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HOUSE BILL NO. 1492

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice
on February 13, 2000)

(Patron Prior to Substitute—Delegate Devolites)

A BILL to amend and reenact §§ 18.2-373 and 18.2-391 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 18.2-391.2, relating to unlawful electronic file or message.

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-373 and 18.2-391 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding a section numbered 18.2-391.2 as follows:

§ 18.2-373. Obscene items enumerated.

Obscene items shall include:

(1) Any obscene book; or

(2) Any obscene leaflet, pamphlet, magazine, booklet, picture, painting, bumper sticker, drawing, photograph, film, negative, slide, motion picture, videotape recording; or

(3) Any obscene figure, object, article, instrument, novelty device, or recording or transcription used or intended to be used in disseminating any obscene song, ballad, words, or sounds; or

(4) Any obscene item, including but not limited to any writing, picture or similar visual representation, or sound recording, stored in an electronic or other medium retrievable in a perceivable form.

§ 18.2-391. Unlawful acts.

A. It shall be unlawful for any person knowingly to sell, rent or loan to a juvenile, or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse:

1. Any picture, photography, drawing, sculpture, motion picture film, ~~electronic file or message containing an image~~, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles, or

2. Any book, pamphlet, magazine, printed matter however reproduced, ~~electronic file or message containing words~~, or sound recording which contains any matter enumerated in subdivision 1 of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which, taken as a whole, is harmful to juveniles.

B. It shall be unlawful for any person knowingly to sell to a juvenile an admission ticket or pass, or knowingly to admit a juvenile to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles or to exhibit any such motion picture at any such premises which are not designed to prevent viewing from any public way of such motion picture by juveniles not admitted to any such premises.

C. It shall be unlawful for any juvenile falsely to represent to any person mentioned in subsection A or subsection B hereof, or to his agent, that such juvenile is eighteen years of age or older, with the intent to procure any material set forth in subsection A, or with the intent to procure such juvenile's admission to any motion picture, show or other presentation, as set forth in subsection B.

D. It shall be unlawful for any person knowingly to make a false representation to any person mentioned in subsection A or subsection B hereof or to his agent, that he is the parent or guardian of any juvenile, or that any juvenile is eighteen years of age, with the intent to procure any material set forth in subsection A, or with the intent to procure such juvenile's admission to any motion picture, show or other presentation, as set forth in subsection B.

E. Violation of any provision hereof shall constitute a Class 1 misdemeanor.

§ 18.2-391.2. Defenses.

A. No person shall be held to have violated §§ 18.2-374 or 18.2-391 for providing access or connection to or from a facility, system, electronic file or message, or network not under that person's control, including transmission, downloading, intermediate and transient storage, caching, web hosting, online directories, online indices, search engines, hypertext links, access software, or other related capabilities that are incident to providing such access or connection that does not include the creation of the content of the communication.

The defense provided under this subsection shall not be applicable to (i) a person who is a conspirator with an entity actively involved in the creation or knowing distribution of communications that violates §§ 18.2-374 or 18.2-391, or who knowingly advertises the availability of such communications, or (ii) a person who provides access or connection to a facility, system, or network

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60 *engaged in the violation of §§ 18.2-374 or 18.2-391 that is owned or controlled by such person.*
61 *B. In addition to any other defenses available by law, no employer shall be held liable under*
62 *§§ 18.2-374 or 18.2-391 for the actions of an employee or agent unless:*
63 *1. The employee's or agent's conduct is within the scope of his employment or agency; and*
64 *2. The employer (a) having knowledge of such conduct, authorizes or ratifies such conduct, or (b)*
65 *recklessly disregards such conduct.*
66 *C. Nothing in this section shall be construed to treat interactive computer services as common*
67 *carriers or telecommunications carriers. #*