

**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 Criminal Justice Committee

BILL: SB 846  
 INTRODUCER: Senators Benacquisto and Gaetz  
 SUBJECT: Prevention of Child Exploitation  
 DATE: March 30, 2011

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	<b>Pre-meeting</b>
2.	_____	_____	JU	_____
3.	_____	_____	BC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**I. Summary:**

This bill amends s. 827.071(5), F.S., the statute prohibiting possession of child pornography, to extend its prohibitions to controlling or intentionally viewing child pornography. The bill also modifies the phrase “representation, or other presentation...” to “representation of an image, data, computer, or other presentation...”.

This bill substantially amends section 827.071 of the 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.<sup>1</sup>

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*, 932 So.2d 326 (Fla. 4th DCA

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

2006), the Fourth District Court of Appeals noted that “passive viewing on the Internet of child pornography does not violate the law because viewing does not constitute possession.” 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 that testimony, he would have been acquitted.

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)).

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.

### III. Effect of Proposed Changes:

**Section 1** of the bill amends s. 827.071, F.S., in several ways. First, 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. With the criminalization of intentional viewing, temporary Internet files of child pornography images found on a computer can 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.<sup>2</sup>

Another scenario that could occur if the statute is amended is that 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

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<sup>2</sup> Of course, the judge or jury would also consider any evidence that is presented and any defenses that are raised by the defendant, and must find the defendant’s guilt beyond a reasonable doubt.

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" as meaning to "deliberately, purposefully, and voluntarily view." This clearly does not include inadvertent or unintentional viewing such as might happen 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.

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 amends the list of materials that include sexual conduct by a child to which the prohibition against possession are applied. Among other things, the statute currently prohibits possession of a "representation" that includes any sexual conduct by a child in whole or part. The bill expands "representation" to "representation of an image, data, computer depiction." It appears that this is intended to include computer images, but Florida case law has already established that images of child pornography on a computer are included in the current list of prohibited materials.<sup>3</sup> Narrowing the broad term "representation" to "representation of an image, data, computer depiction" may have the unintended effect of limiting prosecution of certain cases.

**Section 2** of the bill reenacts 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.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

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<sup>3</sup> See Footnote 1.

**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.

**VI. Technical Deficiencies:**

The following amendments to the bill are recommended for purposes of clarification:

- Lines 66-67 should be amended to read “exhibition, show, image, data, computer depiction, representation, or other presentation which, in whole or in part, he” to avoid inadvertently narrowing the application of the statute.
- On line 69, the new language “control, or viewing” should be amended to read “control, or intentional viewing” for purposes of consistency.

**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.)

None.

## B. Amendments:

None.