

# 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 356  
 SPONSOR: Senator Campbell  
 SUBJECT: Obscenity  
 DATE: April 15, 2001                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	White	Wilson	GO	Favorable
2.	_____	_____	AGG	_____
3.	_____	_____	AP	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

## I. Summary:

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 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 that prohibits access to obscene material from library computers. Such software 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.

As of September 30, 2000, 2,940 public access computers were available in Florida county and municipal libraries. The Department of State (DOS) estimates that an additional 294 computers will have been added for a total of 3,234 by October 1, 2001, the effective date of the act. The

The DOS estimates that 1,617 (half of all public access computers) will be covered by the bill and anticipates a 10 percent annual increase in the number of public access computers subject to the bill.

According to the American Library Association, libraries serving 61 of Florida's 67 counties prohibit display of obscene images or images offensive to others; libraries serving 32 counties filter some computers; libraries serving 24 counties filter all computers; and libraries serving eight counties filter some computers or those used by minors. All have locally adopted Internet policies.

**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 becomes effective April 20, 2001.<sup>1</sup>

Under the new law, libraries that receive E-rate discounts for Internet access<sup>2</sup> must block or filter all access to visual depictions (not text) that are: (a) obscene, child pornography, or harmful to minors when a minor is using the computer; and (b) obscene or child pornography when an adult is using the computer. 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;
- 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:

- 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

<sup>1</sup>The American Library Association, along with numerous other library-related associations, have filed suit in the United States District Court for Eastern District of Pennsylvania against the federal government. The suit seeks to enjoin the government from enforcing the provisions of the new federal legislation.

<sup>2</sup>Libraries that receive E-rate funds only for non-Internet-related "telecommunications services" need not comply with the act.

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

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

- 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.

### **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 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 persons under 18 years of age from accessing computer obscenity fulfills an important state interest.

The bill takes effect October 1, 2001.

### **IV. Constitutional Issues:**

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

The bill requires county and municipal libraries to purchase software which prohibits access to obscene material on the Internet. The bill does not fund this requirement.

Pursuant to Art. VII, s. 18(a) of the Florida Constitution, the general rule is that the Legislature cannot pass a law requiring a county or municipality to spend funds unless an appropriation of sufficient funding is provided. However, the bill is anticipated to have an insignificant fiscal impact (less than \$1.6 million) ; thus, pursuant to Art. VII, s. 18(d), Florida Constitution, the bill appears to be exempt from the requirements of Art. VII.

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

None.

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

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

It may 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 federal constitution and Art. I, s. 4 of the Florida Constitution. In *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, the court found a Virginia library policy that required the blocking of sites containing child pornography, obscene material, or material deemed harmful to juveniles violated the First Amendment.<sup>6</sup> In order to enact a content based limitation on speech, the limitation must serve a compelling state interest and be narrowly drawn to achieve that end.<sup>7</sup> The *Loudoun* court assumed that minimizing the access to illegal pornography and the prevention of a sexually hostile environment were compelling state interests, but found that mandating filtering software was not the least restrictive means to further those interests.<sup>8</sup> According to the Court, adults were thus unnecessarily blocked from constitutionally protected materials.<sup>9</sup>

The *Loudoun* opinion does suggest several less restrictive measures to accomplish the library's goal of protecting children from obscene material on the Internet; however, the opinion does not find that these measures are constitutional.<sup>10</sup> In other words, it cannot be unequivocally stated that these measures could not be successfully challenged on First Amendment grounds. The measures include: (1) establishing a use policy; (2) setting time limits on usage; (3) educating patrons; (4) turning filters off for adult use or using filters only on some machines; (5) relocating terminals; (6) enforcing criminal laws; and (7) using privacy screens.<sup>11</sup>

The statute created by the bill differs from the statute successfully challenged in *Loudoun* in two ways, and as a result it can be argued that the bill does not unconstitutionally impinge on First Amendment protections. First, the bill only requires the filtering of computers which can be accessed by minors. As such, it can be argued that adult access to speech is not inhibited by the bill, as pursuant to the bill, it is within the library's discretion to provide unfiltered computer access to adults.

Second, the bill does not require that all material harmful to minors be blocked. It requires only the blocking of "obscene" materials.<sup>12</sup> Since obscenity is not protected by the First

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<sup>6</sup>24 F.Supp.2d 552 (E.D. Virginia 1998).

<sup>7</sup>*Loudoun*, 24 F.Supp.2d at 564.

<sup>8</sup>*Id.* at 565-570.

<sup>9</sup>*Id.* at 570.

<sup>10</sup>*Id.* at 567.

<sup>11</sup>*Id.* at 566.

<sup>12</sup>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.

Amendment, blocking obscene material is permitted.<sup>13</sup> While the statute on its face only applies to obscene material, it could be problematic, however, as applied. Given current technology, it is not clear that software exists which blocks only obscene material, while not also blocking protected speech.

**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 reported 2,940 public access computers at municipal and county libraries as of September 30, 2000. The DOS expects that an additional 294 computers will have been added for a total of 3,234 PCs by October 1, 2001, the effective date of the bill. The DOS estimates that 1,617 (half of all public access PCs) will be covered by the bill and anticipates a 10 percent annual increase in the number of public access computers that will be subject to the bill.

A popular filtering product, Cyber Patrol, sells for \$34.95 per copy with a \$5 per year license renewal cost. The DOS estimates that two hours per PC will be required for loading and maintaining the software each year at a rate of \$20 per hour, for a total of \$40 per PC per year.

Year 1

1,617 PCs x \$34.95 =	\$56,514
1,617 PCs x \$40 per year =	\$64,680
<b>Total =</b>	<b>\$121,194</b>

Year 2

162 new PCs x \$34.95 =	\$5,662
162 x \$40 =	\$6,480
1,617 x \$5 =	\$8,085
1,617 x \$40 =	\$64,680
<b>Total =</b>	<b>\$84,907</b>

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<sup>13</sup>See *Reno v. ACLU*, 521 U.S. 844 (1997).

Year 3

178 new PCs x \$34.95 =	\$6,221
178 x \$40 =	\$7,120
1,779 x \$5 =	\$8,895
1,779 x \$40 =	\$71,160
<b>Total =</b>	<b>\$93,396</b>

**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 software. Therefore, if the library fails to comply with its duty, it may be sued civilly for that failure.

**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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