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BILL ANALYSIS

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House Bill 4360 (Substitute H-6 as passed by the House)
Sponsor: Representative Triette Reeves
House Committee: Commerce
Senate Committee: Judiciary

Date Completed: 9-30-03

CONTENT

The bill would amend Public Act 33 of 1978, which prohibits disseminating, exhibiting, or displaying sexually explicit matter to minors, to do all of the following:

- Revise a provision that makes it a misdemeanor for a manager of a business to display sexually explicit matter to a minor.**
- Revise and add definitions of certain terms.**
- Make an exception to the Act's misdemeanor and felony offenses for a person who disseminated sexually explicit matter to a minor by means of a computer network or the Internet.**
- Delete provisions related to disseminating material by computer network or the Internet that were added by Public Act 33 of 1999.**

The Act defines "sexually explicit matter" as sexually explicit visual material, sexually explicit verbal material, or a sexually explicit performance.

Displaying Sexually Explicit Matter

Under the Act, a person is guilty of displaying sexually explicit matter to a minor if the person has managerial responsibility for a business that sells "visual matter" depicting sexual intercourse or sadomasochistic abuse that is harmful to minors, and knowingly permits a minor who is not accompanied by a parent or guardian to examine that matter.

Under the bill, the offense would apply, instead, to a manager of a business enterprise that sold "sexually explicit visual material" that visually depicted sexual intercourse or sadomasochistic abuse and was harmful to minors, if he or she did either of the following:

- Knowingly permitted a minor who was not accompanied by a parent or guardian to examine the matter.
- Displayed that matter knowing its nature, unless the person did so in a restricted area.

As currently provided the offense would be a misdemeanor punishable by up to 90 days' imprisonment and/or a maximum fine of \$5,000.

The bill would define "display" as "to put or set out to view or to make visible". "Restricted area" would mean any of the following:

- An area where sexually explicit matter was displayed only in a manner that prevented public view of the lower two-thirds of its cover or exterior.

- A building, or a distinct and enclosed area or room within a building, if access by minors were prohibited, notice of the prohibition were prominently displayed, and access were monitored to prevent minors from entering.
- An area with at least 75% of its perimeter surrounded by walls or solid, nontransparent dividers that were sufficiently high to prevent a minor in a nonrestricted area from seeing sexually explicit matter within the perimeter, if the point of access provided prominent notice that access to minors was prohibited.

(The Act defines "sexually explicit visual material" as a picture, photograph, drawing, sculpture, motion picture film, or similar visual representation that depicts nudity, sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse, or a book, magazine, or pamphlet that contains such a visual representation. The Act does not define "visual matter".)

Disseminating Sexually Explicit Matter

Under the Act, it is a felony punishable by up to two years' imprisonment and/or a maximum fine of \$10,000 for a person to disseminate sexually explicit matter to a minor, if that person does either of the following:

- Knowingly disseminates to a minor sexually explicit visual or verbal material that is harmful to minors.
- Knowingly exhibits to a minor a sexually explicit performance that is harmful to minors.

The Act defines "disseminate" as to sell, lend, give, exhibit, or show, or offer or agree to do so. Under the bill, that term also would include to allow to examine or offer or agree to allow to examine.

Display or Dissemination by Computer

Under provisions added by Public Act 33 of 1999, neither the misdemeanor of displaying sexually explicit matter to a minor, nor the felony of disseminating sexually explicit matter to a minor, applies if a person displays or disseminates sexually explicit matter to a minor by means of the Internet or a computer network, unless one or both of the following apply:

- The matter is obscene, as that term is defined in law.
- The prosecuting attorney proves that the person displayed or disseminated the matter to one or more specific minors and knew their status as minors.

The bill would delete that exception, so that the offenses would not apply to any person who displayed or disseminated sexually explicit matter to a minor by means of the Internet or a computer network.

The Act also provides that a violation or attempted violation of the dissemination prohibition involving the Internet, a computer, or a computer program, system, or network occurs if the violation originates and/or terminates in this State, and may be prosecuted in any jurisdiction in which the violation originated or terminated. The bill would delete these provisions.

In addition, the bill would delete provisions under which "sexually explicit visual material", "sexually explicit verbal material", and "sexually explicit performance" include material or a performance communicated, transmitted, displayed, or otherwise made available by means of the Internet, a computer, or a computer program, system, or network.

MCL 722.671 et al.

BACKGROUND

Public Act 33 of 1999 amended Public Act 33 of 1978 to include material made available via the Internet, a computer, or a computer program, system, or network in the 1978 Act's prohibitions against disseminating, exhibiting, or displaying sexually explicit matter to minors. On July 29, 1999, in *Cyberspace Communications, Inc. v Engler*, the United States District Court for the Eastern District of Michigan granted the plaintiffs' motion for a preliminary injunction against enforcement of Public Act 33 of 1999 (55 F. Supp. 2d 737).

The Court held that the plaintiffs were likely to succeed on their claims that Public Act 33 of 1999 violated the First Amendment of the United States Constitution because it effectively would have banned constitutionally protected free speech, was overbroad, and would have prevented people from communicating and gaining access to information anonymously. The Court also found that the plaintiffs were likely to succeed on their claims that the Act violated the Commerce Clause of the United States Constitution because it would have regulated conduct occurring wholly outside the State of Michigan, it would constitute an unreasonable and undue burden on interstate and foreign commerce, and it would have subjected interstate use of the Internet to inconsistent state regulations. Further, the Court held that the defendants failed both to satisfy their burden to demonstrate that the Act would have directly and materially advanced a compelling governmental interest, and to demonstrate that the Act would have constituted the least restrictive means of serving its stated purpose.

The United States Court of Appeals for the Sixth Circuit affirmed the District Court's decision and remanded the case to the District Court for further proceedings. On June 1, 2001, the District Court found that there were "no genuine issues of material fact which would preclude judgment as a matter of law" in the case, and granted plaintiffs' motion for summary judgment (142 F. Supp. 2d 827). The Court ruled that Public Act 33 of 1999 was unconstitutional because it violated the First Amendment and the Commerce Clause, and permanently restrained and enjoined the State from enforcing any provision of the Act.

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

The bill would have an indeterminate fiscal impact on State and local government.

There are no Statewide data to indicate how many offenders are currently convicted of a misdemeanor for displaying sexually explicit matter or how many would be convicted under the proposed changes. Local units of government incur the costs of misdemeanor probation and incarceration in a local facility, which vary by county.

According to the Department of Corrections Statistical Report, in 2001 there were six offenders convicted of distributing obscene matter to a minor. Three received prison sentences, two received jail sentences, and one received probation. There are no data to indicate how the proposed changes regarding dissemination involving a computer or the Internet would change these figures. Local units incur the cost of incarceration in jail, which varies by county. The State is responsible for the cost of felony probation at an average annual cost of \$1,750, as well as the cost of incarceration in a State facility at an average annual cost of \$27,000.

Fiscal Analyst: Bethany Wicksall

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.