

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/CS/SB 1128

INTRODUCER: Judiciary Committee, Criminal Justice Committee, and Senator Fasano

SUBJECT: Minors/Distribution of Harmful Material

DATE: April 22, 2008                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	<u>Rogers</u>	<u>Cooper</u>	<u>CM</u>	<u>Fav/1 amendment</u>
3.	<u>Daniell</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/CS</u>
4.	_____	_____	<u>JA</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**Please see Section VIII. for Additional Information:**

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

This bill expands what materials might be determined harmful to minors by amending the definition of “harmful to minors.”

The bill provides that any person who knowingly sells, lends, gives away, distributes, transmits, shows, or transmutes materials that depict a minor engaged in any act or conduct that is harmful to minors commits a felony of the third degree. The bill also provides that it is a third-degree felony for a person to knowingly use a minor in the production of certain proscribed material regardless of whether the material is intended for distribution to minors or is actually distributed to them.

The bill amends sections of law relating to the prohibition of sale or other distribution of harmful materials to minors and relating to exposing minors to harmful motion pictures, by removing “honest mistake” excuse from the definition of “knowingly.”

Throughout various obscenity statutes dealing with minors, the bill also provides that a person’s ignorance of a minor’s age, a minor’s misrepresentation of his or her age, a bona fide belief of a

minor's age, or a minor's consent may not be raised as a defense in a prosecution for these crimes, if the minor is less than 12 years of age.

Legislative intent language is amended to specify that it is the intent of the Legislature to preempt the field of exposing minors to certain harmful productions, to the exclusion of counties and municipalities, insofar as it concerns exposing persons less than 17 years of age to commercial or sexual exploitation.

The bill provides exceptions from criminal offenses for providers of communications services or providers of information services, as specified.

This bill amends the following sections of the Florida Statutes: 847.001, 847.011, 847.012, 847.013, 847.0133, and 921.0022. This bill creates an undesignated section of the Florida Statutes.

## II. Present Situation:

### Definition of "Harmful to Minors"

Currently, s. 847.001, F.S., provides for a three-pronged test to determine whether material is harmful to minors. Florida law defines "harmful to minors" as any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting 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 material for minors; and
- Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.<sup>1</sup>

### "Obscene" Materials

Section 847.001, F.S., defines "obscene" as the status of material which:

- The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
- Depicts or describes, in a patently offensive way, sexual conduct;<sup>2</sup> and
- Taken as a whole, lacks serious literary, artistic, political, or scientific value.

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<sup>1</sup> Section 847.001(6), F.S.

<sup>2</sup> Section 847.001, F.S., defines "sexual conduct" as "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 with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. A mother's breastfeeding of her baby does not under any circumstance constitute 'sexual conduct.'"

Currently, it is a first-degree misdemeanor<sup>3</sup> for a person to knowingly distribute, sell, lend, give away, transmit, transmute, or show certain obscene materials.<sup>4</sup> It is a second-degree misdemeanor<sup>5</sup> for a person to knowingly have certain obscene material in one's possession, custody, or control.<sup>6</sup>

### **Selling or Distributing Harmful Materials to Minors**

Section 847.012, F.S., provides that it is a third-degree felony to knowingly sell, rent, or loan for monetary consideration to a minor:

- Any picture, photograph, drawing, sculpture, motion picture film, videocassette, or similar visual representation or image of a person or portion of the human body which depicts nudity or sexual conduct, sexual excitement, sexual battery, bestiality, or sadomasochistic abuse and which is harmful to minors; or
- Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter defined in s. 847.001, F.S., explicit and detailed verbal descriptions or narrative accounts of sexual excitement, or sexual conduct and which is harmful to minors.

The term “knowingly” is defined as having the general knowledge of, reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

- The character and content of any material (described above) which is reasonably susceptible of examination by the defendant; and
- The age of the minor; however, an honest mistake constitutes an excuse from liability if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.<sup>7</sup>

### **Exposing Minors to Harmful Materials**

Section 847.013, F.S., provides that it is a first-degree misdemeanor to:

- Knowingly exhibit for a monetary consideration to a minor or knowingly rent, sell, or loan a videotape of a motion picture to a minor or knowingly sell to a minor an admission ticket or pass or knowingly admit a minor for a monetary consideration to premises whereon there is exhibited a motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts nudity, sexual conduct, sexual excitement, sexual battery, bestiality, or sadomasochistic abuse and which is harmful to minors; or

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<sup>3</sup> A first-degree misdemeanor is punishable by a term of imprisonment not exceeding one year, and a fine not exceeding \$1,000 may be imposed. *See* ss. 775.082 and 775.083, F.S.

<sup>4</sup> *See* s. 847.011(1)(a), F.S.

<sup>5</sup> A second-degree misdemeanor is punishable by a term of imprisonment not exceeding 60 days, and a fine not exceeding \$500 may be imposed. *See* ss. 775.082 and 775.083, F.S.

<sup>6</sup> *See* s. 847.011(2), F.S.

<sup>7</sup> Section 847.012, F.S.

- Knowingly rent, sell, or loan to a minor for monetary consideration, a videocassette or a videotape of a motion picture, or similar presentation, which, in whole or in part, depicts nudity, sexual conduct, sexual excitement, sexual battery, bestiality, or sadomasochistic abuse and which is harmful to minors.

The term “knowingly” is defined as having general knowledge of, reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

- The character and content of any motion picture (described above) which is reasonably susceptible of examination by the defendant, or the character of any exhibition, presentation, representation, or show (described above), other than a motion picture show, which is reasonably susceptible of being ascertained by the defendant; and
- The age of the minor; however, an honest mistake shall constitute an excuse from liability if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.<sup>8</sup>

### Showing Obscene Materials to Minors

Section 847.0133, F.S., provides that it is a third-degree felony<sup>9</sup> to knowingly sell, rent, loan, give away, distribute, transmit, or show any obscene material<sup>10</sup> to a minor.

### III. Effect of Proposed Changes:

Currently, s. 847.001, F.S., provides for a three-pronged test to determine whether material is harmful to minors. Specifically, material is harmful to minors if it depicts nudity, sexual conduct, or sexual excitement that:

- 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 material for minors; and
- Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

This bill amends s. 847.001, F.S., to expand what materials might be determined harmful to minors by amending the second prong of the definition of “harmful to minors” to read: “Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material *or conduct* for minors.” It also modifies the first prong to delete the word “minors” so that it appears that something may be considered “harmful to minors” if the nudity,

<sup>8</sup> Section 847.013, F.S.

<sup>9</sup> A third-degree felony is punishable by a state prison sentence not exceeding five years, and a fine not exceeding \$5,000 may be imposed. *See* ss. 775.082 and 775.083, F.S.

<sup>10</sup> “Obscene material” is defined as any obscene book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing paper, card, picture, drawing, photograph, motion picture film, figure, image, videotape, videocassette, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose. *See* s. 847.0133, F.S.

sexual conduct, or sexual excitement predominately appeals to anyone's prurient, shameful, or morbid interest.

The bill amends s. 847.011, F.S., to increase the penalty to a third-degree felony, ranked in level 6 of the offense severity ranking chart of the Criminal Punishment Code, if a violation of the section was based on materials that depict a minor engaged in any act or conduct that is harmful to minors. The bill also provides that ignorance of a minor's age, a minor's misrepresentation of his or her age, a bona fide belief of a minor's age, or a minor's consent may not be raised as a defense in a prosecution for these crimes, if the minor is less than 12 years of age.

The bill amends ss. 847.012 and 847.013, F.S., to remove the "honest mistake" language from the definition of "knowingly" relating to the age of a minor. Specifically, the following language was removed: "[A]n honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor." The bill also provides that "a person's ignorance of a minor's age, a minor's misrepresentation of his or her age, a bona fide belief of a minor's age, or a minor's consent may not be raised as a defense in a prosecution" for violations of ss. 847.012 and 847.013, F.S., if the minor is less than 12 years of age.

Section 847.012, F.S., is further amended to provide that it is a third-degree felony for a person to knowingly use a minor in the production of any of the proscribed material regardless of whether the material is intended for distribution to minors or is actually distributed to them.

The bill amends current legislative intent language found in s. 847.013, F.S., to specify that it is the intent of the Legislature to preempt the field, to the exclusion of counties and municipalities, insofar as it concerns exposing persons less than 17 years of age to commercial or sexual exploitation.

Section 921.0022, F.S., relating to the Criminal Punishment Code offense severity ranking chart, is amended to rank the offenses previously described in the bill.

The bill creates an undesignated section of law that provides that the amendments to ss. 847.011, 847.012, 847.013, and 847.0133, F.S., do not apply to providers of communications services as defined in s. 202.11, F.S.,<sup>11</sup> or to providers of information services, including, but not limited to, Internet access service providers and hosting service providers, when they provide only the transmission, storage, or caching of electronic communications or messages of others or provide other related communications or information services used by others in violation of such amended provisions. This exemption does not apply to providers of communications services or providers of information services that knowingly, for commercial advantage or private financial gain, facilitate the specific violation of such amended provisions by others.

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<sup>11</sup> Communications services is defined as "the transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals, including cable services, to a point, or between or among points, by or through any electronic, radio, satellite, cable, optical, microwave, or other medium or method now in existence or hereafter devised, regardless of the protocol used for such transmission or conveyance. The term includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing without regard to whether such service is referred to as voice-over-Internet-protocol services or is classified by the Federal Communications Commission as enhanced or value-added." Section 202.11(2), F.S.

The bill also makes technical and conforming changes.

The bill provides that the effective date is July 1, 2008.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference (CJIC) has not yet met to consider the prison bed impact, if any, of this bill. However, the CJIC estimated that CS/HB 559, which is the House companion to this bill, should have an insignificant prison bed impact.<sup>12</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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<sup>12</sup> Office of Economic and Demographic Research, Fla. Legislature, *Criminal Justice Estimating Conference, 2008 Conference Results* (March 31, 2008), <http://edr.state.fl.us/conferences/criminaljustice/Impact/cjimpact.htm> (follow the "2008 Conference Results" link) (last visited April 19, 2008).

**VIII. Additional Information:****A. Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS/CS by Judiciary on April 21, 2008:**

The committee substitute engrosses amendment 543382 solely in order to remove a traveling amendment (301830) and, accordingly, the committee substitute does not change the bill from how it arrived in the Judiciary Committee. The traveling amendment would have inserted the words “intend to” after the word “knowingly” on line 158 of the bill (dealing with use of a minor in production).

**CS by Criminal Justice on April 8, 2008:**

The committee substitute:

- Provides that the preclusion in ss. 847.011, 847.012, and 847.013, F.S., on raising the defense of ignorance of a minor’s age, a minor’s misrepresentation of his or her age, a bona fide belief of a minor’s age, or a minor’s consent may not be raised as a defense in a prosecution for these crimes only applies if the minor is less than 12 years of age.
- Deletes third-degree felony offenses relating to erotic nudity and erotic fondling and a first-degree misdemeanor relating to knowingly using a minor in the production of proscribed material.
- Provides that the amendments to ss. 847.011, 847.012, 847.013, and 847.0133, F.S., by the bill do not apply to providers of communications services as defined in s. 202.11, F.S., or to providers of information services, including, but not limited to, Internet access service providers and hosting service providers, when they provide only the transmission, storage, or caching of electronic communications or messages of others or provide other related communications or information services used by others in violation of such amended provisions.
- Provides that the exemption of providers of communications services and providers of information services does not apply to providers of communications services or providers of information services that knowingly for commercial advantage or private financial gain facilitate the specific violation of such amended provisions by others.

**B. Amendments:**

None.