

State of South Dakota

SEVENTY-THIRD SESSION
LEGISLATIVE ASSEMBLY, 1998

880B0440

SENATE BILL NO. 177

Introduced by: Senators Aker, Dunn (Rebecca), Frederick, Hainje, Halverson, Hunhoff, Hutmacher, Johnson (William), Lawler, Reedy, and Vitter and Representatives Hunt, Apa, Brooks, Duenwald, Fitzgerald, Gabriel, Hagg, Hassard, Koskan, Madden, McNenny, Smidt, and Van Gerpen

1 FOR AN ACT ENTITLED, An Act to revise and clarify certain provisions concerning the
2 regulation of pornography and obscenity.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. That § 22-24-25 be amended to read as follows:

5 22-24-25. ~~Except as~~ Other than the exceptions provided in §§ ~~22-24-36 and~~ 22-24-37,
6 nothing contained in this ~~chapter~~ Act limits any county or municipality from regulating obscene
7 material or obscene live conduct within its jurisdiction. However, the county or municipality shall
8 follow the procedural requirements of this ~~chapter~~ Act.

9 Section 2. That § 22-24-25.1 be amended to read as follows:

10 22-24-25.1. ~~A~~ Any county or municipality may ~~provide~~ adopt, by ordinance, ~~for a~~
11 contemporary community standards ~~test~~ to regulate the sale, distribution, and use of obscene
12 material and to regulate obscene live conduct in any commercial establishment or public place
13 within its jurisdiction. The ordinance shall be referred to the electorate at the next regular
14 municipal or general election, and, upon approval of a majority of those voting in the election,

1 become law effective.

2 Section 3. That § 22-24-27 be amended to read as follows:

3 22-24-27. Terms used in §§ ~~22-24-25 to 22-24-37, inclusive~~, this Act mean:

4 (1) "Contemporary community standard," the contemporary community standard ~~of the~~
5 ~~state in which the question of obscenity is to be tested, by the average person, of the~~
6 state adopted pursuant to section 2 of this Act;

7 (2) "~~Distributed~~ Distribute," to transfer possession of matter or material, whether with or
8 without consideration;

9 (3) "Exhibit," to show or display;

10 (4) "Harmful to minors," ~~includes in its meaning~~ the quality of any matter or material or
11 of any performance or of any description or representation, in whatever form, of
12 nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, ~~when~~ if it:

13 (a) Predominantly appeals to the prurient, shameful, or morbid interest of minors,
14 and

15 (b) Is patently offensive to prevailing standards in the adult community as a whole
16 with respect to what is suitable material for minors, and

17 (c) Is without serious literary, artistic, political, or scientific value;

18 (5) "Magistrate," a judge of the circuit court or magistrate;

19 (6) "Material," anything tangible which is harmful to minors, whether derived through the
20 medium of reading, observation, or sound;

21 (7) "Matter" or "material," any book, magazine, newspaper, or other printed or written
22 material; or any picture, drawing, photograph, motion picture, or other pictorial
23 representation; or any statue or other figure; or recording, transcription, or
24 mechanical, chemical, or electrical reproduction; or any other articles, equipment,
25 machines, or materials;

- 1 (8) "Minor," any person less than eighteen years of age;
- 2 (9) "Nudity," ~~within the meaning of subdivision (4) of this section,~~ the showing of the
3 human male or female genitals, pubic area or buttocks with less than a full opaque
4 covering, or the showing of the female breast with less than a full opaque covering or
5 any portion thereof below the top of the nipple, or the depiction of covered male
6 genitals in a discernibly turgid state;
- 7 (10) "Obscene live conduct," any physical human body activity, whether performed or
8 engaged in alone or with other persons, including singing, speaking, dancing, acting,
9 simulation, or pantomiming, ~~where if:~~
- 10 (a) The dominant theme of such conduct, taken as a whole, appeals to a prurient
11 interest;
- 12 (b) The conduct is patently offensive because it affronts contemporary community
13 standards relating to the description or representation of sexual matters; and
- 14 (c) The conduct is without serious literary, artistic, political, or scientific value:
15 ~~In prosecutions under §§ 22-24-27 to 22-24-37, inclusive, if circumstances of~~
16 ~~production, presentation, advertising, or exhibition indicate that live conduct is being~~
17 ~~commercially exploited by the defendant for the sake of its prurient appeal, such~~
18 ~~evidence is probative with respect to the nature of the conduct;~~
- 19 (11) "Obscene material," material:
- 20 (a) The dominant theme of which, taken as a whole, appeals to the prurient
21 interest;
- 22 (b) Which is patently offensive because it affronts contemporary community
23 standards relating to the description or representation of sado-masochistic
24 abuse or sexual conduct; and
- 25 (c) Lacks serious literary, artistic, political, or scientific value:

1 ~~In prosecutions under §§ 22-24-27 to 22-24-37, inclusive, if circumstances of~~
 2 ~~production, presentation, sale, dissemination or publicity indicate that the matter is~~
 3 ~~being commercially exploited by the defendant for the sake of its prurient appeal, such~~
 4 ~~evidence is probative with respect to the nature of the matter;~~

5 (12) "Prurient interest," a shameful or morbid interest in nudity, sex, or excretion, which
 6 goes substantially beyond customary limits of candor in description or representation
 7 of such matters. If it appears from the character of the material or the circumstances
 8 of its dissemination that the subject matter is designed for a specially susceptible
 9 audience or clearly defined deviant sexual group, the appeal of the subject matter shall
 10 be judged with reference to such audience or group;

11 (13) "Sado-masochistic abuse," flagellation or torture by or upon a person who is nude or
 12 clad in undergarments, a mask or bizarre costume, or the condition of being fettered,
 13 bound, or otherwise physically restrained on the part of one who is nude or so
 14 clothed;

15 (14) "Sexual conduct," ~~within the meaning of subdivision (4) of this section,~~ any act of
 16 masturbation, homosexuality, sexual intercourse, or physical contact with a person's
 17 clothed or unclothed genitals, pubic area, buttocks, or if such person be a female, the
 18 breast;

19 (15) "Sexual excitement," the condition of human male or female genitals when in a state
 20 of sexual stimulation or arousal.

21 Section 4. That § 22-24-28 be amended to read as follows:

22 22-24-28. Any person who ~~disseminates~~ distributes material harmful to minors is guilty of
 23 a Class 1 misdemeanor.

24 Section 5. That § 22-24-29 be amended to read as follows:

25 22-24-29. A person is guilty of ~~disseminating~~ distributing material harmful to minors ~~when~~

1 ~~he that person~~ knowingly gives or makes available to a minor ~~or promotes or,~~ possesses with
 2 intent to promote to minors, or ~~he~~ knowingly sells or loans to a minor for monetary
 3 consideration any material ~~described in subdivision 22-24-27 (4)~~ which is harmful to minors.

4 Section 6. That § 22-24-29.1 be amended to read as follows:

5 22-24-29.1. ~~It is unlawful for any~~ No person may knowingly ~~to~~ distribute, display, sell, or
 6 exhibit for sale in any public place any magazine, book, or newsprint displaying or containing
 7 obscene material on the cover thereof or material within unless ~~said~~ the magazine, book, or
 8 newsprint is wrapped and sealed so that no more than the title, name, price, or date thereof is
 9 exposed to the public and ~~said~~ the magazine, book, or newsprint cannot be viewed or examined
 10 without breaking the seal, wrapping, or covering. A person who violates this section is guilty of
 11 a Class 1 misdemeanor.

12 Section 7. That § 22-24-30 be amended to read as follows:

13 22-24-30. A person is guilty of ~~disseminating~~ distributing material harmful to minors ~~when~~
 14 if, with reference to a motion picture, show, or other presentation ~~which depicts nudity, sexual~~
 15 ~~conduct or sado-masochistic abuse, and~~ which is harmful to minors, ~~he that person~~ knowingly:

- 16 (1) Exhibits such motion picture, show, or other presentation to a minor;
- 17 (2) Sells or gives to a minor an admission ticket or pass to the premises whereon there
 18 is exhibited such motion picture, show, or other presentation; or
- 19 (3) Admits a minor for a monetary consideration to the premises whereon there is
 20 exhibited or to be exhibited such motion picture, show, or other presentation.

21 Section 8. That § 22-24-31 be amended to read as follows:

22 22-24-31. In any prosecution for ~~disseminating~~ distributing material harmful to minors, it is
 23 an affirmative defense that:

- 24 (1) The defendant had reasonable cause to believe that the minor involved was eighteen
 25 years old or more. ~~A draft card, driver's license, birth certificate, or other official or~~

1 ~~apparently official document is evidence establishing that the minor was eighteen~~
2 ~~years of age or older;~~

3 (2) The minor involved was accompanied by ~~his~~ a parent or guardian, or by an adult ~~and~~
4 ~~the adult~~ who represented that he or she was the minor's parent or guardian ~~or an~~
5 ~~adult and signed a written statement to that effect;~~

6 (3) The defendant was the parent or guardian of the minor involved; or

7 (4) The defendant was a bona fide school, college, university, museum, or public library,
8 or was acting in ~~his~~ the capacity as of an employee of such an organization or a retail
9 outlet affiliated with and serving the educational purposes of such an organization.

10 Section 9. That § 22-24-32 be amended to read as follows:

11 22-24-32. A person is guilty of a Class 1 misdemeanor ~~when he~~ if that person knowingly
12 misrepresents that he or she is a parent or guardian of a minor for the purpose of obtaining
13 admission of ~~any~~ that minor to any motion picture, show, or other presentation which is harmful
14 to minors.

15 Section 10. That § 22-24-33 be amended to read as follows:

16 22-24-33. A minor is guilty of a Class 2 misdemeanor if ~~he~~ that minor misrepresents his or
17 her age for the purpose of obtaining admission to any motion picture, show, or other
18 presentation which is harmful to minors.

19 Section 11. That § 22-24-34 be amended to read as follows:

20 22-24-34. If more than one article or item of material ~~prohibited under §§ 22-24-27 to~~
21 ~~22-24-37, inclusive,~~ that is harmful to minors is sold, given, advertised for sale, distributed
22 ~~commercially or promoted,~~ in violation of the provisions of said sections this Act by the same
23 person, ~~after a hearing and determination that probable cause exists to believe such article or~~
24 ~~material is harmful to minors each such sale, gift, advertisement,~~ the distribution, or promotion
25 shall constitute of each article or item of material constitutes a separate offense.

1 Section 12. That § 22-24-36 be repealed.

2 ~~22-24-36. Nothing contained in this chapter shall prohibit the exhibition or distribution of~~
3 ~~material to adults.~~

4

5 Section 13. That § 22-24-37 be amended to read as follows:

6 22-24-37. ~~Sections 22-24-27 to 22-24-37, inclusive, shall~~ The provisions of this Act do not
7 apply to any persons person who may possess or distribute possesses or distributes obscene
8 matter or participate participates in conduct, otherwise proscribed by ~~said sections, when this~~
9 Act, if such possession, distribution, or conduct occurs;

- 10 (1) In the course of law enforcement and judicial activities;;
 - 11 (2) In the course of bona fide school, college, university, museum, or public library
12 activities or in the course of employment of such an organization or retail outlet
13 affiliated with and serving the educational purposes of such an organization; or
 - 14 (3) In the course of employment ~~as a moving picture machine operator, or assistant~~
15 ~~operator;~~ in a motion picture theater in connection with a motion picture film or show
16 exhibited in such theater if ~~such operator or assistant operator~~ the employee has no
17 financial interest in the motion picture theater ~~wherein he is so employed~~ other than
18 his wages received or owed;
- 19 ~~or like circumstances of justification where the possession, distribution, or conduct is not~~
20 ~~limited to the subject matter's appeal to prurient interests.~~

21 Section 14. That chapter 22-24 be amended by adding thereto a NEW SECTION to read as
22 follows:

23 In any prosecution pursuant to the provisions of this Act, if the circumstances of production,
24 presentation, advertising, sale, distribution, or exhibition indicate the material or conduct is being
25 commercially exploited by the defendant for the sake of its prurient appeal, such evidence is

1 probative with respect to the nature of the conduct.