HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 611 Internet Screening in Public Libraries
SPONSOR(S): Baxley
TIED BILLS: **IDEN./SIM. BILLS:** SB 722

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Lammers	Billmeier
2) Transportation & Economic Development Appropriations Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

HB 611 provides that public libraries must install technology protection measures on all public computers to prevent adults from using such computers to access child pornography or obscene visual depictions, and to prevent minors from accessing child pornography and visual depictions that are obscene or harmful to minors. The technology protection measures must be disabled upon the request of an adult to use the computer for bona fide research or other lawful purpose. Libraries must post notices of their Internet policies, and libraries may not maintain a record of names of adults who request technology disablement.

The bill creates a civil cause of action whereby any resident of the state may write a letter to the administrative unit responsible for the local library to compel compliance with the provisions of the bill. If the administrative unit fails to comply with the request within sixty days, the resident may initiate a civil action against the administrative unit, and the court may assess against the unit a fine of $100 per day per non-complying library. The library may be responsible for a prevailing resident's reasonable attorney's fees and costs, but if a resident files an action frivolously or in bad faith, the resident shall be required to pay the administrative unit's reasonable attorney's fees and costs. The money collected as a result of this fine shall be deposited with the Records Management Trust Fund.

The bill authorizes the Division of Library and Information Services to adopt rules requiring the head of each administrative unit to give an annual written statement, under penalty of perjury, that all public library locations within the administrative unit are in compliance with this section, as a condition of receiving any state funds distributed pursuant to ch. 257. The bill provides that no cause of action, other than the one contained in this bill, is authorized in favor of any person for a library's non-compliance with the requirements of the bill.

The fiscal impact of this bill is unknown.

This bill shall take effect October 1, 2005.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government—This bill creates additional responsibilities and work for public libraries and their administrative units. The bill establishes rule-making authority in the Department of State, Division of Library and Information Services.

B. EFFECT OF PROPOSED CHANGES:

Federal Law

In 2000, Congress enacted the Children's Internet Protection Act (CIPA), which requires public libraries participating in certain internet technology programs to certify that they are using computer filtering software to prevent the on-screen depiction of obscenity, child pornography, or other material harmful to minors.[1] The Supreme Court upheld CIPA in *United States v. American Library Association*, 539 U.S. 194 (2003), determining that CIPA did not violate the First Amendment's free speech clause and did not impose an unconstitutional condition on public libraries. CIPA does not impose any penalties on libraries that choose not to install filtering software; however, libraries that choose to offer unfiltered Internet access would not receive federal funding for acquiring educational Internet resources.[2]

State Law

Currently, state law does not contain any requirements that public libraries place Internet filters on the public computers.

"Obscenity" is defined in s. 847.001(10), F.S., as:

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

This definition of obscenity is taken directly from *Miller v. California*, 413 U.S. 15 (1973).[3]

"Harmful to minors" is defined in s. 847.001(6), F.S., as:

> "[a]ny reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:
> (a) Predominantly appeals to the prurient, shameful, or morbid interests 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.

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[1] National Conference of State Legislatures, *Children and the Internet: Laws Relating to Filtering, Blocking and Usage Policies in Schools and Libraries*, Feb. 17, 2005.
[2] *U.S. v. Am. Libraries Ass'n*, 539 U.S. 194, 212 (2003).
[3] *Haggerty v. State*, 531 So. 2d 364, 365 (Fla. 1st DCA 1988).

Section 847.0133, F.S., prohibits any person from knowingly selling, renting, loaning, giving away, distributing, transmitting, or showing any obscene material to a minor, including obscene books, magazines, periodicals, pamphlets, newspapers, comic books, cards, pictures, drawings, photographs, images, videotapes, or any written, printed, or recorded matter of any such character, or any article or instrument for obscene use. The term "obscene" has the same meaning in s. 847.0133 as it has in s. 847.001. Section 847.0137, F.S., prohibits the transmission of any image, data, or information, constituting child pornography through the Internet or any other medium. Section 847.0138 prohibits the transmission of material harmful to minors to a minor by means of electronic device or equipment. Section 847.0139, F.S., provides immunity from civil liability for anyone reporting to a law enforcement officer what the person reasonably believes to be child pornography or the transmission to a minor of child pornography or any information, image, or data that is harmful to minors. Section 847.03, F.S., requires any officer arresting a person charged with an offense under s. 847.011, F.S., relating to acts relating to lewd or obscene materials, to seize such materials at the time of the arrest.

Current County Library Internet Policies

The Department of State, Division of Library and Information Services, conducted a survey of Florida's public libraries to ascertain their Internet use policies and filtering practices.[4] Out of 149 county and municipal libraries in Florida's 67 counties, 135 libraries responded to the survey. All of the libraries who answered the survey had locally adopted Internet use policies, and 134 of the libraries prohibited the display of obscene or offensive images.[5] Of the libraries responding to the survey,112 currently had filtering software or technology on their computers, and 22 did not filter.[6] Eleven counties have one or more libraries that do not have filters, another five libraries only filter computers in the children's or youth section of the library, and two of the counties that did not have filters indicated that they were in the process of acquiring filters.[7] Nine libraries do not post their Internet usage policy, and libraries in another nine counties do not inform their patrons that unfiltered Internet access is available.[8] An additional nine counties have libraries that do not offer filter disablement.[9]

Two libraries reported that they were not CIPA compliant, 29 libraries stated that CIPA did not apply to them, and the other 104 libraries indicated that they were CIPA compliant.[10] According to the Florida Libraries Association (FLA), in 2003, there were only 569 complaints registered out of more than 66 million library visits.

HB 611

This bill creates s. 257.44, F.S., entitled "Internet screening in public libraries."

In section 257.44(2), this bill provides that public libraries must enforce an Internet safety policy providing for:

- Installation and operation of a technology protection measure on all public computers in the library which restricts access by adults to visual depictions that are obscene or constitute child pornography, and which restricts access by minors to visual depictions that are obscene, constitute child pornography, or are harmful to minors
- Disablement of the technology protection measure by a library employee when an adult requests to use the computer for bona fide research or other lawful purpose

[4] Department of State, Division of Library and Information Services, *Internet Policies & Filtering in Florida's Public Libraries Report*, March 11, 2005 (hereinafter *Internet Policies*).
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*

The bill requires that public libraries take “reasonable efforts” in implementing the policy proscribed in the bill, which means that a library must:

- Post its Internet safety policy
- Use a technology protection measure on all public computers
- Disable the technology protection measure when an adult requests to use the computer for bona fide research or other lawful purpose

A “technology protection measure” is software or equivalent technology that blocks or filters Internet access to the visual depictions prohibited under section 257.44(2).

Child pornography has the same definition as it does in s. 847.001, F.S., although the statute creates a new definition for “harmful to minors.” For purposes of this bill, “’harmful to minors’ means any picture, image, graphic image file, or other visual depiction that:

> 1. Taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion.
> 2. 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, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals.
> 3. Taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.”

The bill defines “obscene” as it is defined in s. 847.001. The bill defines “administrative unit” as “the entity designated by a local government body as responsible for the administration of all public library locations established or maintained by that local government body.”

A public computer is defined in the bill as any computer made available to the public that has Internet access. A public library includes any library open to the public that is established or maintained by a local government body, including a county, municipality, consolidated city-county government, special district, or special tax district. The bill does not include any library that is open to the public which is established or maintained by a community college or state university.

Each public library is required to post a conspicuous notice informing library patrons of the Internet safety policy and stating that the policy is available for review. Libraries are prohibited from maintaining a list of the names of adults who request disablement of the technology protection measure.

<u>Cause of Action Created by HB 611</u>

The bill further provides, in s. 257.44(3), that if any public library knowingly fails to make reasonable efforts to comply with the requirements of the bill, a resident of the state may seek to enforce the statute. Before a resident may institute a civil action, the resident shall, within 45 days of the library’s alleged failure to make reasonable efforts, mail a notice of intended civil action for enforcement to the head of the applicable administrative unit. The notice must list the public library involved and specify the facts and circumstances constituting a violation of the bill’s requirements.

Within 45 days of receiving such a notice, the head of the administrative unit must send a written response to the resident who provided the notice, specifying any efforts the library has made to comply with s. 257.44(2). The mailings required by this section must be sent by certified mail with return receipt requested.

If the resident does not receive a written response within 60 days of the administrative unit’s receipt of the notice, or if the written response fails to indicate what reasonable efforts are being made to comply with s. 257.44(2), the resident is then permitted to institute a civil action in the circuit court of the county

where the administrative unit is located. Such a lawsuit may seek injunctive relief to enforce compliance with s. 257.44(2), and a court may impose a civil fine of $100 per day against the administrative unit if it finds that the library did not make reasonable efforts to comply with the statute. The fine shall accrue from the date the administrative unit received notice of the intended civil action until the date that the library began making reasonable efforts to comply with s. 257.44(2). The court may also order an administrative unit to pay reasonable attorney's fees and costs to a prevailing resident, although if the court finds that the resident's action was filed frivolously or in bad faith, the resident must pay the reasonable attorney's fees and costs of the administrative unit.

The clerk of the court shall act as the depository for all civil fines paid pursuant to this section, and the clerk is authorized to retain a service charge of $1 for each payment. The clerk shall transfer the money collected from such fines to the Department of Revenue, for deposit with the Records Management Trust Fund of the Department of State on a monthly basis.

The Division of Library and Information Services is required to adopt rules requiring the head of each administrative unit to attest annually, in writing and under penalty of perjury, that all public libraries within the administrative unit are in compliance with the requirements of this section, as a condition of receiving any state funds distributed under chapter 257.[11] However, the restriction on libraries imposed by this bill appears to extend further than the federal funding tied to CIPA because of the private causes of action and civil fines a library may face. And, in contrast with CIPA, it does not appear that a library may opt out of the provisions of this bill simply by declining to accept state funding.[12]

The bill provides that no cause of action, other than the one listed within this section, shall arise in favor of any person due to the public library's failure to comply with the section.

This bill shall take effect October 1, 2005.

C. SECTION DIRECTORY:

Section 1. Creates s. 257.44, F.S., requiring Internet screening in public libraries.

Section 2. Finding that the installation and operation of technology protection measures in public libraries to protect against adult access to obscene visual depictions, or images that constitute child pornography, or access by minors to obscene visual depictions, images that constitute child pornography or that are harmful to minors, fulfills an important state interest.

Section 3. Provides for an effective date of October 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

[11] Pursuant to s. 257.17, F.S., a library administrative unit designated by a county or municipality may receive an operating grant of no more than 25 percent of all local funds expended by that political subdivision, subject to certain conditions. An administrative unit for a multicounty library may receive a grant matching up to $1 million dollars in expenditures by all participating counties. Section 257.172, F.S. The amount of a multicounty grant depends upon the number of counties participating. *Id.* Pursuant to s. 257.191, F.S., libraries may receive dollar-per-dollar matching grants for construction of library facilities.
[12] *Cf. Am. Library Ass'n*, 539 U.S. at 212.

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

Although it appears that Internet filtering software is available at no charge,[13] the potential financial cost to counties and municipalities as a result of the bill's cause of action is unknown. Libraries will incur costs in purchasing software and in installing and maintaining it, although it appears that most libraries already have some type of Internet filtering software.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Article VII, s. 18(a), Florida Constitution, provides that no county or municipality can be required to take an action requiring the expenditure of funds unless certain conditions are met. It can be argued that this bill requires counties and municipalities to spend funds to purchase filtering software. However, some filtering software is available for free, so it can be argued that the mandate provision does not apply.[14] If a bill does not have a significant fiscal impact, then it is exempt from the mandate provision.[15] The current policy of House & Senate appropriations staff is that if a bill requires an aggregate expenditure of more than $0.10 per resident, or $1.8 million, then the bill has a significant economic impact. It does not appear likely that this bill will impose a significant economic impact on counties and municipalities.

This bill sets forth that it is fulfilling an important state interest, but it does not provide any funding, does not fulfill a federal requirement, and it may not be a requirement of all similarly situated persons. Thus, if the bill has a significant fiscal impact, because it fulfills an important state interest, it will require a two-thirds vote of the membership of each house in order to pass.[16]

2. Other:

This bill might also raise First Amendment concerns based on the fact that the statute creates a definition of "harmful to minors" that extends beyond the current definition found in s. 847.001(10), which is a codification of the Supreme Court's definition of obscenity. Although obscenity is not a protected category of speech, "'[s]exual expression which is indecent but not obscene is protected by the First Amendment.'"[17]

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[13] *See, e.g.*, www.we-blocker.com.
[14] *See id*.
[15] Art. VII, s. 18(a), FLA. CONST.
[16] *See* art. VII, s. 18(c), FLA. CONST.
[17] *Simmons v. State*, 886 So. 2d 399, 492-03 (Fla. 1st DCA 2004) (quoting *Sable Comm. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

The “harmful to minors” standard is a content-based regulation of speech, which must be narrowly tailored to promote a compelling government interest.[18] However, Internet access in a public library is not a traditional or designated public forum, and a library “does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves.”[19]

It can be argued that the protection of children from harmful material is a compelling state interest, as “common sense dictates that a minor’s rights are not absolute,” and the Legislature has the right to protect minors from the conduct of others.[20] The Legislature has the responsibility and authority to protect all of the children in the state, and the state “has the prerogative to safeguard its citizens, particularly children, from potential harm when such harm outweighs the interests of the individual.” [21]

“A library’s need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material; it is no less entitled to play that role when it collects material from the Internet than when it collects material from any other source.”[22] Thus, Internet access in public libraries is not afforded the broadest level of free speech protection, and the government is free to regulate the content of speech and to determine which topics are appropriate for discussion, although to the extent that Internet access might be considered a limited public forum, it is treated as a public forum for its topics of discussion.[23] A government-run public forum requires that content-based prohibitions be narrowly drawn to effectuate a compelling state interest.[24]

The Supreme Court has “repeatedly” recognized that the government has an interest in protecting children from harmful materials.[25] As with CIPA, any Internet materials that are suitable for adults but not for children may be accessed by an adult simply by asking a librarian to unblock or disable the filter, provided that the adult desires to access the material for “bona fide research or other lawful purposes.”[26] Therefore, it appears that this bill will not cause adults to lose their right to engage in protected speech, although the adult’s access may be hindered somewhat by the amount of time it takes the library to respond to an unblocking request. In most libraries, this time will be no more than a few minutes, although some libraries may take up to two days to process such a request.[27] This might be considered an unreasonable infringement upon an adult’s right to conduct bona fide research and pursue other lawful uses of the Internet.

B. RULE-MAKING AUTHORITY:

Requires the Department of State, Division of Library and Information Services, to adopt rules pursuant to s. 120.536(1), F.S., and s. 120.54, F.S., requiring the head of each administrative unit to annually attest in writing, under penalty of perjury, that all public library locations within the administrative unit are in compliance with s. 257.44(2), which requires each public library to enforce an Internet safety policy.

C. DRAFTING ISSUES OR OTHER COMMENTS:

FLA has raised concerns that some libraries might be unable to comply with the effective date of this bill because of local government procedures they must comply with before taking action.

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[18] *Id.* at 403 (internal citations omitted).
[19] *Am. Library Ass’n*, 539 U.S. at 205-06.
[20] *B.B. v. State*, 659 So. 2d 256, 259 (Fla. 1995).
[21] *Simmons*, 886 So. 2d at 405 (citing *Jones v. State*, 640 So. 2d 1084, 1085-87 (Fla. 1994)).
[22] *Id.* at 206-07.
[23] *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-46 (1983).
[24] *Id.* at 46.
[25] *Id.* (citing *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978); *Morris v. State*, 789 So. 2d 1032, 1036 (Fla. 1st DCA 2001)).
[26] *Am. Library Ass’n*, 539 U.S. at 209.
[27] *Internet Policies.*

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

N/A.