

## Delaware

- [Title 11, Chapter 5, §§ 1361-1366](#)

### **§ 1361. Obscenity; acts constituting; class E felony or class G felony; subsequent violations.**

(a) A person is guilty of obscenity when the person knowingly:

(1) Sells, delivers or provides any obscene picture, videotape, video game, writing, record, audio cassette tape, compact disc or other representation or embodiment of the obscene;

(2) Presents or directs an obscene play, dance or performance or participates in that portion thereof which makes it obscene;

(3) Publishes, exhibits or otherwise makes available any obscene material;

(4) Possesses any obscene material for purposes of sale or other commercial dissemination; or

(5) Permits a person under the age of 12 to be on the premises where material harmful to minors, as defined by § 1365 of this title, is either sold or made available for commercial distribution and which material is readily accessible to or easily viewed by such minors. Any material covered by this paragraph shall not be considered readily accessible to or easily viewed by minors if it has been placed or otherwise located 5 feet or more above the floor of the subject premises or if the material is concealed so that no more than the top 3 inches is visible to the passerby.

(b) Obscenity is a class E felony if a person sells, delivers or provides any obscene picture, videotape, video game, writing, record, audio cassette tape, compact disc or other representation or embodiment of the obscene to a person under the age of 18. In all other cases, obscenity is a class G felony. In addition to the above penalties, upon conviction of obscenity involving live conduct as defined in § 1364 of this title, the court shall order the business or establishment which presented, displayed or exhibited such conduct closed for a period of 6 months.

(c) Notwithstanding Chapter 42 of this title, the minimum sentence for a subsequent violation of this section occurring within 5 years of a former conviction shall be a fine in the amount of \$5,000, imprisonment for a minimum period of 9 months, no portion which may be suspended or reduced, and probation for a period of 2 years; provided, however, that where the defendant is an organization, the fine shall be \$10,000. In addition to the above penalties, upon conviction of obscenity involving conduct as defined in § 1364 of this title, the court shall order the business or establishment which presented, displayed or exhibited such conduct closed for a period of 2 years.

(d) Where the criminality of conduct depends on a child being under the age of 12, subsection (a)(5) of this section, or under the age of 18, subsection (b) of this section, it is no defense that the actor did not know the child's age. (11 Del. C. 1953, § 1361; 58 Del. Laws, c. 497, § 1; 60 Del. Laws, c. 445, § 1; 61 Del. Laws, c. 121, § 1; 63 Del. Laws, c. 111, §§ 1-3; 67 Del. Laws, c. 130, § 8; 67 Del. Laws, c. 350, §§ 11, 12; 70 Del. Laws, c. 186, § 1; 74 Del. Laws, c. 71, § 2; 74 Del. Laws, c. 380, §§ 1, 2.)

### **§ 1362. Obscenity; defenses.**

In any prosecution for obscenity it is an affirmative defense that dissemination was restricted to:

(1) Institutions or persons having scientific, educational, governmental or other similar justification for possessing obscene material; or

(2) Noncommercial dissemination to personal associates of the accused who are known by the accused not to object to the receipt of such material. (11 Del. C. 1953, § 1362; 58 Del. Laws, c. 497, § 1.)

### **§ 1363. Obscenity; presumption.**

A person who disseminates or possesses obscene material in the course of business is presumed to do so knowingly or recklessly. (11 Del. C. 1953, § 1363; 58 Del. Laws, c. 497, § 1; 70 Del. Laws, c. 186, § 1.)

### **§ 1364. Definition of obscene.**

Material or live conduct is obscene if:

(1) The average person applying contemporary community standards would find the material or conduct, taken as a whole, appeals to the prurient interests; and

(2) The material depicts or describes or the live conduct portrays:

a. Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; or

b. Patently offensive representations or descriptions of masturbation, excretory functions, and/or lewd exhibitions of the genitals; and

(3) The work or conduct taken as a whole lacks serious literary, artistic, political or scientific value. (11 Del. C. 1953, § 1364; 58 Del. Laws, c. 497, § 1; 59 Del. Laws, c. 236, § 1; 63 Del. Laws, c. 111, § 4.)

### **§ 1365. Obscene literature harmful to minors; class A misdemeanor.**

(a) Definitions as used in this section:

(1) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement or sado-masochistic abuse which predominately appeals to the prurient, shameful or morbid interest of minors and is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors.

(2) "Knows" means:

a. Knowledge that the character and content of any material described in subsection (i)(1) of this section is harmful to minors; or

b. Knowledge of facts that would lead a reasonable person to inquire whether the character and content of any material described in subsection (i)(1) of this section is harmful to minors; or

c. Knowledge or information that the material described herein has been adjudged to be harmful to minors in a proceeding instituted pursuant to subsection (b) or (i) of this section or is the subject of a pending proceeding instituted pursuant to subsection (b) or (i) of this section.

(3) "Minor" means any person under the age of 17 years.

(4) "Known minor" is any person known, in fact, to be under the age of 18 years, or any person, in fact, under the age of 18 years unless a reasonable, bona fide attempt has been made to ascertain the age of that minor.

(5) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple or the depiction of covered male genitals in a discernibly turgid state.

(6) "Sado-masochistic abuse" means flagellation or torture practiced by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(7) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse or physical contact with a person's unclothed genitals or pubic area or a female person's breast.

(8) "Sexual excitement" means the condition of human male or female genitals in a state of sexual stimulation or arousal.

(b) Whenever the Attorney General of this State has reasonable cause to believe that any person is or may become engaged in any of the acts described in subsection (i)(1), (2)

or (4) of this section, the Attorney General shall institute an action in the Court of Chancery for the county where such act is or will be performed for adjudication of the question of whether such material is harmful to minors.

(c) The action authorized by subsection (b) of this section shall be commenced by the filing of a complaint to which shall be attached as an exhibit a true copy of the allegedly harmful material. The complaint shall:

(1) Be directed against such material by name or description;

(2) Allege that such material is harmful to minors;

(3) Designate as respondents and list the names and addresses, if known, of any person in this State engaged or about to be engaged in any of the acts described in subsection (i)(1), (2) or (4) of this section with respect to such material;

(4) Seek an adjudication that such material is harmful to minors; and

(5) Seek a permanent injunction against any respondent prohibiting the respondent from performing any of the acts described in subsection (i)(1), (2) or (4) of this section.

(d) Upon the filing of the complaint described in subsection (c) of this section, the Attorney General shall present the same, together with the material attached thereto, as soon as practicable to the Court for its examination and reading. If after such examination and reading the Court finds no probable cause to believe such material to be harmful to minors, the Court shall cause an endorsement to that effect to be placed and dated upon the complaint and shall thereupon dismiss the action. If after such examination and reading the Court finds probable cause to believe such material to be harmful to minors, the Court shall cause an endorsement to that effect to be placed and dated upon the complaint whereupon it shall be the responsibility of the Attorney General promptly to request the Register in Chancery to issue summons and to furnish to the Register in Chancery such number of copies of such complaint and endorsement as are needed for the service of summons. Service of such summons and endorsed complaint shall be made upon the respondents thereto in any manner provided by law.

(e) The author, publisher or any person interested in sending or causing to be sent, bringing or causing to be brought, into this State for sale or commercial distribution, or any person in this State preparing, selling, exhibiting or commercially distributing or possessing with intent to sell or commercially distribute or exhibit, the material exhibited to the endorsed complaint, may appear and may intervene in accordance with the Rules of the Court of Chancery. If no person appears and files an answer, or moves to intervene within the time set by the rule or by an order of the Court of Chancery, the Court may forthwith adjudge whether the material so exhibited to the endorsed complaint is harmful to minors and enter an appropriate final judgment.

(f)(1) The public policy of this State requires that all proceedings prescribed in this section, other than criminal actions under subsection (i) of this section, be heard and disposed of with the maximum promptness and dispatch commensurate with constitutional requirements, including due process, freedom of the press and freedom of speech.

(2) The Rules of the Court of Chancery shall be applicable, except as they may be modified by this section.

(3) Any party or intervenor shall be entitled, upon request, to a trial of any issue with an advisory jury and the Court, with the consent of all parties, may order a trial of any issue with a jury whose verdict shall have the same effect as in cases of law.

(4) In any action in which an injunction is sought under this section, any respondent or intervenor shall be entitled to a trial of the issues within 1 day, exclusive of Saturday, Sunday and holidays, after joinder of issue, and a decision shall be rendered by the Court or jury, as the case may be, within 2 days, exclusive of Saturday, Sunday and holidays, of the conclusion of the trial. If the issues are being tried before a jury and the jury shall not be able to render a decision within 2 days of the conclusion of the trial, then notwithstanding any other provision of this section, the jury shall be dismissed and a decision shall be rendered by the Court within 2 days of the conclusion of the trial.

(5) In the event that the Court or jury, as the case may be, finds the material exhibited to the complaint not to be harmful to minors, the Court shall enter judgment accordingly and shall dismiss the complaint.

(6) In the event that the Court or jury, as the case may be, finds the material exhibited to the complaint to be harmful to minors, the Court shall enter judgment to such effect and may, in such judgment or in subsequent orders of enforcement thereof, enter a permanent injunction against any respondent prohibiting the respondent from engaging in any of the acts described in subsection (i)(1), (2) or (4) of this section.

(g) If the Court, pursuant to subsection (d) of this section, finds probable cause to believe the exhibited material to be harmful to minors, and so endorses the complaint, the Court may, upon the motion of the Attorney General and in accordance with the Chancery Court Rules, issue a temporary restraining order against any respondent prohibiting the respondent from selling, commercially distributing or giving away such material to minors or from permitting minors to inspect such material. No temporary restraining order shall be granted without notice to the respondents unless it clearly appears from specific facts shown by affidavit or by the verified complaint that 1 or more of the respondents are engaged in the sale of material harmful to minors and that immediate and irreparable injury to the morals and general welfare of minors in this State will result before notice can be served and a hearing had thereon. All proceedings for temporary restraining order and preliminary injunction shall be governed by the Rules of the Court of Chancery.

(h) Any respondent, or any officer, agent, servant, employee or attorney of such respondent, or any person in active concert or participation by contract or arrangement with such respondent, who receives actual notice, by personal service or otherwise, of any injunction or restraining order entered pursuant to subsection (f) or (g) of this section, and who shall disobey any of the provisions thereof, shall be guilty of contempt of court and upon conviction shall be guilty of a class A misdemeanor.

(i) Any person is guilty of a class A misdemeanor who:

(1) Exhibits for sale, sells, displays, transfers, gives gratis, loans, rents or advertises to a known minor any book, pamphlet, magazine or printed matter, however reproduced, or sound recording or picture, photograph, drawing, sculpture, motion picture film or similar visual representation that such person knows to be in whole or in part harmful to minors.

(2) Sells, gives gratis or transfers an admission ticket or pass to a known minor or admits a known minor to a premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, such person knows to be harmful to minors.

(3) Misrepresents the person's age as 17 years or older for the purpose of evading the restrictions of this section.

(4) Exhibits for sale, sells, displays, gives gratis, transfers, loans or rents any matter enumerated in paragraph (1) of this subsection that such person knows to be harmful to minors which does not prominently include in such advertisement the words "unlawful to persons under 17 years of age."

(j) No criminal proceeding shall be commenced against any person pursuant to subsection (i)(1), (2) or (4) of this section unless, prior to the act which is the subject of such proceeding, such person:

(1) Had written notice from the Attorney General that the material which is the subject of such proceeding has been adjudged harmful to minors pursuant to subsection (b) or (i) of this section; or

(2) Has been subject to an order entered pursuant to subsection (b) of this section relating to the material which is the subject of such criminal proceeding, or any other material harmful to minors.

(k) No person shall be subject to prosecution pursuant to this section:

(1) For any sale to a minor where such person had reasonable cause to believe that the minor involved was 17 years old or more, and such minor exhibited to such person a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was 17 years old or more; or

(2) For any sale where a minor is accompanied by a parent or guardian, or accompanied by an adult and such person has no reason to suspect that the adult accompanying the minor is not the minor's parent or guardian; or

(3) Where such person is a bona fide school, museum or public library or is acting in an official capacity as an employee of such organization or as a retail outlet affiliated with and serving the educational purposes of such organization.

(l) In order to provide for the uniform application of this section to all minors within this State, it is intended that the sole and only regulation of the matters herein discussed shall be under this section and no municipality, county or other governmental unit within this State shall make any law, ordinance or regulation relating to the subject matter hereof as to minors. All such laws, ordinances and regulations, as they affect minors, whether enacted before or after this section shall become void, unenforceable and of no effect upon April 1, 1973; provided, however, that such prior laws, ordinances and regulations shall govern litigations commenced prior to April 1, 1973, and shall continue in effect solely for that purpose.

(m) This section may be known and cited as Delaware Law on the Protection of Minors From Harmful Materials, and may be referred to by that designation. (11 Del. C. 1953, § 1365; 58 Del. Laws, c. 497, § 1; 59 Del. Laws, c. 236, § 2; 67 Del. Laws, c. 130, § 8; 70 Del. Laws, c. 186, § 1.)

## **§ 1366. Outdoor motion picture theatres.**

(a) Whoever being the owner or operator of an outdoor motion picture theatre exhibits or permits to be exhibited any film not suitable for minors or harmful to minors and which film can be viewed by such minors not in attendance at the said outdoor motion picture theatre shall be guilty of a class A misdemeanor.

(b) Definitions as used in this section:

(1) "Code and Rating Administration of the Motion Picture Association of America" ratings are:

"G" -- All ages admitted. General audiences;

"PG" -- All ages admitted. Parental guidance suggested;

"R" -- Restricted. Under 17 requires accompanying parent or adult guardian;

"X" -- No one under 17 admitted.

(2) "Film" means any motion picture film or series of films, whether full length or short subject, but does not include newsreels portraying actual current events or pictorial news of the day.

(3) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement or sado-masochistic abuse which predominately appeals to the prurient, shameful or morbid interest of minors and is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and taken as a whole the work lacks serious literary, artistic, political or scientific value for minors.

(4) "Minor" means any person under the age of 17 years.

(5) "Not suitable for minors" means any film, reel or view which has a rating of "R" or "X" according to the Code and Rating Administration of the Motion Picture Association of America.

(6) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple or the depiction of covered male genitals in a discernibly turgid state.

(7) "Sado-masochistic abuse" means flagellation or torture practiced by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(8) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse or physical contact with a person's unclothed genitals or pubic area or a female person's breast.

(9) "Sexual excitement" means the condition of human male or female genitals in a state of sexual stimulation or arousal.

(10) "Suitable for minors" means any film, reel or view which has a rating of "G" or "PG" according to the Code and Rating Administration of the Motion Picture Association of America. (59 Del. Laws, c. 258, § 1.)