

# 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.)

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Prepared By: Criminal Justice Committee

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BILL: CS/SB 1220

INTRODUCER: Criminal Justice Committee and Senator Posey

SUBJECT: Minor/Transmission of sex materials

DATE: February 9, 2006

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	_____	_____	<u>CU</u>	_____
3.	_____	_____	<u>JA</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

This bill creates two new offenses that provide that a person in this state or in another jurisdiction who knows, should know, or believes that an individual in this state is a minor and who transmits, by means of electronic e-mail or a computer pop up, sexually oriented material or an image, information, or data that is harmful to a minor to such individual commits a third degree felony. The bill also does the following:

- Provides that the fact that an undercover operative or law enforcement officer was involved in the detection and investigation of a violation of the act shall not constitute a defense to prosecution under the act.
- Specifies that the act shall not be construed to prohibit prosecution of a person in this state or another jurisdiction for a violation of any law of this state providing penalties for electronic transmission of sexually oriented materials or material harmful to minors.
- Provides that the offenses do not apply to subscription-based transmissions such as list servers.
- Provides that the act does not create a cause of action or provide criminal charges against an interactive computer service, telephone company, or cable provider whose equipment is used in violation of the act.

This bill creates section 847.01385, Florida Statutes.

## II. Present Situation:

### A. Definition of “harmful to minors” and “sexually oriented material”

Section 847.001, F.S., the definitions section of ch. 847, F.S., defines the term “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>

This section defines the term “sexually oriented material” as any book, article, magazine, publication, or written matter of any kind or any drawing, etching, painting, photograph, motion picture film, or sound recording that depicts sexual activity, actual or simulated, involving human beings or human beings and animals, that exhibits uncovered human genitals or the pubic region in a lewd or lascivious manner, or that exhibits human male genitals in a discernibly turgid state, even if completely and opaquely covered.<sup>2</sup>

### B. Current laws relating to electronic transmission of pornography or materials harmful to a minor

Section 847.0137, F.S., provides that, notwithstanding ss. 847.012 and 847.0133, F.S.,<sup>3</sup> a person in this state commits a third degree felony<sup>4</sup> if he or she knew or reasonably should have known that he or she was transmitting child pornography, as defined in s. 847.001, F.S., to another person in this state or in another jurisdiction.

This section also provides that, notwithstanding ss. 847.012 and 847.0133, F.S., any person in any jurisdiction other than this state who knew or reasonably should have known that he or she was transmitting child pornography to any person in this state commits a third degree felony.

This section also specifies that the section shall not be construed to prohibit prosecution of a person in this state or another jurisdiction for a violation of any law of this state, including a law providing for greater penalties than prescribed in this section, for the transmission of child pornography to any person in this state.

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<sup>1</sup> Section 847.001(6), F.S. This subsection also indicates that a mother’s breast feeding of her baby does not fall within this definition.

<sup>2</sup> Section 847.001(18), F.S.

<sup>3</sup> Section 847.012, F.S., prohibits sale or distribution of harmful material to minors. Section 847.0133, F.S., prohibits sale or distribution of obscene material to minors.

<sup>4</sup> Pursuant to s. 775.082, F.S., the maximum period of incarceration for a third degree felony is 5 years.

This section also specifies that a person is subject to prosecution in this state pursuant to ch. 910, F.S.,<sup>5</sup> for any act or conduct proscribed by the section, including a person in a jurisdiction other than this state.

The provisions of this section do not apply to subscription-based transmissions such as list servers.

Section 847.0138, F.S., provides that, notwithstanding ss. 847.012 and 847.0133, F.S., a person in this state or another jurisdiction commits a third degree felony if he or she knew or believed that he or she was transmitting an image, information, or data that is harmful to minors, as defined in s. 847.001, F.S., to a specific individual known by the defendant to be a minor in this state. The provisions of this section do not apply to subscription-based transmissions such as list servers.

### **III. Effect of Proposed Changes:**

The bill creates s. 847.01385, F.S., which does the following:

- Creates two new offenses that provide that a person in this state or in another jurisdiction who knows, should know, or believes that an individual in this state is a minor and who transmits, by means of electronic e-mail or a computer pop up, sexually oriented material or an image, information, or data that is harmful to a minor to such individual commits a third degree felony.
- Provides that the fact that an undercover operative or law enforcement officer was involved in the detection and investigation of a violation of the act shall not constitute a defense to prosecution under the act.
- Specifies that the act shall not be construed to prohibit prosecution of a person in this state or another jurisdiction for a violation of any law of this state providing penalties for electronic transmission of sexually oriented materials or material harmful to minors.
- Provides that the offenses do not apply to subscription-based transmissions such as list servers.
- Provides that the act does not create a cause of action or provide criminal charges against an interactive computer service, telephone company, or cable provider whose equipment is used in violation of the act.

The bill takes effect on July 1, 2006.

Staff notes that while, in some cases, there may be some overlap regarding the statute created by the bill and ss. 847.0137 and 847.0138, F.S., this should not be a problem. The prosecutor will

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<sup>5</sup> Chapter 910, F.S. , pertains to criminal jurisdiction and venue. Section 910.005, F.S., addresses the prosecution in this state of a person for an offense that the person committed while either within or outside this state.

charge the statute he or she deems appropriate. Overlap exists elsewhere in the Florida Statutes. For example, Florida has 4 statutes that punish flag desecration.<sup>6</sup>

#### 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:

In *Simmons v. State*, 886 So.2d 399 (Fla. 1st DCA 2004), the court held that s. 847.0138, F.S., which punishes electronic transmission to minors of materials “harmful to minors,” did not violate the First Amendment or the dormant Commerce Clause<sup>7</sup> (as regards interstate communications) and was not unconstitutionally vague.

The bill punishes transmitting materials “harmful to minors” to minors via e-mail or computer pop-up. The punished conduct appears closely akin to the conduct punished by s. 847.0138, F.S. The bill does reach farther than s. 847.0138, F.S., by also punishing the transmission of “sexually oriented materials” to minors via e-mail or computer pop-up. However, the definition of “sexually oriented materials” indicates it is limited to sexual activity that exhibits uncovered genitals in a “lewd or lascivious manner” or that exhibits male genitals, covered or uncovered, in a “discernibly turgid state.”

In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244-45, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002), the United States Supreme Court stated: “The state has a compelling interest in protecting the physical and psychological well-being of children, which extends to shielding minors from material that is not obscene by adult standards, but the means must be carefully tailored to achieve that end so as not to unnecessarily deny adults access to material which is indecent (constitutionally protected), but not obscene (unprotected).” In *Simmons*, the appellant argued that s. 847.0138, F.S., was not “narrowly tailored” and was unconstitutionally overbroad. The court disagreed, finding that the statute did not chill adult to adult speech protected by the First Amendment because it is only directed at transmissions to a minor. Similarly, the bill is only directed at transmissions to minors.

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<sup>6</sup> Sections 256.05, 256.051, 256.06 and 876.52, F.S. Additionally, the overlap does not present the problem addressed in *State v. Malloy*, 823 So.2d 815 (Fla. 1st DCA 2002), in which language in a statute relating to fraudulent claims precluded charging the defendant with crimes under other statutes.

<sup>7</sup> Art. 1, sec. 8, cl. 3, United States Constitution.

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

A preliminary estimate of the bill provided by the Office of Economic and Demographic Research of the Florida Legislature is that the bill may have an insignificant impact but further data review is necessary. A final, official estimate must be provided by the Criminal Justice Impact Conference, which had not met to consider the bill at the time this analysis was completed.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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

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## **VIII. Summary of Amendments:**

None.

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