

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 Commerce Committee

BILL: CS/SB 1128

INTRODUCER: Criminal Justice Committee and Senator Fasano

SUBJECT: Minors/Distribution of Harmful Materials

DATE: April 11, 2008

REVISED: 4/15/08

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

Please see Section VIII. for Additional Information:

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

I. Summary:

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.

The CS amends s. 847.001, F.S., relating to definitions. It expands 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 is indicated that the nudity, sexual conduct, or sexual excitement predominately appeals to a prurient, shameful, or morbid interest.

The CS amends s. 847.011, F.S., relating to prohibition of certain acts in connection with obscene, lewd, etc., materials, 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 the violation was based on materials that depict a minor engaged in any act or conduct that is harmful to minors. The CS 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 CS amends s. 847.012, F.S., relating to prohibition of sale or other distribution of harmful materials to persons less than 18 years of age, and s. 847.013, F.S., relating to exposing minors to harmful motion pictures, etc., to remove the following language from the definition of "knowingly" relating to the age of the minor: "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." The CS 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.

The CS amends s. 847.012, F.S., to provide that it is a third degree felony, ranked in level 6, 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 CS amends current legislative intent language 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.

The CS provides exceptions from criminal offenses for providers of communications services as defined in s. 202.11, F.S., or to providers of information services, as specified.

This CS creates an undesignated section of the Florida Statutes and amends the following sections of the Florida Statutes: 847.001, 847.012, 847.103, 847.0133, and 921.0022.

II. Present Situation:

Definition of "Harmful to Minors"

Section 847.001, F.S., 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.

“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;¹ and
- Taken as a whole, lacks serious literary, artistic, political, or scientific value.

Currently, it is a first degree misdemeanor² for a person to knowingly distribute, sell, lend, give away, transmit, transmute, or show certain obscene materials.³ It is a second degree misdemeanor⁴ for a person to knowingly have certain obscene material in one’s possession, custody, or control.⁵

Selling / 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.⁶

¹ 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.’”

² A first degree misdemeanor is punishable by a term of imprisonment not exceeding 1 year, and a fine not exceeding \$1,000 may be imposed. *See* ss. 775.082 and 775.083, F.S.

³ *See* s. 847.011(1)(a), F.S.

⁴ 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.

⁵ *See* s. 847.011(2), F.S.

⁶ Section 847.012, F.S.

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
- 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.⁷

Showing Obscene Materials to Minors

Section 847.0133, F.S., provides that it is a third degree felony⁸ to knowingly sell, rent, loan, give away, distribute, transmit, or show any obscene material⁹ to a minor.

III. Effect of Proposed Changes:

Section 1 amends s. 847.001, F.S., relating to definitions. The CS expands 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 is indicated that the nudity, sexual conduct, or sexual excitement predominately appeals to a prurient, shameful, or morbid interest.

⁷ Section 847.013, F.S.

⁸ A third degree felony is punishable by a state prison sentence not exceeding 5 years, and a fine not exceeding \$5,000 may be imposed. *See* ss. 775.082 and 775.083, F.S.

⁹ “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.

Section 2 amends s. 847.011, F.S., relating to prohibition of certain acts in connection with obscene, lewd, etc., materials, to increase the penalties to a third degree felony, ranked in level 6 of the offense severity ranking chart of the Criminal Punishment Code, if the violation was based on materials that depict a minor engaged in any act or conduct that is harmful to minors. The CS 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.

Section 3 amends s. 847.012, F.S., relating to prohibition of sale or other distribution of harmful materials to persons less than 18 years of age, to remove the following language from the definition of "knowingly" relating to the age of the minor: "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." The CS 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.

The CS also provides that it is a third degree felony, ranked in level 6, 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.

Section 4 amends s. 847.013, F.S., relating to exposing minors to harmful motion pictures, exhibitions, shows, presentations, or representations to remove the following language from the definition of "knowingly" relating to the age of the minor: "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." The CS 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.

The CS also amends current legislative intent language 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 5 amends s. 847.0133, F.S., relating to protection of minors and prohibition of certain acts in connection with obscenity, to make minor, technical wording changes to make a sentence more readable.

Section 6 amends s. 921.0022, F.S., relating to the Criminal Punishment Code offense severity ranking chart to rank offenses as noted in the previous description of sections of the CS.

Section 7 provides for an undesignated section that provides that the amendments to ss. 847.012, 847.011, 847.013, and 847.0133, F.S., by the CS 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. This exemption does not apply to providers of communications services as defined in s. 202.11, F.S., or providers of information services that knowingly for commercial advantage or private financial gain facilitate the specific violation of such amended provisions by others.

Section 8 provides that the CS takes effect on 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 CS. However, the CJIC estimated that CS/HB 559, which is identical to CS/SB 1128, should have an insignificant prison bed impact.

VI. Technical Deficiencies:

None.

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 by Criminal Justice on April 8, 2008:**

- 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 CS 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:**Barcode 301830 by Commerce Committee on April 15, 2008:**

This amendment inserts "intend to" after the word "knowingly" on line 158 of the CS.