

INTERPRETATIONS AND ISSUES IN RELATION TO HB 04-1004 (The Library Filtering Bill)

In the 2004 Legislative Session, the Colorado Legislature passed HB-1004, "*Concerning Enhanced Protection for Child Users of Public Library Services from Harmful Materials on the Internet.*" The bill was signed into law by Governor Owens on April 27. This paper indicates what is in the law and offers some interpretations. Full text of the signed Act is enclosed in boxes.

The bill closely models the federal CIPA bill as interpreted by the U.S. Supreme Court, however with some differences which are pointed out in the following information. A full text of the bill is available from the Colorado General Assembly website:

www.leg.state.co.us/Clitics2004a/csl.nsf/BillFoldersHouse?openFrameset

Legislative Declaration

The bill begins with a Legislative Declaration that technically is not part of the law but does indicate the intention of the Legislature in passing the bill.

CONCERNING ENHANCED PROTECTION FOR CHILD USERS OF PUBLIC LIBRARY SERVICES FROM HARMFUL MATERIALS ON THE INTERNET.

Be it enacted by the General Assembly of the State of Colorado:

24-90-601. Legislative declaration. The general assembly hereby finds and declares that use of the internet in the public libraries of the state provides an extraordinary, unique, and unparalleled educational resource and source of knowledge and information. The general assembly further finds and declares that reasonable measures must be adopted and implemented to protect the children who use such internet services in public libraries from access to material that is harmful to their beneficial development as responsible adults and citizens. It is the intent of the general assembly by enacting this part 6 that **public libraries be required to adopt and enforce reasonable policies of internet safety that are consistent with the federal "children's internet protection act", as amended, (P.L. No. 106-554), and that will protect children from access to harmful material without compromising responsible adult use of internet services in such libraries.**

The section in **bold** indicates that public libraries are required to adopt and enforce a policy relating to children's access to the internet.

Definitions

The following definitions parallel the federal CIPA act.

24-90-602. Definitions. as used in this part 6, unless the context otherwise requires:

- (1) "access to the internet" means, with reference to a particular computer, that the computer is equipped with a modem or is connected to a computer network that provides access to the internet.
- (2) "computer" includes any hardware, software, or other technology attached or connected to, installed in, or otherwise used in connection with a computer.
- (3) "harmful to minors" means any picture, image, graphic image file, or other visual

depiction that:

- (a) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;
 - (b) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals; and
 - (c) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.
- (4) "minor" means any person who has not attained the age of seventeen years.
- (5) "public library" shall have the same meaning as set forth in section 24-90-103 (13). for purposes of this part 6, a "public library" shall be the equivalent of the library system established and maintained by the governing body of a particular library district or otherwise connected group of libraries and shall not mean each separate or individual library facility established and maintained by such library district or connected group of libraries.
- (6) "sexual act" or "sexual contact" shall have the same meaning as set forth in 18 U.S.C. sec. 2246 (2) and (3).

Different definition from CIPA

The Colorado law and the federal CIPA law differ in the definition of “technology protection measure” in the area shown in **bold** below.

- (7) "technology protection measure" means a specific technology, including without limitation computer software, that blocks or filters internet access to visual depictions that are:
- (a) obscene, as defined in section 18-7-101 (2), C.R.S.;
 - (b) child pornography, as defined in 18 U.S.C. sec. 2256 (8); or
 - (c) harmful to minors; **except that no technology protection measure may block scientific or medically accurate information regarding sexual assault, sexual abuse, incest, sexually transmitted diseases or reproductive health.**

Sections (a) and (b) are parallel the federal law. Section (c), however, is unique to Colorado. This amendment was requested by Colorado advocacy groups against sexual, child, and spousal abuse. The implication for libraries is that the filtering system chosen has to be sophisticated enough to distinguish between, for example, “penis” on a medical website and “penis” used on an adult sexual site. In addition the bill does not indicate who determines if the information is or is not “scientific or medically accurate.”

Adoption of an Internet Safety Policy

This section requires the adoption of an internet safety policy for minors and its operation.

24-90-603. Adoption and enforcement of policy of internet safety for minors including technology protection measures - public libraries.

- (1) No later than December 31, 2004, the governing body of each public library shall adopt and implement a policy of internet safety for minors that includes the operation of a technology protection measure for each computer operated by the public library that allows for access to the internet by a minor.
- (2) After the adoption and implementation of the policy of internet safety required by subsection

(1) of this section, the governing body of each public library shall continue to enforce the policy and the operation of the technology protection measure for each computer operated by the public library that allows for access to the internet by a minor.

Part (1) is similar to the requirement in the current library law in Section 4 (Library Grants) that requires libraries to have a policy on access to the internet by minors. Since almost all public libraries applied for and received state funding for libraries during the two years it was available, presumably all have a policy in place. However, if the library chooses to filter some or all of its computers, the policy may have to be reconsidered.

Part (2) goes further than the state funding law and requires the library to implement a technology protection measure on “each computer operated by the public library that allows for access to the internet by a minor.”

Temporary disabling of the technology protection measure.

Again, the state law closely mirrors the federal CIPA act.

24-90-604. Temporary disabling of technology protection measure.

(1) (a) (I) Subject to the requirements of paragraph (b) of this subsection (1), an administrator, supervisor, or any other person authorized by the public library to enforce the operation of the technology protection measure adopted and implemented in accordance with the requirements of section 24-90-603 **shall temporarily disable** the technology protection measure entirely to enable access to the internet on a particular computer able to be accessed by a minor by an adult upon request without significant delay by the public library in responding to the request.

This part of the law (by using “shall”) requires the library to disable the technology protection measure when asked to by an adult. This raises the issue of when a library could refuse to do this. If an adult requests that the filter be turned off and then subsequently views explicit (non-scientific or non-medical) sexual sites, can the library ask the person to stop? Yes, if the library has a policy about viewing pornography or other objectionable material in the library, and appropriate behavior in the library. The director of the Arapahoe Library District, in a memo to the ALD board, also points out that there is a conflict in the law between a directive that libraries shall turn off the filtering and the wording in the Declaration paragraph, 24-90-601.

A portion of that memo reads:

... it says that the legislature intends this law to require “reasonable policies of internet safety that are consistent with the Federal “Children’s Internet Protection Act,” without compromising responsible adult use of internet services.” Turning off the filter so an adult can view pornography is not consistent with CIPA and does not constitute responsible use of internet services.

Access to the Internet by a minor

There are some very special circumstances in which a minor can have the technology protection measure turned off.

I) Subject to the requirements of paragraph (b) of this subsection (1), an administrator, supervisor, or any other person authorized by the public library to enforce the operation of the technology

protection measure adopted and implemented in accordance with the requirements of section 24-90-603 the **may temporarily disable technology protection measure** entirely to enable access to the internet on a particular computer **able to be accessed by a minor for bona fide research or other lawful purposes where the internet use in connection with the research or other lawful purpose is supervised by an administrator, supervisor, parent, guardian, or other person authorized by the public library to perform such function.**

(b) Where the public library has installed a technology protection measure that **requires electronic verification of the age of the computer user, or where the parent or guardian of a minor has provided explicit prior approval for use of the computer by the minor**, before the technology protection measure required by section 24-90-603 is disabled, no additional involvement by the staff of the public library shall be required.

(2) Notwithstanding any other provision of this section, the **temporary disabling of the technology protection measure authorized by this section shall not be allowed in connection with a computer located in an area in a public library facility used primarily by minors.**

Colorado's law varies significantly from the federal CIPA law in allowing parents to approve their child's use of the internet in two circumstances:

- 1) a library can turn off the technology protection measure for a child in connection with research or other lawful purpose. This use by a minor must be supervised; however, this supervision can be done by a parent rather than library staff.
- 2) if the library is using a filtering system that electronically verifies the age of the user before the filtering system is disengaged, then the parent can give "explicit prior approval" for their child to access the unfiltered internet. This seems as if it would require a card that includes a field for age to be issued to a library user so that the user can insert the card into the computer, have his/her age verified (or parental permission verified) and then the filtering is automatically turned off.

No restrictions on blocking additional material

This section just allows the library to go further than the law requires in blocking what might be considered objectionable material.

24-90-605. No restrictions on blocking access to the internet of other material.

Nothing in this part 6 shall be construed to prohibit a public library from limiting internet access or otherwise protecting against materials other than those that are obscene, child pornography, or harmful to minors.

Is implementation of this law required?

The biggest issue relating to this bill is whether or not a library is actually required to implement this law. It is not clear from the language of the law.

24-90-606. No requirement of additional action for public libraries already in compliance - no additional action in special circumstances.

(1) Nothing in this part 6 shall be construed to require any additional action on the part of any public library that is already in compliance with the requirements of this part 6 as of July 1, 2004.

This implies that if a library already has a filtering system in place on all computers in the library, then the library need do nothing more. However, if the filtering system blocks access to

sites that are deemed “scientific and medically accurate,” then an upgraded filtering program would seem to be required.

Funding

The law further gives libraries two circumstances where they might not have to implement the law.

(2) Nothing in this part 6 shall be construed to require any additional action on the part of any public library in circumstances where:

(a) no moneys exist in the budget for such library for the purchase of a technology protection measure that satisfies the requirements of this part 6; and

There are two legal issues related to this section of the law.

- 1) Who decides if there is money in the budget to implement the law? Colorado library law gives authority over the budget to the Board of Trustees, both where the Board is advisory and governing.

C.R.S. 24-90-109 (d) (I) and (II) explicitly gives authority over the library’s budget to the board:

- (d) Submit annually a budget as required by law and certify to the legislative body of the governmental unit which they library serves the sums necessary to maintain and operate the library during the ensuing year;*
- (e) (I) In county and municipal libraries, have exclusive control and spending authority over the disbursement of the library funds as appropriated by its legislative body, including all assets of the public library fund, as set forth in section 24-90-112(2)(a); (II) In library districts, adopt a budget and make appropriations for the ensuing fiscal year as set forth in part 1 of article 1 of title 29, C.R.S. and have exclusive control and spending authority over the disbursement of library funds as set forth in section 24-90-112(2)(a).*

Thus, for any budget already in place, it would seem the library board would determine if there were sufficient funding to implement the law. The interpretation is less clear for future years since, for county and municipal libraries, it is the city or county officials that actually determines the budget over which the library board has control.

In addition, in home rule cities and counties, (and, in some other libraries as well) the library board sometimes does not have authority over the budget, once approved. There is also an unofficial reality test. If the library’s budget is relatively large, and the price of filtering relatively small, it would be difficult to make an actual case that funds were not available.

However, the CDE attorney in the Attorney General’s office says that this decision must be a reasonable one, and not based on a desire to avoid the law. The Library Board that decides not to filter based on a lack of funding should be able to demonstrate a true fiscal

situation that results in a decline in service or personnel if funds are diverted to purchase a filter.

- 2) A second legal issue – is this bill an unfunded mandate under Colorado law? Implementing this law requires the local government or library to take funds from another budget category and apply it to funding a technology protection measure instead. The CDE attorney in the Attorney General’s office says that the unfunded mandate provision in TABOR has never been implemented, and has been determined to not apply.

Free filters

The Colorado law goes on to say that libraries should look for free filters to implement the law.

(b) After a good faith effort, the library is unable to acquire a technology protection measure free of charge that satisfies the requirements of this part 6.

This section contains no definition for what a “good faith” effort is, or who determines it.

Informal testing by an independent consultant for the State Library showed that free filters tend to over-block and are unlikely to distinguish between “scientific and medically accurate” sites and adult sexual sites. The filter selected must be highly sophisticated or use an adequate “black list” of sites specifically filters out objectionable adult sites.

Effective date

SECTION 2. Effective date. This act shall take effect July 1, 2004.

While the act takes effect on July 1, 2004 , libraries do not have to come into compliance (if they have to at all) until December 31, 2004.

INTERPRETATION QUESTIONS for HB-1004, the Library Internet Filtering Bill

The following questions and answers have been raised in the discussion of the filtering bill.

1) The law requires permanent filtering in the children's area of the library. What is officially considered a children's area and who determines this?

Each library should determine the children's area. Most libraries have a children's area that may not be in a separate room, and may or may not have a computer in the children's area. The law would require that, if there is a computer in the children's area, it would have a permanent filter installed if the library implements the provisions stated in 24-90-603 of the law.

2) If no filter can be found that does not block "scientific and medically accurate" information, must a library filter?

Extensive research has demonstrated that no filters can completely fulfill the intent of this law and provide 100% protection from the items stipulated in the law. Libraries may make a good faith effort to find one that meets the requirements if they have the funds to purchase and maintain a filter on library computers. A filter that blocks a specified list of adult sex sites would seem to fulfill the requirement of the law.

3) Can a library be held liable if it is felt a library is not following the law?

Section 24-90-404 of the Library Law states that "a...public library that complies...shall be immune from any criminal or civil liability resulting from access by a minor to obscene or illegal material through the use of a public access computer owned or controlled by [the] public library." However, a library that chooses not to implement the law could be liable for a private law suit.

4) What is the meaning of "bona fide research and other lawful purposes" in 24-90-604 as it applies to minors?

This can be very subjective. One person may consider a research question to be 'bona fide and lawful' while another may not. It should not be up to the librarian or other staff to decide if a request to disable a filter is 'bona fide and lawful' since this can be perceived as invasion of the minor's privacy rights. The librarian or staff person may ask the person requesting the disabling "is this request for bona fide research or other lawful purpose?" If the answer is yes, the filter may be immediately disabled. If the answer is no, the library may choose to keep the filter in place for that research. The library should, through its Internet use policies, make it known that the parent is the primary supervisor of unfiltered internet use by their minor child(ren). The library may also monitor a minor's use of the internet for abuse of the access to unfiltered sites, keeping in mind a minor's privacy rights concerning information access.

5) Are there consequences for non-compliance?

There are no funds attached to implementation of this bill, no state aid provided to libraries as is the case under CIPA, and no penalties are stated in the bill. So there are no legal consequences for non-compliance. However, it is always possible that a citizen or the local media might challenge a library that chooses not to filter.