



H.B. 512

126th General Assembly
(As Introduced)

Reps. Gilb, Brinkman, Bubb, Combs, D. Evans, Faber, Fessler, Hood, J. McGregor, Reidelbach, Schaffer, Setzer, Wagner, Allen, Fende, Perry

BILL SUMMARY

- Defines a second circumstance in which any material or performance is "obscene," that is, if the material or performance is hard-core pornography. (Existing law's definition, not changed by the bill, defines one circumstance in which any material or performance is obscene.)
- Defines "hard-core pornography" as any material or performance if it explicitly depicts ultimate sexual acts, including, but not limited to, vaginal or anal intercourse, fellatio, cunnilingus, anilingus, or masturbation, when the penetration, manipulation, or ejaculation of the genitals is clearly visible, and it lacks serious literary, artistic, political, and scientific value.

CONTENT AND OPERATION

When material or performance is "obscene"

Existing law

Under the Sex Offenses Law (R.C. 2907.01 to 2907.37), when considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any *material* or *performance* is "obscene" if any of the following apply (R.C. 2907.01(F), see **COMMENT 3**) (See **COMMENT 1** for definitions of italicized terms):

- (1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting *sexual activity*, masturbation, *sexual excitement*, or *nudity* in a way that tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

Operation of the bill

The bill defines a second circumstance in which any material or performance is "obscene." Under the bill, any material or performance is "obscene" if it is *hard-core pornography* (see definition below). (R.C. 2907.01(F)(2).) The bill does not change the existing definition of "obscene," as described above, other than revising the divisional designation. The existing definition of "obscene" defines one circumstance in which a material or performance is obscene. (See **COMMENT 2** and **3**.)

The bill defines "hard-core pornography" as any material or performance to which both of the following apply: (a) it explicitly depicts ultimate sexual acts, including, but not limited to, vaginal or anal intercourse, fellatio, cunnilingus, anilingus, or masturbation, when the penetration, manipulation, or ejaculation of the genitals is clearly visible, and (b) it lacks serious literary, artistic, political, and scientific value (R.C. 2907.01(Q)).

Internet- or computer-based community school

Current law provides that for any internet- or computer-based community school, the contract between the sponsor and the governing authority of the school described in R.C. 3314.03 must specify two requirements, one of which is a requirement that the school use a filtering device or install filtering software that protects against internet access to materials that are "obscene" or harmful to

juveniles on each computer provided to students for instructional use. The school must provide such device or software at no cost to any student who works primarily from the student's residence on a computer obtained from a source other than the school. Current law defines "obscene" as having the same meaning as in R.C. 2907.01(F) (see "Existing law" under "When material or performance is 'obscene,'" above) as that division has been construed by the Ohio Supreme Court. (R.C. 3314.031(A)(2) and (C)(1) in the bill.)

The bill modifies the definition of "obscene" in current law as described in the preceding paragraph by providing that "obscene" has the same meaning as in R.C. 2907.01(F) (see "Existing law" and "Operation of the bill" under "When material or performance is 'obscene,'" above), *provided that regarding the portion of the definition in existing law, not modified by the bill, "obscene" has the same meaning as in existing law as it has been construed by the Ohio Supreme Court.* (R.C. 3314.031(A)(2) and (C)(1) in the bill, renumbered to R.C. 3314.21(A)(2) and (C)(1) by Am. Sub. H.B. 66 of the 126th General Assembly.) (The bill will need to be amended to reflect this renumbering.)

COMMENT

1. R.C. 2907.01 defines the following terms among others:

"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.

"Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

"Sexual activity" means sexual conduct or sexual contact, or both.

"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.

"Sexual contact" means any touching of an erogenous zone of another, including without limitation 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.

"Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

"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.

2. By making hard-core pornography per se obscene, the bill causes all the existing criminal offenses that regulate obscene material and performances to apply to hard-core pornography. Those offenses, none of which are in the bill, include "disseminating matter harmful to juveniles" (R.C. 2907.31), "pandering obscenity" (R.C. 2907.32), "pandering obscenity involving a minor" (R.C. 2907.321), "compelling acceptance of objectionable materials" (R.C. 2907.34), and "endangering children" (R.C. 2919.22). A number of other existing Revised Code provisions also use the term "obscene" or "obscenity." Some of them (R.C. 503.65, regarding township resolutions regulating or restricting adult-oriented businesses; R.C. 2933.21, regarding the issuance of search warrants; R.C. 3314.21, regarding criteria for computer use in internet- or computer-based community schools; and R.C. 2907.35 and 2907.36, regarding procedures in obscenity cases) use the definition of "obscene" contained in R.C. 2907.01, which the bill amends. Others (R.C. 9.03, 109.40, 109.65, 505.171, 715.54, 1701.91, 2901.01, 2923.46, 2925.44, 2933.41, 3767.01, and 5515.08) use the general terms "obscene" or "obscenity" without specifically incorporating the definition in R.C. 2907.01.

3. In *Miller v. California* (1973), 413 U.S. 15, 24, the United States Supreme Court established a general rule for determining when material or a performance is obscene. Under that general rule, material is obscene and unprotected by the First Amendment to the U.S. Constitution if all of the following apply: (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to prurient interest, (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. The *Miller* test has been construed and applied in many court decisions, and it appears that it remains valid today.

The Ohio Supreme Court, in *State v. Burgun* (1978), 56 Ohio St.2d 354, addressed the validity of the existing definition of "obscene" in R.C. 2907.01,

holding that it is valid when "authoritatively construed" to incorporate the guidelines prescribed in *Miller*.

HISTORY

ACTION	DATE
Introduced	02-08-06

h0512-i-126.doc/kl

