

"Pornography" - What is and is not legal?

The term "pornography" (literally the writings of or about whores) is so diversely and indiscriminately used, that it has virtually come to mean whatever subjective interpretation each individual places upon it. It is hardly surprising, therefore, that its concept does not exist in U.K. law and "pornography" per se is not thus illegal. It only becomes illegal if and when it qualifies as being "obscene" according to the provisions of the Obscene Publications Act 1959. The legal test of 'obscenity' in that Act is the notorious "deprave and corrupt" yardstick. This is the test the law enforcement agencies are charged with applying, notwithstanding that "nobody can demonstrate that anybody has ever been depraved or corrupted by a particular obscene article"¹.

In practice this means that police and customs officers simply apply their own idiosyncratic, subjective and inevitably inconsistent standards, even though they always claim that their reactive decisions are based on what they know to have been successfully prosecuted in the Courts in the past. But this measure, too, is deeply flawed because the Courts themselves are notoriously quirky and inconsistent in their judgments - i.e. an item found 'obscenely' guilty in one Court will often be found innocent in another. No-one can therefore state categorically that a particular item is "obscene" in the eyes of the law and the outcome of any prosecution is effectively a lottery.

1. R.M. Jackson, Downing Professor of the Laws of England, University of Cambridge - Evidence to the 1968 Arts Council Report on the workings of the Obscene Publications Acts.

However, mere possession of "obscene" material involving 'over-16-year-olds' is not an offence, but it could be so if the material is knowingly counterfeit or has been illegally imported. Moreover the showing of any "obscene" article, in one's private possession, to another person, whether a friend or not, has been interpreted by the Courts as 'publishing'. This is an offence under the 1959 Act whether for gain or not.

With regard to "indecent" material involving or depicting children under the age of 16, the law is, perhaps, slightly less ambiguous, although by no means free from flaws and dangers. Here the test to be applied, according to the Protection of Children Act 1978 is that of 'indecent', which is not subject to the "deprave and corrupt" limitation of the O.P. Act's 'obscenity' test, ^{and} which is interpreted by the Courts much more broadly and consequently often recklessly. Furthermore, under Section 160 of the Criminal Justice Act 1988, mere possession of such "indecent" material (i.e. of under 16 year olds) became a criminal offence. The potential hazard ^{are} ~~is~~ that (a) the law enforcement agencies are prone to adjudge even the most innocuous material 'indecent' (viz ITN newscaster 'Julia Somerville' and partner's traumatic arrest for 'family-type' photographs of their 7 year-old daughter in the bath); and (b) the onus is on any defendant charged with such possession to prove to the Court that those involved are not under-age (often an impossibility) rather than the prosecution having to prove that they are (i.e. a reversal of the usual 'burden of proof' obligation demanded by the Courts in other areas of the law).

Finally a word about the importation into the U.K. of allegedly "obscene" material. Although the provisions of an antiquated, 122

year-old law (Customs Consolidation Act 1876) still apply, which prohibit the importation of "indecent" or "obscene" material, Customs officers (as the result of case law) now apply only the 'obscenity' test of the 1959 O.P. Act - not that that gives any great cause for comfort, as I have already shown.

The course of action to be followed by H.M. Customs and Excise officers upon the discovery of allegedly "obscene" material is set down in the Customs and Excise Management Acts, and in which they are afforded frighteningly wide powers, possibly rivalling those of the Third Reich! Their main weapon, where a small number of items is concerned, is confiscation of the offending material (again often depending on the idiosyncratic and subjective whims of their officers) but if they suspect you of being a commercial importer, or carrier, or dealer, you will almost certainly be arrested, strip-searched and taken under escort to your home, which will then also be searched. If you wish to challenge a 'simple' confiscation order you can do so within 28 days. The case (which is a civil - not criminal - hearing) will then be heard before magistrates when you will have to show cause why the material you have imported is not "obscene", is not thus illegal, and why it should be returned to you - not an easy task, because in practice magistrates invariably 'rubber-stamp' customs seizures.

Customs officers are, however, permitted to exercise the "personal use tolerance" clause from their own internal operational instructions which states:-

"Do not seize or detain small quantities of obscene material (i.e. no more than 3 copies) which passengers or crew members import as part of their accompanied or unaccompanied baggage

or effects e.g. (i) magazines; (ii) books; or (iii) other items (except video-tapes, films, laser discs and computer disks), providing: none of the items depicts children; there are no duplicate items; there is no suspicion of the passenger or crew member abusing the tolerance (e.g. a regular visitor); and there are no accompanying video-tapes, films, laser discs or computer disks."

Such 'big-hearted' concessions to us intolerably repressed 'Brits', in a supposedly 'free-world' where elsewhere freedom-of-expression is rightfully taken for granted, are hardly likely to fill us with paroxysms of joy, however, and effectively British State Nannyism - and hypocrisy! - prevails.

David Webb,
Honorary Director,
National Campaign for the Reform of the Obscene Publications Acts,
(NCROPA),
P.O. Box 7744,
London,
SW3 5YT