

# THE LAW & Legal Definitions

## A. Child Pornography.

An unprotected visual depiction of a minor child (federal age is under 18) engaged in actual or simulated "sexually explicit conduct", including a sexual act or a lewd or lascivious exhibition of the genitals. See 18 U.S.C. § 2256; *New York v. Ferber*, 458 U.S. 747 (1982), *Osborne v. Ohio*, 495 U.S. 103 (1990), *U.S. v. X-Citement Video, Inc.*, 513 U.S. 64 (1994). See also *U.S. v. Wiegand*, 812 F.2d 1239 (9th Cir 1987), *cert. denied*, 484 U.S. 856 (1987) ("Dost" tests for "lascivious"), *U.S. v. Knox*, 32 F3d 733 (3rd Cir 1994), *cert. denied*, 513 U.S. 1109 (1995) (scope of "exhibition". Note: In 1996, 18 U.S.C. § 2252A was enacted and § 2256 was amended to include "child pornography" that consists of a visual depiction that "is or appears to be" of a minor engaging in "sexually explicit conduct". Held invalid as applied to computer generated images that do not involve actual minors in *Ashcroft v. Free Speech Coalition*, 122 S.Ct 1389 (2002).

## B. Obscene (adult) pornography:

"Thus much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment." *Miller v. California*, 413 U.S. 15, 23 (1973). This is true even for "consenting adults." *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 57-59 (1973). "Transmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles." *Reno v. ACLU*, 521 U.S. 844, 117 S.Ct. 2329, at 2347, n. 44 (1997). The "Miller Test" applies to actual or simulated sexual acts and lewd genital exhibitions. See *Miller v. California*, 413 U.S. 15, 24-25 (1973); *Smith v. United States*, 431 U.S. 291, 300-02, 309 (1977); *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987), providing the three-prong constitutional criteria for federal and state laws and court obscenity adjudications:

(1) whether the average person, applying contemporary adult community standards, would find that the material, taken as a whole, appeals to a prurient interest in sex (i.e., an erotic, lascivious, abnormal, unhealthy, degrading, shameful, or morbid interest in nudity, sex, or excretion); and

(2) whether the average person, applying contemporary adult community standards, would find that the work depicts or describes, in a patently offensive way, sexual conduct (i.e., ultimate sex acts, normal or perverted, actual or simulated; masturbation; excretory functions; lewd exhibition of the genitals; or sadomasochistic sexual abuse); and

(3) whether a reasonable person would find that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

## C. Harmful To Minors:

Pornography that is "obscene for minors": Known as "variable obscenity" or the "Millerized-Ginsberg Test" for what is "Obscene For Minors". See *Ginsberg v. New York*, 390 U.S. 629 (1968); and *Miller, Smith, Pope, supra*. See also *Ashcroft v. ACLU*, 122 S.Ct. 1700 (2002), upholding application of COPA, 47 U.S.C. § 231, to "cyberspace" for some level of community standards; see Congressional intent for "age" standard of average American adult, rather than "geographic" community standard, House Committee Report No. 105-775 (1998 WL 691067 or <http://thomas.loc.gov>). Under State laws, it is illegal to sell, exhibit, or display "HTM" or "OFM" pornography (i.e. "soft-core") to minors, even if the material is not obscene or unlawful for adults. See *Com. v. Am. Booksellers Ass'n*, 372 S.E.2d 618 (Va. 1998), *followed*, *Am. Booksellers Ass'n v. Com. of Va.*, 882 F.2d 125 (4th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990); *Crawford v. Lungren*, 96 F.3d 380 (9th Cir. 1996), *cert. denied*, 520 U.S. 1117 (1997). "Harmful To Minors" or "Obscene For Minors" means pornographic written, visual, or audio matter, judged in reference to the age group of minors in the intended and probable recipient audience that: (1) the average adult person, applying contemporary community standards, would find, taken as a whole and with respect to those minors, appeals to a prurient interest in nudity, sex, or excretion, and

(2) the average adult person, applying contemporary community standards, would find depicts, describes, or represents, in a patently offensive way with respect to what is suitable for those minors, ultimate sexual

acts or sadomasochistic sexual acts or abuse, whether normal or perverted, actual or simulated, or masturbation, excretory functions, or lewd exhibitions of the genitals or post-pubertal female breast, and

(3) a reasonable person would find, taken as a whole, lacks serious literary, artistic, political, or scientific value for those minors in the intended and probable recipient audience.

### **Protecting Children From Harmful Material**

See <http://www.attorneygeneral.utah.gov/pornography/protectchild.htm>

Indecent Public Display makes it illegal to display any material in any place where a person under 18 years of age has a right to be:

- If the material contains nudity, partial nudity or sexual acts; and
- It has no value for a minor.
- Nudity or partially denuded means:
  - (a) Less than completely and opaquely covered (you can see through the covering):
    - (i) human genitals
    - (ii) pubic regions
    - (iii) buttock; and
    - (iv) female breast below a point immediately above the top of the areola; and
  - (b) Human male genitals in a discernibly turgid state, even if completely and opaquely covered (you can't see through the covering).

This law applies to motion picture theaters, plays, video tapes, still photographs, books, CDs, magazine covers and any other public display where the person in the material is posed or presented in a manner to provoke or arouse lust or passion or to exploit lust or perversion.

**Example: A grocery store has a Playboy magazine, which contains pictures of nude people in sexual poses, displayed for sale at the checkout stand. The magazine is not in a sealed wrapper so a 13-year-old child is able to look at it while waiting in line.**

The Supreme Court of the United States has stated many times that children can be protected for adult material that is inappropriate for children can be regulated but it cannot be completely outlawed. Michigan passed a law making all material that was inappropriate for children illegal even for adults. The court said the law violated adults' First Amendment rights because it reduces "the adult population of Michigan to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380 (1957).