

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/CS/SB 144

SPONSOR: Judiciary Committee, Criminal Justice Committee and Senator Geller

SUBJECT: Internet/Child Pornography

DATE: April 18, 2001                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Gardner</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable/CS</u>
2.	<u>Matthews</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable/CS</u>
3.	_____	_____	<u>APJ</u>	_____
4.	_____	_____	<u>AP</u>	_____
5.	_____	_____	_____	_____

## I. Summary:

Committee Substitute for Senate Bill 144 amends and creates sections of ch. 847, F.S., relating to obscene literature and profanity. This bill implements several recommendations made in a 2000 report by the Information Technology Development Task Force relating to child pornography and other activity over the Internet involving minors. Specifically, the bill:

- Defines “child pornography,” and “transmit” for purposes of new criminal offenses;
- Creates new third degree felony offenses relating to the transmission of child pornography and other specified images to minors from within or outside the state;
- Establishes Florida’s jurisdiction to prosecute persons who transmit such images into or from this state;
- Grants immunity from civil liability to anyone who reports an incident of child pornography; and
- Add violations of the Computer Pornography and Child Exploitation Prevention Act to the list of criminal offenses into which the statewide grand jury may inquire.

This bill substantially amends ss. 847.001 and 905.34 of the Florida Statutes and creates ss.847.0137; and 847.0139.

## II. Present Situation:

### Background

In June 1999, the Legislature created a 34-member Information Service Technology Task Force (Task Force) for a two-year term to develop policies to benefit residents of this state by fostering the free market development and beneficial use of advanced communication networks and information technologies within this state. *See* ch. 99-354, L.O.F. Eight subcommittees were

formed. In February, 2000, the Task Force issued a report with numerous policy recommendations and implementation strategies. *See 1999 Annual Report to the Legislature, Information Service Technology Task Force (February 14, 2000)*. In particular, Subcommittee 7 (the *Electronic Commerce and Consumer Protection Subcommittee*, referred to in this analysis as the *Subcommittee*) evaluated state laws, rules and procedures as may impact e-commerce (i.e., electronic commerce--the buying or selling of products and services by businesses and consumers over the Internet). Three typical e-commerce transactions that take place over the Internet are: business to business; business to consumer; and consumer to consumer. The subcommittee noted that most of Florida's laws affecting commerce and consumer protection against fraud, child abuse and other victimization predate the rapid proliferation of the Internet and e-commerce. In examining the issue of adult and child pornography transmitted over the Internet, the subcommittee acknowledged the difficulty in addressing the issue in light of the First Amendment, jurisdictional difficulties and other considerations. Without providing a definition for child pornography or pornography, the subcommittee ultimately recommended criminalizing the transmission of pornography over which Florida ought to have jurisdiction.

The subcommittee also recommended civil immunity legislation for persons reporting pornography, including child pornography, to law enforcement and to any third person who furnishes a copy of a photograph or other evidence to law enforcement which the third party reasonably believes to be child pornography. The subcommittee, however, could not agree to mandate reporting requirements.<sup>1</sup>

### **Current Law Relating to Child Pornography**

In 1986, the Legislature enacted the "Computer Pornography and Child Exploitation Prevention Act of 1986." *See s. 847.0135, F.S.* The law prohibits using a computer to print, exchange or otherwise transmit information that facilitates sexual conduct with minors, or a visual depiction of such. The law also prohibits using the Internet or other on-line service to solicit a child or a person posing as a child to engage in sexual conduct. These crimes are punishable as third degree felonies. It is within prosecutorial discretion to prosecute under the specific statute dealing with computers and child pornography or the general statute prohibiting child pornography. *See Wade v. State, 751 So.2d 669, (Fla. 2d DCA 2000)*.

To date, there is no common law or statutory definition for the term "child pornography." Chapter 847, F.S., contains the following definitions:

- *Sexual conduct*—"actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed." The definition excludes a mother breastfeeding her baby. *See s. 847.001(11), F.S.*<sup>2</sup>

<sup>1</sup> Computer repair shops or commercial developers who locate child pornography within a computer or who come across digital or regular photographs currently report. Although the subcommittee agreed that incidences of child pornography should be reported and such persons should be immunized from liability, the subcommittee could not agree *requiring* third parties to report child pornography.

<sup>2</sup> The current definition for "sexual conduct" under chapter 847, F.S., is the same definition used formerly for sexual conduct under chapter 827, F.S., relating to child abuse, which has been found to be unconstitutional. The Florida Supreme Court held

- *Harmful to minors*—“that quality of any description, exhibition, presentation, or representation, in whatever form, of nudity, sexual conduct, or sexual excitement when it:
  - Predominantly appeals to the prurient, shameful, or morbid interest of minors
  - Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and
  - Taken as a whole, is without serious literary, artistic, political, or scientific value for minors. *See* s. 847.001(3), F.S.

Chapter 827, F.S., relating to child abuse, contains a provision that prohibits promoting or facilitating a sexual performance by a child. *See* s. 827.071, F.S. The term “performance” is defined further as “any play, motion picture, photograph, or dance or any other visual representation exhibited before an audience.” “Sexual performance” is defined as any performance that includes “sexual conduct by a child of less than 18 years of age.” The term “sexual conduct” is identical to that definition in chapter 847, F.S., with the exception that the physical contact with the genitals, pubic area, buttocks or female breast must be made with the intent to arouse or gratify the sexual desire of either party in order to be classified as a criminal activity. It does not contain an express exclusion for breastfeeding. Section 827.071, F.S., has been used to prosecute for possession of child pornography.

Computer pornography and child exploitation through Internet activity is not currently within the jurisdictional purview of statewide grand juries. *See* s. 905.34, F.S., relating to the powers and duties of statewide grand juries. The Statewide Grand Jury Act found in ss. 905.31-905.40, F.S., provides for the establishment of the grand jury process which entails the Governor petitioning the Supreme Court to impanel a statewide grand jury to inquire into multi-county or other multi-jurisdictional criminal activity. Under the *Florida Constitution*, no person may be tried for a capital crime without the presentment or indictment of a grand jury. *See* s.15(a), art. I, *Fla. Constitution*.

### III. Effect of Proposed Changes:

Section s. 847.0137, F.S., is created to criminalize as third degree felony offenses, the transmissions of pornography under four specified circumstances. These new offenses are cumulative to existing offenses under ss. 847.012 and 847.0133, F.S.<sup>3</sup> and arise if a person:

1. *In this state*, knowingly transmits, by means of the Internet, *child pornography* to another person in this state or in another jurisdiction;

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that the language impermissibly chilled free speech and expression by punishing entirely innocent and innocuous activities involving families and children, which clearly are protected by the guarantee of free expression. *See Schmitt v. State*, 590 So.2d 404, 413 (Fla. 1991). Further, the Court held that the particular language violated due process because, to the extent the language punished innocent and innocuous activities, it lacked a rational relationship to its obvious purpose. Consequently, the Legislature amended the definition of “sexual conduct” in chapter 827, F.S., to specify that the contact had to be “with the intent to arouse or gratify the sexual desire of either party.” *See* ch

<sup>3</sup> Section 847.012, F.S., relates to sale or other distribution of harmful materials to a person under 18 years of age and includes visual representations. Section 847.0133, F.S., in part, prohibits the transmission of obscene material to a minor.

2. *In this state*, knowingly transmits, by means of the Internet, *an image harmful to minors to a known minor or a person believed to be a minor*<sup>4</sup> in this state;
3. In any *jurisdiction other than this state*, knowingly transmits, by means of the Internet, *child pornography* to another person in this state; or
4. In any *jurisdiction other than this state*, knowingly transmits, by means of the Internet, *an image harmful to minors to a known minor or a person believed to be a minor* in this state.

The offender must have actual knowledge rather than belief to be prosecuted for transmitting unlawful material. The bill establishes Florida's jurisdiction over such crimes, whether or not the violator lives or transmits in or outside Florida. The bill also provides that the new section shall not be construed to prohibit prosecution of the unlawful conduct under this section under any other section that may provide for even greater penalties.

For purposes of these new offenses, the bill creates and amends definitions. "Child pornography" is newly defined to be "any image depicting a minor engaged in sexual conduct." The existing definition of "sexual conduct" under chapter 847, F.S., is amended to conform with the definition of "sexual conduct" under chapter 827, F.S., by adding "with the intent to arouse or gratify the sexual desire of either party." The term "transmit" is defined to mean the sending of an e-mail to a specified address. This would exempt the mere posting of otherwise constitutionally protected adult material on a website or bulletin board. Nor does this affect the ability of a minor to search for sexual material on the Internet.

These offenses are not applicable to scenarios involving receipt of "subscription-based transmissions" from list servers. A list server is a type of on-line bulletin board to which persons can subscribe. The subscriber can post information or a question which would then be e-mailed to all other subscribers. Any subscriber could then respond to all subscribers on the list, or limit their response. The subscriber has little or no control over what arrives on their computer.

The bill emphasizes that prosecution for violations under the new section may be more severe than provided in the section currently. It allows the state to prosecute the offender if the circumstances of the Internet transmission also constituted a more severe crime under a provision such as s. 827.071, F.S., which prohibits promoting sexual performances by children as well as possession of child pornography. It is indeterminate whether a transmission over the Internet would in and of itself constitute a lewd act as defined in s. 800.04, F.S. Patterned after a similar provision in s. 847.0135, F.S. (relating to computer pornography), there is a provision which subjects a person outside the state to criminal prosecution for these new offenses pursuant to the criminal jurisdiction statute in chapter 910, F.S.

Section 847.0139, F.S., is also created to grant immunity from civil liability to a person who reports to law enforcement what he or she reasonably believes to be child pornography, including a copy of a photograph or other evidence.

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<sup>4</sup> The language in this bill relevant to transmission of an image harmful to minors or to a person believed to be a minor in this state is designed to accommodate legal law enforcement operations in which a law enforcement officer poses as a minor for the purpose of apprehending persons who use the Internet to prey on children.

Section 905.34, F.S., relating to the duties and powers of statewide grand juries, is amended to add violations of computer pornography and child exploitation provisions in s. 847.0135, F.S. ("Computer Pornography and Child Exploitation Prevention Act), to the list of offenses within the grand jury's jurisdiction.

The effective date of this bill is July 1, 2001.

#### IV. Constitutional Issues:

##### A. Municipality/County Mandates Restrictions:

None.

##### B. Public Records/Open Meetings Issues:

None.

##### C. Trust Funds Restrictions:

None.

##### D. Other Constitutional Issues:

Legal efforts to regulate Internet use or otherwise criminalize certain activity such as the posting or dissemination of adult material on the basis that such material is harmful to minors raise constitutional issues. Although the First Amendment does not protect the possession, creation, or transmission of any image (expression) depicting an actual minor child engaged in sexual conduct (*Osborne v. Ohio*, 495 U.S. 103 (1990)), it does protect the creation, possession, and distribution of images depicting adults engaged in sexual conduct but may be regulated under limited circumstances. The distribution of "adult material" is subject to reasonable restrictions, community standards, and restrictions on obscenity. The overbreadth doctrine in relation to the First Amendment requires that laws restricting freedom of expression be so narrowly drawn that the law does not unreasonably restrict constitutionally protected speech, such as adult expression of adult material. Therefore the attempt to protect children from exposure to harmful or sexually explicit material found on the Internet without limiting an adult's constitutionally protected right to view that material has posed significant challenges to lawmakers. *See e.g., Reno v. American Civil Liberties Union*, 117 S.Ct. 2329 (1997)(Communications Decency Act-47 U.S.C.A. s. 223(a, d)--prohibiting transmission of obscene or indecent communications by means of telecommunications devices to minors or sending patently offensive communications struck down as unconstitutional for placing content-based blanket restrictions on speech.); *ACLU v. Johnson*, 194 F.3d 1149 (C.A.10(N.M.) 1999); *Reno v. ACLU*, 521 U.S. 844 (1997) (injunctions granted to prevent enforcement of child pornography laws that have a chilling effect or cause self-censorship of otherwise protected First Amendment rights).

In addition, successful prosecution can be further complicated by lack of jurisdiction, the degree of anonymity surrounding who actually receives, transmits or otherwise accesses material over the Internet, the lack of control over who gains access to posted material on a

bulletin board or web page, and what constitutes child pornography. For example, some states (e.g., Virginia, New Jersey, and California) have enacted laws expressly criminalizing even computer-generated images depicting minor children engaged in sexual conduct. *See e.g., State v. Cohen*, 696 So.2d435 (Fla.4<sup>th</sup> DCA 1997) (prosecution under s. 827.071, F.S., for exploitation of children for computer representation of a photo of an actual child, rather than a computer generated image). These laws are being challenged on the basis that there can not be child pornography when no actual child is exploited to produce the material. The U.S. Supreme Court recently granted certiorari to hear *Free Speech Coalition v. Reno*, 220 F.3d 1113 (9<sup>th</sup> Cir. 2000) for the 2001 term. The Act under this bill would apply to both actual and computer-generated images.

It is indeterminate whether this law is drawn sufficiently narrow to prohibit the transmission of a sexually explicit image to a minor (or to a law enforcement officer posing as a minor for investigative purposes) without violating an adult's constitutionally protected right to view such materials or without causing a chilling effect of constitutionally protected speech. The bill does require scienter in the actual transmission which would appear to exclude from criminal prosecution the mere posting of such material on the Internet and an adult's right to view it or send such material to another adult.

## V. Economic Impact and Fiscal Note:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

To the extent that this bill creates new criminal offenses relating to child pornography and harmful images to minors, this bill provides another prosecutorial tool in the arsenal to prosecute the increasing number of pedophiles and child molesters who have set up websites containing child pornography and who use chat rooms and e-mail communications to contact and lure children into sexual exploitation and sexual conduct. In 2000, the U.S. Customs Service handled about 300 cases of child pornography transported across borders. The F.B.I. handled almost 3000 cases of "online pedophilia" such as posting child pornography, or trying to lure minors to meet with the pedophile. The actual number of cases is likely to be much higher.

### C. Government Sector Impact:

There will be attendant costs of criminal investigation, prosecution, court expenses and cost of counsel. It is indeterminate what impact this law will have on prison population. The Criminal Justice Estimating Conference has not taken a position on this bill.

## VI. Technical Deficiencies:

Minor is redundantly defined in the new statutory provision, s. 847.0137, F.S. A definition for minor already exists as applicable to the entire chapter 847. See s. 847.001(5), F.S.

**VII. Related Issues:**

The bill does not express an offense level in regards to a sentencing score sheet; however, the only violation of ch. 847, F.S., listed in s. 921.0022(3), F.S. is a level 1. This crime is as yet unranked in terms of ch. 921, F.S., sentencing guidelines.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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