.

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

No.

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

No.

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.

5. Family Empowerment:

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

- (1) Who evaluates the family's needs?

N/A.

- (2) Who makes the decisions?

N/A.

- (3) Are private alternatives permitted?

N/A.

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

N/A.

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

N/A.

- 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?

No.

(3) government employees/agencies?

No.

D. STATUTE(S) AFFECTED:

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

E. SECTION-BY-SECTION ANALYSIS:

Section 1: Requires each public library to install software on computers available to public which prohibits access to materials containing obscene descriptions, photographs or descriptions.

Section 2: Defines "sexually explicit image". Creates third degree felony for a person who mails, faxes or otherwise communicates a sexually explicit image to someone whom the person knows is less than 18 years of age.

Section 3: Creates third degree felony for person to use a computer to transmit any sexually explicit image to a person less than 18 years of age.

Section 4: Provides effective date of October 1, 1999.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See fiscal comments.

2. Recurring Effects:

See fiscal comments.

3. Long Run Effects Other Than Normal Growth:

See fiscal comments.

4. Total Revenues and Expenditures:

See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

See fiscal comments.

2. Recurring Effects:

See fiscal comments.

3. Long Run Effects Other Than Normal Growth:

See fiscal comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

See fiscal comments.

2. Direct Private Sector Benefits:

See fiscal comments.

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

See fiscal comments.

D. FISCAL COMMENTS:

The Criminal Justice Estimating Conference has not met to determine the fiscal impact of this bill. However, any fiscal impact from the creation of two third degree felonies should not be significant.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill is exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is criminal law.

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 before it had been amended 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.

THE TRANSMISSION OF SEXUALLY EXPLICIT IMAGES TO CHILDREN

Neither "obscenity" nor child pornography is protected by the First Amendment to the United States Constitution. Miller v. California, 413 U.S. 15, 93 S.Ct. 2607. Something is considered obscene if: 1) the average person, applying contemporary community standards would find the work, taken as a whole, appeals to prurient interest in sex; 2) it portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and 3) taken as a whole, does not have serious literary, artistic, political or scientific value.

In Reno v. American Civil Liberties Union, 521 U.S. 844, 117 S.Ct. 2329 (1997), the United States Supreme Court considered the constitutionality of certain provisions of the Communications Decency Act which prohibited the knowing transmission by way of telecommunications device of "obscene" or "indecent" messages to any person under the age of 18. Another provision prohibited the knowing sending or displaying of patently offensive sexual activities in a manner that is available to a person under 18 years of age. The Court recognized that the government has an interest in protecting children from potentially harmful materials but found that the challenged provisions were facially overbroad in violation of the First Amendment.

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 states the following:

Each public library that makes available for public use computer on-line service, internet service, or local bulletin board service is hereby encouraged to develop specific policies and guidelines which address both public access to the internet and a use policy for children in order to restrict their access to sexually explicit images as defined in s. 827.071(l) or materials otherwise unlawful for their viewing or use.

On April 15, 1999, the Committee on Crime and Punishment adopted a substitute strike everything amendment that was offered by Rep. Ryan. The substitute strike everything amendment makes the following changes to the bill:

- The amendment includes the changes made by the amendment adopted by the Judiciary Committee which encourages libraries to develop specific policies regarding public access to the internet.
- The amendment also amends the definition of "sexually explicit image" by adding a provision that the image is "harmful to minors". This amendment was intended to narrow the category of images prohibited by the bill in order to pass constitutional scrutiny. Section 847.001(3) defines the phrase "harmful to minors" as:

that quality of any description, exhibition, presentation, or representation, in whatever form, of nudity, sexual conduct, or sexual excitement when it:

(a) Predominantly appeals to the prurient, shameful, or morbid interest of minors;

(b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

In Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274 (1968), the United States Supreme Court upheld the constitutionality of a statute which made it unlawful to sell to a minor any picture or magazine which depicts nudity and which was harmful to minors. The definition of "harmful to minors" was nearly identical to the one contained in section 847.001, F.S. The Court rejected the defendant's argument that a person's First Amendment right to read or see material concerned with sex does not depend on whether the person is an adult or a minor. The Court decided that the state was entitled to prohibit minor's access to material which would be obscene to a minor, regardless of whether it would be obscene to adults.

- The amendment also adds language to the crimes created by the bill by providing that a person may not knowingly send a sexually explicit image to a "specific child or children whom the person knows, should know, or has reason to believe is less than 18 years of age." In Reno v. ACLU, discussed above, the United States Supreme Court was concerned with the fact that the statute in question prohibited a person from using an "interactive computer service to display in a manner available to a person under 18 years of age" any patently offensive material. The Court noted that this would force an adult to restrict communications about sexual matters any time that the adult thought that a minor may have access to the material. This would interfere with communications between adults and be unconstitutional. The amendment clarifies that it would be a crime to send sexually explicit material directly to a child that the sender knows or has reason to believe is under 18.

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VII. SIGNATURES:

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