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87 WisACT 416

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Assembly Bill 10

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1987 Wisconsin Act 416

AN ACT to repeal 944.21 (1) (c); to renumber and amend 66.051 (intro.), (1), (2), (3) and (4) and 944.21 (1) (intro.), (a) and (b); to amend 196.625, 944.21 (title) and 944.21 (2) (b); to repeal and recreate 66.051 (2) and 944.21 (2); and to create 59.07 (64m), 66.051 (3), 165.25 (3m), 944.21 (1) and 944.21 (3) (c) and (4) to (10) of the statutes, relating to obscenity, defining obscene material and obscene performance and providing penalties.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 59.07 (64m) of the statutes is created to read:

59.07 (64m) REGULATION OF OBSCENITY. Enact an ordinance to prohibit conduct that is the same as that prohibited by s. 944.21. A county may bring an action for a violation of the ordinance regardless of whether the attorney general has determined under s. 165.25 (3m) that an action may be brought. The ordinance may provide for a forfeiture not to exceed \$10,000 for each violation.

SECTION 2. 66.051 (intro.), (1), (2), (3) and (4) of the statutes are renumbered 66.051 (1) (intro.), (a), (b) and (c) and (2), and 66.051 (2), as renumbered, is amended to read:

66.051 (2) ~~Nothing~~ Except as provided in sub. (3), nothing in this section shall may be construed to preclude cities and villages from prohibiting conduct which is the same as or similar to that prohibited by chs. 941 to 947.

SECTION 3. 66.051 (2) of the statutes, as affected by 1987 Wisconsin Act (this act), is repealed and recreated to read:

66.051 (2) Except as provided in sub. (3), nothing in this section may be construed to preclude cities and villages from prohibiting conduct which is the same as or similar to that prohibited by chs. 941 to 948.

SECTION 4. 66.051 (3) of the statutes is created to read:

66.051 (3) The board or council of a city, village or town may not, by ordinance, prohibit conduct which is the same as or similar to conduct prohibited by s. 944.21.

SECTION 5. 165.25 (3m) of the statutes is created to read:

165.25 (3m) REVIEW OBSCENITY CASES. Review obscenity cases submitted to the department by district attorneys under s. 944.21 (7). The attorney general shall determine whether a prosecution may be commenced.

SECTION 5m. 196.625 of the statutes is amended to read:

196.625 Discrimination by telecommunications utilities. Every telecommunications utility shall receive and transmit without discrimination messages from

and for any person upon tender or payment of the usual or customary charges therefor, whenever requested to do so, without regard to the character of the messages to be transmitted unless a court of competent jurisdiction finds the messages to be in violation of s. 944.21 (3). Any person neglecting or refusing to comply with any of the provisions of this section shall forfeit not less than \$25 nor more than \$100 for each day of such neglect or refusal. One-half of the forfeitures recovered under this section shall be paid to the person prosecuting under this section.

SECTION 6. 944.21 (title) of the statutes is amended to read:

944.21 (title) Obscene material or performance.

SECTION 7. 944.21 (1) (intro.), (a) and (b) of the statutes are renumbered 944.21 (3) (intro.), (a) and (b) and amended to read:

944.21 (3) (intro.) Whoever ~~intentionally~~ does any of the following with knowledge of the character and content of the material or performance and for commercial purposes is guilty of a Class D felony subject to the penalties under sub. (5):

(a) Imports, prints, ~~advertises,~~ sells, has in his or her possession for sale, ~~or publishes, exhibits, or transfers commercially any lewd, obscene or indecent written matter, picture, sound recording, or film; or material.~~

(b) ~~Advertises, produces~~ Produces or performs in any ~~lewd, obscene or indecent performance; or.~~

SECTION 8. 944.21 (1) of the statutes is created to read:

944.21 (1) The legislature intends that the authority to prosecute violations of this section shall be used primarily to combat the obscenity industry and shall never be used for harassment or censorship purposes against materials or performances having serious artistic, literary, political, educational or scientific value. The legislature further intends that the enforcement of this section shall be consistent with the first amendment to the U.S. constitution, article I, section 3, of the Wisconsin constitution and the compelling state interest in protecting the free flow of ideas.

SECTION 9. 944.21 (1) (c) of the statutes is repealed.

SECTION 10. 944.21 (2) of the statutes is repealed and recreated to read:

944.21 (2) In this section:

(a) "Community" means this state.

(b) "Internal revenue code" has the meaning specified in s. 71.02 (2).

(c) "Obscene material" means a writing, picture, sound recording or film which:

1. The average person, applying contemporary community standards, would find appeals to the prurient interest if taken as a whole;

2. Under contemporary community standards, describes or shows sexual conduct in a patently offensive way; and

3. Lacks serious literary, artistic, political, educational or scientific value, if taken as a whole.

(d) "Obscene performance" means a live exhibition before an audience which:

1. The average person, applying contemporary community standards, would find appeals to the prurient interest if taken as a whole;

2. Under contemporary community standards, describes or shows sexual conduct in a patently offensive way; and

3. Lacks serious literary, artistic, political, educational or scientific value, if taken as a whole.

(e) "Sexual conduct" means the commission of any of the following: sexual intercourse, sodomy, bestiality, necrophilia, human excretion, masturbation, sadism, masochism, fellatio, cunnilingus or lewd exhibition of human genitals.

(f) "Wholesale transfer or distribution of obscene material" means any transfer for a valuable consideration of obscene material for purposes of resale or commercial distribution; or any distribution of obscene material for commercial exhibition. "Wholesale transfer or distribution of obscene material" does not require transfer of title to the obscene material to the purchaser, distributee or exhibitor.

SECTION 11. 944.21 (2) (b) of the statutes, as affected by 1987 Wisconsin Act (this act), is amended to read:

944.21 (2) (b) "Internal revenue code" has the meaning specified in s. ~~71.02(2)~~ 71.01 (6).

SECTION 12. 944.21 (3) (c) and (4) to (10) of the statutes are created to read:

944.21 (3) (c) Requires, as a condition to the purchase of periodicals, that a retailer accept obscene material.

(4) Whoever does any of the following with knowledge of the character and content of the material is subject to the penalties under sub. (5):

(a) Transfers or exhibits any obscene material to a person under the age of 18 years.

(b) Has in his or her possession with intent to transfer or exhibit to a person under the age of 18 years any obscene material.

(5) (a) Except as provided under pars. (b) to (e), any person violating sub. (3) or (4) is subject to a Class A forfeiture.

(b) If the person violating sub. (3) or (4) has one prior conviction under this section, the person is guilty of a Class A misdemeanor.

(c) If the person violating sub. (3) or (4) has 2 or more prior convictions under this section, the person is guilty of a Class D felony.

(d) Prior convictions under pars. (b) and (c) apply only to offenses occurring on or after the effective date of this paragraph [revisor inserts date].

(e) Regardless of the number of prior convictions, if the violation under sub. (3) or (4) is for a wholesale transfer or distribution of obscene material, the person is guilty of a Class D felony.

(5m) A contract printer or employe or agent of a contract printer is not subject to prosecution for a violation of sub. (3) regarding the printing of material that is not subject to the contract printer's editorial review or control.

(6) Each day a violation under sub. (3) or (4) continues constitutes a separate violation under this section.

(7) A district attorney may submit a case for review under s. 165.25 (3m). No civil or criminal proceeding under this section may be commenced against any person for a violation of sub. (3) or (4) unless the attorney general determines under s. 165.25 (3m) that the proceeding may be commenced.

(8) (a) The legislature finds that the libraries and educational institutions under par. (b) carry out the essential purpose of making available to all citizens a current, balanced collection of books, reference materials, periodicals, sound recordings and audiovisual materials that reflect the cultural diversity and pluralistic nature of American society. The legislature further finds that it is in the interest of the state to protect the financial resources of libraries and educational institutions from being expended in litigation and to permit these resources to be used to the greatest extent possible for fulfilling the essential purpose of libraries and educational institutions.

(b) No person who is an employe, a member of the board of directors or a trustee of any of the following is liable to prosecution for violation of this section for acts or omissions while in his or her capacity as an employe, a member of the board of directors or a trustee:

1. A public elementary or secondary school.

2. A private school, as defined in s. 115.001 (3r).

3. Any school offering vocational, technical or adult education that:

a. Is a vocational, technical and adult education district school, is a school approved by the educational approval board under s. 38.51 or is a school described in s. 38.51 (9) (f), (g) or (h); and

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b. Is exempt from taxation under section 501 (c) (3) of the internal revenue code.

4. Any institution of higher education that is accredited, as described in s. 39.30 (1) (d), and is exempt from taxation under section 501 (c) (3) of the internal revenue code.

5. A library that receives funding from any unit of government.

(9) In determining whether material is obscene under sub. (2) (c) 1 and 3, a judge or jury shall examine individual pictures or passages in the context of the work in which they appear.

(10) The provisions of this section, including the provisions of sub. (8), are severable, as provided in s. 990.001 (11).

SECTION 13. Effective dates. This act takes effect on the day after publication, except as follows:

(1) The repeal and recreation of section 66.051 (2) of the statutes takes effect on July 1, 1989.

(2) The amendment of section 944.21 (2) (b) of the statutes takes effect on January 1, 1989.
