



Sub. H.B. 8*

124th General Assembly
(As Reported by H. Criminal Justice)

Reps. Hughes, DePiero, Sietz, Latta, Smith, Reidelbach, Jerse, Perry, Sykes, Willamowski

BILL SUMMARY

- Expands the definition of "material" that applies to the Sex Offense Law so that it lists as examples of included items any image appearing on a computer monitor, television screen, liquid crystal display, or similar display device and any image recorded on a computer hard disk or floppy disk, compact disk, magnetic tape, or similar data storage device.
- Exempts a person from certain sex offenses if the offenses would apply to the person solely because the person provided access or connection to or from a computer facility, system, or network not under that person's control, including having provided transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing access or connection to or from a computer facility, system, or network, and that does not include the creation of the content of the material that is the subject of the access or connection.
- States that an employer is not guilty of certain sex offenses based on the actions of an employee or agent of the employer unless the employee's or agent's conduct is within the scope of the employee's or agent's employment or agency, and the employer either, with knowledge of the employee's or agent's conduct, authorizes or ratifies the conduct or recklessly disregards the employee's or agent's conduct.
- Establishes an affirmative defense to a charge of disseminating matter harmful to juveniles or displaying matter harmful to juveniles as the

* *This analysis was prepared before the report of the House Criminal Justice Committee appeared in the House Journal. Note that the list of co-sponsors and legislative history may be incomplete.*

offense applies to an image transmitted through the Internet that the person charged with the violation has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by juveniles to material that is harmful to juveniles, including any method that is feasible under available technology.

CONTENT AND OPERATION

Existing law

The Sex Offense Law contains a series of sexual assault-related offenses (e.g., "rape," "gross sexual imposition," "voyeurism," etc.), prostitution-related offenses (e.g., "compelling prostitution," "procuring," "soliciting," etc.), and obscenity-related and pornography-related offenses and numerous procedural provisions related to those offenses. Many of the obscenity-related and pornography-related offenses and many of the procedural provisions use the term "material," as defined in the Sex Offense Law (see below), as an element of the offense or as a criterion within the procedure; those offenses and provisions are set forth in **COMMENT 1**. A few provisions outside of the Sex Offense Law also use the term "material," as defined in the Sex Offense Law; those provisions are set forth in **COMMENT 2**.

The general definitional section for the Sex Offense Law specifies that, as used in that Law, "material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch (R.C. 2907.01(J)).

Operation of the bill

Definition of "material"

The bill expands the definition of "material" that applies throughout the Sex Offense Law so that it lists as examples of included items *an image appearing on a computer monitor, television screen, liquid crystal display, or similar display device and an image recorded on a computer hard disk, computer floppy disk, compact disk, magnetic tape, or similar data storage device*. Thus, under the bill, "material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch, *including an image appearing on a computer monitor, television screen, liquid crystal display, or similar display device and an image recorded on a computer*

hard disk, computer floppy disk, compact disk, magnetic tape, or similar data storage device. (R.C. 2907.01(J).)

The effect of the bill's changes described in the preceding paragraph is to make all of the references to "material" that are contained within the existing offenses and other provisions set forth in **COMMENT 1** and **2** apply to all of the items identified in the expanded definition. Thus, for the offenses identified in **COMMENT 1** and **2** that prohibit specified conduct involving "material," the prohibitions will specifically include conduct involving items that are "material" under the bill's expanded definition of that term.

Exemptions to Sex Offense Laws

The bill also creates two exemptions under the Sex Offense Laws.

Providing access. Under the bill, the offenses of disseminating matter harmful to juveniles (R.C. 2907.31), displaying matter harmful to juveniles (R.C. 2907.311), pandering obscenity (R.C. 2907.32), pandering obscenity involving a minor (R.C. 2907.321), pandering sexually oriented matter involving a minor (R.C. 2907.322), illegal use of a minor in a nudity-oriented material or performance (R.C. 2907.323), and compelling acceptance of objectionable materials (R.C. 2907.34), and, in certain circumstances, deception to obtain matter harmful to juveniles (R.C. 2907.33(A)) do not apply to a person solely because the person provided access or connection to or from a computer facility, system, or network not under that person's control, including having provided transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing access or connection to or from a computer facility, system, or network, and that does not include the creation of the content of the material that is the subject of the access or connection.

This exemption does not apply to a person who conspires with an entity actively involved in the creation or knowing distribution of material in violation of those offenses, or who knowingly advertises the availability of material of that nature. Also, this exemption does not apply to a person who provides access or connection to a computer facility, system, or network engaged in the violation of those offenses and that is owned or controlled by that person. (R.C. 2907.35(D).)

Employer exemption. Under the bill, an employer is not guilty of a violation of disseminating matter harmful to juveniles (R.C. 2907.31), displaying matter harmful to juveniles (R.C. 2907.311), pandering obscenity (R.C. 2907.32), pandering obscenity involving a minor (R.C. 2907.321), pandering sexually oriented matter involving a minor (R.C. 2907.322), illegal use of a minor in a nudity-oriented material or performance (R.C. 2907.323), deception to obtain matter harmful to juveniles (R.C. 2907.33), or compelling acceptance of

objectionable materials (R.C. 2907.34) based on the actions of an employee or agent of the employer unless the employee's or agent's conduct is within the scope of the employee's or agent's employment or agency, and the employer does either of the following (R.C. 2907.35(E)):

(1) With knowledge of the employee's or agent's conduct, the employer authorizes or ratifies the conduct.

(2) The employer recklessly disregards the employee's or agent's conduct.

Affirmative defense to a charge of disseminating matter harmful to juveniles or displaying matter harmful to juveniles

Under the bill, it is an affirmative defense to a charge of disseminating matter harmful to juveniles (R.C. 2907.31) or displaying matter harmful to juveniles (R.C. 2907.311) as the offense applies to an image transmitted through the Internet that the person charged with the violation has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by juveniles to material that is harmful to juveniles, including any method that is feasible under available technology (R.C. 2907.35(F)).

COMMENT

1. The offenses and procedural provisions included in the Sex Offense Law that use the term "material" are as follows:

(a) **Disseminating matter harmful to juveniles**. R.C. 2907.31 prohibits a person, with knowledge of its character or content, from recklessly doing any of the following: (i) selling, delivering, furnishing, disseminating, providing, exhibiting, renting, or presenting to a juvenile any *material* or performance that is obscene or harmful to juveniles, (ii) offering or agreeing to sell, delivering, furnishing, disseminating, providing, exhibiting, renting, or presenting to a juvenile any *material* or performance that is obscene or harmful to juveniles, or (iii) allowing any juvenile to review or peruse any *material* or view any live performance that is harmful to juveniles. A violation of the section is the offense of "disseminating matter harmful to juveniles" and, depending upon the circumstances present, is a misdemeanor of the first degree, a felony of the fifth degree, or a felony of the fourth degree.

(b) **Displaying matter harmful to juveniles**. R.C. 2907.311 prohibits a person who has custody, control, or supervision of a commercial establishment, with knowledge of the character or content of the *material* involved, from displaying at the establishment any *material* that is harmful to juveniles and that is open to view by juveniles as part of the invited general public. The section

contains a "blinder rack" exception to the prohibition. A violation of the section is the offense of "displaying matter harmful to juveniles" and is a misdemeanor of the first degree. Each day during which the offender is in violation of the section constitutes a separate offense.

(c) **Pandering obscenity**. R.C. 2907.32 prohibits a person, with knowledge of the character of the *material* or performance involved, from doing any of the following: (i) creating, reproducing, or publishing any obscene material, when the offender knows that the *material* is to be used for commercial exploitation or will be publicly disseminated or displayed, or when the offender is reckless in that regard, (ii) promoting or advertising for sale, delivery, or dissemination; selling, delivering, publicly disseminating, publicly displaying, exhibiting, presenting, renting, or providing; or offering or agreeing to sell, deliver, publicly disseminate, publicly display, exhibit, present, rent, or provide, any obscene material, (iii) creating, directing, or producing an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when the offender is reckless in that regard, (iv) advertising or promoting an obscene performance for presentation, or present or participate in presenting an obscene performance, when the performance is presented publicly, or when admission is charged, or (v) buying, procuring, possessing, or controlling any obscene material with purpose to violate the provision described in clause (ii) or (iv) of this paragraph. A violation of the section is the offense of "pandering obscenity" and, depending upon the circumstances present, is either a felony of the fifth degree or a felony of the fourth degree.

(d) **Pandering obscenity involving a minor**. R.C. 2907.321 prohibits a person, with knowledge of the character of the *material* or performance involved, from doing any of the following: (i) creating, reproducing, or publishing any obscene material that has a minor as one of its participants or portrayed observers, (ii) promoting or advertising for sale or dissemination; selling, delivering, disseminating, displaying, exhibiting, presenting, renting, or providing; or offering or agreeing to sell, deliver, disseminate, display, exhibit, present, rent, or provide, any obscene material that has a minor as one of its participants or portrayed observers, (iii) creating, directing, or producing an obscene performance that has a minor as one of its participants, (iv) advertising or promoting for presentation, presenting, or participating in the presentation of an obscene performance that has a minor as one of its participants, (v) buying, procuring, possessing, or controlling any obscene material that has a minor as one of its participants, or (vi) bringing or causing to be brought into Ohio any obscene material that has a minor as one of its participants or portrayed observers. The section does not apply to materials or performances in certain specified circumstances. A violation of the section is the offense of "pandering obscenity involving a minor" and, depending upon the

circumstances present, is a felony of the second degree, a felony of the fourth degree, or a felony of the third degree.

(e) **Pandering sexually oriented matter involving a minor.** R.C. 2907.322 prohibits a person, with knowledge of the character of the *material* or performance involved, from doing any of the following: (i) creating, recording, photographing, filming, developing, reproducing, or publishing any *material* that shows a minor participating or engaging in sexual activity, masturbation, or bestiality, (ii) advertising for sale or dissemination, selling, distributing, transporting, disseminating, exhibiting, or displaying any *material* that shows a minor participating or engaging in sexual activity, masturbation, or bestiality, (iii) creating, directing, or producing a performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality, (iv) advertising for presentation, presenting, or participating in presenting a performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality, (v) soliciting, receiving, purchasing, exchanging, possessing, or controlling any *material* that shows a minor participating or engaging in sexual activity, masturbation, or bestiality, or (vi) bringing or causing to be brought into Ohio any *material* that shows a minor participating or engaging in sexual activity, masturbation, or bestiality, or bringing, causing to be brought, or financing the bringing of any minor into or across Ohio with the intent that the minor engage in sexual activity, masturbation, or bestiality in a performance or for the purpose of producing *material* containing a visual representation depicting the minor engaged in sexual activity, masturbation, or bestiality. A violation of the section is the offense of "pandering sexually oriented matter involving a minor" and, depending upon the circumstances present, is a felony of the second degree, a felony of the fifth degree, or a felony of the fourth degree.

(f) **Illegal use of a minor in a nudity-oriented material or performance.** R.C. 2907.323 prohibits a person from doing any of the following:

(i) Photographing any minor who is not the person's child or ward in a state of nudity, or creating, directing, producing, or transferring any *material* or performance that shows the minor in a state of nudity, unless *both* of the following apply: the *material* or performance is, or is to be, sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into Ohio, or presented for a *bona fide* artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing *bona fide* studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the *material* or performance; *and* the minor's parents, guardian, or custodian consents in writing to the photographing of the minor, to the use of the minor in the

material or performance, or to the transfer of the *material* and to the specific manner in which the *material* or performance is to be used.

(ii) Consenting to the photographing of the person's minor child or ward, or photographing the person's minor child or ward, in a state of nudity or consenting to the use of the person's minor child or ward in a state of nudity in any *material* or performance, or using or transferring a *material* or performance of that nature, unless the *material* or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a *bona fide* artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing *bona fide* studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the *material* or performance;

(iii) Possessing or viewing any *material* or performance that shows a minor who is not the person's child or ward in a state of nudity, unless *one* of the following applies: the *material* or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into Ohio, or presented for a *bona fide* artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing *bona fide* studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the *material* or performance; *or* the person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the *material* or performance is used or transferred.

A violation of the section is the offense of "illegal use of a minor in a nudity-oriented material or performance" and, depending upon the circumstances present, is a felony of the second degree, a felony of the fifth degree, or a felony of the fourth degree.

(g) **Deception to obtain matter harmful to juveniles.** R.C. 2907.33 prohibits a person, for the purpose of enabling a juvenile to obtain any *material* or gain admission to any performance that is harmful to juveniles, from doing either of the following: (i) falsely representing that he or she is the parent, guardian, or spouse of the juvenile, or (ii) furnishing the juvenile with any identification or document purporting to show that the juvenile is 18 years of age or over or married. It also prohibits a juvenile, for the purpose of obtaining any *material* or gaining admission to any performance that is harmful to juveniles, from doing either of the following: (i) falsely representing that he or she is 18 years of age or over or married, or (ii) exhibiting any identification or document purporting to show that he or she is 18 years of age or over or married. A violation of the

section is the offense of "deception to obtain matter harmful to juveniles," a misdemeanor of the second degree.

(h) **Compelling acceptance of objectionable materials.** R.C. 2907.34 prohibits a person, as a condition to the sale, allocation, consignment, or delivery of any *material* or goods of any kind, from requiring the purchaser or consignee to accept any other *material* reasonably believed to be obscene, or which if furnished or presented to a juvenile would be in violation of R.C. 2907.31. The section also prohibits a person from denying or threatening to deny any franchise or imposing or threatening to impose any financial or other penalty upon any purchaser or consignee because the purchaser or consignee failed or refused to accept any *material* reasonably believed to be obscene as a condition to the sale, allocation, consignment, or delivery of any other *material* or goods or because the purchaser or consignee returned any *material* believed to be obscene that the purchaser or consignee initially accepted. A violation of the section is the offense of "compelling acceptance of objectionable materials," a felony of the fifth degree.

(i) **Presumed knowledge of character of materials.** R.C. 2907.35 specifies that an owner or manager, or his or her agent or employee, of a bookstore, newsstand, theater, or other commercial establishment engaged in selling *materials* or exhibiting performances, who, in the course of business: (i) possesses five or more identical or substantially similar obscene articles, having knowledge of their character, is presumed to possess them in violation of R.C. 2907.32(A)(5), or (ii) does any of the acts prohibited by R.C. 2907.31 or 2907.32, is presumed to have knowledge of the character of the *material* or performance involved, if he or she has actual notice of the nature of such *material* or performance, whether or not he or she has precise knowledge of its contents. Without limitation on the manner in which such notice may be given, actual notice of the character of *material* or a performance may be given in writing by the chief legal officer of the jurisdiction in which the person to whom the notice is directed does business; the notice, regardless of the manner in which it is given, must identify the sender, identify the *material* or performance involved, state whether it is obscene or harmful to juveniles, and bear the date of the notice. R.C. 2907.31 and 2907.32 do not apply to a motion picture operator or projectionist acting within the scope of his or her employment as an employee of the owner or manager of a theater or other place for the showing of motion pictures to the general public, and having no managerial responsibility or financial interest in his or her place of employment, other than wages.

2. Two provisions outside of the Sex Offense Law incorporate by reference that Law's definition of the term "material" and use the term in their provisions:

(a) **Township regulation of adult-oriented businesses.** R.C. 503.65 authorizes the board of township trustees of a township to adopt, amend, and



rescind resolutions that regulate or restrict, within the unincorporated area of the township, adult-oriented businesses that sell, offer for sale, or distribute *material* that is harmful to juveniles or obscene. When it appears that a resolution adopted under this authority is being violated, the legal counsel of the township in which the violation is taking place may bring an action to enjoin the violation; the legal counsel also may bring an action to abate as a nuisance under R.C. 3767.03 to 3767.10 any place in the unincorporated area of the township at which the resolution has been violated. As used in this provision, "material" and "harmful to juveniles" have the same meanings as in the Sex Offense Law and "adult-oriented business" means an establishment having as its primary stock and trade material that is distinguished or characterized by its emphasis on sexually oriented material that is harmful to juveniles or obscene.

(b) **Endangering children.** R.C. 2919.22, in relevant part, prohibits a person from doing any of the following to a child under 18 years of age or a mentally or physically handicapped child under 21 years of age: (i) abusing the child, (ii) torturing or cruelly abusing the child, (iii) administering corporal punishment or other physical disciplinary measure, or physically restraining the child in a cruel manner or for a prolonged period, which punishment, discipline, or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child, (iv) repeatedly administering unwarranted disciplinary measures to the child, when there is a substantial risk that such conduct, if continued, will seriously impair or retard the child's mental health or development, or (v) enticing, coercing, permitting, encouraging, compelling, hiring, employing, using, or allowing the child to act, model, or in any other way participate in, or be photographed for, the production, presentation, dissemination, or advertisement of any *material* or performance that the offender knows or reasonably should know is obscene, is sexually oriented matter, or is nudity-oriented matter. A violation of this prohibition is the offense of "endangering children." If the violation is of the provision described in clause (v), it is a felony of the second degree. Depending upon the circumstances present, a violation of any of the other provisions is a misdemeanor of the first degree, a felony of the fourth degree, a felony of the third degree, or a felony of the second degree.

3. The expansion of the definition of "material" in this bill may raise questions regarding freedom of speech, particularly as the expanded definition would apply to the offense of disseminating matter harmful to juveniles. *Reno v. ACLU* (1997), 521 U.S. 844.

HISTORY

ACTION	DATE	JOURNAL ENTRY
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