

# 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/SB 144

SPONSOR: Criminal Justice Committee and Senator Geller

SUBJECT: Internet/Child Pornography

DATE: March 27, 2001      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gardner	Cannon	CJ	Favorable/CS
2.	_____	_____	JU	_____
3.	_____	_____	WMD	_____
4.	_____	_____	WD	_____
5.	_____	_____	_____	_____

## I. Summary:

Committee Substitute for Senate Bill 144 would amend and create some sections of ch. 847, F.S., having to do with child pornography, Internet transmission of child pornography, Internet transmission of sexual images harmful to minors, and civil immunity for persons who report instances of such transmission or pornography in good faith. This bill enacts into law some of the recommendations of the Information Technology Development Task Force regarding improper activity over the Internet. This bill would:

- define “Child Pornography” as “any image depicting a minor in sexual conduct”;
- define “transmit” to mean, “send an electronic mail communication to a specified electronic mail address or addresses”;
- create a new offense relating to transmitting child pornography over the Internet or transmitting to a minor any sexual image that would be harmful to a minor as a third degree felony;
- establish Florida’s jurisdiction to prosecute persons who transmit such images into this state; and
- grant immunity from civil liability to anyone who reports an incident of child pornography.

The provisions of this bill would take effect on July 1, 2001.

This bill substantially amends, renumbers, or creates the following sections of the Florida Statutes: 847.001; 847.0137; and 847.0139.

## **II. Present Situation:**

### **A. Creation and Responsibilities of the Information Service Technology Task Force**

On June 11, 1999, the Legislature created the Information Service Technology Task Force (referred to in this analysis as the **Task Force**), comprised of 34 bipartisan members from the public and private sector. *See* ch. 99-354, L.O.F. The task force exists for two years. Since its creation, the task force held several meetings at various sites around the state. The task force was established for the purpose of developing 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. In order to implement the legislative mandate, the task force established eight subcommittees. Based on its stated objective, each subcommittee developed policy recommendations that will affect Florida's position in the technology marketplace.

The recommendations of one subcommittee are relevant to this analysis: Subcommittee 7 (the **Civil and Criminal Subcommittee**, referred to in this analysis as the **Subcommittee**).

### **B. Responsibilities of the Subcommittee**

On February 14, 2000, the task force issued a report containing numerous policy recommendations, and implementation strategies to carry out those recommendations, from the eight subcommittees. The intent of the policy recommendations submitted was to protect and serve the citizens of Florida. *See 1999 Annual Report to the Legislature*, Information Service Technology Task Force (February 14, 2000) (all information included in this section is from this report).

Subcommittee 7 was charged with the responsibility of evaluating state laws, rules and procedures to determine if there was a need to create new laws or amend or repeal existing laws, rules, or procedures to reflect the impact of **ecommerce**, otherwise referred to as **electronic commerce**, is the buying or selling of products and services by businesses and consumers over the Internet. Three typical ecommerce transactions take place over the Internet: business to business; business to consumer; and consumer to consumer.

### **C. General Findings of the Subcommittee**

The subcommittee noted that most of Florida's laws were created prior to the rapid proliferation of the Internet and ecommerce and stressed that it was important to ensure that the many protections against fraud, child abuse, and other victimization continue into the new world of ecommerce. The subcommittee also recognized the importance of the Florida courts maintaining jurisdiction over perpetrators of crimes in order to protect Florida businesses and residents.

### **D. Subcommittee Recommendations Relating to Internet Transmission of Pornography**

The subcommittee examined the issue of transmission of adult and child pornography over the Internet as a subset of the criminal activity facilitated through use of the Internet. At the outset, the subcommittee found this to be a difficult issue to resolve, finding that many considerations

were involved, including First Amendment issues regarding adult pornography and jurisdictional issues regarding child pornography.

As an implementation strategy to address the transmission of pornography over the Internet, the subcommittee agreed with, and recommended legislation to reflect, the following statements:

- # If anyone in or outside of the State of Florida knowingly (or should have known) transmits any type of pornography to a minor in Florida, a crime has occurred and Florida has jurisdiction.
- # If anyone in this state knowingly (or should have known) transmits child pornography to anyone in or outside the State of Florida, a crime has occurred and Florida has jurisdiction.
- # If anyone outside of the State of Florida knowingly (or should have known) transmits child pornography to anyone in the State of Florida, a crime has occurred and Florida has jurisdiction.

The task force provides no specific recommendation on the definition of Apornography@ or Achild pornography@ for the purpose of these new offenses.

#### **E. Subcommittee Recommendation Relating to Civil Immunity for Third Parties Reporting Child Pornography**

Connected to the child pornography issue, the subcommittee also discussed and addressed the issue of third parties reporting child pornography. The subcommittee noted that questions have arisen as to what obligation, if any, a third party should have to report child pornography the party has located during the course of business. Examples involving third parties provided by the subcommittee included computer repair shops that locate child pornography during the repair of a customer's computer or a commercial developer who comes across digital or regular photographs that may be child pornography.

The subcommittee agreed that any incidence of locating child pornography should be reported to law enforcement and those third parties who do report child pornography should be immune from civil liability. However, the subcommittee could not agree on requiring third parties to report child pornography.

As an implementation strategy to address voluntary reporting of child pornography by third parties, the subcommittee recommended enacting legislation that would not require anyone to report pornography, including child pornography, but would grant immunity from civil liability to a third party who reports to law enforcement what the party reasonably believes to be child pornography. This immunity would extend to a third party who furnishes a copy of a photograph or other evidence to law enforcement which the third party reasonably believes to be child pornography.

## F. Current Law and Definitions Relating to this Bill

Currently, no definition of the term “**child pornography**” exists in Florida law. Promoting or facilitating a sexual performance by a child is prohibited under s.827.071, F.S. That statute defines “performance” as “any play, motion picture, photograph, or dance or any other visual representation exhibited before an audience.” s. 847.071(1)(b), F.S. “Sexual performance” is defined as any performance that includes “sexual conduct by a child of less than 18 years of age.” s. 827.071(1)(h), F.S. This statute has been used to describe possession of child pornography for criminal prosecution, which is punished as a second degree felony.

Florida law prohibits computer pornography used for the exploitation of children. In 1986, the Legislature passed the “**Computer Pornography and Child Exploitation Prevention Act of 1986**”. s. 847.135, 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 punished as third degree felonies.

Prosecutors have discretion as to whether to charge a defendant under the statute specifically dealing with computers and child pornography, rather than under the statute prohibiting child pornography in general. *Wade v. State*, 751 So.2d 669, (Fla.App. 2 Dist. 2000). Florida law generally holds that a specific statute takes precedence over a general statute. *Adams v. Culver*, 111 So.2d 665, (Fla.1959).

**Actual sexual conduct** is currently defined in s. 847.001, F.S., 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; 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.

Part of the current definition of **Actual sexual conduct** in s. 847.001, F.S., the phrase **Actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast,** appeared in a former definition of **Actual sexual conduct** in s. 827.071(1)(g), F.S., (sexual performance by a child). That language was struck down by the Florida Supreme Court, which severed the objectionable language and retained the remainder of the definition, because, in the court’s estimation, the language was overbroad and violated due process. The court held 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. *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.

Subsequent to *Schmitt*, the definition of **Actual sexual conduct** in s. 827.071(1)(g), F.S., was amended to read: **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.** This modified definition has not been challenged.

**AHarmful to minors** is currently defined in s. 847.001(3), F.S., as 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.

**ANudity**, **Asexual conduct**, and **Asexual excitement** are also defined in s. 847.001, F.S.

### III. Effect of Proposed Changes:

#### A. Definitions

Consistent with the subcommittee's statements that certain transmissions of pornography constitute crimes over which Florida has jurisdiction, and the subcommittee's recommendation that legislation be enacted consistent with those statements, the bill creates s. 847.0137, F.S. This new section prohibits such transmissions and provides that Florida has jurisdiction over violations involving this criminal conduct, whether or not the violator lives or transmits in Florida.

To prohibit the transmission of child pornography to any person in Florida, the bill initially defines **Achild pornography**, since no definition of this term exists in Florida law. The bill amends s. 847.001, F.S. (definitions), to create a definition of **Achild pornography**. The bill defines **Achild pornography** as **Any image depicting a minor engaged in sexual conduct**.

The bill amends the definition of **Asexual conduct** to include the phrase, "with the intent to arouse or gratify the sexual desire of either party." The new definition of **Achild pornography** conforms with the modified definition of sexual conduct, thus it conforms with the court's decision in *Schmitt*.

#### B. Prohibit Certain Internet Transmissions of Pornography

Having defined **Achild pornography**, the bill then creates four new offenses which incorporate the subcommittee's recommendations. The bill provides that, notwithstanding ss. 847.012 and 847.0133, F.S., any person commits a third degree felony, if that person:

1. Being in this state, knowingly transmits, by means of the Internet, child pornography to another person in this state or in another jurisdiction;
2. Being 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 in this state;
3. Being in any jurisdiction other than this state, knowingly transmits, by means of the Internet, child pornography to another person in this state; or
4. Being 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.

Having made the “transmission” of such material a crime, the bill defines “transmit” 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. This bill would not prevent a minor from searching for sexual material on the Internet.

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. A Minor is defined in the bill as a person under 18 years of age.

The bill requires the state to prove actual knowledge rather than just a belief under the circumstances that the defendant transmitted such unlawful material. The bill does not express an offense level in regards to a sentencing scoresheet; however, the only violation of ch. 847, F.S., listed in s. 921.0022(3), F.S. is a level 1.

The words “Notwithstanding ss. 847.012 and 847.0133” are intended to indicate that, to the extent the conduct prohibited by this new section also may be covered by one or both of the cited sections, the conduct may be prosecuted as a violation of this new section. 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.

### **C. Provide Immunity From Civil Liability**

The bill provides that the new section shall not be construed to prohibit prosecution of a person in this state or any other jurisdiction for a violation of any law of this state, including a law providing for greater penalties than prescribed in this new section for the transmission, by means of the Internet, of an image harmful to minors or depicting child pornography, as defined in s. 847.001, F.S. Therefore, this provision allows for prosecution of the conduct under another section that provides for greater penalties.

The bill also provides, in proposed s. 847.137(4), F.S., that the new statute would not apply to “subscription-based transmissions such as list servers.” A list server is a type of on line bulletin board that persons can subscribe to. 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 also allows this state, in proposed s. 847.137(5), F.S., to prosecute a person who transmits child pornography to anyone or transmits to a child a harmful sexual image more severely than provided in this section.

However, this provision would allow the state to prosecute the offender if the circumstances of the Internet transmission also constituted a more severe crime, such as s. 827.071, F.S., which prohibits promoting sexual performances by children as well as possession of child pornography.

It is unlikely that any transmission over the Internet would in and of itself constitute a lewd act as defined in s. 800.04, F.S.

The bill also provides, in proposed s. 847.137(6), F.S., that a person is subject to prosecution in this state, pursuant to ch. 910, F.S., which relates to state criminal jurisdiction, for any act proscribed by this section, including acts in violation of this new section committed by a person in another jurisdiction. This provision is patterned after a similar provision in s. 847.0135, F.S., (computer pornography).

Consistent with the subcommittee's recommendation that third parties be immune from civil liability for reporting to law enforcement what they reasonably believe to be child pornography, the bill creates s. 847.0139, F.S. This new section grants immunity from civil liability to any person who reports to law enforcement what the person reasonably believes to be child pornography. This immunity would extend to any person who furnishes a copy of a photograph or other evidence to law enforcement which the person reasonably believes to be child pornography.

The effective date of this bill is July 1, 2000.

#### **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:**

The Internet is a decentralized, global medium of communication that links people, institutions, corporations, and governments around the world. There is no single entity that actually controls the Internet or access to it. Generally speaking, a person who posts material on a bulletin board or web page has no control over whether minors or adults gain access to that material. *Reno v. ACLU*, 521 U.S. 844 (1997). Likewise it is impossible for an Internet user to positively know either the age of a person who accesses a given web connection or the state from which the connection emanates.

A law could be held to violate the First Amendment if that law seeks to punish an Internet user who posts or disseminates adult material on the basis that the material is harmful to minors and minors access that material through the Internet. The fear of prosecution could have the effect of chilling speech and causing self censorship. Injunctions to prevent enforcement of such laws have been granted. *ACLU v. Johnson*, 194 F.3d 1149 (C.A.10(N.M.) 1999), and cases cited therein.

## **1. Transmission of Child Pornography**

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). This bill defines child pornography as an image depicting a minor engaged in sexual conduct. Thus, the bill would clearly fall within the current legal definition of child pornography.

One Florida case ruled on the issue of child pornography within the context of computers and the Internet. *State v. Cohen*, 696 So.2d435 (Fla.4<sup>th</sup> DCA 1997). The case referred to a computer representation of a photo of an actual child, rather than a computer generated image. The court determined that the purpose of the statute in question, s.827.071, F.S., was to prohibit the exploitation of children. It could be argued that a child could later be exploited even though no actual child was abused to make the computer generated image.

Some states, such as Virginia, New Jersey, California, etc. have written laws expressly criminalizing computer generated images depicting minor children engaged in sexual conduct. These laws are being contested on the assertion that it cannot be child pornography where no actual child is exploited to produce the material. Proponents of these measures assert that such images are so life like that the images encourage pedophiles to commit crimes of sexual violence against children. This issue remains unresolved.

## **2. Transmission of Images Harmful to Minors**

The First Amendment does protect the creation, possession, and distribution of images depicting adults engaged in sexual conduct. 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 not unreasonably restrict constitutionally protected speech, such as adult expression of adult material.

There is no First Amendment protection for exposing minors to harmful or sexually explicit material. The Internet continues to pose challenges for lawmakers as they struggle to protect children from harmful materials without impinging on the constitutional rights of adults. The U.S. Supreme Court struck down the Communications Decency Act that attempted to protect children from sexually explicit material found on the Internet, because the act limited adult’s constitutionally protected right to view that material.

A narrowly drawn law prohibiting transmission of a sexually explicit image to a minor (including a law enforcement officer posing as a minor to investigate such activity) would not violate an adult’s constitutionally protected right to view adult materials, so long as that law did not result in the chilling of constitutionally protected speech. As this bill prohibits the actual transmitting of sexually explicit material to specific or known minor, rather than simply posting such material on the Internet, there does not appear to be a violation of an adult’s right to view adult material 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 a person charged under this law hire private counsel, expert witnesses, and investigators, the private sector could be impacted.

**C. Government Sector Impact:**

As with any new criminal statute, there will be the costs of prosecution, criminal investigation, court expenses, and to an extent the cost of appointed counsel. This crime is as yet unranked in terms of ch. 921, F.S., sentencing guidelines. It would be very difficult to estimate the impact this law would have on the prison population. The Criminal Justice Estimating Conference has not taken a position on this bill.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

A recent copy of *Newsweek* reported on the growing misuse of the Internet by persons sexually exploiting children, dated March 19, 2001. According to *Newsweek*, pedophiles and child molesters have set up a number of web sites containing child pornography and invitations to exchange child pornography.

Likewise, pedophiles and child molesters are using chat room and e-mail communication features of the Internet to contact and lure children into sexual exploitation. It appears as though the Internet has given these people a sense of anonymity from which to operate. Web sites can be located in other countries and communications can pass through a number of connections.

The Internet is so large, it is difficult to grasp how much traffic takes place. 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.

**VIII. Amendments:**

None.