

# 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 for SBs 392 and 404

SPONSOR: Governmental Oversight and Productivity Committee, Senators Wise and Campbell

SUBJECT: Obscenity

DATE: February 5, 2002

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	White	Wilson	GO	Favorable/CS
2.			CA	
3.				
4.				
5.				
6.				

## I. Summary:

The committee substitute combines the content of two identical bills, SB 392 and SB 404. This bill requires county and municipal libraries, which make computer on-line, Internet, or local bulletin-board service available for public use, to install and maintain software or equivalent technology on any computer 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 or equivalent technology 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. 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 is used by each computer on the server network.

According to the Department of State, as of February 2002, there are 4,960 public access computers available in Florida's 98 county and municipal library systems. "Library system" refers to a library's headquarters and its branch locations. Of these systems, 34 currently filter public Internet access, while 64 do not. On a county-basis, all libraries have adopted Internet use policies. In 56 counties, the policies prohibit the display of obscene images. Five counties prohibit display of images that are offensive to others. Two counties prohibit minors from accessing obscene images, and the remaining four counties do not prohibit the display of obscene images.

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

Under the new law, K-12 schools and 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 on the basis that no filtering software can successfully differentiate between constitutionally protected speech and obscene speech. The trial in this case is scheduled for March 25, 2002.

<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(i)(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.

Representatives of the DOS estimate that 80 percent of Florida libraries benefit directly or indirectly from E-rate funding. Further, DOS representatives estimate that 90 percent of libraries that benefit from E-rate are subject to the requirements of the CIPA.

### **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, 2002.

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

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

The bill requires county and municipal libraries to purchase software or equivalent technology that 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 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, under 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 that 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

<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.

the First 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:**

Pursuant to the requirements of the CIPA, public libraries receiving E-rate discounts for Internet access<sup>14</sup> are required by July 1, 2002, to have implemented software that blocks or filters obscene or pornographic depictions. Representatives of the DOS estimate that 80 percent of Florida libraries benefit directly or indirectly from E-rate funding. Further, DOS representatives estimate that 90 percent of libraries that benefit from E-rate funding are subject to the requirements of the CIPA. Thus, assuming Congress does not amend the requirements of the CIPA and that the CIPA is not struck by the courts, the majority of libraries affected by this bill will already be in compliance with the bill's requirements that take effect on October 1, 2002, and will not have to make new expenditures as a result of the bill.<sup>15</sup>

If, however, the CIPA is no longer in effect at the time this bill becomes effective, the DOS has provided an estimate of the costs municipal and county libraries will incur as a result of the bill. The DOS figures are based upon: (a) the purchase of server-based product which will filter the Internet; (b) a non-recurring initial start up cost of \$160,000 for servers for libraries which are not currently filtering (\$2500 per server x 64 libraries); (c) staffing costs of 4 hours per week at \$30 per hour for server management; and (d) inflation of 3 percent annually.

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

<sup>14</sup> Libraries that receive E-rate funds only for non-Internet-related "telecommunications services" need not comply with the act.

<sup>15</sup> The bill requires blocking not only of obscene and pornographic depictions as is required by the CIPA, but also requires the blocking of obscene "descriptions," i.e., text. It appears, however, that current software that blocks depictions can also block descriptions. Consequently, this bill should not require software different than that which will be used to comply with the CIPA.

**Year 1**

Libraries that are currently filtering:

<u>License</u>	<u>Servers</u>	<u>Staff</u>
34 libraries	0	4 staff hours x 52 weeks x \$30 x 34 libraries
\$66,503		\$212,160

Libraries that are not currently filtering:

<u>License</u>	<u>Servers</u>	<u>Staff</u>
64 libraries	64 x \$2,500	4 staff hours x 52 weeks x \$30 x 64 libraries
\$94,058	\$160,000	\$399,360

TOTAL NON-RECURRING = \$160,000

TOTAL RECURRING = \$772,081

**Year 2**

Libraries that are currently filtering:

<u>License</u>	<u>Servers</u>	<u>Staff</u>
34 libraries	0	4 hours x 52 weeks x \$30 x 34 Libraries x 3% inflation
\$68,498		\$218,525

Libraries that are not currently filtering:

<u>License</u>	<u>Servers</u>	<u>Staff</u>
64 libraries	0	4 hours x 52 weeks x \$30 x 64 libraries (plus 3% inflation)
\$96,880		\$411,341

TOTAL NON-RECURRING = \$0

TOTAL RECURRING = \$795,244

**Year 3**

Libraries that are currently filtering:

<u>License</u>	<u>Servers</u>	<u>Staff</u>
34 libraries	0	4 hours x 52 weeks x \$30 x 34 libraries (plus 3% inflation)
\$70,553		\$225,081

Libraries that are not currently filtering:

<u>License</u>	<u>Servers</u>	<u>Staff</u>
64 libraries	0	4 hours x 52 weeks x \$30 x 64 libraries (plus 3% inflation)
\$99,786		\$423,681

TOTAL NON-RECURRING = \$0

TOTAL RECURRING = \$819,101

The companion to this bill, HB 95, which is identical in content, was heard by the House Committee on Juvenile Justice on January 24, 2002. The House staff analysis that was prepared subsequent to the committee meeting indicates that certain proponents of the bill provided lower cost figures for technology that would enable the libraries to comply with this bill.<sup>16</sup>

According to the House analysis, David Burt, a Public Relations Executive with N2H2, Inc., a popular filtering software company, provided several price quotes for filtering software. The costs below are from three leading manufacturers of filtering software, based on an estimate by the department that there are 4,960 public library terminals provided for public use throughout Florida.

<u>Company</u>	<u>License/Software Price Per Year</u>
N2H2	\$4.50 per work station = \$22,320
SurfControl	\$34,500 flat price for approx. 5,000 work stations
Websense	\$4.50 per work station = \$22,320

According to David Burt, 43 percent of the nation's public libraries already filter and he is unaware of any library system that has had to hire additional staff to maintain the filtering process.

The DOS reviewed this new pricing information, but maintains that its estimated figures in the DOS fiscal analysis provided above are accurate.

In any case, as noted above, if the CIPA remains the law, the majority of public libraries affected by this bill will already be compliance with the bill at the time it becomes effective.

#### **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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<sup>16</sup> House of Representatives Committee on Juvenile Justice, *Staff Analysis for HB 95*, January 31, 2002, pp. 5-6.