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INTERNET: SEXUALLY EXPLICIT MATERIAL

Senate Bill 117 with House committee amendments First Analysis (3-18-99)

Sponsor: Sen. Bev Hammerstrom
House Committee: Criminal Law and Corrections
Senate Committee: Judiciary

THE APPARENT PROBLEM:

The Internet offers users quick and relatively simple access to a wide variety of information resources, products and services, and opportunities for interactive communication with millions of people through the use of a computer. Reportedly, approximately 40 million people use the Internet world-wide, and some 6 million of these users are minor children. Many children access the Internet at school, at public libraries, and in their homes, and are often more adept at using a computer than many of their elders.

Despite the beneficial and educational advantages of the Internet's growing network of information, the Internet is not without its problems. One common concern, particularly in light of the number of children who use the Internet, is the relative ease with which children can access materials that their parents might find offensive. Although a child might not be able to attend an X-rated movie, enter a topless bar, or purchase a pornographic magazine; the functional equivalents of such items are available on the Internet and can be accessed by children. Although the federal Communications Decency Act (CDA), enacted in February of 1996, established criminal sanctions for providing, transmitting or making available certain materials to minors on the Internet, it was struck down by the U.S. Supreme Court in June of 1997 on the grounds that it violated the First Amendment to the U.S. Constitution. Recognizing that a broad prohibition against sexually explicit materials on the Internet, and the risk of use of the Internet by pedophiles has and does occur, it has been suggested that the state should, with a narrowly tailored law, attempt to prevent people from directly providing minors with sexually explicit material.

THE CONTENT OF THE BILL:

The bill would amend Public Act 33 of 1978, which prohibits the dissemination, exhibition, or display of certain sexually explicit matter to minors, to include material communicated, transmitted, displayed, or otherwise made available by means of the Internet, a computer, or a computer program, system, or network, in the act's definitions of "sexually explicit performance", "sexually explicit verbal material", and "sexually explicit visual material".

The bill also would revise the offense of "distributing obscene matter to a minor" by referring, instead, to "disseminating sexually explicit matter to a minor", and would revise the offense of displaying "obscene" matter to a minor by referring, instead, to "sexually explicit" matter. Those offenses would not apply if a person disseminated or displayed sexually explicit matter to a minor by means of the Internet or a computer network unless 1) the matter was "obscene" as that term is defined in Public Act 343 of 1984 (i.e., the average person, applying contemporary community standards, would find that the material, taken as a whole, appeals to the prurient interest; and the reasonable person would find the material, taken as a whole, lacks serious literary, artistic, political, or scientific value) or 2) the prosecuting attorney proved that the offender disseminated or displayed the matter to one or more specific minors and knew of their status as minors. A dissemination violation involving the Internet, a computer, or a computer program, system, or network would occur if the violation originated or terminated in Michigan.

A dissemination offense would not apply either to an Internet or computer network service provider who, in

Senate Bill 117 (3-18-99)

good faith and without knowledge of the nature of the sexually explicit matter or the status of a minor, provided the medium for disseminating the sexually explicit matter, or to a person who disseminated sexually explicit matter that was a public document, publication, record, or other material issued by a state, local, or federal official or governmental entity or an accurate republication of that material.

The bill would take effect August 1, 1999.

MCL 722.673 et al.

HOUSE COMMITTEE ACTION:

The House Committee on Criminal Law and Corrections adopted a technical amendment correcting a drafting error and an amendment adding an effective date of August 1, 1999.

BACKGROUND INFORMATION

In February of 1996, President Clinton signed the Communications Decency Act (CDA) into law. The CDA created two statutory provisions known informally as the "indecent transmission" provision and the "patently offensive display" provision. The indecent transmission provision prohibited the knowing transmission of obscene or indecent messages to any recipient under the age of 18. The patently offensive display provision prohibited the knowing sending or displaying of patently offensive messages in a manner that was available to a person under the age of 18. Although the law was never prosecuted because of it was immediately challenged by the American Civil Liberties Union as unconstitutional, violators could have been sentenced to two years in prison and a \$250,000 fine. According to proponents of the act, the CDA was intended to protect minors by prohibiting the production and circulation of indecent materials through the Internet. Opponents argued that the act unfairly (and unwisely) interfered with free speech in a new medium. It was an argument that was won on June 26, 1997 by the opponents of the act when the U.S. Supreme Court, affirming a lower-court ruling, ruled that the CDA was unconstitutional. (*American Civil Liberties Union v Reno*, 117 S. Ct. 2329 [1997])

In the *ACLU v Reno* case, a majority of the court (seven justices - Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg and Breyer) agreed that the act unconstitutionally violated the First Amendment's protection of freedom of speech. Although the

majority supported the legislative goal of protecting children from exposure to adult material, it held that the actual provisions of the law unconstitutionally undermined the free-speech rights of adults. Because the CDA was a content-based regulation of speech and imposed criminal sanctions for its violation, the majority opinion concluded that the act raised special concerns due to its obvious chilling effect upon free speech since the severity of the criminal sanctions would likely "cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." Due to the vagueness of the terms in the act, the opinion questioned whether under the act's provisions a speaker could "confidently assume that a serious discussion about birth control practices, homosexuality, . . . , or the consequences of prison rape would not violate the CDA[.]"

The court pointed out that "[i]n order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." The court also noted that sexual expression that is indecent but not obscene is protected by the First Amendment - "The fact that society may find speech offensive is not a sufficient reason for suppressing it."

A minority opinion was offered by the two justices who did not fully agree with the seven-member majority opinion. Although the minority agreed with the court's decision that the statute abridged 'freedom of speech' protected by the First Amendment and lacked "the precision that the First Amendment requires when a statute regulates the content of speech," the two justices disagreed with the majority on the issue of making it a crime to "knowingly" send indecent material to a specific person under the age of 18.

On behalf of herself and Chief Justice Rehnquist, Justice O'Connor wrote "separately to explain why I view the Communications Decency Act of 1996 as little more than an attempt by Congress to create 'adult zones' on the Internet. Our precedent indicates that the creation of such zones can be constitutionally sound." O'Connor said technological barriers can be built in cyberspace to keep kids out of pornographic areas while letting adults enter freely. "This transformation of cyberspace is already under way," she said, citing the evolution of blocking software such

as Cyber Patrol and SurfWatch. But she hastened to add: "Until gateway technology is available throughout cyberspace, and it is not in 1997, a speaker cannot be reasonably assured that the speech he displays will reach only adults because it is impossible to confine speech to an "adult zone." Nevertheless, such "gateway" technology might someday be used to write zoning laws for the Internet.

The minority opinion noted that a zoning law is valid if a) it does not unduly restrict adult access to the material; and b) minors have no First Amendment right to read or view the banned material. On this basis, the minority opinion argued that some of the other provisions of the statute might, under certain circumstances, be constitutional: for example, when applied to a conversation between an adult and one or more minors, as when an adult speaker sends an e-mail knowing the addressee is a minor, or when an adult and a minor converse by themselves or with other minors in a chat room. In such a situation, the minority opinion argued, "[r]estricting what an adult may say to the minors in no way restricts the adult's ability to communicate with other adults. He is not prevented from speaking indecently to other adults in a chat room (because there are no other adults participating in the conversation) and he remains free to send indecent e-mails to other adults." The minority opinion would, as a result, have upheld the provisions regarding indecent transmissions and those indecent displays where the sender knew that all of the recipients were minors.

Since the overturning of the CDA, the federal government has enacted another Internet law - the Child Online Protection Act, which is currently being challenged in the courts and a federal district judge has granted a preliminary injunction against enforcement of the act.

FISCAL IMPLICATIONS:

According to the Senate Fiscal Agency, the bill would have an indeterminate fiscal impact on state and local government. In 1996, seven people were convicted of distributing obscene matter to a minor. There are no data to indicate how many more people could be convicted if Internet transmissions were included in the definitions. The bill would not change the two-year maximum sentence for dissemination; statutory sentencing guidelines classify this crime in Class E, which carries a recommended minimum sentence range of from 0-3 months to 24-38 months. According to statute, the minimum sentence cannot be more than

2/3 of the maximum sentence or, in this case, more than 18 months. Therefore, short of a judicial departure, most offenders would be sentenced to local sanctions, the cost of which varies from county to county. (2-16-99)

ARGUMENTS:

For:

A number of studies have found a correlation between the use of "hard-core" pornography and a number of societal ills - from rape to child molestation. For example, in a study of convicted child molesters, 77 percent of those who molested boys said they were regular users of hard-core pornography. And 87 percent of those who molested girls said they were regular users of hard-core pornography (W. Marshall, Report on the Use of Pornography by Sexual Offenders, Report to the Federal Department of Justice, Ottawa, Canada, 1983.)

The LAPD Sexually Exploited Child (SEC) Unit examined the relationship between child sexual abuse by non-family members and pornography in their cases over a ten year period from 1980-1989. Pornography was directly involved in 62 percent of the cases and actually recovered in 55 percent of the total cases. (Ralph W. Bennett, "The Relationship Between Pornography and Extrafamilial Child Sexual Abuse," The Police Chief, February 1991).

It is also believed that pornography contributes to rape and sexual violence in America. Another study by Dr. Marshall of adult sex offenders found that 86 percent of convicted rapists said they were regular users of pornography, with 57 percent admitting direct imitation of pornographic scenes they enjoyed in the commission of their rapes (W. Marshall, Use of Sexually Explicit Stimuli by Rapists, Child Molesters and Non-Offenders, 25 Journal of Sex Research 267, 1988.)

Further, in Oklahoma City, as officials eliminated over 150 sexually oriented businesses, the rape rate declined over 27 percent in the five-year period. During that same time, rape in the rest of the state continued to rise over 19 percent. (Uniform Crime Report, 1990) A 1979 study in Phoenix, Arizona, found that neighborhoods with a pornography business experienced 40 percent more property crime and 500 percent more sexual offenses than similar neighborhoods without a pornography outlet (U.S. Department of Justice, "Child Pornography, Obscenity and Organized Crime," February 1988.)

For:

The Internet offers a wide variety of educational and learning opportunities for both young and old; however, although it opens doors to an almost endless array of learning opportunities, it also offers a number of doors that many parents would just as soon their children not open. It is not unreasonable for parents to hope that their children might be allowed to avail themselves of all of the good things that access to the Internet offers without the parents being required to constantly look over the child's shoulder to prevent the child from receiving sexually explicit materials over the Internet. Parents have every right to hope to limit their children's access to sexually explicit materials, and in particular they have the right to expect that other adults will not direct sexually explicit materials to them. The bill will help to alleviate some of the fears that all good parents have about their children's use of the Internet by making it a crime to offer a minor sexually explicit material over the Internet, just as it is a crime to offer them sexually explicit material on a playground or anywhere else.

Against:

The bill is almost certainly unconstitutional and will likely be struck down if enacted into law. The U.S. Supreme Court's decision in *American Civil Liberties Union v Reno*, 117 S. Ct. 2329 (1997) specifically addressed the government's assertion (similar to the one offered by proponents of this bill) that the CDA's provisions only prohibited dissemination of indecent messages to persons "known" to be under 18, and therefore it did not unconstitutionally prevent communication between adults. The court noted that "given the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it." The court also noted that such an argument "ignores the fact that most Internet fora -- including chat rooms, news groups, mail exploders, and the Web -- are open to all comers. The Government's assertion that the knowledge requirement somehow protects the communications of adults is therefore untenable. Even the strongest reading of the 'specific person' requirement of [section] 223(d) cannot save the statute. It would confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech who might simply log on and inform the would be discourses that his 17 year old

child -- a specific person . . . under 18 years of age," [citation omitted] would be present." [Note: 47 U.S.C.A. sec. 223 (d) would have prohibited a person

from knowingly using an interactive computer service to send an indecent message to a specific person or persons under 18 years of age, or from knowingly using any interactive computer service to display indecent material in a manner available to a person under 18 years of age.]

Furthermore, a CDA-like state law has been rejected by a federal court. The New York case, *American Library Association v George Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997) challenged the constitutionality of the a New York state online indecency regulation. The federal judge hearing the case ruled that the law was unconstitutional on the grounds that it violated the Constitution's interstate commerce clause, which forbids one state from regulating another state's commercial activity. The judge also noted that the state could already protect children through vigorous enforcement of existing criminal law. It is likely that a similar finding could be made regarding Senate Bill 117.

POSITIONS:

The Department of State Police supports the bill. (3-17-99)

The American Civil Liberties Union opposes the bill. (3-17-99)

Analyst: W. Flory

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.