HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 519 CS Internet Screening in Public Libraries
SPONSOR(S): Kravitz
TIED BILLS: None **IDEN./SIM. BILLS:** SB 960

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	5 Y, 1 N, w/CS	Shaddock	Bond
2) Transportation & Economic Development Appropriations Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

This bill addresses the access by adults and children to internet pornography in public libraries. The bill requires public libraries to adopt an internet safety policy and install technology protection measures on all public computers. The protection measures are to prevent adults from using the libraries 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 protection measures can be disabled upon an adult's request to use the computer for bona fide research or other lawful purposes. Libraries are precluded from maintaining a record of the adults who request this disablement.

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 unit are in compliance with this section, as a condition of receiving state funds.

This bill appears to have a minimal negative fiscal impact on local governments. This bill does not appear to have a fiscal impact on state government.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

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

Empower Families -- This bill seeks to benefit families by decreasing the possibility of children and adults being exposed to pornography at public libraries.

B. EFFECT OF PROPOSED CHANGES:

Background

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. Am. Library Ass'n*, 539 U.S. 194 (2003), determining the law did not violate the First Amendment's free speech clause nor did it 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 will 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. Nevertheless, there are a number of statutes that prohibit the display of obscene materials to minors and child pornography.

"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 the Supreme Court's definition in *Miller v. California*, 413 U.S. 15 (1973).[3]

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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)(plurality opinion).
[3] *Haggerty v. State*, 531 So. 2d 364, 365 (Fla. 1st DCA 1988).

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

> any 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.

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.[4] [5] 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, F.S. 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 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.[6] Out of 149 county and municipal libraries in Florida's 67 counties, 139 libraries responded to the survey. All of the libraries who answered the survey had locally adopted internet use policies, and 138 of the libraries prohibited the display of obscene or offensive images.[7] Of the libraries responding to the survey, 110 currently had filtering software or technology on their computers, and twenty-three did not filter.[8] Fourteen counties have one or more libraries that do not have filters, another four libraries only filter computers in the children's or youth section of the library, and three of the counties that did not have filters indicated that they would be installing filters soon or were in the process of negotiating with vendors.[9]

Three libraries reported that they were not CIPA compliant, twenty-nine libraries stated that CIPA did not apply to them, and the other 107 libraries indicated that they were CIPA compliant.[10]

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[4] Obscene materials means "any obscene book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing paper, card, picture, drawing, photograph, motion picture film, figure, image, videotape, videocassette, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose." Section 847.0133, F.S.

[5] The term "obscene" has the same meaning in s. 847.0133, F.S as it has in s. 847.001, F.S.

[6] Department of State, Division of Library and Information Services, *Internet Policies & Filtering in Florida's Public Libraries Report*, March 21, 2005 (hereinafter "*Internet Policies*").

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

Effect of Bill

Definitions

The bill creates a new section, s. 257.44, F.S., requiring internet screening in public libraries. A number of terms that are crucial to an understanding of the requirements and prohibitions provided for in the bill are detailed below. The bill defines "public library" as "any library that is open to the public and that is established or maintained by a county, municipality, consolidated city-county government, special district, or special tax district, or any combination thereof."[11] Excluded from this definition are libraries open to the public that are maintained or established by a community college or state university. A "public computer" is any computer made available to the public and that has internet access.[12]

This bill requires a public library to enforce an internet safety policy providing for:

- Installation and operation of a protection measure on all public computers in the library that restricts access by adults to visual depictions that are obscene or constitute child pornography and that restricts access by minors to visual depictions that are obscene, constitute child pornography, or are harmful to minors, and

- Disablement of the 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 that are obscene, contain child pornography, or that are harmful to minors.[13]

The definition of child pornography is the same definition that appears in s. 847.001, F.S. For the purposes of this bill, harmful to minors is defined as:

> [A]ny 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; and
>
> 3. Taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.[14]

“Obscene” is defined as it is currently in s. 847.001, F.S.[15] “Administrative unit” is defined as “the entity designated by a local government body as responsible for administering all public libraries established or maintained by that local government body.”[16]

[11] Section 257.44(1)(g).
[12] Section 257.44(1)(f).
[13] Section 257.44(1)(i).
[14] Section 257.44(1)(c).
[15] Section 257.44(1)(e).
[16] Section 257.44(1)(a).

Internet Policy

Each public library is required to post a conspicuous notice informing library patrons of the internet safety policy and indicating that the policy is available for review.[17] Libraries must disable the protection measure upon the request of any adult who wishes to use the computer for bona fide research or other lawful purpose,[18] and the library may not maintain a record containing the names of any adult who has requested the protection measure be disabled.[19]

Rule-Making Authority

The Division of Library and Information Services must adopt administrative rules requiring the head of each administrative unit to annually attest in writing, under penalty of perjury, that all libraries within the administrative unit are in compliance with the internet safety policy as a condition of the receipt of any state funds being distributed under ch. 257, F.S.[20]

C. SECTION DIRECTORY:

Section 1 creates s. 257.44, F.S., requiring internet screening in public libraries.

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

Section 3 provides an effective date of October 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The fiscal analysis provided by the Department of State states that there is no fiscal impact to the Department. However, this bill would appear to have a minimal but unknown fiscal impact on state government. The Department of State is required to promulgate rules concerning annual compliance by libraries, and the Department is required to collect and maintain those annual attestations.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

[17] Section 257.44(2)(b).
[18] Section 257.44(2)(a)(2).
[19] Section257.44(2)(c).
[20] Section 257.44(4).

The Department of State estimates that this bill will require recurring expenditures of $108,240 annually for libraries not currently using filtering software. The department estimates that the total recurring cost to all libraries regulated by this bill for filtering software is $666,600.

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, if a bill does not have a significant fiscal impact, then it is exempt from the mandate provision.[21] The current policy of the House and Senate Appropriations Committees 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. Based upon the survey of Florida's public libraries and the fiscal analysis from the Department of State it appears that this bill will not impose a significant economic impact on counties and municipalities, and thus does not require an extraordinary vote as a mandate.

2. Other:

Access by Minors

This bill may raise First Amendment concerns since the statute creates a new definition of "harmful to minors" that extends beyond the current definition found in s. 847.001(10), F.S., which is similar to 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.'"[22] In other words, obscene material is unprotected by the Constitution but indecent material is constitutionally protected. Hence, the new definition should be reviewed to determine whether it would infringe upon Constitutional protected speech.

For the purposes of this bill, harmful to minors is defined as:

> [A]ny 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; and

[21] Art. VII, s. 18(a), FLA. CONST.
[22] *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)).

3. Taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.[23]

This "harmful to minors" standard is a content-based regulation of speech[24], which must be narrowly tailored to promote a compelling government interest.[25] However, internet access in a public library is not a traditional or designated public forum,[26] and a library "does not acquire internet terminals in order to create a public forum for Web publishers to express themselves."[27]

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.[28] 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." [29]

"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."[30] 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.[31] A government-run public forum requires that content-based prohibitions be narrowly drawn to effectuate a compelling state interest.[32]

"The state has a compelling interest in protecting the physical and psychological well-being of children, which extends to shielding minors from material that is not obscene by adult standards, but

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[23] Section 257.44(1)(c).

[24] According to 16A Am. Jur. 2d, Constitutional Law s. 460:

> [t]he most exacting scrutiny test is applied to regulations that suppress, disadvantage, or impose different burdens upon speech on the basis of its content, and to laws that compel speakers to utter or distribute speech bearing a particular message, but regulations that are unrelated to content are subject to an intermediate level of scrutiny reflecting the less substantial risk of excising ideas or viewpoints from public dialogue. .. . . Regulations of speech that are regarded as content-neutral receive an intermediate rather than a strict scrutiny under the First Amendment; this includes regulations that restrict the time, place, and manner of expression in order to ameliorate the undesirable secondary effects of sexually explicit expression. Therefore, as a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of ideas or views expressed are content-based and subject to strict scrutiny under the First Amendment, while laws that confer benefits or impose burdens on speech without reference to ideas or views expressed are in most instances content-neutral. Regulations which permit the government to discriminate on the basis of the content of a speaker's message ordinarily cannot be tolerated under the First Amendment.

[25] *Simmons v. State*, 886 So. 2d at 403 (internal citations omitted).

[26] Whether or not a place is designated a traditional or designated public form can be significant. The following quotation from 16A Am. Jur. 2d, Constitutional Law, s. 518 is particularly enlightening:

> Even protected speech is not equally permissible in all places and at all times; nothing in the Constitution requires the government freely to grant access to all who wish to exercise their right to free speech on every type of government property without regard to the nature of the property or to the disruption that might be caused by a speaker's activities. The right to communicate is not limitless; even peaceful picketing may be prohibited when it interferes with the operation of vital governmental facilities. Thus, the government's ownership of property does not automatically open that property to the public for First Amendment purposes. However, the Constitution forbids a state from enforcing certain exclusions from a forum generally open to the public, even if the state is not required to create the forum in the first place.

[27] *Am. Library Ass'n*, 539 U.S. at 205-06.

[28] *B.B. v. State*, 659 So. 2d 256, 259 (Fla. 1995)(citing *In re T.W.*, 551 So.2d 1186 (Fla.1989).

[29] *Simmons*, 886 So. 2d at 405 (citing *Jones v. State*, 640 So. 2d 1084, 1085-87 (Fla. 1994)).

[30] *Am. Library Ass'n.* 539 U.S at 208.

[31] *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

[32] *Id.* at 46.

the means must be carefully tailored to achieve that end so as not to unnecessarily deny adults access to material which is indecent (constitutionally protected), but not obscene (unprotected)."[33]

The Supreme Court has "repeatedly" recognized that the government has an interest in protecting children from harmful materials.[34] 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."[35]

Request for Unblocking

CIPA provides for the disabling of the filtering software upon request. Specifically, CIPA provides: "[a]n administrator, supervisor, or other authority *may disable* a technology protection measure under paragraph (1) to enable access for a bona fide research or other lawful purpose." 20 U.S.C. s. 9134(f)(3) (emphasis added). The bill provides that "each public library shall enforce an Internet safety policy that provides for:" "[d]isablement of the technology protection measure by an employee of the public library upon an adult's request to use the computer for bona fide research or other lawful purpose."[36] In discussing CIPA's express requirement that the filtering software be disabled for bona fide research or other lawful purposes the Supreme Court stated that even if there is embarrassment by a person requesting the lifting of the software, "the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment."[37]

Access by Adults

The constitutional standards regarding adult access to indecent materials are different from those applicable to minors. It is possible that a court might find that an adult's constitutional right to access such material is hindered by the inherent time delay required to stop the filtering software for the adult patrons benefit. There is no definitive line for determining when an extended delay in granting an adult's request to unblock the software might be considered an unreasonable infringement upon an adult's right to conduct bona fide research and pursue other lawful uses of the internet. For as Justice Kennedy opined in his concurrence in the plurality opinion in *Am. Library Ass'n*:

> If, on the request of an adult user, a librarian will unblock filtered material or disable the internet software filter without significant delay, there is little to this case. The Government represents this is indeed the fact.
>
> ****
>
> If some libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user's election to view constitutionally protected internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge, not the facial challenge made in this case.
>
> ****
>
> There are, of course, substantial Government interests at stake here. The interest in protecting young library users from material

[33] *Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004).
[34] *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)).
[35] *Am. Library Ass'n*, 539 U.S. at 209.
[36] Section 257.44(2)(a).
[37] *Am. Library Ass'n*, 539 U.S. at 209.

> inappropriate for minors is legitimate, and even compelling, as all Members of the Court appear to agree. Given this interest, and the failure to show that the ability of adult library users to have access to the material is burdened in any significant degree, the statute is not unconstitutional on its face.[38]

B. RULE-MAKING AUTHORITY:

This bill 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:

Filtering Difficulties

The following is an enlightening quote from Justice Stevens' dissent in *Am. Library Ass'n*,

> Due to the reliance on automated text analysis and the absence of image recognition technology, a Web page with sexually explicit images and no text cannot be harvested using a search engine. This problem is complicated by the fact that Web site publishers may use image files rather than text to represent words, i.e., they may use a file that computers understand to be a picture, like a photograph of a printed word, rather than regular text, making automated review of their textual content impossible. For example, if the Playboy Web site displays its name using a logo rather than regular text, a search engine would not see or recognize this Playboy name in that logo.[39]

Harmful to Minors

Section 847.001(6), F.S. provides a definition for "harmful to minors." The instant bill seeks to establish a new definition for "harmful to minors" for the purposes of this bill. It is unclear why a different definition of "harmful to minors" is included in the bill.

Visual Depictions

Section 257.44(1)(i), F.S. defines technology protection measure as "software or equivalent technology that blocks or filters internet access to the visual depiction that are proscribed under subsection (2) [the internet safety policy]". This definition would seem not to include audio depictions. The CIPA provides additional protection against other materials that may be prohibited by providing: "(2) Access to other materials[:] Nothing in this subsection shall be construed to prohibit a library from limiting internet access to or otherwise protecting against materials other than those referenced in subclauses (I), (II), and (III) of paragraph (1)(A)(i) [items that are obscene, child pornography, or harmful to minors]" 20 U.S.C. s. 9134.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On February 8, 2006, the Civil Justice Committee adopted one amendment to the bill. The amendment removed the civil action provision from the bill. The bill was then reported favorably with a committee substitute.

[38] *Am. Library Ass'n*, 539 U.S. at 214-15 (Kennedy, J., concurring).
[39] *Am. Library Ass'n*, 539 U.S. at 221 (Stevens, J., dissenting).