

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.)

Prepared By: Governmental Oversight and Productivity Committee

BILL: SB 722

SPONSOR: Senator Wise

SUBJECT: Internet Screening in Public Libraries

DATE: April 7, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McKay	Wilson	GO	Pre-meeting
2.	_____	_____	CA	_____
3.	_____	_____	CU	_____
4.	_____	_____	JU	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Senate Bill 722 requires local public libraries to enforce an Internet safety policy that provides for the installation of a technology protection measure, e.g., Internet filtering software, on public computers that blocks access to visual depictions that are obscene or child pornography, and additionally, in the case of minors, that are harmful to minors. The bill also provides that the technology protection measure must be disabled upon an adult's request to use the computer for bona fide research or other lawful purpose.

Two enforcement mechanisms are provided by the bill. The first permits a civil enforcement action to be brought by a resident of the state, and requires the court to assess fines and reasonable attorney's fees and costs against libraries found to have violated the bill's requirements. The second requires compliance with the bill's requirements as a condition of the receipt of state funding distributed pursuant to ch. 257, F.S.

The bill provides a legislative finding that use of such technology protection measures in public libraries fulfills an important state interest.

This bill creates section 257.44, Florida Statutes.

II. Present Situation:

State regulation of Internet access in public libraries: Currently, Florida law does not require libraries to install and maintain software or equivalent technology that prohibits access to obscene material on library computers. Such technology 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 used by each computer on the server network.

The Division of Library and Information Services of the Department of State surveyed public libraries in February of 2005, to obtain information concerning their internet use and filtering practices. Of a total of 149 county and municipal public libraries in Florida's 67 counties, 135 responded to the survey with the following results:

- 135 of those responding have locally adopted internet use policies.
- 134 of those responding prohibit the display of obscene images or images offensive to others.
- 112 of those responding provide filters on some or all of their computers with public internet access.

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 CS was signed into law (Public Law 106-554) on December 21, 2000, and became effective April 20, 2001.

Under the law, K-12 schools and libraries that receive E-rate discounts¹ for Internet access² must block or filter all access to visual depictions (not text) that are obscene, child pornography, or in the case of minors, harmful to minors.³ The blocking or filtering software may be disabled for adults for "bona fide research or other lawful purpose."⁴

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; and
- 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.⁵

Materials which are deemed harmful to minors are defined as:

¹ The E-Rate is the discount that schools and libraries receive for the acquisition of telecommunication services.

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

³ The CIPA contains statutory references to the definitions of the terms "obscene" and "child pornography," and provides a definition for the phrase "harmful to minors." 47 U.S.C. s. 1703(3).

⁴ The act does not define this phrase.

⁵ 47 U.S.C. s. 254(1)(2).

- 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
 - Taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.⁶

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 estimated that in 2003, 80 percent of Florida libraries benefited directly or indirectly from E-rate funding, and that 90 percent of these libraries would have been subject to CIPA requirements.

State Aid to Libraries Program: The Division of Library and Information Services within the DOS administers the State Aid to Libraries program, which provides operating grants to public libraries.⁷ Such grants may be no more than 25 percent of local funds expended to operate and maintain a public library. The Legislature annually appropriates funds for grants, which are prorated among eligible recipients. The division notes that with the exception of the first year of grants in 1962/63, annual appropriations have not been sufficient to meet the 25 percent match authorized in law.

According to the Division, the following libraries received state operating grant funds for FY 2003-2004: (a) libraries in all 67 counties; and (b) libraries in 11 municipalities. Libraries in 16 other municipalities were eligible for the grants, but did not apply.

III. Effect of Proposed Changes:

Section 1 requires a public library to enforce an Internet safety policy that provides for the installation of a technology protection measure on public computers that protects against access to visual depictions that are obscene or child pornography, and in the case of minors, that are harmful to minors. Additionally, the bill provides that the technology protection measure must be disabled upon an adult's request to use the computer for bona fide research or other lawful purpose.

The term "public library" is defined to mean any library open to the public established by counties, municipalities, consolidated city-county governments, special districts, and special tax districts, excluding libraries that are open to the public that are established or maintained by a community college or university. The term "harmful to minors" is defined to mean any image

⁶ 20 U.S.C. 9134.

⁷ Sections 257.14 through 257.25, F.S.

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; and (3) taken as a whole, lack serious literary, artistic, political, or scientific value as to minors. This definition is identical to the definition of “harmful to minors” contained in the CIPA.

The bill also defines the terms, “administrative unit,” “child pornography,” “minor,” “obscene,” “public computer,” and “technology protection measure.”

The bill provides in subsection (3) that a state resident may seek enforcement of its provisions in the event a public library knowingly fails to make reasonable efforts to comply with the bill’s Internet Safety Policy requirements. “Reasonable efforts” are defined by the bill to mean the public library, in implementing the policy, posts its internet safety policy, uses a technology protection measure on all public computers, and disables the technology protection measure upon an adult’s request to use the computer for bona fide research or other lawful purpose. The process provided for is as follows:

- The state resident must notify the administrative unit responsible for the public library implicated of the facts and circumstances constituting the alleged violation, and must provide the library with 45 days to comply or to make reasonable efforts toward compliance.
- If the library fails to comply or make reasonable efforts, the resident may file a civil cause of action in circuit court to enforce the bill’s requirements.
- If the court finds that a public library has not made reasonable efforts to comply, the court is required to impose a fine of \$100 per day per library location for the period between the date that the head of the administrative unit received notice of the intended civil action and the date upon which the library begins making reasonable efforts to comply.

If the administrative unit is fined, the court must order that reasonable attorney’s fees and costs be paid to the prevailing resident by the administrative unit; if the court finds that the filing of the action was in bad faith or frivolous, the court must order that reasonable attorney’s fees and costs be paid to the administrative unit by the resident.

The Clerk of the Circuit Court is directed to collect fines that are assessed and is permitted to retain \$1 of each payment as a service charge. The clerk is directed to transfer these moneys on a monthly basis to the Department of Revenue for deposit in the Records Management Trust Fund within the Department of State.

The bill directs the Division of Library and Information Services within the DOS in subsection (4) to adopt rules that require the head of each administrative unit to annually attest in writing, under penalty of perjury, that all public library locations within the unit are in compliance with the bill’s Internet Safety Policy requirements as a condition of the receipt of state funds distributed under ch. 257, F.S.

The bill states in subsection (5) that no cause of action, other than that authorized in subsection (3), shall arise in favor of any person due to a public library's failure to comply with the bill's Internet Safety Policy requirements.

Section 2 provides a legislative finding that use of technology protection measures in public libraries to protect against access to visual depictions that are obscene or child pornography and, in the case of minors, which are harmful to minors fulfills an important state interest.

Section 3 provides that the bill takes effect on October 1, 2005.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill requires local public libraries to purchase technology protection measures that prohibit Internet access to visual depictions that are obscene, child pornography, and harmful to minors. The bill does not fund this requirement.

Pursuant to Art. VII, s. 18 of the Florida Constitution, the provision concerning local mandates, the Legislature may not pass a law requiring a county or municipality to spend funds unless an appropriation of sufficient funding is provided. The bill, however, is anticipated to have an insignificant fiscal impact, i.e., less than \$1.6 million, based on the DOS's estimate that this bill's fiscal impact is \$220,000 for the first year and \$560,000 for future years.⁸ Thus, the bill appears to be exempt from the constitutional mandate funding requirements.

Further, in the unlikely event that the fiscal impact of this bill would exceed \$1.6 million, the bill may be excepted from the constitutional mandate funding requirements, given its legislative finding that it fulfills an important state interest, if it is passed by two-thirds of the membership in both houses of the Legislature.⁹

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

⁸ Article VII, s. 18(d) of the Florida Constitution, provides that laws having an "insignificant fiscal impact" are exempt from the constitutional mandate funding requirements. The term "insignificant fiscal impact" means the aggregate total of the impact is less than the average state population for a fiscal year times ten cents. In April 2001, the state population was 16,331,739; thus, fiscal impacts less than \$1.6 million are deemed insignificant. See "2002 Intergovernmental Impact Report," Florida Legislative Committee on Intergovernmental Relations, February 2003.

⁹ See Article VII, s. 18(a) of the Florida Constitution.

D. Other Constitutional Issues:

The CIPA was enacted by Congress in 2000. As discussed in the “Present Situation” section, *supra*, the Act requires public libraries that receive specified federal funding to install technology protection measures that block visual depictions that are obscene or constitute child pornography, and in the case of minors, that are harmful to minors.

In 2002, the American Library Association and the American Civil Liberties Union filed suit against the federal government, challenging the constitutionality of CIPA. The Court for the Eastern District of Pennsylvania held that the CIPA’s mandatory filtering requirements violated the First Amendment of the U.S. Constitution because current filtering technology blocks not only illegal material, i.e., child pornography and obscenity, but also blocks constitutionally protected speech.¹⁰

On June 23, 2003, the U.S. Supreme Court reversed, holding that the CIPA does not violate the First Amendment and does not impose an impermissible condition on libraries that received federal funding.¹¹ In a plurality opinion, Chief Justice Rehnquist found that Congress may attach conditions to federal funding in order to compel certain behavior so long as that behavior is constitutional.¹² ¹³ Chief Justice Rehnquist found Internet filtering to be constitutional behavior, given that the goal of libraries is not to provide “universal coverage” of all materials; instead, libraries make content-based decisions when collecting materials.¹⁴ For example, most libraries exclude pornography from their collections. Accordingly, the Chief Justice held that libraries were likewise entitled to make content-based decisions regarding materials collected from the Internet.¹⁵

The bill’s requirement that Florida public libraries install technology protection measures is substantively identical to that contained in the CIPA. Accordingly, it appears the bill would withstand the constitutional challenges resolved by the U.S. Supreme Court in the *American Library Association* case.

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 by the public at county and municipal libraries. The bill will permit residents to bring enforcement

¹⁰ 201 F. Supp. 2d 401 (E.D. Pa. 2002).

¹¹ *U.S. v. American Library Ass’n, Inc.*, 123 S.Ct. 2297 (2003).

¹² Justices O’Connor, Scalia, and Thomas joined the plurality opinion drafted by Chief Justice Rehnquist. Justices Kennedy and Breyer concurred separately, and Justices Stevens, Souter, and Ginsburg dissented.

¹³ *Id.* at 2303.

¹⁴ *Id.* at 2304.

¹⁵ *Id.*

actions in civil court against public libraries that fail to comply with the bill's Internet Safety Policy requirements.

C. **Government Sector Impact:**

Cost associated with filtering software: The DOS has indicated that Florida public libraries use 22 different products to filter the Internet. Libraries reported that annual filtering software costs anything from \$0 to \$30,000.

The DOS estimates that the annual cost for all libraries to filter, based on the price of a popular filtering software product used by one quarter of the libraries currently filtering, would be \$305,072, exclusive of costs for servers and personnel to install and maintain the filtering products.

Fines and attorney's fees and costs: Public libraries that fail to comply with the bill's Internet Safety Policy requirements are subject to civil enforcement suits by residents. If a library is found by the court to be in non-compliance, the court is required to order assessment of a fine of \$100 per day per library location beginning from the date that the head of the administrative unit received notice of the intended civil enforcement action. Additionally, the court is required to award reasonable attorney's fees and costs to be paid to prevailing residents by losing administrative units. The fiscal impact of the fines, fees, and costs is indeterminate as the number of public libraries that will fail to comply with the bill and that will be sued is unknown.

State funding: The bill provides that the head of each administrative unit must annually attest in writing, under penalty of perjury, that all public library locations within the unit are in compliance with the bill's Internet Safety Policy requirements as a condition of the receipt of state funds distributed under ch. 257, F.S. Thus, public libraries failing to comply with the bill will not be eligible for funds provided by the Division of Library and Information Services within the DOS through the State Aid to Libraries Program in ch. 257, F.S.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

None.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
