S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243

February 22, 2000

Opinion No. 00-030

Violations of Tenn. Code Ann. § 39-17-911(a)(1)

QUESTIONS

1. If a public library provides Internet access to patrons, would the library violate Tenn. Code Ann. § 39-17-911(a)(1) if a minor accessed pornography or viewed the computer screen of an adult accessing pornography? Would the statute be violated if the library used filtering software in an effort to avoid making such material available to minors even though the software will not block every pornographic site?

2. If a public library rents videos for a nominal fee to patrons, would Tenn. Code Ann. § 39-17-911(a)(1) be violated if the library rented a video containing nudity or sexual conduct to a minor?

OPINIONS

1. A public library that provides Internet access to patrons would not violate Tenn. Code Ann. § 39-17-911(a)(1) if a minor accessed pornography or viewed the computer screen of an adult accessing pornography, unless the library knowingly permitted the minor access to the material and did so having knowledge of the content and character of the specific material viewed by the minor. A library's use of filtering software to avoid having minors access materials obscene as to them might provide a defense against the culpable mental state in Tenn. Code Ann. § 39-17-911(a)(1). However, recent case law suggests that the use of such software may violate the First Amendment to the extent that it restricts adult access to sexually explicit, non-obscene material.

2. A public library would violate Tenn. Code Ann. § 39-17-911(a)(1) if the library knowingly rented a video containing nudity or sexual conduct to a minor.

ANALYSIS

1. The first question asks whether a public library that provides Internet access to patrons would violate Tenn. Code Ann. § 39-17-911(a) if a minor accessed pornography or viewed the computer screen of an adult accessing pornography. In addition, you have asked whether the library would violate the statute if filtering software was used in an effort to avoid making such material available to minors.

Tenn. Code Ann. § 39-17-911(a)(1) provides:

> It is unlawful for any person to knowingly sell or loan [*sic*] for monetary consideration or otherwise exhibit or make available to a
>
> minor:
>
> (1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or a portion of the human body, which depicts nudity, sexual conduct, excess violence, or sadomasochistic abuse, and which is harmful to minors; . . ..

The statutory definition of "person" includes "any individual, firm, partnership, co-partnership, association, corporation, governmental subdivision or agency, or other organization or other legal entity, or any agent or servant thereof." Tenn. Code Ann. § 39-11-106(a)(27). This definition is sufficiently broad to include a public library.[1]

A "minor" is defined as "any person who has not reached eighteen (18) years of age and is not emancipated; . . .." Tenn. Code Ann. § 39-17-901(8). The definition of "harmful to minors" is:

> that quality of any description or representation, in whatever form, of nudity, sexual excitement, sexual conduct, excess violence or sadomasochistic abuse when the matter or performance:
>
> (A) Would be found by the average person applying contemporary community standards to appeal predominately to the prurient, shameful or morbid interests of minors:
>
> (B) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and,
>
> (C) Taken as a whole lacks serious literary, artistic, political or scientific values for minors; . . ..

Tenn. Code Ann. § 39-17-901(6).

The Tennessee Supreme Court has construed a companion statute regulating the display of material that is "harmful to minors," Tenn. Code Ann. § 39-17-914(a), as facially constitutional under the United States and Tennessee Constitutions. *Davis-Kidd Booksellers, Inc. v. McWherter,*

---

[1]An earlier version of the Tennessee obscenity statutes exempted, *inter alia*, public libraries from the statutory proscription. *See State v. Hunt*, 660 S.W.2d 513 (Tenn. Crim. App. 1983).

866 S.W.2d 520 (Tenn. 1993). The plaintiffs in that case did not challenge the constitutional authority of a state to regulate materials that are protected as to adults but obscene as to minors. *Id*. at 526. Based on precedent, such a challenge would have failed. *See, e.g., American Booksellers v. Webb*, 919 F.2d 1493 (11th Cir.), *cert. denied*, 500 U.S. 942, 111 S.Ct. 2237, 114 L.Ed.2d 479 (1991)(under *Ginsberg v. State of New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968), a state may, absent an impermissible burden on adults, deny minors all access in any form to materials obscene as to them). Thus, if minors access pornography, they would be accessing material statutorily deemed obscene as to them, *viz*., "harmful to minors."

In *Davis-Kidd Booksellers, Inc.,* the Court emphasized the importance of the scienter requirement imported from Tenn. Code Ann. § 39-11-301(c) into the display statute at issue in that case: "[i]n the context of criminal statutes regulating obscenity, the State must establish that the defendant had knowledge of the contents and character of the materials displayed or sold." 866 S.W.2d at 528. Tenn. Code Ann. § 39-17-911 has a specific scienter requirement of a knowing sale, loan, or exhibition of the proscribed materials. The statutory definition of "knowing" refers "to a person who acts knowingly with respect to the conduct or the circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result; . . .." Tenn. Code Ann. § 39-11-106(a)(20). This definition is identical to the definition in Tenn. Code Ann. § 39-11-301(c).

Thus, to establish criminal liability for a violation of Tenn. Code Ann. § 39-17-911(a)(1), the State must show that a defendant had actual knowledge of the content and character of the materials sold, lent, or exhibited. *See State v. Pendergrass*, __S.W.3d__ (Tenn. Crim. App. 1999)("knowing" means actual, not constructive, knowledge). *See also Davis-Kidd Booksellers, Inc*., 866 S.W.2d at 528-29 (because knowledge on the part of the defendant is necessary for conviction , display statute does not impose strict liability). Merely providing Internet access to patrons will not lead to criminal liability on the part of a public library that is unaware that providing Internet access would be reasonably certain to exhibit or make available pornographic matters to unemancipated persons under eighteen. In other words, a library would not be criminally liable where a minor accessed pornography without the knowledge of the library. The knowledge requirement would likewise protect a library from criminal liability if a minor viewed the computer screen of an adult accessing pornography if the library was unaware of the minor's conduct.

The second part to your question asks whether the library could use filtering software to avoid making material harmful to minors available to them. Based on the requirement that the State must establish that a defendant had knowledge of the contents and character of the materials sold, lent, or otherwise exhibited to a minor before criminal liability is imposed, it is reasonable to conclude that the use of filtering software to avoid having minors access materials obscene as to them should provide a defense against the culpable mental state. However, such use of filtering software would have to avoid restricting public access to constitutionally protected material. As the Court in *Davis-Kidd Booksellers* explained:

> The danger of attempting to regulate expression without a requirement that an affected merchant bookseller have knowledge is that it imposes severe limitations on the public's access to constitutionally protected matter and a severe burden on booksellers who will tend to restrict the books sold to those reviewed. The practical limitations as to the amount of material a bookseller can review, combined with the self-censorship inherent in the face of strict criminal liability, would tend to restrict public access to protected materials.

Id. at 528-29 (citation omitted).

This caveat was recently realized in *Mainstream Loudon v. Board of Trustees of the Loudon County Library*, 24 F. Supp. 2d 552 (E.D. Va. 1998), holding that a public library's Internet policy restricting access to sites with sexually explicit material by the use of filtering software was an unconstitutional burden on patrons' First Amendment access.[2] Thus, although the use of filtering software could help a library comply with the prohibitions of the statute, any such use of filtering software would have to be pursuant to a policy that comports with the competing rights guaranteed by the First Amendment.

2. In your second question, you ask whether a violation of the statute would occur if a public library rented a video containing nudity or sexual conduct to a minor. Again, the criminal liability of the library would turn on whether the library knowingly rented such a video. As discussed above, to establish criminal liability under the statute, the State must prove that the library had knowledge that the video contained nudity or sexual conduct.[3]

---

[2]The 1996 Communications Decency Act granting absolute immunity to good-faith users of filtering software, 47 U.S. § 230(c)(2)(A), has been construed as providing immunity from tort actions for damages. *Mainstream Loudon*, 24 F.Supp.2d at 561; *Zeran v. America Online, Inc.*, 129 F.3d 327, 329-30 (4th Cir.), *cert. denied*, __U.S.__, 118 S.Ct. 2341, 141 L.Ed.2d 712 (1998).

[3]In regard to your parenthetical observation about "R" rated films, our research has found no legal description of the content of "R" rated films.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

ELIZABETH B. MARNEY
Assistant Attorney General

Requested by:

Randy McNally
Senator, 5th Senatorial District
302 War Memorial Building
Nashville, TN 37243-0205