

In May 2008 the Criminal Justice and Immigration Act 2008 was passed by the UK parliament. This new law makes it illegal in the UK to possess certain types of sexually-explicit imagery. This leaflet contains important information about the new law and how it affects you.

WHAT DOES THE NEW LAW SAY?

The new law makes it an offence punishable by up to three years in prison for someone to possess what it calls "extreme images". The date when this provision becomes effective has not yet been fixed but is probably 1 January 2009.

An "extreme image" is defined as one which portrays in a realistic way any of:

- An act which threatens a person's life
- An act which results in or is likely to result in serious injury to a person's anus, breasts or genitals
- A sexual act with a corpse or an animal (but we will not be addressing these categories here)

and the image...

- Is grossly offensive, disgusting or otherwise of an obscene character
- Has been produced solely or principally for the purpose of sexual arousal

It is claimed that only a small number of images are intended to be caught by this law ("images" means both still photographs and video but excludes drawings and works of art). Unfortunately many of the terms used in the Act are vague and open to interpretation. So until some unfortunate people end up in court and a jury decides, it is difficult to give absolutely definitive advice on what the Act means and how it will be enforced. In addition, police investigations, seizure of computers etc can cause disruption and damage to people's lives even if no charges are brought.

However, based on the way cases involving possession of child pornography have been decided in court we are able to give some advice.

FIRST OFF – DON'T PANIC!

Images of bondage, fetish wear, role play, watersports, sexual intercourse and domination/submission are not "extreme".

Images of corporal punishment, whipping and flogging, needle play, cutting, heat play or medical scenes involving areas besides the anus, genitals or breasts are almost certainly safe to possess (though the activities themselves may be illegal due to the Spanner ruling - see page 3).

In fact the list of images which are certain to fall under the law is very small compared to the wide range of BDSM, kink and fetish images available.

IS YOUR PORN COLLECTION STILL LEGAL?

If there's no injury to the areas of the body mentioned above or threat to life the image is almost certainly legal to possess. But there are grey area activities as well which are detailed below.

WHAT DOES "POSSESSION" MEAN?

In the age of the Internet and digital media, possession of images has needed to be refined in law. Clearly if you own a physical photograph or a DVD or video tape then you possess it. But images on your computer are a different matter.

For a start just viewing an image or video on a web site does not constitute "possession". So you can browse the Internet quite legally.

Your web browser may keep a temporary copy of the web pages and images you browse on your hard disk (the "cache") but this too does not constitute possession. Nor do unsolicited images received by email as part of a message.

However, if you actively save or download an image or video to your computer or other device from a web page or email, or move or copy the files from the cache then case law has established that this does constitute possession. As, obviously, does printing out such images.

WHAT TYPES OF IMAGES WILL IT BE ILLEGAL TO POSSESS?

If the image or video shows a serious injury to breasts, anus or genitals or the activity is life threatening and the image is produced for sexual arousal it will be illegal to possess it.

WHAT IS SERIOUS INJURY?

"Serious injury" is not explicitly defined in law and it is up to the jury to decide. As a result of the Spanner trials (see box opposite) it was established that "serious injury" when part of sexual activity was anything beyond "transient or trifling" which are equally subjective terms and open to interpretation by a judge or jury.

Breaking limbs, disfigurement, castration and other lasting disabling injuries are very likely to be included. Images of a whipping, beating or cutting of breasts, genitals or the anus which leaves cuts and bruises may be illegal to possess too. Genital modification and medical scenes involving catheters, needles, sounds etc are a grey area but see the Defences section below. A video or series of images which shows that any injuries healed quickly may be a defence to the charge that the injuries were serious. But again this is up to the court.

WHAT IS LIFE THREATENING?

This too is a grey area. Putting a plastic bag over someone's head, tying a cord around their neck, forcing smoke into their lungs, water immersion, breath control, holding a gun or knife to their head can all be life threatening in the context of a real non-consensual kidnap or torture scene.

Where these activities take place during a consensual BDSM scene the intention is clearly not to threaten or endanger life. However taken in isolation it may not be obvious from the image whether or not there is a real threat to life. If the image is part of a sequence

or a video which shows the consensual nature of the activity and that the recipient of the activity was not harmed then that could provide a defence should the images be seized, particularly if you are a participant in the activities.

ARE CLASSIFIED FILMS AND VIDEOS OK?

If a film or video has a certificate from the British Board of Film Classification then it is legal to possess it. However if you take stills or clips from the film to make pornographic material then you could be prosecuted for possessing that material if in isolation it falls under the category of “extreme pornography”.

WHAT ARE THE PENALTIES?

If found guilty under this section of the Criminal Justice and Immigration Act you could be sent to prison for up to three years or fined (or both) and be put on the sex offenders’ register if you receive a prison sentence of over two years.

ARE THERE ANY DEFENCES?

The law provides two relevant defences.

1. That you did not know you possessed the image, or that you had not requested it and that you did not keep the image for an unreasonable time after becoming aware that you possessed it. So if someone emails you illegal images you should delete them immediately.
2. That the owner of the image directly participated in the acts shown and that there was no non-consensual harm. So in theory it is legal to possess images which show you or a play/partner’s activities even if they show serious injury to breasts, anus or genitals

HOWEVER

Under the current law in England and Wales consent is not a defence to a charge of assault if the sexual activities cause injuries which are more than “transient or trifling”. So even though you and your partner have actually consented, that consent is not legally allowed as a defence to either a prosecution for possession of the images or prosecution for the activities themselves.

HOW CAN I PROTECT MYSELF?

1. Do not download or save images from web sites you visit if you think there is a risk that you could be prosecuted for possessing them
2. Clear your web browser’s cache regularly or set it to keep images in the cache for as little time as possible (even for no longer than until the end of a browsing session).
3. Do not take photographs or videos of your own BDSM sexual activity if they show serious injuries to breast,

WHAT IS “THE SPANNER RULING?”

In the late 1980s a group of 16 men were charged with various counts of assault as a result of consensual SM activity. The prosecutions were the result of a police investigation called “Operation Spanner”. The men were under the impression that their consent to the activities was a valid defence. But this was rejected by the High Court and by subsequent appeals made as far as the European Court of Human Rights in 1996. In England and Wales consent is not a defence to a charge of assault where injuries caused during sexual activity are more than “trifling or transient”.

anus or genitals. It may be illegal to possess those images and if you can be identified in the photos or videos you could be prosecuted for the activities themselves

4. If you have pornographic images which show activities which appear to be life threatening make sure you know who the participants are and that you can be sure there was no real threat to life
5. If you take pictures or videos of legal consensual SM activity it will help defend any prosecution if you can prove that you participated in the activities (include your face or tattoo or something identifiable, even if just reflected in a mirror)

HOW CAN I BE SURE IMAGES ARE PROPERLY DELETED FROM MY COMPUTER?

Deleting images on a computer usually just moves them to a Recycle bin (in case you made a mistake). So the first thing to do is regularly empty the Recycle bin (or configure your computer to do it automatically).

However the physical space on your hard disk where the deleted files lived may still contain a "ghost" of the files which could be recoverable using special software. To make sure that no trace of the files exists you should download and install a utility usually called a "file shredder" (check Google for where to find one). This will overwrite unused areas of the disk (sometimes to military standard) so that neither you nor anyone else can recover the images you have deleted which might be illegal.

WHAT IF I NEED LEGAL ADVICE?

You can contact these solicitors:

David Clark 020 7433 1562 office@davidclarkandco.co.uk

John Lovatt 020 7247 9336 john.lovatt@btinternet.com

You should also inform the Spanner Trust if you are investigated or prosecuted under this new law.

Remember that if you are arrested or questioned by the police you should not make any statements without consulting a solicitor first.

WHAT CAN I DO TO HELP?

Make sure as many people as possible are aware of the law. Distribute copies of this leaflet (more can be obtained from the Spanner Trust). Put a link to the online version (www.spannertrust.org/extremeporn) on your web site.

ABOUT THE AUTHORS

The Spanner Trust – protecting the legal and human rights of those involved in BDSM

www.spannertrust.org

Backlash – the campaign against this new law

www.backlash-uk.org.uk

SM Gays:

www.smgays.org

DISCLAIMER

The Spanner Trust always tries to ensure that all information provided is accurate and up-to-date. However, the law can change and is open to interpretation. Before relying upon any statement made in this document you should take your own independent legal advice and the Spanner Trust cannot accept any liability whatsoever.

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