

# The Regulatory Framework Controlling UK Porn

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# Pornography in the UK

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- Most Western countries legalised hardcore pornography during the 1960s and 1970s; the UK was almost the only liberal democracy not to do so.
- Britain's obscenity laws, such as the Obscene Publications Act 1959, are strict by European standards.
- UK still the only Member State of the European Union that prohibits private imports of adult pornography by consumers coming from other Member States of the European Union.
- Hardcore material on video and DVD was until recently banned by the requirement under the Video Recordings Act to be certified by the BBFC; websites were unrestricted until recently.
- Current British legislative framework is complex and confusing.

# A brief history of UK porn law

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- Obscene Publications Act 1959 (and 1964)
- Video Recordings Act 1984
- Communications Act 2003
- Criminal Justice and Immigration Act 2009
- AudioVisual Media Services Regulations 2007-2014
- Digital Economy Act 2017

# Obscene Publications Act (OPA) 1959

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## 1 Test of obscenity.

- (1) For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to **deprave and corrupt** persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.
- Includes text, images, sound and film.
  - Has been described as “unenforceable” due to vagueness of “deprave and corrupt” test.
  - Moving standard evolving via legal precedent.
  - Number of cases decreases each year but social impact far more wide-reaching - Crown Prosecution Service uses it to advise film censors.

# Obscene Publications Act 1964

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- Issues arising from 1959 Act:
- Offer of materials for sale not held to be publication, merely an invitation to treat.
- Negatives for photographs could not be forfeited if it was not intended to publish them (Straker v DPP 1963)
- As a result, Obscene Publications Act 1964 created the offence of “possessing obscene articles for publication or sale” and also extended “obscene materials” to cover photograph negatives.

# Notable OPA cases: R v Penguin Books Ltd 1960

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- First noted case under OPA was R v Penguin Books Ltd. 1960 for publishing Lady Chatterley's Lover.
- Defence justified by 'public good' - academics and critics testified that book had literary merit
- Not guilty verdict
- Prosecutor Mervyn Griffith-Jones: "Is it a book that you would even wish your wife or your servants to read?"
- Classist and patriarchal ideals of UK obscenity law - some adults are considered more adult than others.

# Notable OPA cases: R v Peacock 2012

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- Male escort Michael Peacock prosecuted for selling hardcore gay pornography depicting male fisting, urination and BDSM - acts which are legal to perform
- Defended by 'obscenity lawyer' Myles Jackman and acquitted through trial by jury
- Landmark result - first acquittal involving this kind of gay BDSM porn under the OPA (also one of first cases in English Courts to be live-tweeted, under hashtag #obscenitytrial)
- Jury watched several hours of footage and determined that viewers specifically seeking out this material would not be "depraved or corrupted"
- Legal experts wrote afterwards that obscenity law now "makes no sense"; BBFC and police both conceded obscenity "may require a major rethink"
- CPS guidance on the OPA has still not been updated in light of this case, and BBFC content guidelines still prohibit urolagnia, fisting and whipping from R18 classification from offline and online (via AVMS 2014) publication

# Notable cases: R v Walker 2009

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- First such prosecution under the OPA involving written material in nearly two decades
- Set a precedent for using the act to prosecute web fiction
- Defendant was charged with publishing an obscene story on the Internet contrary to Section 2(1) of the Act - a real person fiction text horror story entitled Girls (Scream) Aloud describing the imagined murder of the members of British pop group Girls Aloud
- The case was abruptly abandoned on its first day and the defendant was cleared of all charges after IT expert showed that the story could only be located by those specifically searching for such material.

# Notable cases: R v GS 2013

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- Landmark Court of Appeal decision extending publication under the OPA to private, one-to-one, sexual fantasy text chat via the internet; potentially criminalising millions of adults.
- CPS guidance: [http://www.cps.gov.uk/legal/l\\_to\\_o/obscene\\_publications](http://www.cps.gov.uk/legal/l_to_o/obscene_publications)

Transmitting comments to another person in the context of an internet relay chat is publication and, if the publication is obscene, in the terms of 1(1), a prosecution can be considered. It cannot be said that because there is only one recipient and only one likely reader of an article, the article is incapable of meeting the test of obscenity for the purposes of the Act. [...] For instance, in R v GS [2012] EWCA Crim 398, the defendant was charged with publishing an obscene article contrary to section 2(1) of the Obscene Publications Act 1959, relating to an explicit internet relay chat or conversation with one other person, concerning fantasy incestuous, sadistic paedophile sex acts on young and very young children.

# Images of (and for) children

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- Section 1 of the Protection of Children Act 1978 covers the taking, making, distribution, showing or possession with a view to distributing any indecent image of a child.
- **Children and Young Persons (Harmful Publications) Act 1955** controls picture books for children, and prohibits stories portraying acts of “violence or cruelty”, “incidents of a repulsive or horrible nature” in a way that “would tend to corrupt” a child who looked at it.
- Images of children also covered by definition of “extreme pornography” - **Criminal Justice and Immigration Act 2008**.

# Possible alternate offences

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- CPS guidance lists various options for police who want to charge someone, but don't feel they can do so under the OPA:
- **Revenge porn** via section 1 of the Malicious Communications Act; section 127 of the Communications Act; the Protection from Harassment Act or; where the victim was under 18 when the images were taken, the Protection of Children Act 1978.
- **Video Recordings Act 1984 and 2010 (VRA)** - criminal offence to supply video recording of unclassified work, falsely labelling a video's classification, or selling certain video recordings from an unlicensed sex shop.
- **Indecent Displays (Control) Act 1981** - Section 1 states it is an offence to publicly display indecent matter.
- **Importation of Indecent and Obscene Material** - section 42 of the Customs Consolidation Act 1876.

“The Customs Consolidation Act 1876 does not define the terms "indecent" or "obscene". It is therefore necessary to rely on the dictionary definitions and the changing standards of society as reflected in contemporary court decisions.”

# Video Recordings Act 1984

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- **Video Recordings Act 1984 (VRA)** required the British Board of Film Classification (BBFC) to censor all video works before release
- R18 classification had only just been introduced in 1982:

“To be supplied only in licensed sex shops to adults of not less than 18 years. The 'R18' category is a special and legally restricted classification primarily for explicit videos of consenting sex between adults. Such videos may be supplied to adults only in licensed sex shops, of which there are currently about 90 in the UK. 'R18' videos may not be supplied by mail order.”

- Only a handful of videos were granted R18 certificates between 1982 and 1997, and in general these were heavily cut, to remove any material clearly showing unstimulated sexual arousal or contact.

# BBFC “R18” classification

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- In 1997 BBFC Secretary James Ferman experimentally passed some rather more explicit films
- Because he took this decision without consulting the police and Customs, the Home Office strongly objected.
- In 1999, the Video Appeals Committee ruled that the BBFC should not have refused an R18 certificate to seven pornographic videos. A judicial review brought by the BBFC upheld the VAC's ruling.
- In late 2000 the BBFC issued radically revised guidelines for the R18 classification - and clarified matters by stating for the first time what was not permissible within the category, something distributors had been requesting for some time.
- Guidance for the BBFC is produced by the Crown Prosecution Service - based on what would be considered prosecutable under the OPA.



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**R18 - To be shown only in specially licensed cinemas, or supplied only in licensed sex shops, and to adults only**

**The R18 category is a special and legally-restricted classification primarily for explicit works of consenting sex or strong fetish material involving adults. Films may only be shown to adults in specially licensed cinemas, and video works may be supplied to adults only in licensed sex shops. R18 video works may not be supplied by mail order.**

**The following content is not acceptable:**

- material which is in breach of the criminal law, including material judged to be obscene under the current interpretation of the Obscene Publications Act 1959 (see Annexe)
- material (including dialogue) likely to encourage an interest in sexually abusive activity which may include adults role-playing as non-adults
- the portrayal of sexual activity which involves real or apparent lack of consent. Any form of physical restraint which prevents participants from indicating a withdrawal of consent
- the infliction of pain or acts which may cause lasting physical harm, whether real or (in a sexual context) simulated. Some allowance may be made for moderate, non-abusive, consensual activity
- penetration by any object associated with violence or likely to cause physical harm
- sexual threats, humiliation or abuse which do not form part of a clearly consenting role-playing game. Strong physical or verbal abuse, even if consensual, is unlikely to be acceptable

These Guidelines will be applied to the same standard regardless of sexual orientation of the activity portrayed.

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# Criminal Justice and Immigration Act 2008

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- Section 63: “Possession of extreme pornographic images”
- **Crime of possession** - first of its kind
- Driven by campaigning following the conviction of Graham Coutts for murder - he possessed images of strangulation
- Opposition during the consultation process, and spurred creation of campaigns including Backlash and Consenting Adults Action Network
- Govt indicated that only a handful of cases would be subject to prosecution, but over a thousand cases are brought each year
- Legislation has disproportionately impacts gay and BDSM communities
- Wording of the law makes no allowance for consensuality of acts, nor actual harm sustained by participants

# Definition of “pornography” (CJIA 2008 s63)

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**Section 63 (3)** An image is “pornographic” if it is of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal.

- Double standard: graphic violence and murder frequently occur in the mainstream media

# Definition of 'extreme pornography' (CJIA 2008 section 63)

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(5A) An “extreme image” is an image which—

- (a) falls within subsection (7) or (7a) and
- (b) is grossly offensive, disgusting or otherwise of an obscene character.

(7) An image falls within this subsection if it portrays, in an explicit and realistic way, any of the following—

- (a) an act which threatens a person's life,
- (b) an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals,
- (c) an act which involves sexual interference with a human corpse, or
- (d) a person performing an act of intercourse or oral sex with an animal (whether dead or alive)

and a reasonable person looking at the image would think that any such person or animal was real.

- Grey areas - eg smoking, consensual knife or needle play (although Myles Jackman has persuaded the police to take No Further Action for two separate clients who were in possession of self made “needle-porn” images.)

# CJIA 2009: 'Rape clause'

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(7A) An image falls within this subsection if it portrays, in an **explicit and realistic** way, either of the following—

- (a) an act which involves the non-consensual penetration of a person's vagina, anus or mouth by another with the other person's penis, or
- (b) an act which involves the non-consensual sexual penetration of a person's vagina or anus by another with a part of the other person's body or anything else,

and a reasonable person looking at the image would think that the persons were real.

S. 63(7A) inserted (13.4.2015) by [Criminal Justice and Courts Act 2015 \(c. 2\)](#)

- 'Explicit and realistic' - prohibits consensual / simulated rape roleplay
- Performer consent not considered valid under UK law

# Impact on UK porn industry

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- UK porn law is complicated and constantly changing
- Regulatory framework is in flux
- This inconsistency carries its own burden
- OPA still informs new laws - dates back to a time when social standards were very different
- CPS guidance (and hence BBFC classification guidelines) is out of date with recent case law
- Chilling effect

# The Authority for TV on Demand (ATVOD)

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- The Authority for Television On Demand was the video on demand regulator from 2010 to 2015
- EU Audiovisual Media Services Directive 2007 was implemented into UK law by amending Part 4A of the Communications Act 2003, extending TV regulation to 'TV-like' video on demand
- ATVOD originally a self-regulatory industry body, later chosen to regulate VOD alongside Ofcom (Audiovisual Media Services Regulations 2010)

# The ATVOD regime

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- Any person providing an “On Demand Programme Service” (ODPS) had to give advance notification and pay a fee to ATVOD
- Appeals against ATVOD’s decisions were referred to Ofcom
- In 2014 Ofcom upheld the appeal of The Urban Chick Supremacy Cell, a small BDSM femdom website
- Chief Executive Peter Johnson was in favour of tightening age verification, regulating overseas websites and bringing in web blocking

# Audiovisual Media Services Regulations 2014

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In December 2014 an ATVOD and BBFC led seminar on the impact of the new regulations explained that the following sexual activities would be deemed unacceptable at R18 classification level

- **Watersports** and **Squirting** - on another person or if consumed
- **Fisting** - despite R v Peacock
- **'Public' Sex** - only if shot on private land with no public access
- **BDSM Pain Play** - acts which if copied by the uninitiated have the potential to cause injuries more than transient and trifling. Reddening of the skin acceptable but no raised welts, blood and bruising are not.

# Wait, there's more...

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- **Age Play**
- **Weapons** (sexual activities performed at gunpoint if "believable")
- **Bondage and Restraint** - ie full bondage in conjunction with a gag
- **Facesitting as Breathing Restriction** - "there is no flexibility on this"
- **Power Tools** - The test in question is the 'association with violence'.
- **Head-Scissoring** - Any choking sounds or reddening of face as a result are not acceptable.
- **Wrestling** - only if knockout moves are not deployed.

# By contrast, the following are 'acceptable'

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- **Eating Ejaculate** - any form of consumption of (male) ejaculate is acceptable.
- **Vomiting** - may be acceptable if it is not performed as part of a sexual act; and is not visibly enjoyed by the participants.
- **School uniforms** are acceptable presuming that there are no references to the performer pretending to be under eighteen; and participants clearly 'of legal age' and participating in a consensual adult role play
- **Gagging** on cock and deep throat are acceptable if not for the whole scene.

# ATVOD vs DreamsofSpanking.com

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- In 2015 my queer spanking site Dreams of Spanking was served with a takedown notice
- ATVOD determined content on the website would be refused classification by the BBFC as it depicted “The infliction of pain or acts which may cause lasting physical harm”
- I subsequently won my appeal to Ofcom and reopened the site after 10 months of downtime
- Four weeks later the Digital Economy Bill 2016 was introduced to Parliament, rendering my victory largely ineffective

# Digital Economy Act 2017

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- Mandatory age verification
- New Prohibited Content regulations (via CJIA 2009)
- Affects any website accessible from within the UK - including overseas businesses
- Web blocking as sanction
- New online porn regulator to be designated (tipped as BBFC)
- Deadline for enforcement given as April 2018 but lengthy parliamentary process before enforcement can take place means this is unrealistic

# Prohibited Content

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- Digital Economy Bill at first and second reading prohibited any content stronger than R18.
- Successful lobbying campaign moderated this - amended by Lords in final reading, and Digital Economy Act 2017 only prohibits 'extreme pornography'.
- Definition via Criminal Justice and Immigration Act 2008, section 63 - less restrictive than BBFC prohibited content, but still criminalises depictions of consensual acts.

# Impact of Digital Economy Act 2017

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- Financial impact of age verification - penalises small businesses.
- Worrying implications for privacy - no protections in the Act, which leaves way open for age verification providers to retain and profit from users' porn browsing data.
- Corporate monopoly - Mindgeek are talking about launching an AV solution.
- Web blocking a new and disproportionate sanction.
- Risk of site owners reporting competitors sites to get them blocked - this happened under ATVOD.

# Current situation for UK pornographers

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- AVMS still in effect (although Ofcom have not been actively enforcing the regulations), disproportionately affecting fetish, feminist and queer porn.
- Unwelcoming climate for new UK pornographers.
- Digital Economy Act may also affect escorts who advertise online - unclear how “commercial basis” will be interpreted.
- Audio a newly regulated category - audio is covered by OPA but BBFC have not published classification guidelines for audio.
- BBFC refusing to comment until they are designated.
- Will enforcement will be proportionate? MindGeek have been lobbying BBFC to block “four million websites” if they don’t install AV, but BBFC have limited staff and resources.

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