

Judiciary Committee

HB 1316

Title: *An act relating to the safety and well-being of children.*

Brief Description: *Protecting children from material that is harmful to minors.*

Sponsors: *Representatives Schindler, O'Brien, Boldt, Sump, Lovick, Miloscia, Mulliken, Lambert, Benson, Mielke, Ahern, Erickson, McMorris, Carrell and Esser.*

Brief Summary of Bill

- *Prohibits the display, sale, dissemination, or distribution to minors of matter that is harmful to minors.*
- *Defines "harmful to minors" as a three-part obscenity test adjusted for minors.*
- *Imposes criminal penalties for violations and provides affirmative defenses to the crime.*

Hearing Date: *2/22/01*

Staff: *Edie Adams (786-7180).*

Background:

The sale, distribution, or exhibition of erotic materials to minors is prohibited by statute (erotic materials statute). This prohibition applies only to materials determined by a court to be "erotic." If material is determined to be erotic, it must be labeled "adults only" and may not be displayed in a manner that makes the material readily accessible to minors. Any person who sells, distributes, or exhibits erotic material to a minor is guilty of a criminal offense.

In 1992, the Legislature extended the coverage of the erotic materials statute to sound recordings. The inclusion of sound recordings was challenged, and in Soundgarden v. Eikenberry (1994), the Washington Supreme Court held that the statute violates the federal constitution. The court held that, although the federal constitution permits states to

regulate speech that is obscene as to minors, the provisions of the statute violate due process and freedom of speech protections. The court did not rule on whether the statute violates the state constitution.

The First Amendment of the federal constitution and Article 1, Section 5, of the state constitution protect freedom of speech. Under both the federal and state constitutions, obscenity is not a protected form of speech and may be regulated or completely prohibited. Protected forms of speech may be regulated to a certain extent depending on the type of speech, the means of regulation, and the government's interest in regulating the speech.

The United States Supreme Court has held that protecting children from sexually explicit material is a legitimate governmental purpose that may justify regulation of some protected speech. The Court upheld the use of a variable obscenity standard for minors under the federal constitution. This standard recognizes that material that is not obscene as to adults may be obscene as to minors. States may regulate this protected material as long as the regulations do not impose unduly burdensome or significant restrictions on adult access to the material.

Congress has attempted to prevent minors' access to indecency on the Internet. In 1996, Congress passed the Communications Decency Act (CDA), portions of which criminalized the knowing transmission of indecent or patently offensive communications to minors. The United States Supreme Court struck down these provisions of the CDA on First Amendment grounds. The Court found that the Internet is entitled to full First Amendment protection, and therefore any regulation of the content of Internet speech must be narrowly tailored and the least restrictive means of achieving a compelling government interest.

In 1998, Congress passed the Child Online Protection Act (COPA), which prohibits commercial communications to minors of any material that may be harmful to minors. In June of 2000, the Third Circuit Court of Appeals upheld a preliminary injunction against enforcement of the COPA, finding that the COPA would most likely be found unconstitutional under the First Amendment. The court found most problematic the inclusion of a contemporary community standards requirement in the definition of harmful to minors, finding that this requirement in the context of the Internet makes the statute unconstitutionally overbroad.

Summary of Bill:

The statutory prohibitions on distribution and display of erotic materials to minors and providing for the labeling of materials determined by a court to be erotic are repealed. These provisions are replaced with provisions prohibiting the display, sale, or distribution to minors of matter that is "harmful to minors."

No person shall, with knowledge of its character, display, sell, furnish, present, distribute, or disseminate to a minor matter that is harmful to minors, or present to a minor or participate in presenting to a minor any live performance that is harmful to minors.

Matter is harmful to minors if it meets the following three-part test: (1) the average adult person applying contemporary community standards would find it appeals to the prurient

interest of minors; (2) it explicitly depicts or describes, by prevailing standards in the adult community with respect to what is suitable for minors, patently offensive representations or descriptions of specifically defined conduct; and (3) when considered as a whole, it lacks serious literary, artistic, political, or scientific value for minors.

Matter that may be harmful to minors includes motion picture films, sexual devices, books, magazines, pamphlets, writings, printings, illustrations, pictures, sound recordings, telephonic communications, or coin-operated machines. "Minor" means a person under the age of 18 years. "Knowledge of its character" means that the person has knowledge that the material contains, depicts, or describes activity or conduct that may be found to be patently offensive.

Matter is deemed not to be "displayed" if it is kept behind blinder racks that cover the lower two-thirds of the matter, or in the case of cable transmissions, if the operator notifies the subscriber of the availability of a device that allows a subscriber to prohibit the viewing of a particular cable service. With respect to computer access, matter is deemed not to be displayed under the following circumstances: (1) in the case of a person who provides access to a computer, the computer is equipped with filtering software; and (2) in the case of a person publishing a world wide web page, hosting or mirroring Internet content on servers located in Washington, or providing access or connection services, all web pages are required to include codes or hidden comments that trigger filtering software.

A violation of the act is a gross misdemeanor punishable by up to one year in jail or a \$5,000 fine, or both. Each day a violation continues constitutes a separate offense. The following affirmative defenses are provided:

- the matter or performance was displayed or disseminated to a minor by the minor's parent or guardian, or with written permission of the parent or guardian, for a bona fide purpose;*
- the person made a bona fide attempt to ascertain the true age of the minor by not relying solely on the oral allegations or apparent age of the minor; and*
- in the case of commercial electronic or telephonic transmission, access by persons under 18 years of age is restricted by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.*

The state entirely preempts the field of regulation of matter that is harmful to minors. Local laws that are inconsistent, more restrictive, or less restrictive are preempted and repealed.

Appropriation: *None.*

Fiscal Note: *Not Requested.*

Effective Date: *The bill contains an emergency clause and takes effect immediately.*

