

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: SB 646

SPONSOR: Senator Miller

SUBJECT: Adult Video Games

DATE: February 26, 2004 REVISED: 03/03/04 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Clodfelter</u>	<u>Cannon</u>	<u>CJ</u>	<u>Fav/1 amendment</u>
2.	_____	_____	<u>CF</u>	_____
3.	_____	_____	<u>CM</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill prohibits the sale or rental of adult video games to minors, and mandates that persons selling or renting such games require proof of age from the customer. Adult video games are defined as any video recording of a game which contains representations or images of excessive violence, sexual conduct that is harmful to persons younger than 18, or criminal activity. The bill makes the knowing sale or rental of an adult video game to a minor a 3rd degree felony with a Level 1 offense severity ranking.

This bill creates a new unnumbered section of the Florida Statutes.

II. Present Situation:

Chapter 847, F.S., regulates obscenity. Section 847.001, F.S., defines a minor as a person under the age of eighteen, and "harmful to minors" as:

[A]ny reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:

(a) Predominantly appeals to the prurient, shameful, or morbid interest of minors;

(b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors. . . .

Section 847.012(2)(a), F.S., makes it a third degree felony for a person to knowingly sell, rent, or loan for monetary consideration material to a minor if the material is:

[A] 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.

Section 847.013(2)(b), F.S., provides essentially the same prohibition as that in s. 847.012(7)(2)(a), F.S., but applies only to a videocassette or videotape of a motion picture, or similar presentation. Violation of s. 847.013(2)(b), F.S., is a first degree misdemeanor.

Under current law, it appears that the sale or rental of a video game to a person under 18 years old could be charged as a violation of s. 847.012(2)(a), F.S., if the video game includes visual representation or images of nudity or certain types of sexual conduct and is harmful to minors. However, there is no current prohibition against the sale or rental of video games containing representations or images of non-sexual violence. There have been reports of some businesses voluntarily restricting sales or rentals of violent video games.

Although it is not required by law, many commercially-distributed video games display a content and suitability rating on the cover. The Entertainment Software Ratings Board (ESRB) of the Interactive Digital Software Association (IDSA), rates video games by content and age-appropriateness. This is the most widely used rating system and can be found on nearly all personal computer software games. In addition to the age-appropriateness rating, the ESRB system includes content descriptors such as “blood and gore,” “intense violence,” and “strong sexual content.”

The ESRB Internet site (<http://www.esrb.com>) lists 9,843 games that have been rated. The following table lists the total number of games in each category. It also indicates the number of games in each category that include content descriptors that may be relevant to the bill’s prohibition against sale of games which contain excessive violence or nudity or sexual conduct that is harmful to minors. Content descriptors with a modifier of “mild,” such as “mild violence,” are not included. Also, the ESRB content descriptors do not specify criminal activity other than gambling and drug use.

It should be noted that the bill does not reference the ESRB ratings, so it cannot be assumed that any of the categories in the table correspond to content that is contemplated by the provisions of the bill. For example, games with the content descriptor “violence” include well-known football and hockey games, which would almost certainly not be considered to be excessively violent.

	Total	Blood & Gore	Intense Violence	Mature Humor	Mature Sexual Themes	Nudity	Partial Nudity	Strong Sexual Content	Violence
EC - Early Childhood (3+)	222	0	0	0	0	0	0	0	0
E - Everyone (6+)	6639	0	0	0	0	0	0	0	322
T - Teen (13+)	2250	58	0	2	49	0	2	0	734
M - Mature (17+)	716	143	25	6	62	2	3	40	241
AO – Adults Only (18+)	16	0	0	0	1	0	0	14	1

III. Effect of Proposed Changes:

Current law arguably already prohibits selling or renting video games to a person under age 18 when the video game is harmful to minors because it contains representations or images of nudity or certain sexual acts. The bill would create a new section of the Florida Statutes to specifically prohibit the sale of adult video games to minors. Adult video games are defined to be any video recording of a game that includes representations or images of (1) excessive violence; (2) nudity or sexual conduct that is harmful to children under 18 years old; or (3) criminal activity.

The bill provides that a person who sells or rents adult video games must require that the customer present proof of age. The sale or rental of an adult video game to a person with knowledge that the customer was under 18 years and that the game was an adult video game would be a felony of the third degree with a Level 1 offense severity ranking. Assuming that there are no prior offenses or additional charges, conviction of this offense would normally result in a non-prison sanction.

The bill provides for an effective date of October 1, 2004.

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 First Amendment of the United States Constitution restricts the ability of government to regulate speech, which can include obscene and violent speech or representations. The United States Supreme Court has determined that children have First Amendment rights, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975), but that potential harm to children is a permissible ground for trying to shield them from sexual expression that does not rise to the level of obscenity. *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968). However, violence that is not in a sexual context and depictions of non-sexual criminal activity have not generally been considered as obscenity or as content that may be regulated by the state in the same circumstances as material with sexual content that is not obscene but that is harmful to children.

In *American Amusement Machine Association v. Kendrick*, 244 F.3d 57 (7th Cir.2001), *cert. denied*, 534 U.S. 994, 122 S.Ct. 462, 151 L.Ed.2d 379 (2001) and *Interactive Digital Software Association v. St.Louis County, Missouri*, 329 F.3d 954 (8th Cir. 2003), two federal appellate courts found that video games are protected forms of expression on a par with books, movies, or other literary forms. Restrictions on the content of such expression are examined by the court under a “strict scrutiny” standard. This means that the government must show that such a restriction is necessary to serve a compelling state interest and is narrowly tailored to achieve that interest. In each of these cases, the appellate court found that the government had failed to meet the high review standard and that the plaintiffs were entitled to an injunction or preliminary injunction against its enforcement. The opinions of these federal appellate courts are not binding upon state or federal courts in Florida, but are persuasive precedent.

Other than in cases involving obscenity, the only exception to application of the strict scrutiny standard is made for material with sexual content that is not obscene for adults but is obscene for children. In such cases, a much less restrictive “rational basis” standard of review is applied. So far, the appellate courts have not expanded application of the exception to include violent material that is harmful to minors.

Since the bill does not specify that the representations of excessive violence or criminal activity must be harmful to minors, it is likely that a First Amendment challenge to the law would be successful.

The bill’s provisions relating to excessive violence is also subject to challenge as being void for vagueness because the term is not defined.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill could have a negative impact upon rental and sales of video games. However, the financial impact may not be significant since the games could be purchased by persons who are 18 years old or older for use by younger persons.

C. Government Sector Impact:

The bill creates a new criminal offense which could result in felony convictions, with potential costs for prosecution and punishment. Also, there could be significant expenditure of funds to defend the constitutionality of the law if it is challenged, and damages and costs if the challenge is successful.

VI. Technical Deficiencies:

Although the bill includes a requirement to check identification prior to selling or renting an adult video game, it does not include any consequence for failure to do so. A seller could fail to check identification of a buyer and still raise lack of knowledge of age as a defense.

The definition of an adult video game as a “video recording of a game” is not an accurate representation of what are commonly considered to be electronic video games. The term “video recording” implies that the material has been filmed or recorded from another source, when it is most often digitally generated by a computer program. It is possible that this definition will be interpreted to limit the applicability of the statute.

The failure to apply the “harmful to minors” standard to games that depict excessive violence appears to be an error caused by use of a semi-colon instead of a comma.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Criminal Justice:

The amendment removes criminal activity as a type of content that is included in the definition of “adult video game.” It also rewords the definition to clarify that the “harmful to minors” standard applies to excessive violence as well as to nudity and sexual content.

A definition of the term “excessive violence” is added to the bill. The added definition includes a provision that the excessive violence must be the result of, or in response to, actions controlled by the game player. This player-control requirement is an element of the definition that differentiates violence in an adult video game from violence that is found in other media.

The amendment also adds a definition of “harmful to minors” that applies to excessive violence, nudity, and sexual conduct. The definition is based upon the standard in s. 847.001(6), F.S., which applies to nudity, sexual conduct, or sexual excitement, but not to excessive violence.

The offense of knowingly selling an adult video game to a minor is changed from a third degree felony to a first degree misdemeanor. A first degree misdemeanor carries a maximum term of imprisonment of one year and a maximum fine of \$1000. It should be noted that this amendment did not delete the bill's language that the offense is punishable as provided in s. 775.084, F.S., although that statute applies only to habitual offender sentencing after conviction for a felony.

The amendment adds a provision that it is a defense to the offense if the seller or renter of an adult video game required presentation of proof of age and the proof presented indicated that the buyer or renter was not a minor.

The amendment creates a new second degree misdemeanor applicable to a minor who knowingly buys or rents an adult video game. A second degree misdemeanor is punishable by imprisonment for not more than 60 days and a fine of not more than \$500. (WITH TITLE AMENDMENT)

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