A Lot's Cave Publication

# A Writer's Guide to Adult Compliance Requirements

**Lot's Cave**

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Edited by Phaedrus T. Wolfe and Becca A. Sinh
Cover by Moira Nelligar

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# Introduction & Conclusion

*What is legal erotica, and what is illegal? A sacred corollary to this question is: what policies are socially and politically acceptable?*

Let's make one thing clear: law and policy are not the same, and often they are not even similar. Authors writing romance novels, or erotica dealing with taboo sexuality, need to understand the differences between law and policy.

*Fifty Shades of Grey* recently pushed the boundaries of acceptable BDSM romance into the distant background. Yet most authors agree that *Fifty Shades* is NOT well written or truly representative of BDSM. Much better BDSM erotica exists, and has existed for many years. What happened? BDSM has always been legal in the USA. What occurred was a shift in the editorial policy of legacy publishing companies who would never before touch BDSM.

Had BDSM been illegal all these years, and publishers turned a blind eye to it by policy, then BDSM would have been considered mainstream long ago, and readers would be demanding better writing skills than demonstrated in *Fifty Shades.* Therefore, it's often necessary to pay more attention to policy than law.

The exception to this rule is with child pornography. The problem with this rule is that few people know its legal definitions, forcing companies to set policy based on crowd acceptance. Publishers tend to be quite conservative, and are slower than the crowd to update legacy policies.

Let's define child pornography as "sexual situations involving people under the age of eighteen." Sound reasonable? Of course, because "everyone knows" that anything dealing with sex and minors is illegal.

But that's not how the law defines it! The law defines child pornography as "VISUAL DEPICTIONS" of….

Does this mean that 'written depictions' do not count? That's right! Child pornography has nothing to do with written depictions of fantasy involving child sexuality, no matter how extreme or disgusting. But sketch a picture of a child (even if said child is fully clothed and doing nothing that involves sex) and include

it with your romance writing, and you can expect to spend the next ten years in a Federal prison cell with Bubba Bad-Ass. Guaranteed. And you can imagine what Bubba thinks about erotica authors!

The First Amendment to the United States Constitution gives protection to written fiction. In 1998, Brian Dalton was charged with creation and possession of child pornography under an Ohio obscenity law. The stories were works of fiction concerning sexually abusing children that he wrote and kept, unpublished, in his private journal. He accepted a plea bargain, pled guilty, and was convicted. Five years later, the conviction was vacated.

Why do publishers refuse to handle underage sexuality in erotica and romance? Policy. Not law, no matter how vociferously the publishers insist it's the law. This policy either drives public opinion, or public opinion drives the policy… or both. A publisher who breaks this underage taboo can expect a massive social backlash.

Still, even that rule is changing with the recent publication of *Tampa* by Alissa Nutting (female pedophilia), published by Harper Collins. If underage pedophilia in novels was illegal, rest assured that Harper Collins would not be publishing it, and Amazon and Barnes & Noble would not be selling it. It's all a matter of changing policies.

Those who publish erotica, especially stories 'on the edge' or of 'taboo' themes, know all-too-well that nearly all press doors are closed to them. And to make things more difficult, PayPal's new content commerce policies mean that the payment company is even more intolerant of 'icky' content than many publishers.

Therefore, writers of 'taboo' erotica are not only fighting the policies of publishers, but also the policies of their credit card processing company—which tends to be the most conservative of all company types.

If a publisher agrees to publish incest, they can expect most credit card processors to dump their merchant account, effectively putting them out of business—based on policy, not on law.

Some publishers, during the early 2012 PayPal ruckus, stood by their writers and readers, and fought, and even led efforts to ensure the freedom of access for erotic fiction. Others did little or nothing. Lot's Cave is one of the few publishers who has your back when your 'filth' gets banned elsewhere. We put few policy boundaries on what an author may publish—provided no laws are violated.

## *What is banned, by policy, with most publishers?*

**Common Abbreviations:**

nc = non-consensual/rape
inc = incest
best = bestiality
necr = necrophilia
ped = pedophilia/underage
ws = watersports
bf = bodily functions (watersports + scat)

Notice the "Big 5″ (B5): non-con/rape, incest, bestiality, necrophilia, and pedophilia/underage. If a publisher excludes the Big 5, it very likely excludes bodily functions as well, but won't say so explicitly.

One thing authors should pay a great deal of attention to is the subject of obscenity. What is the definition of 'obscene,' and how can an author recognize it? It's worth looking into, because most likely that is where erotica authors will run afoul of the law. But with a little understanding of the matter, it is also easy to prevent an obscenity problem. Lot's Cave always includes a disclaimer regarding community standards as front matter in each of the ebooks or books we publish, which effectively blocks obscenity problems.

Further, we have compiled various notes concerning laws on banned subject matter. The entire amount of information herein is taken (copied) from sources on the Internet, for what that is worth. We are not a law firm, and thus are not capable of giving legal advice. However, we thought you might find the matter interesting, and of value. It is not presented as an easy reading novel. Instead, it is almost pure data, and necessary to sort. Before relying on anything contained herein, please check with your attorney.

## *Fiction Submission Guidelines*

**LotsCave.com** and **Carnal-Pleasures.com** are both publishers devoted to writing that breaks the boundaries of original erotic fiction. We accept any stories that combine intense sexuality with quality writing. Submissions should draw the reader in, and let them feel with the characters. We are looking for stories that not only arouse readers through sensations, but also engage them emotionally and mentally through storytelling that's as well-crafted as the sex is hot.

Most romance/erotic romance publishers, including Lot's Cave, require Happily Ever After (HEA) or Happy For Now (HFN) endings. In that spirit, Lot's Cave and Carnal Pleasures will publish any and all of the Big 5 topics, provided the outcome is 'happily ever after,' the story is in good taste, and no underage photographs or artistic renderings exist.

Finally, in order not to run into 'obscenity violations,' all authors should always endeavor at every opportunity to artistically interweave an important moral or political issue into their erotic or romance work.

# What Is Obscenity?

*Obscenity — The character or quality of being obscene; an act, utterance, or item tending to corrupt the public morals by its indecency or lewdness.*

Obscenity is not protected under First Amendment rights to free speech, and violations of Federal obscenity laws are criminal offenses, according to the Dept. of Justice.

Federal law makes it illegal to distribute, transport, sell, ship, mail, produce with intent to distribute or sell, or engage in a business of selling or transferring obscene matter. Convicted offenders face fines and imprisonment. Although the law generally does not criminalize the private possession of obscene matter, the act of receiving such matter could violate Federal laws prohibiting the use of the mails, common carriers, or interactive computer services for the purpose of transportation.

The U.S. courts use a three-pronged test, commonly referred to as the Miller test, to determine if given material is obscene. Obscenity is defined as anything that fits the criteria of the Miller test, which may include, for example, visual depictions, spoken words, **or written text**.

## *Overview*

The Miller test was developed in the 1973 case *Miller v. California*. It has three parts:

1. Whether "the average person, applying contemporary community standards," would find that the work, taken as a whole, appeals to the prurient interest,
2. Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law,
3. Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

A work is considered obscene **only if all three conditions** are satisfied.

The first two prongs of the Miller test are held to the standards of the community, and the last prong is held to what is reasonable to a person of the United States as a whole. The national reasonable person standard of the third prong acts as a check on the community standard of the first two prongs, allowing protection for works that, in a certain community, might be considered obscene, but on a national level might have redeeming value.

For legal scholars, several issues are important. One is that the test allows for community standards, rather than a national standard. What offends the average person in Manhattan, Kansas, may differ from what offends the average person in Manhattan, New York. The relevant community, however, is not defined.

Another important issue is that Miller asks for an interpretation of what the "average" person finds offensive, rather than what the more sensitive persons in the community are offended by, as obscenity was defined by the previous test, the *Hicklin* test, stemming from the English precedent.

In practice, pornography showing genitalia and sexual acts is not *ipso facto* obscene, according to the Miller test. For instance, in 2000, a jury in Provo, Utah, took only a few minutes to clear Larry Peterman, owner of a Movie Buffs video store, in Utah County, Utah, a region which had often boasted of being one of the most conservative areas in the U.S. Researchers had shown that guests at the local Marriott Hotel were disproportionately large consumers of pay-per-view pornographic material, accessing far more material than the store was distributing.

## *Criticism*

Less strict standards may lead to greater censorship.

Huh?

Because it allows for community standards, and demands "serious" value, Justice Douglas worried in his dissent that this test would make it easier to suppress speech and expression. Miller replaced a previous test asking whether the speech or expression was "utterly without redeeming social value." As used, however, the test generally makes it difficult to outlaw any form of expression. Many works decried as pornographic have been successfully argued to have some artistic or literary value, most publicly in the context of the National Endowment for the Arts in the 1990's.

## *The Problem of Definition*

Critics of obscenity law argue that defining what is obscene is paradoxical, arbitrary, and subjective. They state that lack of definition of obscenity in the statutes, coupled with the existence of hypothetical entities and standards as ultimate arbiters within the Miller Test (hypothetical "reasonable persons" and "contemporary community standards") proves that Federal obscenity laws are, in fact, not defined, do not satisfy the vagueness doctrine, and thus are unenforceable and legally dubious.

## *The Problem of Jurisdiction in the Internet Age*

The advent of the Internet has made the "community standards" part of the test more difficult to judge: as material published on a web server in one place can be read by a person residing anywhere else, there is a question as to which jurisdiction should apply. In *United States of America v. Extreme Associates*, a pornography distributor from North Hollywood, California, was judged to be held accountable to the community standards applying in western Pennsylvania, where the Third Circuit made its ruling, because the materials were available via Internet in that area. The Ninth Circuit has ruled that a "national community standard" should be used for the Internet, but this has yet to be upheld at the national level.

## *History and Details*

*Obscenity* is a legal term that applies to anything offensive to morals, and is often equated with the term "pornography." Pornography, however, is a more limited term, which refers to the erotic content of books, magazines, films, and recordings. Obscenity includes pornography, but may also include nude dancing, sexually oriented commercial telephone messages, and scatological comedy routines. U.S. courts have had a difficult time determining what is obscene. This problem has serious implications, because if an act or an item is deemed obscene, it is not protected by the First Amendment.

Until the mid-nineteenth century, and the Victorian era in Great Britain and the United States, sexually explicit material was not subject to statutory prohibition. The Federal Comstock Law of 1873 criminalized the transmission and receipt of "obscene," "lewd," or "lascivious" publications through the U.S. mail. U.S. courts looked to the English case of *Regina v. Hicklin*, 3 L.R.-Q.B. 360 (1868), for a legal definition of obscenity. The *Hicklin* test was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose

minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

This test permitted judges to look at objectionable words or passages without regard for the work as a whole, and without respect to any artistic, literary, or scientific value the work might have.

In 1930, Massachusetts courts declared both Theodore Dreiser's novel *An American Tragedy* and D.H. Lawrence's novel *Lady Chatterly's Lover* obscene. An important break from *Hicklin* came in a lawsuit over the U.S. publication of James Joyce's novel, *Ulysses.* Both at the trial and appellate levels, the Federal courts held that the book was not obscene (*United States v. One Book Called "Ulysses,"* 5 F. Supp. 182 [S.D.N.Y. 1933], aff'd 72 F.2d 705 [2d Cir. 1934]). The courts rejected the *Hicklin* test, and suggested a standard based on the effect on the average reader of the dominant theme of the work as a whole.

In 1957, the U.S. Supreme Court retired the *Hicklin* test in *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498. Justice William J. Brennan, Jr. stated that obscenity is "utterly without redeeming social importance," and therefore was not protected by the First Amendment. He announced, as a new test, "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to a prurient [lewd or lustful] interest." The new test was applicable to every level of government in the United States.

The *Roth* test proved difficult to use because every term in it eluded a conclusive definition. The Supreme Court Justices could not fully agree what constituted "prurient interest," or what "redeeming social importance" meant. Justice Potter Stewart expressed this difficulty at defining obscenity when he remarked, "I know it when I see it." (*Jacobellis v. Ohio*, 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793 [1964])

The Supreme Court added requirements to the definition of obscenity in a 1966 case involving the bawdy English novel, *Fanny Hill.* In *Memoir v. Massachusetts*, 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1, the Court concluded that to establish obscenity, the material must, aside from appealing to the prurient interest, be "utterly without redeeming social value," and "patently offensive because it affronts contemporary community standards relating to the description of sexual matters." The requirement that the material be "utterly" without value made prosecution difficult. Defendants presented expert witnesses, such as well-

known authors, critics, or scholars, who attested to the literary and artistic value of sexually charged books and films.

The Supreme Court did make conclusive rulings on two other areas of obscenity in the 1960's. In *Ginzburg v. United States*, 383 U.S. 463, 86 S. Ct. 942, 16 L. Ed. 2d 31 (1966), the Court held that "pandering" of material by mailed advertisements, designed to appeal to a prurient interest, could be prosecuted under the Federal obscenity statute. Even if the material in publisher Ralph Ginzburg's *Eros* magazine was not obscene, the Court was willing to allow the government to punish Ginzburg for appealing to his prospective subscribers' prurient interest.

Later, in *Stanley v. Georgia*, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969), the Court held that the First and Fourteenth Amendments prohibited making the private possession of obscene material a crime.

The failure of the Warren Court to achieve consensus over the *Roth* test kept the definition of obscenity in limbo. Then, in 1973, aided by conservative justices Lewis F. Powell, Jr. and William H. Rehnquist, Chief Justice Warren Earl Burger restated the constitutional definition of obscenity in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419. Burger explicitly rejected the "utterly without redeeming social value" standard:

The basic guidelines for the trier of fact must be (a) whether the "average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest …, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Burger noted that the new test was intended to address "'hardcore' sexual conduct," which included "patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated … masturbation, excretory functions, and lewd exhibitions of genitals."

In 1987, the Supreme Court modified the "contemporary community standards" criteria. In *Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 439, the Court stated that the "proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, and scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole." It is unclear whether the "reasonable person" standard represents a liberalization of the obscenity test.

In 1989, the Supreme Court unanimously held that the First Amendment's guarantee of free speech protected indecent, sexually explicit telephone messages (*Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 109 S. Ct. 2829, 106 L. Ed. 2d 93). The Court ruled that a Federal law that attempted to ban "Dial-a-Porn" commercial phone services over interstate telephone lines (Pub. L. No. 100-297, 102 Stat. 424) to shield minors from obscenity was unconstitutional, because it applied to indecent as well as obscene speech. The Court indicated, however, that obscene calls could be prohibited.

Congressional attempts to prevent the Internet from being used to distribute obscene materials have been blocked by Supreme Court decisions. The Communications Decency Act of 1996 (CDA), codified at 47 U.S.C.A. § 223(b), as amended, 47 U.S.C.A. § 223(b), was designed to outlaw obscene and indecent sexual material in cyberspace. One section made it a Federal crime to use Telecommunications to transmit "any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication."

The American Civil Liberties Union (ACLU) and 20 other plaintiffs immediately filed a lawsuit challenging the constitutionality of the CDA's provisions, especially the part of the CDA that dealt with indecent material. In *Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997), the Supreme Court recognized the "legitimacy and importance of the congressional goal of protecting children from harmful materials," but ruled that the CDA abridged Freedom of Speech, and therefore was unconstitutional.

The Court was most troubled by the CDA's "many ambiguities." The concern, in particular, was that the act's undefined terms *indecent* and *patently offensive* would provoke uncertainty as to how the two standards relate to each other, and just what they mean. The vagueness of this content-based regulation, along with its criminal penalties, led the Court to conclude that the CDA would have a "chilling effect" on free speech.

In addition, the CDA did not deal with key parts of the *Miller* test. One element from *Miller* which was missing from the CDA requires that the proscribed material must be "specifically defined by the applicable state law." This, in the Court's view, would have reduced the vagueness of the term "patently offensive." Another important element of the *Miller* test is the requirement that the material, "taken as a whole, lacks serious literary, artistic, political, or scientific value." The

Court found that this "societal value" requirement allowed appellate courts "to impose some limitations and regularity on the definition by setting, as a Matter of Law, a national floor for socially redeeming value." The failure of the CDA to include this element meant that the law posed a serious threat to censor speech that was outside the statute's scope.

Congress sought to address these deficiencies, in 1998, when it passed the Child Online Protection Act (COPA). COPA attempted to limit restrictions on pornographic material to communications made for commercial purposes. Although Congress incorporated the *Miller* test in hopes that the law would pass constitutional muster, the ACLU and a group of online website operators challenged the constitutionality of COPA, arguing that it was overbroad. In addition, the plaintiffs contended that the use of the community standards test would give any community in the United States the ability to file civil and criminal lawsuits under COPA.

The Supreme Court, in *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002), issued what many legal commentators considered to be a murky decision that suggested the law might be overbroad. It referred the case back to the district court for a full hearing on the merits of the case.

Obscenity challenges are not restricted to pornographic content. In *City of Erie v. Pap's A. M.*, 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000), the Supreme Court moved from cyberspace to real estate when it held that a city could prevent the location of a nude dancing club using its Zoning law powers. The Court ruled that the zoning ordinance did not violate the First Amendment because the government sought to prevent the means of the expression, and not the expression itself.

In 1994, Erie, Pennsylvania, enacted an ordinance that made it a crime to knowingly or intentionally appear in public in a "state of nudity." The Court held that nude dancing is "expressive conduct" that "falls only within the outer ambit" of First Amendment protection. It based its analysis on the framework for content-neutral restrictions on Symbolic Speech set forth in the draft registration card case, *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct.1673, 20 L. Ed. 2d 672 (1968).

The first factor of the *O'Brien* test is whether the government regulation is within the constitutional power of the government to enact. The Court concluded that Erie had the power to protect public health and safety.

The second factor is whether the regulation furthers an important or substantial government interest. The city based its ban on public nudity as a way of combating the harmful secondary effects associated with nude dancing. The preamble to the ordinance stated that Erie City Council had, for over 100 years, expressed "its findings that certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution and other serious criminal activity." The Supreme Court found this an important government interest.

The ordinance also satisfied *O'Brien's* third factor, that the government interest is unrelated to the suppression of free expression.

Assessing whether an activity or object is obscene based on community standards is problematic, especially when community values change over time. For example, in the case of the "cussin' canoeist," a Michigan man was convicted, in 1999, for violating an 1897 state law making it illegal to use obscenities and profanities while in public. He had been cited for loudly swearing while in a canoe on a public stream. However, the Michigan court of appeals reversed his conviction in 2002. The court struck down the nineteenth-century statute, ruling that the law unquestionably "operates to inhibit the exercise of First Amendment Rights." (*Michigan v. Boomer*, 250 Mich. App. 534, 655 N.W.2d 255 [Mich.App.2002])

Another sticking point in obscenity prosecutions involves the often-overbroad interpretation of what is obscene. In recent years, state appellate courts have struck down laws that made it criminally obscene for a parent to photograph his or her own child playing in a bathtub, or running nude on a beach.

# What Is Child Pornography?

*Child pornography is the visual representation of minors under the age of 18 engaged in sexual activity, or the visual representation of minors engaging in lewd or erotic behavior, designed to arouse the viewer's sexual interest.*

The 'Age of Consent' for sexual activity in any given state is irrelevant; any **visual depiction** of a minor under 18 years of age engaging in sexually explicit conduct is illegal. The Federal child pornography laws, 18 U.S.C. § 2251 and 18 U.S.C. § 2252, in no way apply to **written depictions**. Authors should note that, to the best of our knowledge, at this time, no state laws exist which apply to written depictions.

Child pornography may include actual or simulated sexual intercourse involving minors, deviant sexual acts, bestiality, masturbation, sadomasochistic abuse, or the exhibition of genitals in a sexually arousing fashion. In most instances, however, the mere visual depiction of a nude or partially nude minor does not rise to the level of child pornography. Thus, home movies, family pictures, and educational books depicting nude children in a realistic, non-erotic setting are protected by the Free Speech Clause of the First Amendment to the U.S. Constitution, and do not constitute child pornography.

Child pornography differs from pornography depicting adults in that adult pornography may only be regulated if it is obscene. In *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) the U.S. Supreme Court ruled that pornography depicting adults is obscene if (1) the work, taken as a whole by an average person applying contemporary community standards, appeals to the prurient interest; (2) the work depicts sexual conduct in a patently offensive way; and (3) the work, when taken as a whole, lacks serious literary, artistic, political, or scientific value.

In contrast, child pornography can be banned without regard to whether the pornographic depictions of minors violate contemporary community standards, or otherwise satisfy the *Miller* standard for Obscenity.

In *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (U.S. 1982), the Supreme Court explained the rationale underlying the distinction between child pornography and adult pornography. The Court said that the government has a compelling interest in protecting minor children from Sexual Abuse and exploitation. Using the same rationale, the Supreme Court later said that even the mere possession of child pornography may be prohibited without violating the First Amendment. *Osborne v. Ohio*, 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (U.S. 1990).

However, the Supreme Court drew the line with so-called "virtual" depictions of child pornography.

In 1996, Congress passed the Child Pornography Prevention Act (CPPA), which expanded the Federal prohibition on child pornography to include not only pornographic images made using actual children, but also "any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2256. Civil libertarians worried that the CPPA would be applied to ban a range of sexually explicit images that appeared to depict minors, but were produced by means other than using real children, such as through the use of computer-imaging technology.

The Supreme Court agreed. In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002), the Court ruled that the CPPA's provisions went too far by trying to ban speech that created no real minor victims of sexual abuse. Nor could the CPPA be sustained on grounds that pedophiles might use virtual child pornography to seduce actual children into participating in real child pornography. The prospect of crime, by itself, does not justify laws suppressing protected speech, the Court said.

In response to the Court's decision, the Senate and U.S. House of Representatives introduced almost identical bills that attempted to implement the substantive provisions of the CPPA in a way that would survive constitutional scrutiny. The Child Obscenity and Pornography Prevention Act of 2002 was approved by the House (H.R. 4623 § 3(a)) and as of early 2003 was pending before the Senate Judiciary Committee. S. 2511, § 2(a).

An additional "Statement on Introduced Bills and Joint Resolutions" was added to the Congressional Record on May 15, 2002. The first section deals with S. 2511, and is well worth reading.

In the new bill, Congress changed the prohibition against images that "appear" to be of a minor engaging in sexually explicit conduct to a prohibition against "computer image or computer-generated image that is, or is indistinguishable" from a conventional image of child pornography. Similarly, the proposed legislation replaced language prohibiting electronic images that "convey the impression" that the pornographic material contains a visual depiction of a minor engaging in sexually explicit conduct with an Scienter requirement, which makes it an offense to advertise or promote material "with the intent to cause any person to believe that the material is, or contains, a visual depiction of a minor engaging in sexually explicit conduct."

Finally, the House and Senate included a number of "findings" that attempt to bolster the constitutionality of the proposed law. Section 2 of the Bill details at length how the limitations placed on prosecuting child pornographers who pander both "real" and "virtual" child pornography have frustrated law enforcement efforts and meritorious prosecutions in the Ninth Circuit. These findings are plainly meant to provide any courts that might scrutinize the proposed legislation with a compelling interest necessary to uphold it over First Amendment objections.

However, as of early 2003, Congress had not yet passed the bill.

Every state has its own child pornography laws. It is important to note that an offender can be prosecuted under state child pornography laws **in addition to**, or instead of, Federal law. Comparisons and lists of legalities by state are far beyond the scope of this work. In any event, most states tend to turn child pornography prosecutions over to the Federal Government in lieu of taking on the expense of a local prosecution. Notice that in order to be in violation of the Federal 18 U.S.C. § 2251 and 18 U.S.C. § 2252 'child pornography' laws, three factors must be present, and if any one factor is missing, then the Federal law is not violated:

1. Interstate Commerce must be affected in some way (this can get quite tricky), and
2. A visual depiction is involved—written depictions don't count, and
3. The visual depiction must be of or involve a minor under age 18.

Federal law prohibits the production, distribution, reception, and possession of an image of child pornography using or affecting any means or facility of interstate or foreign commerce (See 18 U.S.C. § 2251; 18 U.S.C. § 2252; 18 U.S.C. § 2252A). Specifically, Section 2251 makes it illegal to persuade, induce, entice, or coerce a minor to engage in sexually explicit conduct for purposes of producing visual depictions of that conduct. Any individual who attempts or

conspires to commit a child pornography offense is also subject to prosecution under Federal law.

Note that Federal jurisdiction is only implicated **if** the child pornography offense occurred in interstate or foreign commerce. This includes, for example, using the U.S. mails or common carriers to transport child pornography across state or international borders. Additionally, Federal jurisdiction almost always applies when the Internet is used to commit a child pornography violation. Even if the child pornography image itself did not travel across state or international borders, Federal law may be implicated if the materials, such as the computer used to download the image, or the CD Rom, DVD or thumb drive used to store the image, originated or previously traveled in interstate or foreign commerce.

Any violation of Federal child pornography law is a serious crime, and convicted offenders face severe statutory penalties. For example, a first-time offender convicted of producing child pornography under 18 U.S.C. § 2251, faces fines and a statutory minimum of 15 to 30 years maximum in prison. A first-time offender convicted of transporting child pornography in interstate or foreign commerce under 18 U.S.C. § 2252, faces fines and a statutory minimum of 5 to 20 years maximum in prison.

The conviction rates for those accused of a child pornography violation, whether innocent or guilty, exceeds 98 percent. Juries tend to automatically convict anyone accused without paying any attention to the facts of a case, the plausibility of events, or even if the crime is possible.

# What is 'Barely Legal' Pornography?

## *What does the term 'Barely Legal' mean?*

The term 'barely legal' originated with teen pornography movies and photographs which feature young actors depicted as being aged 18 or 19, and in some cases as old as 20. Eighteen years old is the youngest age to lawfully perform in sexually explicit films in many countries. See also Age Of Consent.

## *What is the 'Barely Legal' genre of romance fiction?*

In actual fact, no 'barely legal' genre exists because the term was invented solely for use in the adult film industry. However, a few years ago, mainstream publishers eagerly seized on this term (which has no legal standing within the publishing industry) for the sole purpose of making legal erotica books sound illegal, and therefore more appealing to mass audiences.

In 'barely legal' romance fiction themes, the premise of the story mainly revolves around written descriptions of sexual acts involving an 18- to 20-year-old. No sexual acts involve minors; therefore, the 'barely legal' name refers to characters 'barely old enough to be legal.' Most often, 'barely legal' refers to ages 18 and 19; however, some publishers also include 20-year-old characters.

However, this term is a blatant misnomer, since the actual 'age of consent' throughout most of the world is 14-17… which means that if 'barely legal' was really a legitimate genre, then it would apply to teens aged between 14-17.

Recently, some mainstream publishers have stopped selling this genre. For this reason, we have decided to include it as a service to our readers. We currently solicit manuscripts from authors, and ebooks from publishers, in this 'barely legal' category.

## *What is 'Twink'?*

You may rightly assume this is sex between an older person and someone in the age-range of 18-19. 'Twink' refers to m/m titles of 18- to 19-year-old males having sex with older men.

It's interesting to note that none of the publishing houses seem to object to a plethora of Twink m/m titles in their bookstores, or on their websites. Their objection seems entirely against 18- to 19-year-old females having sex with older men.

### *Is 'Underage' (i.e. age-play) romance fiction legal?*

In a word, yes. It is totally legal. 'Underage' romance fiction and written erotica do not fall under the 'Child Pornography' definition, even if they may be socially unacceptable and in bad taste. They can still run afoul of obscenity laws in various local jurisdictions—but then, so can almost any other book, depending on local community standards.

Child Pornography is defined as "the ***visual*** representation of minors under the age of 18 engaged in sexual activity, or the ***visual*** representation of minors engaging in lewd or erotic behavior, designed to arouse the viewer's sexual interest." This legal definition refers ***only*** to photographs or videos, ***not*** to written fantasy. Fantasy books and stories involving minors, provided there are no photos or book covers that portray minors (or adults who appear to be minors), are not a visual representation. At best they can be considered obscene, and violate local obscenity laws.

The only reason publishers will not print underage romance fiction is due to internal policy, not to any existing law. Often, this internal policy is for good reason, because many credit card companies and credit card processors refuse to accept credit card charges for this material on the grounds that it is "high risk," meaning it has a high rate of refunds or customer complaints.

Another reason is that publishers do not want to run afoul of mainstream readers with Calvinistic attitudes toward sexuality. Thus, the perception continues that underage romance fiction is illegal, due to being (mis-)classified as child pornography. See also Age Of Consent.

**Neither Lot's Cave nor Carnal Pleasures publishes any form of Child Pornography, no exceptions.**

# What is the 'Age Of Consent'?

*Why is the term 'Age of Consent' important to erotica writers?*

Erotica authors often advertise that the incest or underage sex portrayed in their stories is acceptable because all their characters are above the 'age of consent'. Some writers wish to push the legal line of consent to the lowest possible minimum, while other authors wrongly assume that the 'barely legal' definition of 18 to 20 also applies to 'age of consent'.

It does not—'age of consent' should NOT be confused with 'barely legal'!

The distinguishing aspect of 'age of consent' laws is that the person below the minimum age is regarded as a victim and the older sex partner as a sex offender, whereas 'barely legal' laws deal exclusively with pornographic images, not with writing in any form.

This raises an important issue regarding the definition of 'age of consent'.

In most countries worldwide, and in nearly 2/3 of the United States, the 'age of consent' is significantly lower than the 'barely legal' age of 18 at which a person can appear in pornographic images and films. In many jurisdictions, the minimum age for participation, or even viewing such material, is 18. Films and images showing individuals under the age of 18 in most jurisdictions worldwide are now classified as child pornography.

Yet the legal age of consent in those same jurisdictions is lower…in some cases, *much* lower!

The term 'age of consent' rarely appears in any legal statutes. It is loosely defined as "the minimum age of a person with whom another person is permitted to engage in certain sexual activities." Another definition might be, "the age at which a person is considered legally competent to consent to sexual acts."

Age of consent laws vary widely from jurisdiction to jurisdiction. In the United States and internationally, **most jurisdictions set the 'age of consent' in the range of 14 to 16.** However, 'ages of consent' are often as low as 12, and jurisdictions exist where 21 is the minimum age.

The laws also vary greatly by the type of sexual act, the gender of the participants, whether the participants are married, or other restrictions such as abuse of a position of trust. Some jurisdictions may also make allowances for minors engaged in sexual acts with each other, rather than a single age. Charges resulting from a breach of these laws may range from a misdemeanor such as corruption of a minor, to what is popularly called statutory rape (which is considered equivalent to rape, both in severity and sentencing).

**Age of consent should not be confused with the age of majority, age of criminal responsibility, the marriageable age, the voting age, the drinking age, driving age, or age for any other purpose.**

There are many gray areas in consent laws, some regarding unspecific and untried legislation, others brought about by debates regarding changing societal attitudes, and others due to conflicts between Federal and State laws. These factors all make 'age of consent' an often-confusing subject, and a topic of highly charged debates. For example, in the United States, under Federal Law, it is a crime to film minors below 18 in sexual acts, even in states where the age of consent is below 18. In those states where the age of consent is lower, charges such as child pornography can be used as alternatives.

**However, the biggest gray area in 'age of consent' and 'barely legal' laws deals with how the publishing industry has deliberately misused these terms.**

First, 'age of consent' violations only apply to real-life situations; they do not apply to fictional writing in any possible way. Therefore, even stories which feature extremely young children engaging in sexual activity are perfectly legal, as long as no photographs of children are included on the cover or anywhere in the story. All such fiction is considered 'fantasy,' and no laws exist which forbid such works from being written or published.

Second, 'barely legal' is NOT a term that applies to fictional writing! It applies ONLY to pornographic images and movies licensed in the United States. In fact, the term was coined by the adult film industry, specifically for the adult film industry's use, and was never intended for any use outside that narrow niche market. It has no legal standing whatsoever in the publishing industry.

However, since many publishers have borrowed the phrase, and are grossly misusing it in order to reject one segment of erotic fiction after another, let's put it in its proper perspective.

The legal 'age of consent' in nearly every country worldwide is 14 to17... so if the term 'barely legal' is mistakenly applied to writing, it must logically refer to

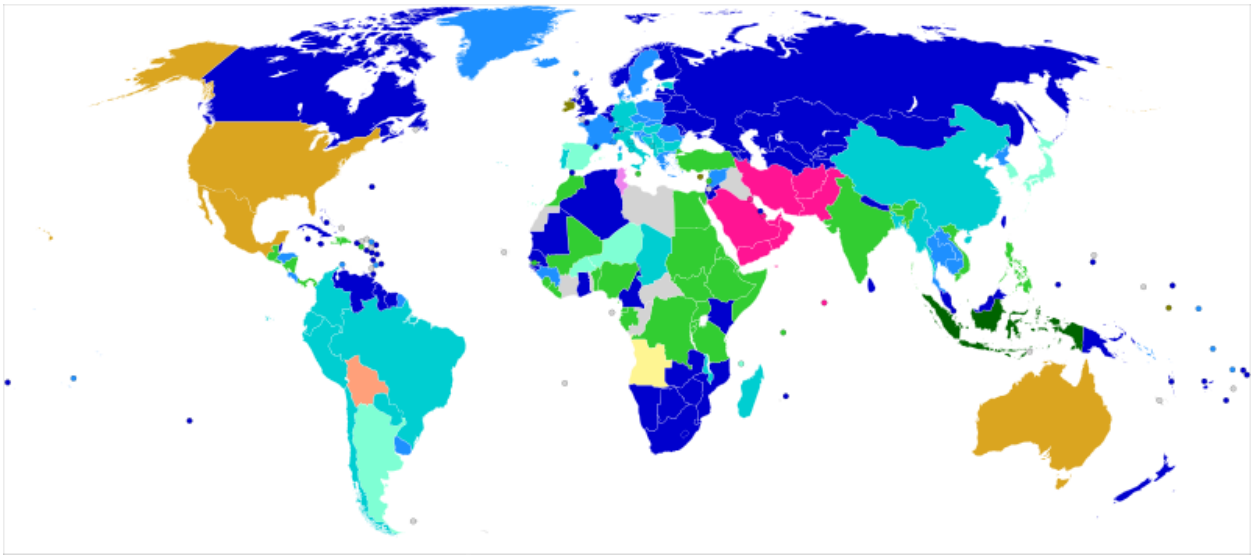
teens who are 14 to 17 years old, not to college-age students—young adults between the ages of 18 to 20 who have reached the legal 'age of majority'.

### *How does this affect you?*

Like it or not, even though they are technically in violation of the First Amendment of the United States Constitution, publishers have the right to decide which books they will publish—and which they will refuse. They bypass the First Amendment by writing exceptions into their Terms of Service agreements such as, "We refuse to publish books which deal with…" and then detail a long list of topics that they find distasteful.

Usually this includes material which is illegal, offensive, promotes hate and violence, infringes upon another's privacy, contains massive amounts of advertising… or is obscene or pornographic. And they define 'obscene or pornographic' by their own narrow-minded ideals which may, or may not, be reflected by the world at large, or their customers in particular.

Below is a map showing the legal 'age of consent' worldwide. As you can clearly see, the vast majority of countries consider 16 to be the standard 'age of consent', and many countries are even more lenient.



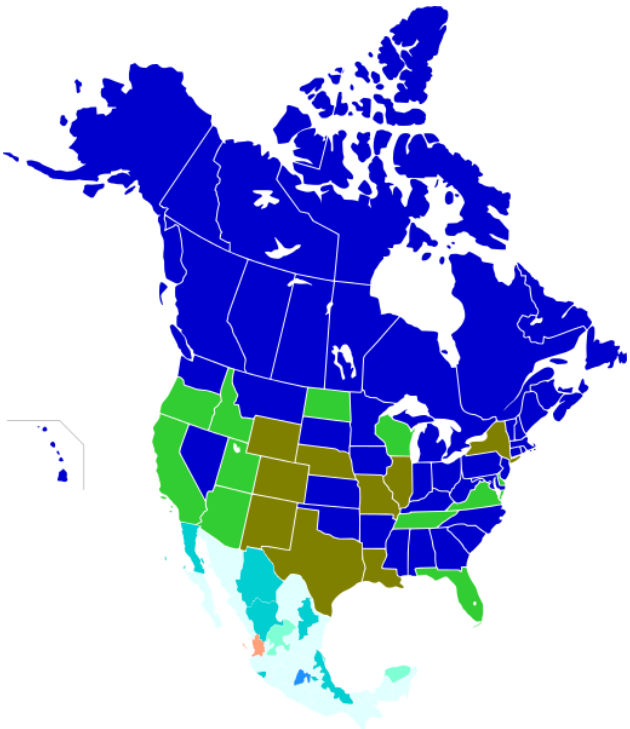
**This map displays the legal age of consent for heterosexual sex in various countries**

puberty
12
13
14
15
16
17
18
19
20
21 (void at present)
varies by state/province/region/territory
must be married

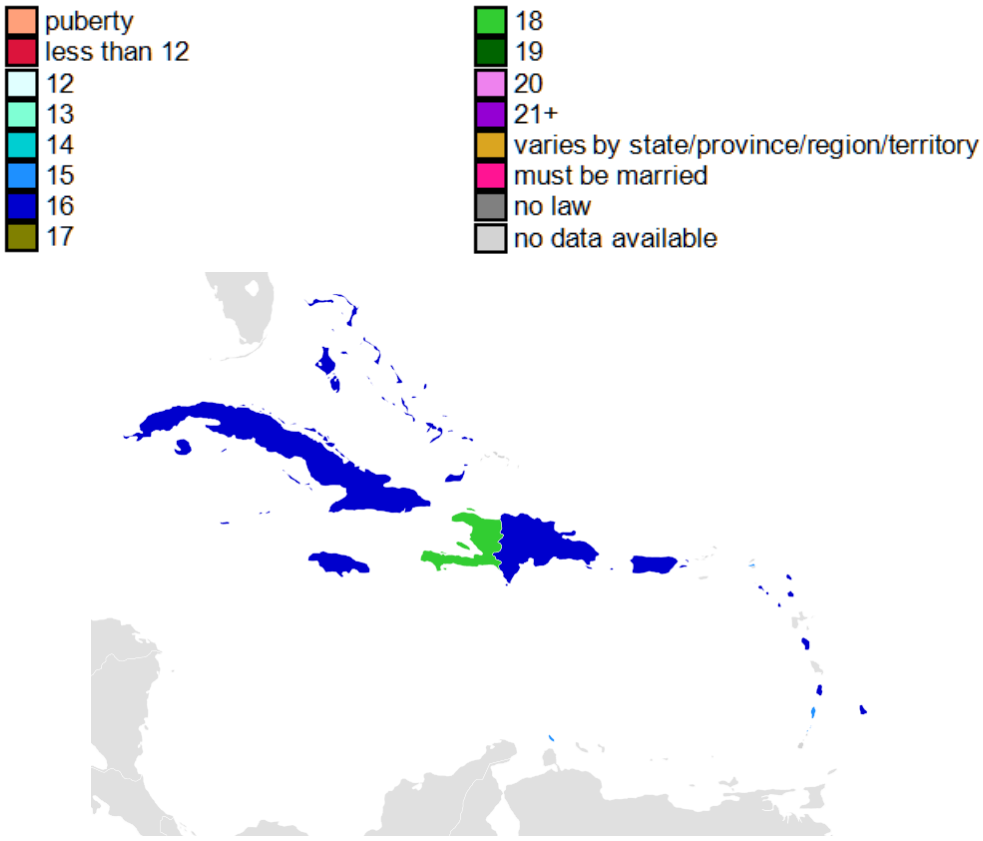
Even in North America, South America, Canada, and the Caribbean, the legal 'age of consent' is lower than most people realize.

In the US, eleven states require teens to be 18, nine states require teens to be 17, and a whopping thirty-one states require teens to be at least 16 in order to engage in sexual activity… unless special conditions apply, such as the partner being within five years of the same age.

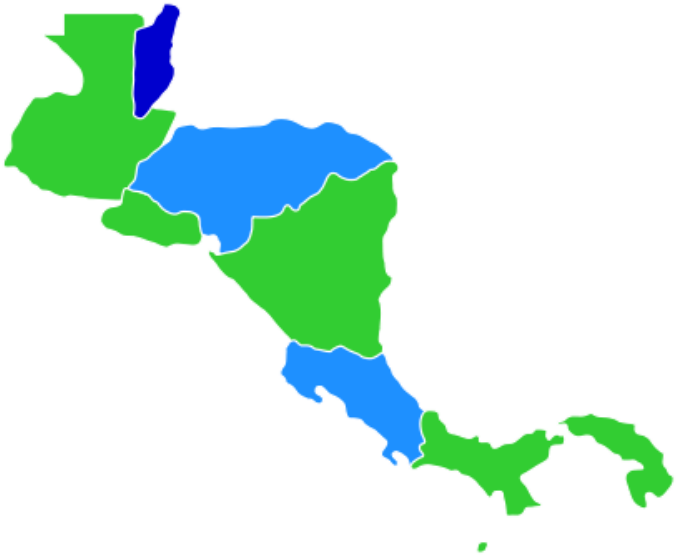
Canada stands united in requiring teens to be 16. The Caribbean almost exclusively agrees that 16 is an acceptable age; Central America waffles between 15 and 18, and South America ranges anywhere from puberty (which can start as early as 9 or 10 years old) to 14, with a very small minority of countries requiring teens to be 16 years old.



**Age of consent laws in North America**




**Age of consent laws in the Caribbean**



**Age of consent laws in Central America**

Why, then, does the publishing industry consider young adults ranging from 18 to 20 to be 'barely legal'?

## *What can be done about it?*

Realistically, very little. Our best recommendation is to find publishers for your material which do not violate Federal laws in the blind pursuit of their own high-flung morality. The list of such publishers is very short, and initial sales may be small. But as more and more paying customers realize that independent publishers are their ONLY reliable source of uncensored erotica, they will abandon the widely-known 'morality' publishers *en-masse.*

## *Can anything else be done?*

Know the facts—and be willing to stand up for your rights! If a publisher refuses to accept your books because they no longer accept 'barely legal' erotica, educate them! What do you have to lose? And if enough people make their voices heard, perhaps they will reconsider their policies.

## *What are the facts?*

- 'Barely legal' does not refer to writing in any way; it is a misnomer that was appropriated from the adult film industry for the sole purpose of making legal erotica books *sound* illegal, and therefore more appealing to mass audiences. It is now being used by publishers to censor and ban an extremely popular genre of *legal* erotica books.
- Even books dealing with extremely young children engaging in sexual acts are not illegal; 'age of consent' violations deal only with real life scenarios, not with fiction.
- If 'barely legal' ***was*** a term that applied to writing, it would only apply to teens ranging between 14-17 years of age, not college students who have reached or passed the legal 'age of majority.'

# What is Adult Material?

*"Adult Material" addresses the legal issues arising from publishing risqué adult-oriented content, including obscenity laws, community standards on the Internet, and the new U.S.C. § 2257 regulations.*

## *Can I put adult content on my blog?*

Yes. The First Amendment protects your right to communicate legal adult content to the public. However, the law prohibits distribution of obscene material and child pornography. In addition, a Federal law, 18 U.S.C. § 2257, currently being challenged in court, imposes recordkeeping requirements on a broadly-defined category of producers of sexually explicit material.

## *What is obscene material?*

United States courts use the Miller test for determining whether speech or expression is "obscene," and therefore not protected by the First Amendment. That means it can legally be banned.

The Miller test stems from *Miller v. California*, 413 U.S. 15 (1973), in which the U.S. Supreme Court held that material is obscene if each of the following factors is satisfied:

- Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;
- Whether the work depicts/describes, in a patently offensive way, sexual conduct specifically defined by applicable law;
- Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Most pornography depicting sexual acts or genitalia would not be considered obscene, but community standards can vary widely (compare Peoria with Manhattan), and a blog can be seen in any jurisdiction.

*How do you determine "community standards" on the Internet?*

Under current law, the legal question of whether speech is obscene is determined partly by reference to local community standards. Federal venue rules permit an obscenity prosecution to be brought where the speech originated, or where it was received. Internet speech, however, is received in every community of our nation. As a result, "the 'community standards' criterion as applied to a nationwide audience will be judged by the standards of the community most likely to be offended by the message." *Reno v. ACLU*, 521 U.S. 844 (1997).

EFF (the Electronic Frontier Foundation) is concerned that present law permits censorship of speech on the Internet under the standards of the least tolerant community, negating the values that the community standards doctrine was intended to protect—diversity and localism in the marketplace of ideas.

In *Nitke v. Ashcroft*, EFF is helping challenge the "least tolerant" standard. Barbara Nitke, a New York photographer who works with erotic subject matter, has joined with the National Coalition for Sexual Freedom to challenge the constitutionality of provisions in the Communications Decency Act that create criminal penalties for making "obscene" materials available online.

In July 2005, the district court ruled that the plaintiffs had not provided sufficient evidence of harm to maintain a facial challenge to the criminal provisions, but left open the possibility of a case-by-case analysis. EFF opposes this decision, because the possibility of being hauled into court in the least tolerant jurisdiction could chill protected speech throughout the Internet. There will be an appeal.

## *What is child pornography?*

Child pornography is any visual depiction, where "(A) the producing of such visual depiction involves the use of a minor [under 18] engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct." 18 U.S.C. § 2252 The law prohibits knowingly possessing or transmitting (including by computer) child pornography.

*What is sexually explicit conduct?*

Sexually explicit conduct is defined in 18 U.S.C. § 2256, but basically includes any form of sex or the "lascivious exhibition of the genitals or pubic area." This definition is used for both child pornography, and for Federal reporting and recordkeeping requirements.

## *Who is required to keep records about adult images under Federal law?*

Under Federal law 18 U.S.C. § 2257, producers of a "visual depiction of an actual human being engaged in actual sexually explicit conduct" are required to keep records showing the ages of the models. It does not cover images produced before July 3, 1995, or depictions of simulated sexually explicit conduct.

While this law has been in effect for years, recently the Department of Justice (DOJ) issued new regulations that expand the definition of a "secondary producer" of sexually explicit material. As of June 23, 2005, new Federal regulations apply the recordkeeping requirement to these secondary producers, and defines them as anyone "who inserts on a computer site or service a digital image of, or otherwise manages the sexually explicit content of a computer site or service that contains a visual depiction" of sexually explicit conduct.

The regulations imply that the recordkeeping requirement is restricted to commercial operations. This would seem to exclude noncommercial or educational distribution from the regulation, and to limit secondary publishing and reproduction to material intended for commercial distribution. However, the DOJ has left wiggle-room, and it is still unclear if they intend to go after noncommercial websites.

## *Wait, don't the new DOJ regulations exceed the statute?*

Absolutely. The statute limits its definition of producers to people involved with the "hiring, contracting for, managing, or otherwise arranging for the participation of the performers depicted." The DOJ regulations define 'producer' much more broadly. This issue will be one part of legal challenges to the requirement.

## *What records do Federal regulations require?*

Producers are required to maintain records of the legal name and date of birth of each performer, plus any name, other than each performer's legal name, ever used by the performer, including the performer's maiden name, alias, nickname, stage name, or professional name.

The proposed DOJ rule would add a requirement that the records include a copy of each image, as well as the URL on which the depiction was published. It also includes onerous requirements for how the records are kept, including

maintaining the records for up to five years after the so-called producer is out of business.

For online publishers, a statement that includes the location of these records must be displayed on their site's "homepage, any known major entry points, or principal URL (including the principal URL of a subdomain), or in a separate window that opens upon the viewer's clicking a hypertext link that states, '18 U.S.C. 2257 Recordkeeping Requirements Compliance Statement.'"

## *What if I don't have the records?*

18 U.S.C. § 2257(f)(4) makes it a crime for a person "knowingly to sell or otherwise transfer" any sexually explicit material that does not have a statement affixed. As noted above, this does not include noncommercial distribution.

## *What is a "lascivious" image?*

Many courts apply the so-called Dost test to determine if a given image is considered to be "lascivious" under the law. *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), aff'd sub nom., *United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987) set forth a six factor test:

1. Whether the genitals or pubic area are the focal point of the image;
2. Whether the setting of the image is sexually suggestive (i.e., a location generally associated with sexual activity, such as a bed);
3. Whether the subject is depicted in an unnatural pose or inappropriate attire considering her age;
4. Whether the subject is fully or partially clothed, or nude;
5. Whether the image suggests sexual coyness or willingness to engage in sexual activity; and
6. Whether the image is intended or designed to elicit a sexual response in the viewer.

This test requires a case-by-case analysis, and is devoid of bright-line rules.

## *How is the Dost Test applied in case law?*

Nudity is not enough for a finding that an image is lascivious, but clothing does not mean a photo is in the clear: "a photograph of a naked girl might not be lascivious (depending on the balance of the remaining Dost factors), but a

photograph of a girl in a highly sexual pose dressed in hose, garters, and a bra would certainly be found to be lascivious." *United States v. Villard*, 885 F.2d 117, 124 (3d Cir. 1989).

Setting is critical, but must be taken in context. For example, "while the setting of a bed, by itself, is some evidence of lasciviousness, it alone is not enough to support a finding of lasciviousness." Id. One should consider not just the bed, but how the person is posed on the bed (i.e. sleeping vs. posing seductively).

Context is also important in determining "whether the image is intended or designed to elicit a sexual response in the viewer." For example, in jury instructions approved by the Ninth Circuit, the Court asked the jurors to consider the caption of the photograph. *United States v. Arvin*, 900 F.2d 1385 (9th Cir. 1990).

## *What do I do if someone puts child porn on my blog?*

Some blogs allow anyone to come along and put in comments, sometimes with images. Federal law 18 U.S.C. § 2258A requires anyone who is engaged in providing certain online services to the public, and obtains knowledge of a violation of the child exploitation statutes, to report such violation to the CyberTipline of the National Center for Missing and Exploited Children. NCMEC will forward information to law enforcement. These regulations apply to electronic communication services and remote computing services. Section 2258B provides a limited safe harbor for these service providers and domain name registrars.

## *Will the DOJ really go after my little blog for a couple of risqué photos?*

Probably not. First, as discussed above, the recordkeeping requirements are only for actually sexually explicit conduct. Photos of you topless at Burning Man, or jogging naked for Bay to Breakers, are not going to trigger the law. Second, the legality of the new regulations is being challenged in court, which should discourage the DOJ from going after borderline sites.

## *What have courts said about recordkeeping requirements?*

In *Sundance Assoc., Inc. v. Reno*, 139 F.3d 804 (10th Cir. 1998), the Tenth Circuit rejected the prior regulation's distinction between primary and secondary producers, and entirely exempted from the recordkeeping requirements those who merely distribute, or those whose activity "does not involve hiring, contracting for,

managing, or otherwise arranging for the participation of the performers depicted." 18 U.S.C. § 2257(h)(3).

However, the DOJ takes the position that *American Library Ass'n v. Reno*, 33 F.3d 78 (DC Cir. 1994), "implicitly accepted that the distinction between primary and secondary producers was valid" and that "the requirement that secondary producers maintain records was not a constitutionally impermissible burden on protected speech."

In *Connection Distributing Co., et al. v. Keisler*, 505 F.3d 545, (6th Cir. 2007) the Sixth Circuit initially rejected the DOJ's argument, and held that "the [revised] statute is overbroad and therefore violates the First Amendment." However, the Court reheard the case *en banc*, and ultimately issued a new opinion, *Connection Distributing Co. v. Holder*, 557 F.3d 321 (6th Cir. 2009), upholding the recordkeeping requirements.

*What is EFF doing about the new 2257 regulations?*

EFF is working with the Free Speech Coalition to challenge the new regulations, which go far beyond the authorization of the statute, and impermissibly impinge on constitutionally protected speech. For instance, on March 5, 2010, they filed an amicus curiae brief in the Eastern District of Pennsylvania, challenging the constitutionality of the statute.

# What is Sexual Exploitation of Minors?

Notice that in order to be in violation of Federal 'sexual exploitation of minors' laws, three factors must be present, and if any factor is missing, then the law is not violated:

1. Interstate Commerce must be affected in some way (this can get quite tricky), and
2. A visual depiction is involved—written depictions don't count, and
3. The depiction must be of or involve a minor.

In the United States, as of 1995, a minor is legally defined as a person under the age of 18, although 21 with the context of alcohol; people under the age of 21 may be referred to as "minors".

If interstate commerce is not affected, then the Federal law is not violated as it is solely the Interstate Commerce Act which gives the Feds jurisdiction in these matters. However, do not assume the interstate commerce provision is not triggered until first talking with an attorney competent in Federal Criminal Law. For an author, writing a one-phrase note on a scrap of paper for later inclusion in the ebook might trigger the interstate commerce clause if the ink in the pen used was manufactured in another state even though the pen was purchased from a local company. It can get seriously ridiculous.

### *Here is the actual law:*

18 USC § 2252 - Certain activities relating to material involving the sexual exploitation of minors

Current through Pub. L. 113-21. (See Public Laws for the current Congress.)

(a) Any person who—

(1) knowingly transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign

commerce by any means including by computer or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(3) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly sells or possesses with intent to sell any visual depiction; or

(B) knowingly sells or possesses with intent to sell any visual depiction that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce, or has been shipped or transported in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported using any means or facility of interstate or foreign commerce, including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; or

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction; or

(B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b)

(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but if such person has a prior conviction under this chapter, section 1591, chapter 71, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 10 years, or both, but if any visual depiction involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71,

chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

(c) **Affirmative Defense.—** It shall be an affirmative defense to a charge of violating paragraph (4) of subsection (a) that the defendant—

(1) possessed less than three matters containing any visual depiction proscribed by that paragraph; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy thereof—

(A) took reasonable steps to destroy each such visual depiction; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

## *Source*

(Added Pub. L. 95–225, § 2(a),Feb. 6, 1978, 92 Stat. 7; amended Pub. L. 98–292, § 4,May 21, 1984, 98 Stat. 204; Pub. L. 99–500, § 101(b) [title VII, § 704(b)], Oct. 18, 1986, 100 Stat. 1783–39, 1783–75, and Pub. L. 99–591, § 101(b) [title VII, § 704(b)], Oct. 30, 1986, 100 Stat. 3341–39, 3341–75; Pub. L. 100–690, title VII, § 7511(b),Nov. 18, 1988, 102 Stat. 4485; Pub. L. 101–647, title III, § 323(a), (b),Nov. 29, 1990, 104 Stat. 4818, 4819; Pub. L. 103–322, title XVI, § 160001(d), (e), title XXXIII, § 330010(8),Sept. 13, 1994, 108 Stat. 2037, 2143; Pub. L. 104–208, div. A, title I, § 101(a) [title I, § 121[5]], Sept. 30, 1996, 110 Stat. 3009, 3009–26, 3009–30; Pub. L. 105–314, title II, §§ 202(a), 203 (a),Oct. 30, 1998, 112 Stat. 2977, 2978; Pub. L. 108–21, title I, § 103(a)(1)(B), (C), (b)(1)(C), (D), title V, § 507,Apr. 30, 2003, 117 Stat. 652, 653, 683; Pub. L. 109–248, title II, § 206(b)(2),July 27, 2006, 120 Stat. 614; Pub. L. 110–358, title I, § 103(a)(3), (b), (c), title II, § 203(a),Oct. 8, 2008, 122 Stat. 4002, 4003.)

## *Codification*

Pub. L. 99–591is a corrected version of Pub. L. 99–500.

*Amendments*

2008—Subsec. (a)(1). Pub. L. 110–358, § 103(a)(3)(A), (b), inserted "using any means or facility of interstate or foreign commerce or" after "ships" and substituted "in or affecting interstate" for "in interstate."

Subsec. (a)(2). Pub. L. 110–358, § 103(a)(3)(B), (b), inserted "using any means or facility of interstate or foreign commerce or" after "distributes, any visual depiction" and after "depiction for distribution" and substituted "in or affecting interstate" for "in interstate" in two places.

Subsec. (a)(3)(B). Pub. L. 110–358, § 103(a)(3)(C), (b), (c), inserted "shipped, or transported using any means or facility of interstate or foreign commerce" after "that has been mailed" and "using any means or facility of interstate or foreign commerce" after "so shipped or transported," substituted "in or affecting interstate" for "in interstate" and struck out "by any means," before "including."

Subsec. (a)(4)(A). Pub. L. 110–358, § 203(a)(1), inserted ", or knowingly accesses with intent to view," after "possesses."

Subsec. (a)(4)(B). Pub. L. 110–358, §§ 103(a)(3)(D), (b), 203 (a)(2), inserted ", or knowingly accesses with intent to view," after "possesses" and "using any means or facility of interstate or foreign commerce or" after "has been shipped or transported" and substituted "in or affecting interstate" for "in interstate."

2006—Subsec. (b)(1). Pub. L. 109–248 substituted "paragraph (1)" for "paragraphs (1)" and inserted "section 1591," after "this chapter," and ", or sex trafficking of children" after "pornography."

2003—Subsec. (b)(1). Pub. L. 108–21, § 507, inserted "chapter 71," before "chapter 109A," and "or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice)," before "or under the laws."

Pub. L. 108–21, § 103(a)(1)(B), (C), substituted "and imprisoned not less than 5 years and" for "or imprisoned," "20 years" for "15 years," "40 years" for "30 years," and "15 years" for "5 years" and struck out "or both," before "but if such person has a prior."

Subsec. (b)(2). Pub. L. 108–21, § 507, inserted "chapter 71," before "chapter 109A," and "or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice)," before "or under the laws."

Pub. L. 108–21, § 103(a)(1)(C), (D), substituted "more than 10 years" for "more than 5 years," "less than 10 years" for "less than 2 years," and "20 years" for "10 years."

1998—Subsec. (a)(4)(A), (B). Pub. L. 105–314, § 203(a)(1), substituted "1 or more" for "3 or more."

Subsec. (b). Pub. L. 105–314, § 202(a), substituted ", chapter 109A, or chapter 117" for "or chapter 109A" in pars. (1) and (2) and substituted "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography" for "the possession of child pornography" in par. (2).

Subsec. (c). Pub. L. 105–314, § 203(a)(2), added subsec. (c).

1996—Subsec. (b). Pub. L. 104–208added subsec. (b) and struck out former subsec. (b) which read as follows:

"(b)(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title or imprisoned not more than ten years, or both, but, if such person has a prior conviction under this chapter or chapter 109A, such person shall be fined under this title and imprisoned for not less than five years nor more than fifteen years.

"(2) Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned for not more than five years, or both."

1994—Subsec. (a)(3)(B). Pub. L. 103–322, § 330010(8), substituted "materials" for "materails" in introductory provisions.

Subsec. (b)(1). Pub. L. 103–322, § 160001(d), (e), inserted ", or attempts or conspires to violate," after "violates" and substituted "conviction under this chapter or chapter 109A" for "conviction under this section."

Subsec. (b)(2). Pub. L. 103–322, § 160001(e), inserted ", or attempts or conspires to violate," after "violates."

1990—Subsec. (a). Pub. L. 101–647, § 323(a), (b), struck out "or" at end of par. (1), substituted "that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer," for "that has been transported or shipped in interstate or foreign commerce by any means including by computer or mailed" in par. (2), struck out at end "shall be

punished as provided in subsection (b) of this section.," and added pars. (3) and (4) and concluding provisions.

Subsec. (b). Pub. L. 101–647, § 323(a)(2), added subsec. (b) and struck out former subsec. (b) which read as follows: "Any individual who violates this section shall be fined not more than $100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined not more than $200,000, or imprisoned not less than five years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000."

1988—Subsec. (a)(1), (2). Pub. L. 100–690inserted "by any means including by computer" after "commerce" in introductory provisions.

1986—Subsec. (b). Pub. L. 99–500and Pub. L. 99–591 substituted "five years" for "two years."

1984—Subsec. (a)(1). Pub. L. 98–292, § 4(1), (3), (4), substituted "any visual depiction" for "for the purpose of sale or distribution for sale, any obscene visual or print medium" in provisions preceding subpar. (A).

Subsec. (a)(1)(A). Pub. L. 98–292, § 4(4), substituted "visual depiction" for "visual or print medium."

Subsec. (a)(1)(B). Pub. L. 98–292, § 4(4), (5), substituted "visual depiction is of" for "visual or print medium depicts."

Subsec. (a)(2). Pub. L. 98–292, § 4(2)–(4), (6), (7), substituted ", or distributes, any visual depiction" for "for the purpose of sale or distribution for sale, or knowingly sells or distributes for sale, any obscene visual or print medium" and inserted "or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails" in provisions preceding subpar. (A).

Subsec. (a)(2)(A). Pub. L. 98–292, § 4(4), substituted "visual depiction" for "visual or print medium."

Subsec. (a)(2)(B). Pub. L. 98–292, § 4(4), (5), substituted "visual depiction is of" for "visual or print medium depicts."

Subsec. (b). Pub. L. 98–292, § 4(8)–(11), substituted "individual" for "person" in three places, "$100,000" for "$10,000," and "$200,000" for "$15,000," and inserted "Any organization which violates this section shall be fined not more than $250,000."

## *Confirmation of Intent of Congress in Enacting Sections 2252 and 2256 of This Title*

Section 160003(a) ofPub. L. 103–322provided that:

"(a) Declaration.—The Congress declares that in enacting sections 2252 and 2256 of title 18, United States Code, it was and is the intent of Congress that—

"(1) the scope of 'exhibition of the genitals or pubic area' in section 2256 (2)(E), in the definition of 'sexually explicit conduct,' is not limited to nude exhibitions or exhibitions in which the outlines of those areas were discernible through clothing; and

"(2) the requirements in section 2252 (a)(1)(A), (2)(A), (3)(B)(i), and (4)(B)(i) that the production of a visual depiction involve the use of a minor engaging in 'sexually explicit conduct' of the kind described in section 2256 (2)(E) are satisfied if a person photographs a minor in such a way as to exhibit the child in a lascivious manner."

# What is Sexually Explicit Conduct?

Sexually Explicit Conduct — Actual or simulated sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; bestiality; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area of any person. Title 18 USC § 2256

## *§ 2256. Definitions for chapter*

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of eighteen years;

(2)

(A) Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated—

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) bestiality;

(iii) masturbation;

(iv) sadistic or masochistic abuse; or

(v) lascivious exhibition of the genitals or pubic area of any person;

(B) For purposes of subsection 8(B) [1] of this section, "sexually explicit conduct" means—

(i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;

(ii) graphic or lascivious simulated;

(I) bestiality;

(II) masturbation; or

(III) sadistic or masochistic abuse; or

(iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than an individual;

(5) "visual depiction" includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format;

(6) "computer" has the meaning given that term in section 1030 of this title;

(7) "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained;

(8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

(9) "identifiable minor"—

(A) means a person—

(i)

(I) who was a minor at the time the visual depiction was created, adapted, or modified; or

(II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

(B) shall not be construed to require proof of the actual identity of the identifiable minor.

(10) "graphic," when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted; and

(11) the term "indistinguishable" used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.

[1] So in original. Probably should be "(8)(B)."

# What is Sexual Abuse?

*Sexual Abuse — Illegal sex acts performed against a minor by a parent, guardian, relative, or acquaintance.*

'Sexual Abuse' is a general term for any type of sexual activity inflicted on a child by someone with whom the child is acquainted. It is considered an especially heinous crime because the abuser occupies a position of trust.

Until the 1970's, the prevalence of sexual abuse was seriously underestimated. Growing awareness of the problem led legislatures to enact reporting requirements, which mandate that any professional person (doctor, nurse, teacher, social worker) who knows or has reason to believe that a child is being abused must report this information to the local Welfare agency or law enforcement department.

Statistics vary widely about the level of sexual abuse, but most researchers agree that it occurs at a higher rate than previously believed. Experts on the subject estimate that more than 130,000 children a year are sexually abused in the United States.

Perpetrators of sexual abuse are prosecuted under state Criminal Law statutes that have been toughened for sexual assaults on minors.

The prosecution of reported sexual abuse has required children to testify in court about the abuse. Children are often unwilling to testify against the abuser, who may be a family member, and may exert control over their victim. To relieve these pressures, courts have allowed the use of closed-circuit television to protect the child witness from the trauma of testifying in court before the defendant, expanded the Hearsay evidence exception to allow testimony about what the child said, if the child lacks a motive to lie, or if the child uses sexual terminology unexpected of a child, and made rules that suspended the Statute of Limitations until the abusive conduct is discovered.

## *Child Testimony in Day Care Center Sexual Abuse Cases*

Between 1983 and 1991, a series of cases involving allegations of sexual abuse by day care center workers drew national attention. During this period, investigations of suspected sexual abuse of preschool children by their teachers took place in more than 100 U.S. cities. Many persons were convicted of crimes, but others were either acquitted or had their convictions overturned on appeal.

The key issue in these cases was whether the children involved had told the truth, or whether their testimony had been tainted by the way they were interviewed by parents, social workers, and psychologists. Though this type of multiple-victim, multiple-offender sexual abuse charge has disappeared, the issue of the credibility of children discussing sexual matters and sexual abuse remains a charged issue.

The most famous case involved the McMartin preschool in Manhattan Beach, California. In 1984, authorities charged Virginia McMartin, age 76; her daughter, Peggy McMartin Buckey; her grandson, Raymond Buckey; a granddaughter; and three female teachers with sexually abusing 120 children. The children reported violent rituals where rabbits were mutilated and the children were forced to touch corpses. Eventually prosecutors dropped charges for lack of evidence against everyone except Peggy Buckey and her son Raymond. They went on trial in 1987.

In January 1990, after the longest (two-and-a-half years) and most expensive ($15 million) criminal trial in U.S. history, Peggy and Raymond Buckey were acquitted on 52 counts of Child Molestation. The jury deadlocked on 12 counts of molestation against Raymond Buckey, and on one count of conspiracy against both defendants. The charge against Peggy Buckey was dismissed, but Raymond was retried on 8 of the 13 counts. In July, 1990, his second trial ended in a mistrial, and the case was finally dismissed.

The McMartin preschool case revealed troubling questions about the way the investigation had been conducted, and how evidence had been obtained from young children.

The initial allegation of abuse was made by a mother later diagnosed as paranoid schizophrenic. She accused Raymond Buckey of molesting her son. The police investigated, but declined to file charges because of lack of evidence. The Manhattan police chief then sent a letter to the 200 parents of past or present McMartin preschool students, and alleged that Buckey may have molested their children. Parents were urged to question their children about any sexual abuse.

The letter caused a panic. Hundreds of children were given medical exams, and interviewed by a group of psychologists at a counseling center. During these

interviews, children were asked leading and suggestive questions, and were rewarded for giving the "right" answers. Children reported bizarre events, including being taken into subterranean passages at the school where animal sacrifices were performed. No passages, nor any traces of animal sacrifices, were found at the school. Several children even reported that they were taken on airplanes and molested.

At trial, the jurors had difficulty distinguishing between fact and fantasy in the childrens' accounts. The prosecution argued that children seldom lie about abuse, and that the implanting of false memories through leading and suggestive questions was unlikely, but that they were often reluctant to disclose what had happened to them. They worried that refusing to believe the childrens' testimony would victimize the children a second time, and send a message that society does not want to hear about sexual abuse.

Therefore, the prosecution said, a therapist interviewing a child would often use suggestive questioning, prompting, and manipulation to encourage the child to disclose the truth about sexual abuse. The bizarre tales were simply the childrens' way of dealing with what had happened to them.

The jurors did not accept these explanations, expressing concern that the childrens' testimony had been influenced by adults. The videotapes of the interviews showed therapists asking leading questions, and the children appearing to try to provide answers that would please the interviewers.

Others have been equally skeptical. About 20 studies have shown that suggestive questioning about events that never happened can contaminate young childrens' memories with fantasies. When police, social workers, therapists, and prosecutors conduct multiple interviews, details they provide in their questions and statements are likely to find their way into the childrens' statements. Children will use their imagination, and confabulate stories that are richly detailed, but are a mix of fact and fantasy.

This is not to say that children are not to be believed. Children rarely lie when they spontaneously disclose abuse on their own, or when a person seeks the complete story with the least probing or leading yes/no questions.

The McMartin preschool outcome has forced investigators to learn better ways of asking children questions. Many law enforcement agencies have developed standard investigatory protocols that seek to prevent contamination of the child's testimony. Interviewers are trained to gain a child's trust, evaluate the child's ability to remember and give details of past events, and let the child tell

what happened in his or her own words. Interviews are generally videotaped, to allow both the prosecution and the defense to evaluate the investigator's methods.

### *Other Highly-Publicized Child Abuse Trials*

Apart from criminal remedies, in the 1980's, Child Abuse victims gained the ability to sue their abusers for damages. Before that time, civil remedies were available only for child victims who filed claims soon after attaining the age of majority. State courts and legislatures accepted the concept of repressed memory, in which traumatic episodes are repressed by the victim for many years.

As of 2003, in more than 23 states, adults who "recover" their memories of childhood sexual abuse, either spontaneously or through psychiatric and psychological counseling, may bring a civil lawsuit against the perpetrator. These states have rewritten their laws to start the statute of limitations from the time the victim knows, or has reason to know, that sexual abuse occurred.

During the 1980's and 1990's, many lawsuits were filed using these new laws. Adults successfully sued a number of Roman Catholic priests for sexual abuse that the victims had endured many years before. Health professionals argued that the victims needed the lawsuits as much for therapeutic as legal reasons. Confronting the abuser, and holding the abuser accountable for the actions, is a significant step for the victim, who often feels shame, guilt, and responsibility for the abuse.

However, a controversy arose over the validity of recovered memories. The dispute centers on memories that are coaxed or brought forth through the efforts of therapists. Some law and mental health experts question the veracity of these memories, and challenge their use as the evidentiary basis for lawsuits over conduct that allegedly occurred years, and sometimes decades, in the past. They contend that these are "implanted memories," brought about by hypnosis, truth serums, and therapists' suggestive remarks. They are also troubled that therapists may be allowed to testify as expert witnesses, when there is no Scientific Evidence to support their theories regarding recovered memories.

# What About Censorship?

*Moral censorship is defined as the removal of materials that are obscene or otherwise considered morally questionable. Erotica, romance literature, and sci-fi are often censored under this rationale.*

Socrates defied censorship, and was sentenced to drink poison in 399 BC for promoting his philosophies. In October of 2013, the censor-shits... er... I mean censorship authorities collectively raised their ugly heads once again. "Self-Published erotica is being singled out for sweeping deletions from major eBookstores," wrote The Digital Reader. Kobo, who claims to be "Inspired by a 'Read Freely' philosophy and a passion for innovation," can no longer be perceived as "one of the world's fastest-growing eReading services," having now become one of the world's fastest growing eReading censors.

It began quietly enough when Amazon and Barnes & Noble took a radical response to "breaking news" from a minor blog site, The Kernel, that they sell boundary-pushing adult content in their ebookstores. These bookstores responded by deleting not just the questionable erotica, but also removed any ebooks that might hint at violating cultural norms, often making the judgment by keywords in the book title alone.

The situation blew up with Kobo, who has book distribution partners on four continents, and powers thousands of ebookstore retailers worldwide. One of these ebookstores in the UK, WH Smith, woke up one day, and embarrassingly realized they were carrying a lot of racy erotica. What a shock. WH Smith, in a nonsensical panic, took their entire ebookstore down, pinned the blame on self-published books, and replaced the home page with an over-the-top anti-self-publishing rant that will not soon be forgotten by independent self-publishers. Kobo responded instantly by unpublishing, or removing search engine links to all their romance and erotica titles as well as any other suspicious-sounding titles based on keywords contained in the title. Of course, many non-erotica books found themselves caught up in the censorship frenzy.

Mark Coker of Smashwords commented, "That's what you call, 'throwing the baby out with the bathwater.' Kobo is now racing to put together all the pieces. From what I'm told, all or most Smashwords titles are not available in the UK through the Kobo-branded store, as well as through WH Smith."

He continues by saying he spoke with Kobo, and they're working to restore as many blocked titles as possible, as soon as possible. However, not all titles will reappear. Similar to Apple, Smashwords' erotica authors can now assume that erotic fiction where the predominant theme, focus, title, cover image, or book description is targeted at readers who seek erotic stories of incest, pseudo-incest, or rape will find that their content is not welcome at the Kobo store.

Lot's Cave has recently seen and verified as fact that Barnes & Noble and Amazon are cracking down on the same material. Mr. Coker states that going forward, he thinks we can expect this to become the new reality as major retailers set their sights on a global market where the cultural, religious, or political norms in some countries will find certain categories of erotica too objectionable, or might find non-erotic categories that most western cultures consider mainstream as too objectionable. "This means we can expect more mess to come in the years ahead as the industry navigates ebook globalization."

Much of what Kobo now finds too objectionable is still accepted by Smashwords. Kobo is going to begin increasing their internal vetting procedures, much as Apple began doing over a year ago. Mr. Coker states clearly, "I realize there are members of the author community who would prefer we throw our bodies upon swords to protect the ability of Smashwords authors to distribute the now-restricted categories to Kobo. That's not going to happen."

## *What Can You Do About Moral Censorship?*

Moral censorship is defined as the removal of materials that are obscene, or otherwise considered morally questionable. Any author who wishes to push the envelope, and is willing to argue over the censorship of his/her book, should always endeavor, at every opportunity, to artistically interweave an important moral or political issue into their erotic or romance work. The hope is that by doing so, the work, taken as a whole, can be shown to possess serious literary, artistic, political, or scientific value, taking the wind out of the sails of censor-shits.

Other than that, little else can be done. The Amazon adult filter has long been a topic of much discussion in forums and on blogs. When the October surprise with Kobo caused another flare-up among erotica authors, the Amazon adult filter again

predominantly figured in discussions as authors began sharing experiences and learning how each ebookstores adult filter works. The amazing part is that so little is known.

## *What is the Infamous 'Amazon Adult Filter'?*

For certain kinds of adult content, Amazon applies what authors often call an "adult filter." Once an ebook becomes filtered, it stops showing up in search results. For some bestselling authors, such as Selena Kitt, one of the groundbreaking mavens of modern erotic romance, this has caused top-selling ebooks to drop out of the ratings charts and become poor sellers. This dramatic effect on sales makes the filter a big concern for authors who publish erotica or erotic romance.

The corporate concept behind the filter appears to be their desire in avoiding adult content from showing up in search results for buying readers who are not looking for it. "Buyers searching for 'stories for daddy to read to his daughter' certainly do not want to be confronted with 'Daddy Breeding Daughter' stories in their search results," writes one blogger.

However, Amazon remains tight-lipped to the extreme about how and why they apply their adult filter to ebooks they publish. This causes any available information to be based not on fact, but on speculation and the patterns that authors observe. Theories on why Amazon takes this hardline attitude vary. Some believe it could be that Amazon is working to eliminate erotica completely from non-erotica-buying customers' eyes. Most likely it's that Amazon is trying to ensure authors can't game the system and outwit whatever their filter is trying to accomplish. A probability exists that it could also be just a vague policy interpreted arbitrarily by middle management, and implemented unevenly by lower-level workers.

## *Do Other eBookstores Filter Their Adult Content?*

Every website that sells ebooks has a limit of some type on the content that those ebooks can include. Some of the restrictions are legal mandates, while other restrictions are policy, based on social pressures of morality police.

Amazon puts their adult filter on ebooks arbitrarily, with no rhyme or reason, no transparency, does not tell publishers or authors when an ebook gets filtered, and refuses to tell authors what got the book flagged in the first place. Amazon

forbids incest, rape, bestiality, and sexual situations involving underage sex, but often is seen to allow pseudo-incest, and unequally allows it past their filter.

While Kobo only recently began filtering or suppressing adult titles, they have long had erotica categories that simply do not function when an author lists their books in them. Kobo's search engine is notoriously quite poor—which means those missing categories make a difference in sales. Further, they refuse to allow authors to use keyword description tags even though they would be useful.

Smashwords was one of the first retailers to deal with the erotica filtering problem. PayPal refused to deal with them unless they removed all hardcore erotica. Erotica was banned for several weeks in 2012 until Mark Coker installed a new filter and made a deal with PayPal. Smashwords continues to allow incest as of this writing, but unevenly forbids other sexual situations such as bestiality and underage; apparently depending on the reviewer's mood on a particular day, and if you get an experienced reviewer who has been with Smashwords a few years or is one of the newer employees. They are also more restrictive on the book descriptions.

In contrast to Smashwords, many authors say that Barnes & Noble doesn't seem to limit their content at all—however, some bestselling authors like Selena Kitt have seen their books artificially lowered in search engine rankings at Barnes & Noble. She says they:

- Misrepresent their "bestseller" list by keeping certain adult books out of the top 100. They tag certain books in their system somehow, which weighs them down in the ranks, like an anchor. Once a book is flagged, it won't go past the "anchor." This happened to my box sets, which sold more than enough to get me into the top 100, but my books wouldn't go past 126, 127 and 128 respectively.
- Push erotica and adult titles to the back of their search engine function, so that those titles appear behind those which are ranked far below them."

The Apple iStore has no erotica category whatsoever, and they *claim* to totally reject all adult and erotic books, or any book which might appear to fall in this category either by cover image, title, or book description. They are also quite liberal in interpreting what connotes adult material. However, Apple can be extremely arbitrary in enforcing this policy.

W. H. Smith solved the erotica problem by shutting down their entire website, and not going back online until they had removed ALL self-published and small-press books. Permanently.

The difference between refusing to sell content like Apple, and Amazon's adult filter, is that the filter is imposed invisibly, without warning or notification. This leaves the author high and dry, because as far as the author knows, the ebook has been published on Kindle Direct Publishing, and is now on sale. However, the ebook cannot be found easily (if at all) by buyers who might want to buy the ebook.

Ebook censorship has also affected graphic artists who create erotic book covers as part of their living. It's a fine line between what is permissible, and what now is not. A naked bottom is not permissible; now the model must be wearing a thong. That tiny strip of material makes a model acceptable.

However, just because the cover is permissible does not mean it will pass adult filters. Hands cupping a woman's breasts, be it her own or her partner's, is no longer permissible… usually. This makes it difficult for an artist to create a cover intriguing enough to inspire a purchase, but not so revealing that the book is rejected by the ebook publisher AND the adult filters.

### *What Happens When An Ebook Is Filtered?*

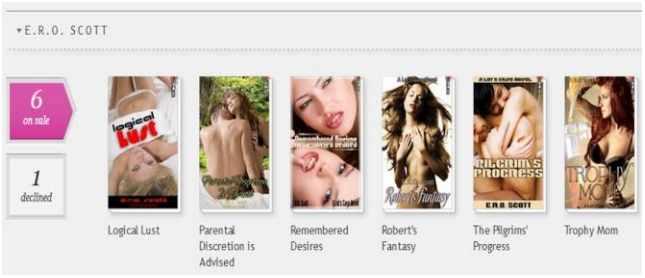
On most websites, if an ebook gets filtered, it no longer shows up in search results for searches performed using the main search tool on the website. But on the Amazon website, if a person searches under the "ebooks" product category, or "Kindle ebooks", or does the search from a Kindle device, then the filtered ebooks often show up with no sign that they are heavily filtered anywhere else.

Most ebook buyers search from the main search bar on the ebookseller's website. You probably do, too: when you're looking for an ebook on Amazon, you probably enter the Amazon.com URL in your browser's address bar. On arrival at the Amazon website, you then type what you're looking for in the first search box you see. If the ebook you want does not appear in these results, a lost sale occurs, due to filtering. Another, less obvious, effect we observe on the Barnes & Noble website is that even when the ebook title is included in search results, the filtered ebooks appear way below the unfiltered ebooks. This means if unfiltered ebooks exist which use the same keywords as your filtered ebook, then you will never reach the top of the search results—and usually will show up two or three pages

later. Few buyers will actually find your ebook, see your beautiful cover, and read your compelling title.

This same filter effect also extends to "also-boughts", the list of books that other customers also bought which a buyer sees on each ebook's webpage. Unfiltered ebooks get priority here. Unless your ebook is near the top of the "also-boughts" list for an ebook, buyers will not see your title.

In Kobo's October surprise, all romance erotica was removed from all search results in lieu of unpublishing the titles. Many authors noticed sales shrink to zero, but saw no mention in their control panel of what was happening. Some authors were alerted by a mysterious email that, in general, there was a temporary issue, but it would be taken care of shortly.




**Kobo's Control Panel with Declined eBook**

Notice the Kobo control panel shown above. Six ebooks are shown as "on sale" and one ebook is shown as "declined". However, a search using Kobo's search tool showed not one of these ebooks as being available on the website for sale.

## *What Ebooks Get Filtered?*

Though Amazon remains highly secretive about why they filter, and what content they filter, clear patterns have emerged. Most of the filtering concentrates on content that is close to banned without actually crossing the banned content line.

Pseudo-incest—where the participants are in the same family, but not blood related, like a stepchild and stepparent—is tolerated somewhat on Amazon, but some key words, like "daddy", will trigger the adult filter more often than other key words, even for the pseudo-incest category.

Recently—some authors speculate it's because of high-profile sexual assaults in the news—other terms have been heavily filtered, too. The words "gangbang"

and “breeding” in ebook titles have been hit hard, presumably because they rightly or wrongly imply lack of consent on the female participant’s part.

Covers are a censorship problem on all ebookstores, too. “Hand bra” covers, with the model covering her otherwise-naked breasts only with her hands, are typically filtered if not disallowed altogether. If something else keeps her breasts hidden, that’s usually perfectly fine. But if it’s just the hands, they will usually be filtered.

### *How Do I Know If They Filter My Ebook?*

Start by searching on the website’s main search bar for the author or title of the ebook. With most ebookstores, this is sufficient. If the ebook does not show up now, most likely it’s been filtered. On the Amazon website, ensure that “All Products” is selected in the drop-down list box on the left of the search field.

However, with Amazon, the best way to find out is by using the special tracking tool available at the website, SalesRankExpress. Whenever you track an ebook on Amazon from this site, not only do you obtain a wealth of information about the ebook, the tracking tool also lets you know if an ebook is filtered: the word ADULT appears in red caps after the title.

### *Oh, My! I’ve Been Filtered. What Should I Do?*

This is not a big deal for some authors. On Amazon, pseudo-incest has been filtered for a long time. Ebook buyers seem willing and able to bypass this filter. As Amazon’s filter censorship increases—and it’s certain to keep growing—many erotica authors believe ebook buyers, especially those who enjoy erotica containing these specific kinks, will figure out how to find it. On websites other than Amazon, if it’s filtered, it might be found via links on Google searches, if the website supports crawler searches from search engines.

Incredibly, numerous authors have tried contacting KDP support at Amazon to try getting the filter removed on a particular ebook. Lot’s Cave is not aware of one author who has ever succeeded. Amazon’s continuing policy of refusing to discuss the adult filter and why or how it’s applied, in both specific cases and general cases, leads to nothing but frustration for unfortunate authors. Lot’s Cave has personal knowledge of one particular publisher who attempted to complain because the filter was not merited. The result was that the publisher was permanently banned from doing any business with Amazon, and the ban also affected each of the authors that publisher represented.

If you find your ebook filtered, the only viable option is to take down the ebook and completely republish it, so that Amazon is caused to review it again. Try changing the title, changing the cover, and changing the description as you do this, in order to avoid targeted keywords and content. For example, when one author changed a series name from "Show Me, Daddy" to "Bad Girl" and republished, the author was successful in avoiding the dreaded filter.

Amazon more than frowns on the practice, particularly if nothing substantial was changed in the ebook when it was republished. However, republishing might be worth a try. Just be aware that if you are not careful, your book can be permanently banned for any reason in the form of a block, and no appeal exists.


**Amazon's Control Panel with Blocked eBook**

With the growing use of filtering on the Amazon website, many writers are simply accepting it, and just moving on to write the next book. As some authors have pointed out, the time you spend rewriting, tweaking the cover, and republishing is time you didn't spend writing new content that is potentially more profitable.

## *Why Is Filtering On Amazon Important?*

Amazon is the largest sales channel for most independent authors. Some authors' entire income depends on their ebooks' exposure to potential buyers and readers. Amazon's adult filter, while understandable from their point of view, is a major problem for authors who want to write erotic romance content.

Part of the problem with Amazon is the secrecy and apparent arbitrariness in their implementation of the filter. Many authors have seen ebook titles that were perfectly acceptable on Amazon one day, with no warning turn into stealthily hidden content on the next day. Authors are (or should be) partners with Amazon—they each make money for the other. This relationship becomes unbalanced if Amazon can unilaterally decide to make some erotic content less available than other erotic content without ever explaining why they're doing it.

A potentially bigger problem, however, is what this action says about Amazon's overall approach to censoring adult content. If they are so worried about being seen by particular customers, or even by the public, as a major seller of X-rated erotica, will they begin widening the filter more and more? Will the filtering become more insidious, leading to worse sales… or worse, an overall ban on adult ebooks?

It probably will. However, since romance erotica is such a good moneymaker for everyone involved, some other self-publishing platform is sure to become available. Amazon stands to lose significant revenue if they make their most popular products less available. But for now, the filter appears to be there to stay. If you publish erotica, you'll want to keep an eye on this—it affects you directly, and it might affect you worse in the future.

## *Slippery Slope Blog: Erotica Censorship*

The following article is from a 2012 blog posting written by Selena Kitt. Though the article is dated, the information contained herein remains relevant, and probably will for years to come. Besides… she has a unique way with words, making each of her books a wonderful discovery. May her Excessica.com live long and prosperously.


———————

"Well, the morality police are at it again. And this time, it's scarier.

"First, Amazon started banning books from their site. They backed down on their anti-censorship stance and removed the Pedophile Guide. Then they went after books that contained incest, bestiality and rape.

"After the dust settled, it was clear that, while biological incest was a no-no, Amazon would, however, allow sex between of-age adults who were related to one another in a non-biological manner—step-relations or adopted relations. Suddenly the top 100 in the Erotica category on Amazon exploded with "pseudo-incest" titles. And the covers were far more revealing than anything the category had previously carried. Titles like "Daddy Licks My Pussy" became commonplace. The line between "erotica" and "porn" had blurred even further.

"Most (if not all) of these titles were written and published by "Indie" authors, who were distributing them not only through Amazon, but through other self-publishing platforms as well—Barnes and Noble, Apple, Bookstrand, All Romance Ebooks. The latter had even taken a stance against the "porn-like" covers and refused to allow them on their new releases front page, especially if they contained content relating to "pseudo-incest" and what they called "barely-legal" sex.


"(I assume this is sex between an older person and someone in the age-range of 18-19. Of course, it's interesting to note that they didn't seem to object to the plethora of "Twink" m/m titles on their site—18-19 year old males having sex with older men. No, their objection seemed entirely against 18-19 females having sex with older men).

"Soon after All Romance Ebooks had imposed these restrictions, and Bookstrand had taken Indie erotica authors off their front page as well, Bookstrand sent out an email to all of its publishers. This is from that email:

*We were informed by PayPal, without notice, and by our credit card processing company, that we are required to remove all titles at BookStrand.com with content containing incest, pseudo incest, rape, and bestiality, effective immediately.*

*We request that you immediately log into your account and unpublish all titles that contain the restricted content. If you have uploaded titles containing restricted content and do not unpublish these titles as we are requesting, we will deactivate your entire publisher account, which will remove all your titles from sale.*

*We urge you to log into your account and remove these titles as soon as possible to prevent your account from being deactivated today.*

*If your account is deactivated, it may or may not be reinstated in the future. After deactivation, requests for reinstatement will require us to go through your catalog, which may take several weeks or longer for us to process.*

"Note that they list not only "incest" but "pseudo-incest" as well. Now, while "incest" is illegal in most states, "pseudo-incest" is not. (Woody Allen, anyone?) Having sex with a step-relation or an adopted relative is just... sex. It might *seem* creepy or weird, but it isn't illegal.

"Now they're not just targeting illegal acts (this is in *fiction* mind you) now they're targeting acts that may simply just be "morally objectionable." Where else do they do this? Are they targeting authors who write about serial killers?

"Of course, erotica writers everywhere were up in arms. How could they do this? Why? A petition even cropped up, and it has some excellent points, if you'd like to go sign it:

"Earlier this week, PayPal told Bookstrand, a major distributor of erotic romance and other erotic content on the Internet, that if certain titles containing "objectionable" material were not pulled from Bookstrand's shelves, Bookstrand's PayPal account would be shut down and the funds within confiscated.

"PayPal has a long track record of suspending, freezing, and terminating customer accounts on the thinnest of justifications, but this is going too far. By telling Bookstrand what books they can and cannot sell using PayPal services, they are also telling readers they don't have the right to read what they wish and telling authors that PayPal has the right to take away their freedom of speech and the press.


"If you use the Internet to find new reading material, if you use PayPal, and/or if you support the rights of authors and readers to have the widest possible selection of topics to read and write about, please sign this petition and let PayPal know that censorship, no matter what form it takes or how it is implemented, is not acceptable. Readers, publishers, storefronts and authors have the right to choose what books are sold and bought.

"Don't leave it up to PayPal to choose how you spend your money or where.

"The fact is, and we all know it—sex and porn make the Internet go-round. It's a huge industry, even if there is a vocal minority who doesn't like it. People like their porn, and they want access to it. So why would PayPal refuse to sell something that wasn't even illegal in any state in the U.S.?

"I got my chance to ask that question, because a few days after the BookStrand debacle, Excessica received a phone call from PayPal. THE phone call. And then came the follow-up letter:

- After a recent review of your account activity, it has been determined that you are in violation of PayPal's Acceptable Use Policy... In order to comply with our Acceptable Use Policy and avoid the limitation of your account, you will need to:
- Remove those items from http://www.excessica.com that violate PayPal's Acceptable Use Policy. Example/s: **all ebooks containing themes of rape and incest**.
- Under the Acceptable Use Policy, PayPal may not be used to send or receive payments for certain sexually oriented materials or services or for items that could be considered obscene.

"When I asked if "pseudo-incest" was included (since that was mostly all we had on the site) the representative confirmed that yes, that would have to be removed. "What about BDSM?" I asked—a category full of dubious consent. "That would have to be removed as well."

"That's right—they weren't just targeting illegal acts between non-consenting adults. Now they were **targeting legal sex between consenting adults**.

"When I asked her why they were doing this, I received no answer except, "We've always had this policy." Perhaps, but it seems that they weren't previously enforcing it very seriously. Why now?

"The only answer I received from PayPal was silence.

"So I started to search for alternatives to PayPal. Not an easy task, I might add. Like Amazon, they are a veritable monopoly in their field. At least they graciously (ha) gave us thirty days to comply, after which the account would be frozen or cancelled. So I had some time. What I discovered was that most merchant-services (i.e. companies that allow you to use Visa and MasterCard on their site) which allow adult products charge a $5000 up-front fee to use their service. Then, they take exorbitant percentages from each transaction. Some 5%, some 14%, some as high as 25%.

"Now it was starting to make more sense. The credit card companies charge higher fees for these "high-risk" accounts because there is a higher rate of what they call "chargebacks." You know that protection on your credit card, where if you dispute the charge, you don't have to pay for it? Well they've determined that happens more with porn and gambling and other "high-risk" sites than others, so they're justified in charging more money to process payment for those sites.

"PayPal doesn't want to have to pay Visa and MC for carrying "high risk" accounts on their books. You have to remember that PayPal is a middleman. Sites that carry high-risk material have to pay the high-risk costs of doing business. If you're going through PayPal, you don't have to pay that. Until PayPal catches you. And then they insist you take down your high-risk content or lose your account.

"What Bookstrand did was use this as an excuse to get rid of a problem. They were having difficulties integrating the harder-core Indie books into their site (although to be fair, the books in question, in terms of *content*, weren't actually any more hardcore than many of the books in their Siren collection—they just had more revealing covers and more conspicuous titles) and so they used this crackdown by PayPal to eliminate hundreds of Indie books.

"Who would be next? All Romance Ebooks? Smashwords? Amazon itself? Erotic writers everywhere said that Amazon was immune from PayPal's clampdown, but were they? No, they didn't accept PayPal on their site. But they did accept Visa and MasterCard. Where, exactly, did the buck stop?

"I'm not sure, but I did find out an interesting piece of information that made me pause and consider where all of this may be leading.

"Someone suggested the new "Amazon Payments" to me as an alternative to PayPal. I thought it made sense if Amazon sells our books, why would they refuse to pay for them through their payment service?

"Well guess what? I opened the account, and they closed it a day later, stating:

> Thank you for registering with Amazon Payments. We appreciate your interest in our product.
>
> Unfortunately, at this time, we are not able to approve your request for an Amazon Payments Business Account based on our review of your intended use of our payments service.
>
> As stated in our Acceptable Use Policy **the following product or services are prohibited from using Amazon Payments**:
>
> Adult Oriented Products and Services includes pornography (including child pornography), **sexually explicit materials (in all media types such as Internet, phone, and printed materials),** dating services, escort services, or prostitution services.
>
> While we appreciate your interest, the blocking of your account is a permanent action. Please feel free to write to us for any questions that you may have.

"Which means, Amazon may not be "immune" to the PayPal rules after all. Because they still have to process credit cards through the same credit card companies that PayPal does.

"I don't know what this means for the future of erotic self-publishing, but like the banning of certain titles begun by Amazon, it is a very slippery slope indeed. Today it's "pseudo-incest" and "rape" (*including BDSM titles*) which is nothing more than **legal sex between consenting adults**.

"What will it be tomorrow?

Selena Kitt

www.selenakitt.com

http://www.selenakitt.com"

*EDITED TO ADD:*

"I'm putting this addendum here, rather than create another blog post, because so many people are linking to it. Bookstrand took the final step and completely eliminated "most of the Indie titles" from their site. They sent an email stating they wanted to "go back to their roots." Whatever that means. Of course, this decision came without warning, and while Indie authors were still trying to comply with their (ever-changing!) new Terms of Service.

"Then Bookstrand said to DearAuthor that Siren ***"NEVER has and NEVER will publish books with the disgusting themes of incest, pseudo incest, rape for sexual titillation, or bestiality with naturally occurring animals."***

"No, they don't publish them. (Except for this one. And this one. Oh and this one). But they sure as heck didn't have a problem distributing them and making 50% commission on selling them before PayPal said, "Hey, you can't do that!" did they? Nope. No problem cashing that check. And they've been selling our stuff (incest and pseudo) since 2008. Hypocrite much?

"Well I guess we couldn't expect them not to cave to PayPal. I just wished they'd done it with more regret and class.

"And I wondered who might be next, didn't I? Well... here we go...

"All Romance Ebooks has been contacted by PayPal and given the same ultimatum as Bookstrand. They have now changed their policies and are implementing a new structure, splitting erotic romance from erotica. Of course, the concern is that perhaps they, like Bookstrand, will simply use that structure to lop off erotica as a category and go without it. Only time will tell.

"In the interest of transparency, here is the letter from All Romance Ebooks:

> This communication is being sent out to all publishers since it involves a process change:

From the beginning, we conceived of All Romance as a niche bookstore that would sell a wide variety of romance novels. Our primary demographic is adult women who enjoy reading romance subgenres featuring stories between two consenting adults. We opened with an “Erotica” category and, until fairly recently, that category was dominated primarily by Erotic Romance, which was our intent. “Vampires/Werewolves” was intended to carry romances featuring Vampires and Werewolves. “Gay” was intended to carry romances featuring Gay men. Over the past few months we’ve begun to receive more and more pure Erotica titles. Admittedly, there is a segment of our readership that wants to read Erotica. There is another segment that prefers to read Erotic Romance. Still others enjoy both, or neither.

In order to improve discoverability for all, we’ve decided to create separate Erotic Romance and Erotica categories. The “old” Erotica category will soon be retired. All titles in that category will need to be re-shelved prior to its retirement to avoid inactivation. We have also made some amendments to our restrictive section to provide some further guidance as to the types of books we feel will resonate best with our Romance community. Please review section 7 of the publisher contract here. If the amended terms are ones you can’t abide by, please let Barbara know and she will accept your notice of termination. If they are, accessing your publisher panel after today will be sufficient to constitute acceptance. We request that you take immediate initiative to remove any titles that may be in breach.

In order to help publishers shelve titles appropriately and aid readers in finding the types of books they most want to enjoy, we’ve worked in conjunction with a team of Erotica and Erotic Romance authors and publishers to craft some guidelines. We appreciate that this division is rather nuanced and that our views may not equate with yours. None-the-less, these guidelines will serve to direct customers, so we ask that you refer to them when deciding upon category placement.

In the next one to two weeks, you will receive notice that re-shelving has commenced. You will have seven calendar days in which to complete the re-shelving process. During the seven-day period, only titles in the New Erotica and New Erotic Romance categories will be visible to the public. If you publish all Erotica or all Erotica Romance, you'll be able to complete the process with one simple step upon login. If you would like us to complete that step for you, please send an email to me, Subject: Shelving. Indicate in the body of the email if you publisher only Erotica or Erotica Romance. I will confirm with you via email when your migration is complete.

If you publish a mixture of Erotica and Erotic Romance, when re-shelving begins upon login you will be directed to a pop-up page that lists only your current Erotica content along with summaries. You will need to check a box for each title, indicating whether it falls into the Erotica or Erotic Romance category.

I'm including our guidelines below so that you can begin planning for this process:

**Erotic romance** is a Romance containing frequent, sexually explicit love scenes. The main plot centers around two or more people falling in love and struggling to make the relationship work. The love scenes are a natural part of the romance and described using graphic and frank language. Typically these stories have an HEA (happily ever after) or HFN (happy for now) ending.

**Erotica** is a sexually explicit story, which explores and focuses on a character's sexual journey rather than an emphasis on a developing romantic relationship. While such an erotic story may have elements of romance, it is the sex that primarily drives the story.

"I find this rather questionable:

*"...accessing your publisher panel after today will be sufficient to constitute acceptance.*"

"So if we want to log in and see our sales or look at our titles, we have to accept these new terms of service? This smacks of what Bookstrand did. They gave no notice to publishers of the terms of service changes (and seemed to change them every five minutes!) and certainly gave no indication that they would be removing the entire "Indie" section of books until it happened. All Romance Ebooks has followed their example, deactivating books and then saying, "Oh by the way, when you log into your account to find out what's going on, you agree to our new Terms of Service." Really!? No box to check, nothing. The contract was amended without anyone's knowledge or consent and then come to find out that logging in to figure out what's going when publishers find their books gone means they somehow agree with the stuff they weren't told about? That's so not cool.

"And what are All Romance Ebooks' new restrictions? Funny, they look similar to the issues PayPal was having with the Bookstrand books. Incest, pseudo-incest, bestiality and rape. All Romance, however, has taken this one step further, and has banned "barely legal" (their term) books. This is, apparently, sex between 18-19 year old women and older men, at least if the books they've banned so far are any indication. Of course, they have lots and lots of "twink" books (18-19 year old males having sex with older men). So far, no banning of those. Double standard much!?

"These will sound familiar:

> 7. Restrictions
>
> All Romance reserves the right not to accept any particular Work submitted by Publisher at All Romance's sole discretion, and may remove any particular Work from sale at any time and for any or no reason. Pornographic and obscene Works are restricted and not allowable for upload on the All Romance site, including without limitation, Works depicting sexual acts involving persons under eighteen years of age (exceptions may be made for certain works of literary fiction involving time periods wherein the age of consent was less than 18 and the purpose of the depiction is not for sexual titillation), Works involving any exploitation of minors, sexual or otherwise, Erotic Works which contain incest or pseudo-incest themes, Works that are written for or being marketed to the barely legal market, rape for the purposes of

titillation, scenes of non-consensual bondage or non-consensual sado-masochistic practices, bestiality with naturally occurring animals, sex with non-animated corpses, snuff or scat play.

“Well.

“Two distributors down.

“Next?

Selena Kitt

www.selenakitt.com

http://www.selenakitt.com”

# Pornography Recordkeeping Requirements

## *Title 18 U.S.C. §2257 Statement*

The pornography recording regulations say that secondary producers are limited to those images involved in commercial operations. This limits the recording requirements of secondary producers to material intended for commercial distribution, and excludes materials for noncommercial or educational distribution from the regulation. (73 Fed. Reg. at 77,469.)

U.S. Attorney General Eric Holder has stated that the statute is "limited to pornography intended for sale or trade," 73 Fed. Reg. at 77,456. The comment section of the regulations makes the same conclusion.

The Sixth Circuit has accepted this interpretation in its rulings. http://ilt.eff.org/index.php/2257_Reporting_Requirements

TITLE 18 > PART I > CHAPTER 110 > § 2257

§ 2257. Record keeping requirements

(a) Whoever produces any book, magazine, periodical, film, videotape, digital image, digitally- or computer-manipulated image of an actual human being, picture, or other matter which—

(1) contains one or more visual depictions made after November 1, 1990 of actual sexually explicit conduct; and

(2) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce;

(3) shall create and maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction.

(b) Any person to whom subsection (a) applies shall, with respect to every performer portrayed in a visual depiction of actual sexually explicit conduct—

(1) ascertain, by examination of an identification document containing such information, the performer's name and date of birth, and require the performer to provide such other indicia of his or her identity as may be prescribed by regulations;

(2) ascertain any name, other than the performer's present and correct name, ever used by the performer including maiden name, alias, nickname, stage, or professional name; and

(3) record in the records required by subsection (a) the information required by paragraphs (1) and (2) of this subsection and such other identifying information as may be prescribed by regulation.

(c) Any person to whom subsection (a) applies shall maintain the records required by this section at his business premises, or at such other place as the Attorney General may by regulation prescribe and shall make such records available to the Attorney General for inspection at all reasonable times.

(d)

(1) No information or evidence obtained from records required to be created or maintained by this section shall, except as provided in this section, directly or indirectly, be used as evidence against any person with respect to any violation of law.

(2) Paragraph (1) of this subsection shall not preclude the use of such information or evidence in a prosecution or other action for a violation of this chapter or chapter 71, or for a violation of any applicable provision of law with respect to the furnishing of false information.

(e)

(1) Any person to whom subsection (a) applies shall cause to be affixed to every copy of any matter described in paragraph (1) of subsection (a) of this section, in such manner and in such form as the Attorney General shall by regulations prescribe, a statement describing where the records required by this section with respect to all performers depicted in that copy of the matter may be located. In this paragraph, the term "copy" includes every page of a website on which matter described in subsection (a) appears.

(2) If the person to whom subsection (a) of this section applies is an organization the statement required by this subsection shall include the

name, title, and business address of the individual employed by such organization responsible for maintaining the records required by this section.

(f) It shall be unlawful—

(1) for any person to whom subsection (a) applies to fail to create or maintain the records as required by subsections (a) and (c) or by any regulation promulgated under this section;

(2) for any person to whom subsection (a) applies knowingly to make any false entry in or knowingly to fail to make an appropriate entry in, any record required by subsection (b) of this section or any regulation promulgated under this section;

(3) for any person to whom subsection (a) applies knowingly to fail to comply with the provisions of subsection (e) or any regulation promulgated pursuant to that subsection;

(4) for any person knowingly to sell or otherwise transfer, or offer for sale or transfer, any book, magazine, periodical, film, video, or other matter, produce in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce or which is intended for shipment in interstate or foreign commerce, which—

(A) contains one or more visual depictions made after the effective date of this subsection of actual sexually explicit conduct; and

(B) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce;

which does not have affixed thereto, in a manner prescribed as set forth in subsection (e)(1), a statement describing where the records required by this section may be located, but such person shall have no duty to determine the accuracy of the contents of the statement or the records required to be kept; and

(5) for any person to whom subsection (a) applies to refuse to permit the Attorney General or his or her designee to conduct an inspection under subsection (c).

(g) The Attorney General shall issue appropriate regulations to carry out this section.

(h) In this section—

(1) the term "actual sexually explicit conduct" means actual but not simulated conduct as defined in clauses (i) through (v) of section 2256 (2)(A) of this title;

(2) the term "produces"—

(A) means—

(i) actually filming, videotaping, photographing, creating a picture, digital image, or digitally- or computer-manipulated image of an actual human being;

(ii) digitizing an image, of a visual depiction of sexually explicit conduct; or, assembling, manufacturing, publishing, duplicating, reproducing, or reissuing a book, magazine, periodical, film, videotape, digital image, or picture, or other matter intended for commercial distribution, that contains a visual depiction of sexually explicit conduct; or

(iii) inserting on a computer site or service a digital image of, or otherwise managing the sexually explicit content,[1] of a computer site or service that contains a visual depiction of, sexually explicit conduct; and

(B) does not include activities that are limited to—

(i) photo or film processing, including digitization of previously existing visual depictions, as part of a commercial enterprise, with no other commercial interest in the sexually explicit material, printing, and video duplication;

(ii) distribution;

(iii) any activity, other than those activities identified in subparagraph (A), that does not involve the hiring, contracting for, managing, or otherwise arranging for the participation of the depicted performers;

(iv) the provision of a telecommunications service, or of an Internet access service or Internet information location tool (as those terms are defined in section 231 of the Communications Act of 1934 (47 U.S.C. 231)); or

(v) the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the content of the communication, except that deletion of a particular communication or material made by another person in a manner consistent with section 230(c) of the Communications Act of 1934 (47 U.S.C. 230 (c)) shall not constitute such selection or alteration of the content of the communication; and

(3) the term "performer" includes any person portrayed in a visual depiction engaging in, or assisting another person to engage in, sexually explicit conduct.

(i) Whoever violates this section shall be imprisoned for not more than 5 years, and fined in accordance with the provisions of this title, or both. Whoever violates this section after having been convicted of a violation punishable under this section shall be imprisoned for any period of years not more than 10 years but not less than 2 years, and fined in accordance with the provisions of this title, or both.

# Recordkeeping Compliance Statements

*Sample Statement No 1*

18 U.S.C. 2257 Recordkeeping Requirements Compliance statement

18 U.S.C. 2257 Statement

All models, actors, actresses and other persons that appear in any visual depiction of actual sexually explicit conduct appearing or otherwise contained in this Website were over the age of eighteen years at the time of the creation of such depictions.

All other visual depictions displayed on this Website are exempt from the provision of 18 U.S.C. section 2257 and 28 C.F.R. 75 because said visual depictions do not consist of depictions of conduct as specifically listed in 18 U.S.C section 2256 (2) (A) through (D), but are merely depictions of non-sexually explicit nudity, or are depictions of simulated sexual conduct, or are otherwise exempt because the visual depictions were created prior to July 3, 1995.

With respect to all visual depictions displayed on this website, whether of actual sexually explicit conduct, simulated sexual content or otherwise, all persons in said visual depictions were at least 18 years of age when said visual depictions were created.

The owners and operators of this Website are not the primary producer (as that term is defined in 18 USC section 2257) of any of the visual content contained in the Website. Original records are kept by the following companies Phoenix Content, Photo By AG, Polymax ltd. The full list, addresses or specific model enquiries are available on request. Official requests only please.

If you have any questions please do not hesitate to contact us:
support@domain.com

*Sample Statement No 2*

CUSTODIAN OF RECORDS

U.S.C. TITLE 18, SECTION 2257 COMPLIANCE

In compliance with United States Code, *Title 18, Section 2257*, all models, actors, actresses and other persons who appear in any visual depiction of sexually explicit conduct appearing or otherwise contained in or at http://www.xxxxxxxxxx.com were over the age of eighteen years at the time of the creation of such depictions.

Records required to be maintained pursuant to *U.S.C. Title 18, Section 2257* are kept by the custodian of records at:

Address: ul.Grutzowa 3b/86, Bialystok, Podlaskie Poland

Custodian of Records Name: Law Offices of EuroMark

Phone: +48 608 744 774

(official inquiries only please)

Should you have any questions, please email xxxxxxxx.com support

Admin@xxxxxxxx.com

*Sample Statement No 3*

18 U.S.C. 2257 Recordkeeping Requirements Compliance Statement

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With respect to all visual depictions displayed on this website, whether of actual sexually explicit conduct, simulated sexual content or otherwise, all persons in said visual depictions were at least 18 years of age when said visual depictions were created.

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The original records required pursuant to 18 U.S.C. section 2257 and 28 C.F.R. 75 for all materials contained in the website are kept by the following Custodian of Records:

**adult.com** http://www.adult.com/2257.htm

**convertfam.com** http://cs.mail.com/udsl-2257.html

**cvmoney.com** http://incestvid.com/support.html

**daddycash.com** http://momslovers.com/legal.html

**getmorecash.com** http://getcash.com/2257.html

**incestms.com** http://www.incestms.com/2257.htm

**incestxxxxx.com** http://www.incest.xxxxx/2257.htm

**noscashx.com** http://noscashx.com/18USC202257Statement.html

**realvideo.com** http://www.realvideo.com/2257.html

**royalclubs.com** http://royalclubs.com/records.html

**sexandmoney.com** http://www.sexandmoney.com/2257sexandmoney.html

**unicash.com** http://www.pornoview.com/2257.html

**xxxcash.com** http://www.incestwebsite.com/2257.html

# Does Sex Sell?

As a writer of erotic romance novels, you probably believe the old aphorism "Sex Sells", right? Maybe Not. Anne R. Allen suggests on her blog. "Why you Might Want to Rethink those Steamy Scenes in Your Novel" Her blog site, to which this chapter is dedicated, contains a great deal of useful information. She writes:

> "When my publisher asked me to remove the explicit sex scenes from my upcoming novel, *The Lady of the Lakewood Diner* I thought he was nuts. Sex sells, doesn't it?
>
> "Maybe not so much anymore.
>
> "That screeching sound you hear is the abrupt U-turn the publishing industry is taking away from erotic material."

Her blog lists a number of factors that have contributed to the change.

## *Factors Contributing to Change:*

1. **Erotica Fatigue –** After the breakout success of Fifty Shades of Grey, the self-publishing industry experienced a surge in copycat ebooks. Now, the industry seems to be suffering from erotica overload. Agent Ginger Clark tweeted from the Frankfurt Book Fair in October that she was observing heavy "erotica fatigue" in the traditional publishing market.
2. **The Global Marketplace –** The marketplace for ebooks is now global, which led Smashwords' Mark Coker to say, *"Major retailers set their sights on a global market where the cultural, religious or political norms in some countries will find certain categories of erotica too objectionable."* Meanwhile, credit card processors concerned about both national and international face, are canceling service to many publishers of erotica and refusing to do business with others.
3. **Apple has No Erotica Category –** While increasingly more people read ebooks on iPads and iPhones, Apple refuses to sell anything they think someone might call porn. Their heavy-handed purge removed

entire publisher accounts from the site because of a few so-called offensive titles.

4. **Amazon's "Erotica Ghetto" –** Amazon has created an 'adult filter' that separates erotica from other books for suggestions and also-boughts. Authors find when they're put in this "erotica ghetto" it greatly reduces their sales.
5. **No Sex, Please, We're British –** In July of 2013, the UK's Conservative government announced a "war on porn" that requires "family friendly" filters on all computers, and has made it illegal to possess material depicting rape.
6. **UK Tabloids'Object To An "Epidemic of Filth" –** Worries about "An Epidemic of Filth" in the book industry escalated in October of 2013 when UK tabloids began screaming about the non-existent problem of unvetted self-published porn. *The Daily Mail* used it as an excuse for an anti-Amazon diatribe and the online magazine, *The Kernel* attacked even venerable UK retailers like W. H. Smith, Foyles and Waterstones.

### *What This Means For Authors:*

Although the handful of books presented in the complaints were obviously offensive and illegal, the nuclear response to the October surprise sent a chill through the entire publishing industry. You can read independent author Michelle Fox's take on the whole mess at *the Indie Reader*. Ms. Fox points out that aside from the question of censorship, the big problem is that adult filter algorithms are never 100% accurate. In fact, she reports some of the "offending books" mentioned in *the Daily Mail* article weren't offensive at all. She says Amazon's erotica filter sometimes labels a book cover as porn just because it has a face on it.

It seems their adult filter measures pixels of skin tones, so a baby's face will show as large a percentage of skin as hardcore porn and can be labeled as such. We've also heard that Amazon's adult filter originally placed *Fifty Shades of Grey* into "Christian fiction" because the protagonist's name is "Christian". Anybody who's received Amazon's title suggestions knows they often get things comically wrong. Amazon's adult filter is constantly being revised and updated. Count on it getting more restrictive following the October surprise of bad press.

Smashwords' Mark Coker believes it will. Mr. Coker said this on his blog on October 15th: *"Smashwords erotica authors can now assume that erotic fiction*

*where the predominant theme, focus, title, cover image or book description is targeted at readers who seek erotic stories of incest, pseudo-incest or rape will find that their content is not welcome at the Kobo store. I've heard multiple reports that Amazon is cracking down on the same."*

It now seems the Smashwords filter developed for PayPal is no longer restrictive enough for Kobo and Apple.

Therefore, Coker has begun work on a "two tier" system for erotica. He says: *"Smashwords is considering adding new metadata fields for erotica authors so they can voluntarily tag their books as NSFAK (not safe for Apple/Kobo), but because these titles meet the Smashwords Terms of Service they are allowed at Smashwords and other Smashwords retailers. This will allow us to omit certain books from certain distribution channels while maintaining the flow to the Smashwords store and others."*

There's no question that some filtering was needed. Parents were understandably freaked when their kids got suggestions to read wildly inappropriate books. And not every adult is into kink. The "romance" category is a huge umbrella these days, and cover images can be pretty shocking to people who aren't used to looking at contemporary erotica. But because the filtering is done by robots, a lot of mistakes happen. And the algorithms powering the adult filters are secret, so nobody knows what words and images will tag a particular book as porn while not tagging another.

## *What If You Don't Write Erotica?*

It's bad enough for an erotic book to be shifted off to an "adult" section, but if your novel only has a few sex scenes, erotica buyers will think it's totally lame, but nobody else will see it.

This means that being flagged for adult content could kill your book dead.

That's why publishers figure it's better to be safe than sorry.

## *So, Does Sex Sell?*

If you can tell your story without explicit language and descriptions of body parts, you might consider leaving them out, since those are most likely to trigger the adult filters. Some authors have begun deleting "f" bombs as well as explicit scenes from their new novels, and don't think their story loses anything.

Does this censorship herald a return to the Puritanism that banned books like *Lady Chatterley's Lover* and *Lolita*? Are we going to return to something like the Hays Code when Hollywood studios banded together under former Postmaster General Will Hays to come up with a list of 36 self-imposed "Don'ts and Be Carefuls"? Will society allow adult filters to become the new Catholic Legion of Decency?

Yes. Lot's Cave really does believe so.

We could be wrong. Michael Tamblyn at Kobo wrote in *The Writing Life* on October 25, *"Many of our readers have no problem with an erotic title in their library next to their romance, literary fiction, investing or high-energy physics books. And we are here for the readers, so erotica stays, a small but interesting part of a multi-million-title catalogue, in all of its grey-shaded glory."*

But notice that he cautions, *"...if your dream is to publish "barely legal" erotica or exploitative rape fantasies, distribution is probably going to be a struggle for you. We aren't saying you can't write them. But we don't feel compelled to sell them."*

If you need another reason to avoid explicit sex scenes, consider this quote from Julian Barnes, *"Writing about sex contains an additional anxiety on top of all the usual ones: that the writer might be giving him or herself away, that readers may conclude, when you describe a sexual act, that it must already have happened to you in pretty much the manner described."*

For more quotes from famous writers on the subject, check out the great post from Roland Yeomans called "Sex, Must We?" at Writing in the Crosshairs.

Maybe the time has come when mainstream books will no longer be sprinkled with those titillating scenes that became *de rigueur* in the heyday of "steamy" novels by authors like Jacqueline Susann and Harold Robbins. Maybe writers will begin treating sex scenes like adverbs by asking themselves, "is this necessary to the story?"

Maybe…but maybe not.

In today's electronic age, it may grow increasingly difficult to sell erotic literature. Moira Nelligar, an ebook cover designer who has done hundreds of book covers for many well-known and top-selling authors concludes that the market is currently in a state of flux, and no one can know where the demand for romance erotica will force the market to settle.

However, Lot's Cave concludes that the heavier the censorship, the better the sex will sell… even if finding credit card processors grows increasingly problematic.

# About the Editors

*Phaedrus T. Wolfe* - www.lotscave.com - After editor Phaedrus T. Wolfe wrote a number of romance erotica novels but had difficulty finding publishers and resellers willing to accept his work, he established the web-based publishing company, Lot's Cave in the USA. This experience led to the founding of a Polish publishing company called Moje Ebooki, or 'My Ebooks' in local vernacular, a Lot's Cave Polska Corporation which represents over 10,000 ebook titles with more on the way.

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*Becca Sinh* - www.becca-sinh.com - Becca is a world-renowned erotica writer, editor, and publisher. She also designs adult websites, and frequently mentors promising new authors. Visit her site, or her twin sister's site, www.carnal-pleasures.com, for the very best in "taboo" erotica! *Boruma Publishing* - http://www.borumapublishing.com - was designed by authors, for authors, to meet the changing needs of today's publishing industry. Current genres include science fiction, paranormal, children's books, fictional romance, suspense thrillers, romance erotica, and "taboo" erotica that is forbidden by most mainstream publishers. Many more categories will be added soon.

**The End**

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