



Sub. H.B. 132*

125th General Assembly
(As Reported by S. Judiciary)

Reps. Setzer, McGregor, Hughes, Allen, Husted, DeWine, Schaffer, Flowers, Walcher, Aslanides, Seaver, Webster, Latta, Cirelli, C. Evans, D. Evans, Gilb, T. Patton, Raga, Reidelbach, Schmidt, Slaby

BILL SUMMARY

- Expands the offense of public indecency to also prohibit a person from knowingly doing any of the following, under circumstances in which the person's conduct is likely to be viewed by and affront another person who is a minor, who is in the offender's physical proximity, who resides in the person's household, and who is not the spouse of the offender: (1) engaging in masturbation, sexual conduct, or conduct that to an ordinary observer would appear to be sexual conduct or masturbation or (2) exposing the person's private parts with the purpose of personal sexual arousal or gratification or to lure the minor into sexual activity.
- Modifies the penalties for public indecency so that the penalty is based on the specific prohibition that is violated instead of on the number of prior convictions or guilty pleas the offender has for the offense.
- Expands the offense "disseminating matter harmful to juveniles" to prohibit a person, with knowledge of its character or content, from recklessly directly selling, delivering, furnishing, disseminating, providing, exhibiting, renting, or presenting a *prepaid adult entertainment card* to one or more juveniles or one or more law enforcement officers posing as juveniles.
- Specifies that the board of trustees of a free public library cannot use state money, or money received from any county library and local

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

government support fund, to purchase computers used to access the Internet or to pay for direct costs associated with accessing the Internet, unless all of the following apply: (1) the board has installed and operates a filtering device or filtering software that protects against Internet access to material that is obscene or harmful to juveniles on library computers accessible to juveniles, (2) the board has installed and operates a filtering device or filtering software that protects against Internet access to obscene material on each computer located at the library that is accessible to any library patron, and (3) the board has adopted and enforces a policy prohibiting a juvenile from borrowing video material absent the parent or guardian's express permission.

- Provides that: (1) if a board of library trustees installs and operates a filtering device or filtering software on computers located at a library, on the request of any person, any official or employee of the library may disable or override the device or software on a computer to enable full access to that computer for *bona fide* research, medical, scientific, educational, governmental, judicial, or other lawful purposes (a requestor who is 18 years of age or older is not required to explain, and cannot be asked to explain, the reason or purpose for the request), and (2) nothing in provisions described in the preceding dot point or in clause (1) of this dot point limits, restricts, or prohibits a board of library trustees, or any library official or employee, from regulating, limiting, restricting, or prohibiting any person from having access while at the library to material other than material that is obscene or harmful to juveniles.
- Makes state funding of public libraries contingent on the recipient library's submission of a resolution asserting current and future compliance with the bill's restrictions regarding the use of public moneys and juvenile Internet access to obscene or harmful material, patron Internet access to obscene material, and juvenile borrowing of videos.

TABLE OF CONTENTS

Public indecency.....	3
Existing law.....	3
Operation of the bill.....	3
Disseminating matter harmful to juveniles	5
Prohibition.....	5
Penalties.....	6
Affirmative defenses.....	6

Mistake of age	7
Severability	7
Free public libraries.....	7
Restriction on use of specified public moneys	7
Restriction on distribution of state money	8
County library and local government support fund	9
Definitions	9
Definitions unchanged by the bill	9
New terms defined by the bill.....	11
Definitions modified by the bill	12

CONTENT AND OPERATION

Public indecency

Existing law

Existing law prohibits a person from recklessly doing any of the following, under circumstances in which the person's conduct is likely to be viewed by and affront others, who are not members of the person's household:

- (1) Expose the person's private parts, or engage in masturbation;
- (2) Engage in sexual conduct;
- (3) Engage in conduct that to an ordinary observer would appear to be sexual conduct or masturbation.

A person who violates this prohibition is guilty of public indecency. Generally, public indecency is a misdemeanor of the fourth degree. If the offender previously has been convicted of or pleaded guilty to one violation of the prohibition, public indecency is a misdemeanor of the third degree. If the offender previously has been convicted of or pleaded guilty to two violations of the prohibition, public indecency is a misdemeanor of the second degree. If the offender previously has been convicted of or pleaded guilty to three or more violations of the prohibition, public indecency is a misdemeanor of the first degree. (R.C. 2907.09.)

Operation of the bill

Prohibition. The bill modifies current law's provision, discussed above in "Existing law," so that no person may recklessly do any of the following under circumstances in which the person's conduct is likely to be viewed by and affront

others *who are in the person's physical proximity* (added by the bill) and who are not members of the person's household (R.C. 2907.09(A)):

- (1) Expose the person's private parts;
- (2) Engage in sexual conduct *or masturbation* (moved from clause (1) to clause (2) by the bill);
- (3) Engage in conduct that to an ordinary observer would appear to be sexual conduct or masturbation.

The bill also enacts a new prohibition that prohibits a person from knowingly doing any of the following, under circumstances in which the person's conduct is likely to be viewed by and affront another person who is a minor, who is in the offender's physical proximity, who resides in the person's household, and who is not the offender's spouse (R.C. 2907.09(B)):

- (1) Engaging in masturbation, sexual conduct, or conduct that to an ordinary observer would appear to be sexual conduct or masturbation;
- (2) Exposing the person's private parts with the purpose of personal sexual arousal or gratification or to lure the minor into sexual activity.

A violation of the new prohibition also is the offense of public indecency, and is subject to the penalties described below (R.C. 2907.09(C)).

The bill also makes technical changes to current law's prohibition described above. (R.C. 2907.09(A).)

Penalties. The bill removes the existing penalty enhancements for an offender who has previous convictions or guilty pleas for public indecency and instead links the penalties for public indecency to the particular conduct in which the offender engaged, as follows (R.C. 2907.09(C)):

Offense	Penalty
Person recklessly exposes his or her private parts under circumstances in which the person's conduct is likely to be viewed by and affront others who are not members of the person's household (R.C. 2907.09(A)(1))	M4
Person recklessly engages in sexual conduct or masturbation or engages in conduct that to an ordinary observer would appear to be sexual conduct or masturbation under circumstances in which the person's conduct is likely to be viewed by and affront others who are not members of the person's household (R.C. 2907.09(A)(2) and (3))	M3

Offense	Penalty
Person knowingly engages in masturbation, sexual conduct, or conduct that to an ordinary observer would appear to be sexual conduct or masturbation under circumstances in which the person's conduct is likely to be viewed by and affront another person who is a minor, who is not the spouse of the offender, and who resides in the person's household (R.C. 2907.09(B)(1), (2), and (3))	M2
Person knowingly exposes the person's private parts with the purpose of personal sexual arousal or gratification or to lure the minor into sexual activity under circumstances in which the person's conduct is likely to be viewed by and affront another person who is a minor, who is not the spouse of the offender, and who resides in the person's household (R.C. 2907.09(B)(4))	M1

Disseminating matter harmful to juveniles

Prohibition

Current law. Current law prohibits a person, with knowledge of its character or content, from recklessly doing any of the following:

(1) *Directly selling, delivering, furnishing, disseminating, providing, exhibiting, renting, or presenting to a juvenile, a group of juveniles, a law enforcement officer posing as a juvenile, or a group of law enforcement officers posing as juveniles any material or performance that is obscene or harmful to juveniles* (terms in italics are defined in the "**Definitions**," portion of this analysis);

(2) Directly offering or agreeing to sell, deliver, furnish, disseminate, provide, exhibit, rent, or present to one or more juveniles or one or more law enforcement officers posing as juveniles any material or performance that is obscene or harmful to juveniles; or

(3) While in the physical proximity of the juvenile or law enforcement officer posing as a juvenile, allowing any juvenile or law enforcement officer posing as a juvenile to review or peruse any material or view any live performance that is harmful to juveniles (R.C. 2907.31(A)).

The bill. The bill expands the offense to also prohibit the sale, delivery, furnishing, etc., of a *prepaid adult entertainment card* to one or more juveniles or one or more law enforcement officers posing as juveniles. Specifically, under the bill, the prohibition also prohibits a person, with knowledge of its character or content, from recklessly directly selling, delivering, furnishing, disseminating, providing, exhibiting, renting, or presenting a prepaid adult entertainment card to a

juvenile, a group of juveniles, a law enforcement officer posing as a juvenile, or a group of law enforcement officers posing as juveniles, or directly offering or agreeing to do so. (R.C. 2907.31(A)(4); see **COMMENT 1**.)

Penalties

Current law. Current law specifies that a violation of the prohibition described above is "disseminating matter harmful to juveniles." Generally, if the material or performance involved is harmful to juveniles a violation of the prohibition is a first-degree misdemeanor. If the material or performance involved is obscene a violation of the prohibition generally is a fifth-degree felony. If the material or performance involved is obscene and the juvenile involved is under 13 years of age, a violation of the prohibition is a fourth-degree felony. (R.C. 2907.31(F).)

The bill. Under the bill, a violation of the new prohibition also is "disseminating matter harmful to juveniles." But, the bill enacts a distinct penalty provision that applies to a person who violates the new prohibition. Under the bill, the new offense is one of the following: (1) generally, a first-degree misdemeanor, or (2) if the juvenile involved is under 13 years of age, a fifth-degree felony. (R.C. 2907.31(F)(2).)

Affirmative defenses

Current law. Current law provides the following affirmative defenses to a charge of disseminating matter harmful to juveniles that involves material or a performance that is harmful to juveniles but not obscene: (1) the defendant is the parent, guardian, or spouse of the juvenile involved, (2) the juvenile involved, at the time of the conduct in question, was accompanied by the juvenile's parent or guardian who, with knowledge of its character, consented to the material or performance being furnished or presented to the juvenile, or (3) the juvenile exhibited to the defendant or to the defendant's agent or employee a draft card, driver's license, birth record, marriage license, or other official or apparently official document purporting to show that the juvenile was 18 years of age or over or married, and the person to whom that document was exhibited did not otherwise have reasonable cause to believe that the juvenile was under 18 and unmarried (R.C. 2907.31(B)).

Current law also provides an affirmative defense to a charge of disseminating matter harmful to juveniles that involves material or a performance that is obscene or harmful to juveniles if the material or performance was furnished or presented for a *bona fide* medical, scientific, educational, governmental, judicial, or other proper purpose, by a physician, psychologist,

sociologist, scientist, teacher, librarian, clergyman, prosecutor, judge, or other proper person (R.C. 2907.31(C)(1)).

The bill. The bill maintains the affirmative defenses listed above in the circumstances described above. For violations of the expansion of the prohibition, however, the following affirmative defenses are available: (1) the defendant is the parent, guardian, or spouse of the juvenile involved, (2) the juvenile involved, at the time of the incident, was accompanied by the juvenile's parent or guardian, who, with knowledge of the purpose for which the card can be used, consented to the sale, delivery, furnishing, etc., of the card to the juvenile, (3) the juvenile involved presented an official or apparently official document purporting to show that the juvenile was age 18 or over or married, and the person to whom the document was exhibited did not have reasonable cause to believe the juvenile was under age 18 or unmarried, and (4) the card was furnished or presented for a proper purpose by a proper person. (R.C. 2907.31(B) and (C).)

Mistake of age

Existing law, substantively unchanged by the bill, specifies that, except in limited circumstances involving a juvenile who presents a document purporting to show the juvenile is age 18 or over or married, mistake of age is not a defense to a charge of disseminating matter harmful to juveniles (R.C. 2907.31(C)(2)).

Severability

Existing law, unchanged by the bill, provides that if any provision of R.C. 2907.31, or the application of any provision of that section, is held invalid, the invalidity does not affect other provisions or applications of the section or related sections that can be given effect without the invalid provision or application. To that end, the provisions are severable. (R.C. 2907.31(E).)

Free public libraries

Restriction on use of specified public moneys

The bill specifies that the board of library trustees of a *library* (see **COMMENT 6**) cannot use any state money it has received, or any money it has received from a county library and local government support fund under the tax levy law, to purchase computers used to access the Internet or to pay for direct costs associated with accessing the Internet, unless all of the following apply: (1) the board has installed and has operational a filtering device or filtering software that protects against Internet access to material that is obscene or harmful to juveniles on each *computer* located at the library that is accessible to *juveniles*, (2) the board has installed and has operational a filtering device or filtering software

that protects against Internet access to material that is obscene on each computer located at the library that is accessible to any patron of the library, and (3) the board has adopted and enforces a policy prohibiting a juvenile from borrowing any video material unless a parent or guardian, after being notified that some video materials available for borrowing might include materials that are harmful to juveniles, has given permission for the juvenile to borrow video materials. If permission of this nature is given to the library by a parent or guardian, it must be clearly noted on the library card or other identification documentation that has been issued to the juvenile. The notification to the parent must be on the application for the library card or for the other identification documentation of the juvenile, if the parent is required to sign the application, or must be provided in any other manner the board determines to be appropriate. (R.C. 3375.351(B); see **COMMENT** 4 and 5.)

If a board of library trustees installs and has operational a filtering device or filtering software on computers located at the library in accordance with the provisions described above, on the request of any person, any official or employee of the library may disable or override the device or software on a particular computer to enable the person to have full access to that computer for *bona fide* research, medical, scientific, educational, governmental, judicial, or other lawful purposes. If the person making the request is 18 years of age or older, the person is not required to explain, and cannot be asked to explain, the reason or purpose for which the person is requesting full access to the computer. (R.C. 3375.351(C).)

The bill states that nothing in the two preceding paragraphs limits, restricts, or prohibits a board of library trustees, or any official or employee of a library, from regulating, limiting, restricting, or prohibiting any person from having access while at the library to material other than material that is obscene or harmful to juveniles (R.C. 3375.351(D)).

The bill provides that the restrictions described above regarding use of public moneys and juvenile Internet access to obscene and harmful material, patron Internet access to obscene material, and juvenile borrowing of videos apply to boards of library trustees 180 days after the bill's effective date (Section 3(A)).

Restriction on distribution of state money

The bill prohibits any entity from distributing state money to a board of public library trustees unless it has received a resolution from the board stating that the library has complied with and will continue to comply with the restrictions the bill enacts regarding use of public moneys, juvenile Internet access to obscene or harmful material, patron Internet access to obscene material, and juvenile borrowing of videos, as described above (R.C. 3375.352).

The bill specifies that the provisions described in the preceding paragraph apply to the distribution of state money beginning 180 days after the bill's effective date (Section 3(B)).

County library and local government support fund

Current law provides mechanisms that govern county budget commissions in their distribution of the county library and local government support fund to eligible entities, including boards of public library trustees (R.C. 5705.32 and 5705.321, not in the bill).

Current law also provides that the board of trustees of any public library desiring to participate in the distribution of the county library and local government support fund must adopt rules extending the benefits of the library's services to all the inhabitants of the county on equal terms, unless those services are by law available to all those inhabitants. The board must also certify a copy of those rules to the taxing authority with its estimate of contemplated revenue and expenditures. Where the rules have been certified or where the adoption of rules is not required, the taxing authority must include in its budget of receipts amounts specified by the board as contemplated revenue from the county library and local government support fund, and in its budget of expenditures the full amounts requested therefrom by the board. No library association is entitled to participate in the proceeds of the county library and local government support fund or other public funds unless it was organized and operating prior to January 1, 1968. (R.C. 5705.28(D)--not in the bill.)

The bill does not change these provisions. However, as stated above, the bill's restrictions on the use of public moneys by a board of library trustees apply regarding the use of money a board of library trustees receives from any county library and local government support fund. (R.C. 3375.351.)

Definitions

Both the bill and this analysis use a number of terms that are defined either by the bill or other provisions of the Revised Code. (For ease of identification, the first time a defined term appears in the text of this analysis it is italicized.) This portion of the analysis sets forth those definitions, in addition to other relevant terms.

Definitions unchanged by the bill

Computer means an electronic device that performs logical, arithmetic, and memory functions by the manipulation of electronic or magnetic impulses. "Computer" includes all input, output, processing, storage, computer program, or

communication facilities that are connected, or related, in a computer system or network to an electronic device of that nature (R.C. 2907.01(S), by reference to existing R.C. 2913.01--not in the bill).

Computer network means a set of related and remotely connected computers and communication facilities that includes more than one computer system that has the capability to transmit among the connected computers and communication facilities through the use of computer facilities (R.C. 2907.01(S), by reference to existing R.C. 2913.01--not in the bill).

Computer program means an ordered set of data representing coded instructions or statements that, when executed by a computer, cause the computer to process data (R.C. 2907.01(S), by reference to existing R.C. 2913.01--not in the bill).

Computer system means a computer and related devices, whether connected or unconnected, including, but not limited to, data input, output, and storage devices, data communications links, and computer programs and data that make the system capable of performing specified special purpose data processing tasks (R.C. 2907.01(S), by reference to existing R.C. 2913.01--not in the bill).

Juvenile means an unmarried person under the age of 18 (R.C. 2907(I)).

Library means a free public library. "Library" includes both a library maintained and regulated by a municipal corporation and libraries created, maintained and regulated pursuant to the state library law. (See **COMMENT 6**.)

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 and includes an image or text appearing on a computer monitor, television screen, liquid crystal display, or similar display device or an image or text recorded on a computer hard disk, computer floppy disk, compact disk, magnetic tape, or similar data storage device (R.C. 2907.01(J)).

Nudity means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state (R.C. 2907.01(H)).

Performance means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience (R.C. 2907.01(K)).

Sado-masochistic abuse means flagellation or torture by or upon a person or the condition of being fettered, bound, or otherwise physically restrained (R.C. 2907.01(P)).

Sexual activity means sexual conduct or sexual contact, or both (R.C. 2907.01(C)).

Sexual conduct means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse. (R.C. 2907.01(A).)

Sexual contact means any touching of an erogenous zone of another, including the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person (R.C. 2907.01(B)).

Sexual excitement means the condition of human male or female genitals when in a state of sexual stimulation or arousal (R.C. 2907.01(G)).

Telecommunication means the origination, emission, dissemination, transmission, or reception of data, images, signals, sounds, or other intelligence or equivalence of intelligence of any nature over any communications system by any method, including, but not limited to, a fiber optic, electronic, magnetic, optical, digital, or analog method (R.C. 2907.01(S), by reference to existing R.C. 2913.01--not in the bill).

Telecommunication device means any instrument, equipment, machine, or other device that facilitates telecommunication, including, but not limited to, a computer, computer network, computer chip, computer circuit, scanner, telephone, cellular telephone, pager, personal communications device, transponder, receiver, radio, modem, or device that enables the use of a modem (R.C. 2907.01(S), by reference to existing R.C. 2913.01--not in the bill).

New terms defined by the bill

Electronic communication generally includes any information communicated electronically. "Electronic communication" means any material, performance, message, or information transferred, sent, posted, published, disseminated, or otherwise communicated, any material, performance, information, or data received, or any telecommunication made, through the use of an electronic method of remotely transferring information, including a computer,

computer network, computer program, computer system, or telecommunications device (R.C. 2907.01(R), added by the bill).

Prepaid adult entertainment card means a product that does either of the following: (1) by means of a predetermined cardholder identification and a password unique to the card, provides or permits access to one or more Internet sites containing, including by link or reference to another Internet site, any electronic communication that is harmful to juveniles or obscene, or (2) by means of a telephone number and an access code or password unique to the card and for a predetermined number of minutes, provides or permits access to an electronic communication that is harmful to juveniles or obscene. (R.C. 2907.01(Q).)

Definitions modified by the bill

Directly sell, deliver, furnish, disseminate, provide, exhibit, rent, or present to a juvenile is defined in current law for the offense of disseminating matter harmful to juveniles. The bill expands the definition to include reference to prepaid adult entertainment cards. Under the bill, a person directly sells, delivers, furnishes, etc., or directly offers or agrees to sell, deliver, furnish, etc., material, a performance, or a prepaid adult entertainment card to a juvenile, a group of juveniles, a law enforcement officer posing as a juvenile, or a group of law enforcement officers posing as juveniles in violation of the prohibition by means of an electronic method of remotely transmitting information if the person knows or has reason to believe that the person receiving the information is a juvenile or the group of persons receiving the information are juveniles. The bill also provides that a person remotely transmitting information by means of a method of mass distribution does not directly sell, deliver, furnish, etc., or directly offer or agree to sell, deliver, furnish, etc., the material, performance, or card in question to one or more juveniles or one or more law enforcement officers posing as juveniles in violation of the prohibition if either: the person has inadequate information to know or have reason to believe that a particular recipient of the information or offer is a juvenile; or the method of mass distribution does not provide the person the ability to prevent a particular recipient from receiving the information. (R.C. 2907.31(D).)

Harmful to juveniles generally describes sexually-oriented material that lacks serious literary, artistic, political, or scientific value for juveniles, and which offends the standards of the adult community regarding what is suitable for juveniles. The bill expands the definition in current law to apply to electronic communications provided or accessed through a prepaid adult entertainment card. Under the bill, harmful to juveniles means that quality of *any electronic communication provided or accessed through a prepaid adult entertainment card*, any material, or any performance describing or representing nudity, sexual conduct, sexual excitement, or sado-masochistic abuse in any form to which all of

the following apply: (1) the *electronic communication*, material, or performance, when considered as a whole, appeals to the prurient interest in sex of juveniles, (2) the *electronic communication*, material, or performance is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for juveniles, and (3) the *electronic communication*, material, or performance, when considered as a whole, lacks serious literary, artistic, political, and scientific value for juveniles. (R.C. 2907.01(E); see **COMMENT 2**.)

Obscene, as used in the bill, describes any electronic communication provided or accessed through a prepaid adult entertainment card, in addition to materials and performances currently included in the existing definition. Under the bill, these electronic communications, materials, and performances are obscene if, when considered as a whole and judged with reference to ordinary adults (or judged with reference to a specially susceptible group if designed for that group), one of the factors listed in the statute applies. The statutory factors include, for example, (1) its dominant appeal is to the prurient¹ interest, (2) its dominant tendency is to arouse lust through display of sexual activity, and (3) it contains a series of displays or descriptions of sexual activity, the cumulative effect of which is a dominant tendency to appeal to the prurient or scatological interest and the appeal to such an interest is primarily for commercial exploitation. (R.C. 2907.01(F); see **COMMENT 3**.)

COMMENT

1. The bill's provisions expanding the offense disseminating matter harmful to juveniles could raise constitutional questions regarding freedom of speech and interstate commerce.

2. The bill modifies the definition of "harmful to juveniles," as it applies for use throughout R.C. Chapter 2907. The effect of that change on the offense "disseminating matter harmful to juveniles" is described in the **CONTENT AND OPERATION** portion of this analysis. The phrase "harmful to juveniles" is used in three other sections contained in R.C. Chapter 2907. and, thus, the definition of the phrase as modified by the bill also applies to those sections. All of the sections use the phrase only in the context of *material* that is harmful to juveniles or a *performance* that is harmful to juveniles. The three sections are: (a) R.C. 2907.311, which sets forth the offense "displaying matter harmful to juveniles"--it prohibits certain conduct that relates to the *display of material* that is harmful to juveniles, (b) R.C. 2907.33, which sets forth the offense "deception to obtain

¹ *Prurient* means "[c]haracterized by or arousing inordinate or unusual sexual desire" (Black's Law Dictionary 1241 (7th ed. 1999)).

matter harmful to juveniles"--it prohibits certain conduct that relates to a juvenile *obtaining or attempting to obtain material, or gaining or attempting to gain admission to a performance*, that is harmful to juveniles, and (c) R.C. 2907.36, which sets forth rules and procedures regarding bringing a declaratory judgment action to determine whether *particular materials or performances* are harmful to juveniles.

3. The bill modifies the definition of the term "obscene," as it applies for use throughout R.C. Chapter 2907. The effect of that change on the offense of "disseminating matter harmful to juveniles" is described in the **CONTENT AND OPERATION** portion of this analysis. The term "obscene" is used in four other sections contained in R.C. Chapter 2907. and, thus, the definition of the term as modified by the bill also applies to those sections. All of the sections use the term only in the context of *material* that is obscene or a *performance* that is obscene. The four sections are: (a) R.C. 2907.32, which sets forth the offense of "pandering obscenity"--it prohibits certain conduct that relates to the *creation, production, promotion, advertisement, purchase, possession, or control, etc., of any obscene material or performance*, (b) R.C. 2907.321, which sets forth the offense of "pandering obscenity involving a minor"--it prohibits certain conduct that relates to the *creation, production, promotion, advertisement, purchase, possession, control, or transportation into Ohio, etc., of any obscene material or performance* that involves, in any of a list of specified manners, a minor, (c) R.C. 2907.34, which sets forth the offense of "compelling acceptance of objectionable materials"--it prohibits certain *conduct related to material* reasonably believed to be obscene, and (d) R.C. 2907.36, which sets forth rules and procedures regarding bringing a declaratory judgment action to determine whether *particular materials or performances* are obscene.

4. The bill's provisions restricting the use of public moneys by libraries to purchase computers used to access the Internet or to pay for direct costs associated with accessing the Internet unless they install and have operational the specified filtering devices or filtering software and have adopted and enforce the juvenile video borrowing policy may raise constitutional questions regarding freedom of speech, interstate commerce, and the right of privacy. However, the U.S. Supreme Court recently upheld a federal law (the Children's Internet Protection Act, or CIPA) that forbids public libraries from receiving federal assistance for Internet access unless they install software to block obscene or pornographic images and to prevent minors from accessing material harmful to them. *United States v. American Library Association* (2003), 539 U.S. 194. When Congress passed CIPA, a group of libraries, patrons, Web site publishers, and related parties sued, challenging the constitutionality of CIPA's filtering provisions. The federal district court ruled that CIPA was facially unconstitutional and enjoined the government from withholding federal assistance for failure to comply with CIPA,

holding that: (a) Congress had exceeded its authority under the U.S. Constitution's Spending Clause because any public library that complied with CIPA's conditions would necessarily violate the First Amendment, (b) CIPA filtering software constituted a content-based restriction on access to a public forum that was subject to strict scrutiny, and (c) although the government had a compelling interest in preventing the dissemination of obscenity, child pornography, or material harmful to minors, the use of software filters was not narrowly tailored to further that interest. The government appealed to the Supreme Court. The Supreme Court reversed the judgment of the district court, thereby upholding CIPA (six members of the court agreed in the judgment, and wrote three separate opinions).

5. Section 66 of Am. Sub. H.B. 95 of the 125th General Assembly (the biennial appropriations bill for the current state fiscal biennium) contains appropriations to the State Library Board for various purposes. It also contains descriptive language regarding the use of some of those appropriations, including the following language that is relevant to this bill (emphasis added):

OHIO PUBLIC LIBRARY INFORMATION NETWORK

The foregoing appropriation items 350-604, OPLIN Technology, and, in fiscal year 2005, 350-400, Ohio Public Library Information Network, shall be used for an information telecommunications network linking public libraries in the state and such others as may be certified as participants by the Ohio Public Library Information Network Board.

The Ohio Public Library Information Network Board shall consist of eleven members appointed by the State Library Board from among the staff of public libraries and past and present members of boards of trustees of public libraries, based on the recommendations of the Ohio library community. The Ohio Public Library Information Network Board, in consultation with the State Library, shall develop a plan of operations for the network. The board may make decisions regarding use of the foregoing OPLIN appropriation items 350-604 and may receive and expend grants to carry out the operations of the network in accordance with state law and the authority to appoint and fix the compensation of a director and necessary staff. The State Library shall be the fiscal agent for the network and shall have fiscal

accountability for the expenditure of funds. The Ohio Public Library Information Network Board members shall be reimbursed for actual travel and necessary expenses incurred in carrying out their responsibilities.

In order to limit access to obscene and illegal materials through internet use at Ohio Public Library Information Network (OPLIN) terminals, local libraries with OPLIN computer terminals shall adopt policies that control access to obscene and illegal materials. These policies may include use of technological systems to select or block certain internet access. The OPLIN shall condition provision of its funds, goods, and services on compliance with these policies. The OPLIN Board shall also adopt and communicate specific recommendations to local libraries on methods to control such improper usage. These methods may include each library implementing a written policy controlling such improper use of library terminals and requirements for parental involvement or written authorization for juvenile internet usage.

The OPLIN Board shall research and assist or advise local libraries with regard to emerging technologies and methods that may be effective means to control access to obscene and illegal materials. The OPLIN Executive Director shall biannually provide written reports to the Governor, the Speaker and Minority Leader of the House of Representatives, and the President and Minority Leader of the Senate on any steps being taken by OPLIN and public libraries in the state to limit and control such improper usage as well as information on technological, legal, and law enforcement trends nationally and internationally affecting this area of public access and service.

The Ohio Public Library Information Network, InfOhio, and OhioLink shall, to the extent feasible, coordinate and cooperate in their purchase or other acquisition of the use of electronic databases for their respective users and shall contribute funds in an equitable manner to such effort.

6. R.C. 715.13, not in the bill, permits any municipal corporation to maintain and regulate free public libraries established by the municipal corporation prior to September 4, 1947. R.C. Chapter 3375. includes comprehensive provisions for the creation, maintenance, and regulation of public libraries, including county free public libraries, free township libraries, municipal free public libraries, school libraries for pupils, school district public libraries, county library district libraries, regional library district libraries, and certain law libraries of counties.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	03-18-03	p. 259
Reported, H. Criminal Justice	05-12-04	pp. 1896-1897
Passed by House (97-2)	05-25-04	pp. 1957
Reported, S. Judiciary	---	---

H0132-RS-125.doc/jc

