

STORAGE NAME: h0933.jud

DATE: March 17, 1999

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIARY
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
 - (2) COMMUNITY AFFAIRS
 - (3) CRIME & PUNISHMENT
 - (4) CRIMINAL JUSTICE APPROPRIATIONS
 - (5)
-

I. SUMMARY:

Section 1 of this bill requires public libraries that make available for public use computer on-line or Internet service to install and maintain on one half of the public computers software which prohibits access to materials containing obscene descriptions, photographs, or depictions.

Section 2 of the bill amends Section 827.071, F.S., to define a sexually explicit image and makes the knowingly sending, transmitting, distributing or exchanging of sexually explicit image to a child of less than 18 years a third degree felony.

Section 3 of the bill amends Section 847.0135, F.S., concerning computer pornography to prohibit the knowing use of electronic devices to send, transmit, distribute or dispense sexually explicit images to a child of less than 18 and makes such transmission a third degree felony.

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

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Library computers

Currently there exist no uniform state-wide standards for Internet access decisions for public library patrons. Some cities and county have elected to use filters on some or all of their computers and some local governments are not using filters. A short summary of the county-by-county policy for each judiciary committee member is attached, along with a more comprehensive survey.

Sexually explicit images and the use of electronic devices to transmit these images to children

The transmission of adult "erotica" to anyone within Florida is currently not illegal and constitutes free speech so long as the conduct is not obscene. While Florida law does currently prohibit the sending of any images of children engaged in sexual conduct, there is no current statute which prohibits the sending to minors by any means, in any form, images of sexual conduct between adults.

It is maintained by certain task forces that adults intending to seduce, coerce, entice, solicit or lure children to commit illegal acts relating to sexual battery, lewdness, indecent exposure or child abuse, first send pictures of sexual activity occurring between adults and/or cartoon characters in an effort to reduce the inhibitions of the child.

B. EFFECT OF PROPOSED CHANGES:

Library computers

All libraries which provide Internet access to the public will be required to place filters on half of the computers provided, except that 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

Subsection 1(h) of 827.071, F.S., will define a sexually explicit image and Section 6 of the same statute will make it a third degree felony to send, transmit, distribute, exchange by mail, facsimile, distribution or other means of communication such an image to any child under the age of eighteen.

Section 847.0135 is the Computer Pornography and Child Exploitation Prevention Act of 1986; addition of a new section (4) will prohibit the knowing transmission of sexually explicit images by a computer or other electronic device or facsimile machine to any child under eighteen.

Advocates of the changes to Sections 827.071 and 847.0135 maintain that prohibiting these behaviors will curtail the inappropriate contact between adults and unsuspecting child victims. They maintain that if an adult is prohibited from sending any forms of sexually explicit images to children, these related crimes against children would be deterred.

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 law.

(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?

Section 1: Possibly, if counties are using filtering software on all computers, adults may gain access to more legal information.

Sections 2 & 3: No, currently legal activities will become criminal.

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

Section 1: Possibly, in a public library with one computer terminal for public access, the information available to individuals will be limited to the filtered information. In libraries with more than one terminal, an individual may not be able to use an unfiltered computer in a reasonable amount of time.

Sections 2 & 3: Yes, the current legal activity of sending adult sexually explicit images to children will become criminal.

5. Family Empowerment:

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

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

Section 1: The legislature decides there is a need for filters on public library computers, the library -- through the software selected -- evaluates what is appropriate to be filtered.

Sections 2 & 3: The remainder of the legislation is designed to assist families and law enforcement officials in protecting children.

- (2) Who makes the decisions?

Section 1: The library and/or the software company selected.

Sections 2 & 3: Local law enforcement officials.

- (3) Are private alternatives permitted?

Section 1: Yes, families can use non-library computers, if available.

Sections 2 & 3: No.

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

Presumably children in public libraries will receive only filtered information.

- (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?

Section 1: No

- (2) service providers?

Section 1: 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 ,F.S. and 847.0135, F.S., and creates a new section on public libraries

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

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 the computer filters consider the required purchase and maintenance of the filters as an unfunded mandate.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

N/A

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

N/A

V. COMMENTS:

Section 1: filters on public library computers

Freedom of speech

To the extent that this provision limits access to information, it may be challenged as an unlawful restraint on the First Amendment right to make and receive 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 protected by the law with the guarantees of free speech and a free press.

The two cases most on point both concern the Loudoun County Library: *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 2 F. Supp 783 (E.D. Va. April 1998) and *Mainstream Loudoun v. Board of Trustees of Loudoun County Library*, 24 F. Supp. 2d 552 (E.D. Va. November 1998.) The blocking software in this county was applied to all computers and did not provide adult users access to the Internet without 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*, 2 F.Supp. at 794

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

The Court in *Mainstream Loudoun*, 24 F. Supp. 2d 552 (E.D. Va. November 1998) for the purpose of the analysis assumed that minimizing access to illegal pornography is a compelling governmental interest. But the Court did not 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 also 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. *Id.* at 15-16. The court also 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, even the 50 per cent filtered limitation of this bill may not be sufficient to meet constitutional requirements.

Prior Restraint

The court also considered the issue of prior restraint. Preventing prior restraints of speech is an essential component of the First Amendment's free speech guarantee. *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. The District Court found that the Loudoun County Library policy lacked any provision for prior judicial determinations before material is censored and lacked sufficient standards and adequate procedural safeguards. The policy applicable in *Loudoun* speaks only in the broadest terms about child pornography, obscenity, and materials deemed harmful to juveniles and fails 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 legislation proposed 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.

Sections 2 & 3: sexually explicit images and the use of electronic devices to transmit these images to children.

The federal government has recognized a compelling public purpose in protecting children from Sexual Exploitation¹ and this compelling public purpose also 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 porn 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.

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 1896, Section 847.0135 *et seq.*, F.S.

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VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

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