

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 Budget Committee

BILL: CS/CS/SB 846

INTRODUCER: Judiciary Committee; Criminal Justice Committee; and Senators Benacquisto and Gaetz

SUBJECT: Prevention of Child Exploitation

DATE: April 19, 2011 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	Fav/CS
2.	Boland	Maclure	JU	Fav/CS
3.	Sadberry	Meyer, C.	BC	Favorable
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

This bill amends the statute prohibiting possession of child pornography to extend its prohibitions to controlling or intentionally viewing child pornography. However, the bill adds a provision that specifies that the prohibition on intentional viewing of child pornography does not apply to material possessed, controlled, or intentionally viewed as part of a law enforcement investigation. The bill specifically adds an “image,” “data,” and “computer depiction” to the enumeration of the items that cannot be possessed, controlled, or viewed. The bill defines “intentionally view” to mean to deliberately, purposefully, and voluntarily view. It specifies that proof of intentional viewing requires establishing more than a single image, motion picture, exhibition, show, image, data, computer depiction, representation, or other presentation over any period of time.

The bill amends a section of the Florida Statutes that lists the level-five offenses for purposes of the offense severity ranking chart to add the offenses of controlling or intentionally viewing child pornography to that list.

This bill substantially amends sections 827.071, and 921.0022, Florida Statutes.

II. Present Situation:

Section 827.071(5), F.S., prohibits a person from possessing a photograph, motion picture, exhibition, show, representation, or other presentation that he or she knows to include any sexual conduct by a child in whole or in part. Violation of the statute is a third-degree felony ranked at Level 5 of the Criminal Punishment Code, punishable by up to five years in prison. A computer image falls within the definition of the proscribed materials.¹

While it is clear that it is illegal to knowingly possess child pornography, in the computer age it is much more difficult to determine whether a person knowingly possesses an image of child pornography. It is clear that intentionally saving an image to a computer hard drive constitutes knowing possession. However, courts in a number of states have held that an image is not knowingly possessed if it is on a computer hard drive because it has been automatically saved as a temporary Internet file. In Florida and many other states, viewing child pornography without possessing or distributing it is not a crime. In *Strouse v. State*, the Fourth District Court of Appeal noted that “passive viewing on the Internet of child pornography does not violate the law because viewing does not constitute possession.”² However, the court upheld the defendant’s conviction because it concluded that testimony given by his girlfriend was sufficient to establish that the child pornography on his computer was not merely an automatically stored temporary Internet file. Without the girlfriend’s testimony, it is likely that the defendant would have been acquitted.³

In reaching its conclusion in *Strouse*, the appellate court considered federal court decisions that addressed the possession issue:

Federal courts have analyzed the issue of temporary Internet files in the context of the federal child pornography statute. In *United States v. Perez*, the court held the mere viewing of a child pornographic image does not constitute knowing possession of the image under 18 U.S.C. § 2252A(a)(5)(B). 247 F.Supp.2d 459, 484 n. 12 (S.D.N.Y.2003) (citing *United States v. Zimmerman*, 277 F.3d 426, 435 (3d Cir.2002)). However, the court acknowledged that “knowing possession” should be based upon the manner in which the defendant manages the files. *Id.*, (citing *United States v. Tucker*, 305 F.3d 1193, 1205 (10th Cir.2002) (upholding a conviction based on automatically stored files because the defendant habitually deleted the temporary files manually, demonstrating that he exercised control over them), *cert. denied*, 537 U.S. 1223, 123 S.Ct. 1335, 154 L.Ed.2d 1082 (2003)).⁴

In 2008, Congress resolved this issue for federal courts by amending 18 U.S.C. § 2252A(a)(5)(B) to criminalize the conduct of a person who “knowingly accesses with intent to view” child pornography.

¹ *State v. Cohen*, 696 So. 2d 435, 436 (Fla. 4th DCA 1997).

² *Strouse v. State*, 932 So. 2d 326 (Fla. 4th DCA 2006).

³ *Id.* at 329.

⁴ *Id.*

III. Effect of Proposed Changes:

The bill amends in several ways the statute governing sexual performance by a child, s. 827.071, F.S. It adds a prohibition against “controlling” or “intentionally viewing” child pornography. As previously noted, the existence of a temporary Internet image file of child pornography on a computer hard drive is not “possession” in violation of the statute unless there is proof that the image was intentionally saved. The bill criminalizes the intentional viewing of child pornography. Therefore, temporary Internet files of child pornography images found on a computer could be used as evidence that a person was intentionally viewing prohibited material. For example, a prosecutor could argue that the existence of numerous temporary Internet files on a hard drive indicates that someone intentionally viewed the images. If the prosecutor is able to offer sufficient proof that the defendant was the person who intentionally viewed the images, a judge or jury may conclude that the defendant is guilty of intentionally viewing child pornography.

The changes made by the bill could create a situation in which a person could potentially be convicted based upon testimony that he or she was observed viewing child pornography (either on a computer or in another form) even if there is no physical evidence to corroborate the testimony. As in all cases, the judge or jury would be required to determine whether such testimony proved the defendant’s guilt beyond a reasonable doubt.

The bill defines “intentionally view” to mean deliberately, purposefully, and voluntarily viewing. It specifies that proof of intentional viewing requires establishing more than a single image, motion picture, exhibition, show, image, data, computer depiction, representation, or other presentation over any period of time. This clearly does not include inadvertent or unintentional viewing that might happen, for example, if a person is using the Internet and an image of child pornography pops up on a computer screen, or the person accidentally accesses a site with child pornography. However, the decision of whether to charge a person with “intentional viewing” is up to the discretion of the prosecutor, and ultimate conviction depends upon the judge or jury concluding that the charge has been proven beyond a reasonable doubt. Furthermore, the statement that proof of intentional viewing requires establishing more than a single image over a period of time does provide additional protection against any possible prosecutions for accidental or inadvertent viewing that might occur.

The addition of a prohibition against “controlling” an image of child pornography addresses emerging technologies. A person can maintain images of child pornography on a remote server (“in the cloud”) and control what happens to the image, even though arguably the person does not possess the image. It is possible that the prohibition against “controlling” images could be used to prosecute such cases in the unusual situation when there is insufficient evidence of distributing, transmitting, or intentionally viewing an image.

The bill also adds “image,” “data,” and “computer depiction” as specific materials to which the prohibition against possession, controlling, or intentionally viewing materials that include sexual conduct by a child are applied. It appears that possession of any of these materials is prohibited under the current statute as either a “photograph” or under the more general categories of

“presentation” or “other representation.”⁵ However, specifically adding the terms removes any question as to whether they are among the materials that are prohibited.

Additionally, the bill adds a provision specifying that the prohibition on intentional viewing of child pornography does not apply to material possessed, controlled, or intentionally viewed as part of a law enforcement investigation.

The bill amends s. 921.0022(3)(e), F.S., which is Level 5 of the Offense Severity Ranking Chart in the Criminal Punishment Code, to incorporate the amendments to s. 827.071, F.S.

The bill provides an effective date of October 1, 2011.

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 found that the bill would have an indeterminate fiscal impact.⁶

VI. Technical Deficiencies:

None.

⁵ See, e.g., note 1, citing the opinion in *State v. Cohen*, holding that a computer image falls within the definition of the proscribed materials.

⁶ Office of Economic and Demographic Research, Criminal Justice Impact Conference, *Conference Results*, available at <http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/index.cfm>.

VII. Related Issues:

None.

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 12, 2011:

The committee substitute amends the original bill in the following ways:

- Adds a provision after the definition of “intentionally view” that specifies that proof of intentional viewing requires establishing more than a single image, motion picture, exhibition, show, image, data, computer depiction, representation, or other presentation over any period of time; and
- Adds a provision that states that the prohibition on knowingly possessing, controlling, or intentionally viewing child pornography does not apply to material possessed, controlled, or intentionally viewed as part of a law enforcement investigation.

CS by Criminal Justice on April 4, 2011:

“Image,” “data,” and “computer depiction” are specifically added to the enumeration of the items that cannot be possessed, controlled or viewed. This removes any question as to whether they are included among more general categories that are already in the statute.

- B. **Amendments:**

None.