

Principles of Regulation for the Pornographic Industry in Canada

VERIFIABLE SPECIFIC CONSENT MODEL
“CONSENT IS NOT JUST AN EVENT”

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Introduction

The purpose of this brief is to attempt to present a draft regulatory framework that addresses many, but not all, of the difficulties and harms that surround the pornographic and adult entertainment industries to assist the committee in preparing their recommendations. Many other groups and people have accumulated irrefutable proof of the many legal and ethical failings associated with this industry, so I will not attempt to bring these issues forward. I aim to present a workable starting point for a long-term legal and regulatory solution that could place Canada as one of the most progressive and world-leading countries in reducing the harms to individuals and society that are inherent in this industry.

The main areas of consideration of this brief are:

- Modernizing the definition of a pornographic work.
- Addressing imbalances of power within the industry through enhancing consent and introducing active management of consent through the concept of “Consent is not JUST an Event”.
- Creating a feasible technological framework for managing consent from pre-production through to on-going distribution.
- Clear responsibilities for all parties and meaningful criminal and civil penalties for non-compliance.

Definition of Pornographic Works

To address the key issues for regulation, a working definition of pornographic Works must exist. Previous definitions have failed to be comprehensive enough to stand the test of time and changing technology. For the purposes of this regulation, I propose the following:

Pornographic Works:

- Are collections or individual images, moving or still, sounds, text, physical materials, signals, or data, in any live or recorded current or future media, format, storage, display or delivery mechanism or technology
- That have been created, edited, animated, enhanced, compiled, modified, remixed, presented or transmitted remotely or in-person,
- That regardless of intended use or production status, show, describe, or otherwise communicate, depict or present people, situations, sex or other actions in an open and direct way intended to cause or induce sexual excitement,
- Or are intended to promote, advertise or induce the consumption or distribution of any pornographic Work.

The Pornographic Ecosystem

For the purposes of this brief, I define the pornographic and adult entertainment industry and their consumers, using the term the “Pornographic Ecosystem”. The term “ecosystem” applies here because each of the four members: Consumers, Distributors, Producers and Actors, are interdependent on the existence of the others. This is similar to a natural world ecosystem where dependencies and interdependencies are extremely complex. As in the natural world, removing any one member creates the significant potential for dysfunction in the others, potentially leading to a collapse of the system.

Consumers are individuals who view or otherwise consume the Work.

Distributors are individuals or companies who make or facilitate making the Works available for Consumers by any means.

Producers are individuals or companies who finance, support, facilitate or otherwise engaged in the creation of pornographic Works

Actors are individual people who’s image, likeness, voice, and/or other attributes, in whole or in part, are depicted as part of a pornographic Work regardless of their gender, age, role, compensation, attribution, identify-ability or significance in the Work. Due to the sexual nature of participation in a pornographic Work, an individual Actor’s personal sexuality is openly depicted.

Self-Regulation of the Pornographic Ecosystem

To date, the pornographic ecosystem is largely self-regulating. A fundamental precondition for safe self-regulation in any industry is that there is sufficient incentive for that industry to align their actions to be compatible with the greater public interest. Self-regulation is the ideal state for any industry and should be encouraged for all industries unless they prove themselves unwilling or unable to do so.

This means that as long as the industry behaves in a way that is beneficial to their business as well as beneficial, or at least non-harmful to society, they may self-regulate.

In cases where the self-regulating industry is not clearly characterized by acting the greater public interest, it is the duty of an external regulator to step in and impose regulations that enforce appropriate behavior.

Unfortunately, the pornographic ecosystem has proven conclusively that they insufficient incentive to self-regulate. Massive imbalances in power and resources within the ecosystem in power create perverse incentives

for the businesses to behave in ways with that are not always in the best interest society. This often comes at the expense of the most vulnerable members of the ecosystem: The Actors.

Imbalances of Power

Many of the issues in the pornographic/ adult entertainment industry find their root in the significant inequalities that have evolved in power and resources between three of the main participants in the Pornographic Ecosystem. Actors have the least power and resources in this system. Producers have more and the Distribution companies have by far the majority of the power, as evidenced by the existence of multi-million dollar international entities such as MindGeek.

The imbalance in power leads Actors to being treated poorly, unfairly compensated, subject to coercion and, in many cases abused and pushed beyond their personal boundaries. In addition some people are forced into participating in pornographic Works against their will, based on individual vulnerabilities ranging from age, poverty and psycho-social pressure, all the way through to well-documented threats or actual acts of violence, rape, prostitution and human sex trafficking.

Long Term Consequences for Actors

Aside from obvious potential physical and emotional abuse and hazards associated with these activities, participants often have to deal with societal stigma, familial, professional and social consequences long after their initial participation in the pornographic Works. This is due to the enduring and long-lived nature of the distribution arm of the pornographic ecosystem. These well-documented consequences can significantly hinder individuals from progressing in their social and professional careers and achieving their full potential.

Many people who were at one point involved in the pornographic industry find that it is impossible to remove their images from public circulation and live in constant fear that it will resurface at some point in the future. As evidenced by the testimony of Ms. Serena Fleites, before this committee on February 1, 2021, many victims of rape or other non-consensual activities express feelings of being re-victimized every time the video of it is replayed.

Public Interest Considerations

In matters concerning the regulation of pornographic Works in Canada and elsewhere, the issue is regularly brought up that there is potential to introduce undue restriction on freedom of expression through pornographic Works.

This is a legitimate concern, however, as with all rights, there can be reasonable limitations placed on such rights by other rights. Any limitation must have a compelling public interest and be as light as necessary so that the that the exercise of a particular right does not place undue limitations on other, more explicitly defined rights, such as those described in the Charter of Rights and Freedoms and those interpreted by the Supreme Court of Canada. This means any regulation that may impinge on the right of freedom of expression and artistic freedom, must have a very good reason to do so.

As discussed previously, Actors in the pornographic ecosystem, Actors are most vulnerable to physical, sexual, financial, legal and psycho-social abuse and exploitation by Producers and Distributors and others, often with very little legal recourse or protection.

Participation in a pornographic Work, in the past, present or future, is often coerced and exploitive and not conducive to the preservation of the Actor’s human rights and dignity. The fallout from an Actor’s participation often holds them back from achieving their life goals.

Self-regulation attempts within the pornographic ecosystem have clearly, and catastrophically, failed.

Current Limitations of Actor’s Consent Rights

An Actor’s rights to consent or object to how and when their intimate images are used and the on-going distribution of pornographic Works that they have participated in are contractually extinguished through the use of long and complex release contracts.

Under current Canadian law and pornographic ecosystem, if an individual Actor decides they no longer desire to be associated with a pornographic Work, they have no legal recourse to prevent the distribution unless they can prove that it contains content that is clearly illegal. Consent in the current system is assumed to be a one-time event and cannot be revoked from that point onward.

There is a compelling public interest in protecting those in society who are vulnerable to exploitation or coercion, and preserving their human rights and dignity, especially in the realm of sexuality. An example of this is the fact that in Canada we have separate criminal offenses for common assault and sexual assault.

While there may very well be considerable public demand from Consumers for pornographic Works, there is no compelling public interest for the production or distribution of pornographic Works that would override the individual Actor’s right to consent to the on-going distribution of their images.

Addressing the Imbalances of Power through enhancing Actor’s Consent Rights

The simplest and most effective way to address the imbalances of power in the pornographic ecosystem is to enhance the concept of Express Consent.

Consent to participate in and allow consumption of a pornographic Work in which they have participated should remain in the exclusive domain of the individual Actors.

The regulation must ensure that all pornographic Works must have the **current valid express consent** of all participants involved with the production and distribution of the Work at all times, otherwise the Work is not legal for production, possession or distribution.

Valid express consent is the clear and unmistakable, voluntary, on-going agreement of an individual to engage in an activity that is given **without even the appearance of**, abuse, exploitation of trust, power, authority, coercion or threats.

Specific Consent

Specific Consent is a form of Express Consent that is related to participation in pornographic Works and consists of two parts: Express Initial Consent and Express On-Going Consent

Express Initial Consent is Express Consent for **initial** participation in the production of a pornographic Work. Express Initial Consent is a specific event, although it can be withdrawn at any time during the actual physical production phase.



Express On-Going Consent is Express Consent for continued participation and distribution of a pornographic Work. Express On-Going Consent is an on-going process and is not a singular event. "Consent is not JUST an event".

The following conditions apply to the Actor:

- Specific Consent must be granted only by the Actor and must remain exclusively in control of the Actor themselves.
- All Actors must be alive, competent, and of the legal age of majority in order to provide specific consent for participating in a pornographic Work.
- An Actor's specific consent will be in force until the Actor removes it or it expires.
- An Actor's specific consent will automatically expire (sunset) after 1 year unless expressly renewed by the Actor.
- Actors may be compensated for their participation in the Work, for granting of Express Initial Consent and at each granting or renewal of Express On-going Consent.
- Compensation in no way obliges an Actor to maintain their consent or removes the right of the Actor to suspend or withdraw their consent at any point in the future.
- Actors are prohibited from granting blanket, time-based or perpetual consents. Actors are prohibited from assigning maintenance or management of consents to any third party and consents may not be exercised by a contract, proxy or any other type of prior arrangement.
- Actors must specifically consent to each Work.
- An Actor's consent is deemed to have expired if the Actor becomes incompetent or otherwise unable to provide or manage their Express On-going Consent.

Specific Consent must have both Initial and On-Going parts present

SPECIFIC CONSENT is a form of express consent for participating in a pornographic Work that consists of the presence of both valid Express Initial Consent and valid Express On-going Consent.

Provision of Express Initial Consent from an Actor does not imply the existence of Express On-going Consent.

If consent is not actively managed, there is assumed to be no consent present

If any of the Actors present in a Work revoke or suspend their Specific Consent for said Work, the consent for the entire Work is revoked or suspended.

Specific Consent must be revocable at any time & for any reason.

Express Initial Consent or Express On-Going Consent may be temporarily suspended, or irrevocably removed at any moment, for any reason, without needing to provide notice, explanation or justification by the individual granting it.

There must be no penalty those for exercising their right to Specifically Consent.

There may be no contractual, civil, financial or criminal penalty or other hardship towards the Actor for removing or suspending Express Initial Consent or Express On-Going Consent for any Work.

No one may interfere with or restrict another persons ability to grant, suspend or revoke Express Initial Consent or Express On-Going Consent

Application of Specific Consent

For Specific Consent to function effectively, all of the individual Actors involved with a pornographic Work need to provide Express Initial Consent. Once Express Initial Consent is provided and registered, the Work may be produced.

If any particular Actor withdraws their Express Initial Consent during the production phase, they must stop their participation and the Producer must immediately prevent any further distribution, remove all traces of the non-consenting Actor from the Work within 14 days and provide the Actor a certification that their participation in the Work has been completely removed.

Once the Work is produced and any derivative Works, including promotional materials, are created and ready for distribution, all the Actors again must provide and register their Express On-Going Consent. At this point, the Work now has Specific Consent for distribution.

The Producer can then offer to transmit the Work to a Distributor. Before the Distributor takes possession of a copy of the Work, they must verify that the Specific Consent for that Work and any derivative Works is still valid.

After the Distributor takes possession, they must periodically (at least every 24 hours), verify that the Work still has Specific Consent.

If a Work is requested from the Distributor by a Consumer, the Distributor must verify and indicate clearly to the Consumer that the Work has valid Specific Consent prior to delivery to the Consumer.

If at any point, an Actor withdraws their Express On-Going Consent or the Specific Consent is otherwise found to be invalid, the Distributor and Producer must immediately stop and prevent any further distribution or transmission of the Work. The Producer then has 14 days to remove all traces of the non-consenting Actor from the Work and provide back to the Actor a certification that they have been completely removed.

Once this is completed, the Producer may re-register the revised Work without the non-consenting Actor, obtain Specific Consents and offer the Work back to the Distributor.

Technological Considerations – General

The technology to manage the registration, maintenance, and verification of pornographic Works, Express Initial Consent and Express On-Going Consent already exists and has been proven to scale well in similar types of applications. These registries would be owned and operated by an independent and impartial authority, ideally by

the Federal government itself. The registries would be funded by registration service fees from Producers and Distributors.

Each Work would require a unique “Digital Watermark” registered to the Producer that is available at all times throughout the consumption of the Work. The “Digital Watermark” may not always be visible to the Consumer, however, it must be extractible from the signal through technology from any portion of the Work. In addition, there may be the opportunity to link “digital DNA”, “digital fingerprint” or other identifying data to the Work in the registries to assist in cross-referencing invalid “Digital Watermarks” and assist with enforcement of copyright and beneficial ownership and responsibility for Works.

Considerations for Actors

Each Actor would require a formal registration on a secure centralized database called the “Actor’s Consent Registry”. The Actor must be verified as competent and of legal age and must provide current contact information, similar to a driver’s license or Firearms License. Stage names or aliases may be used to provide consent, however they must always be linked back to the true identity of the Actor. Since this database contains personal information and extremely sensitive data, it must be robustly protected from unauthorized access.

Specific Consent management for Actors could be managed through a secured web-based app or site, allowing the Actor to grant, suspend or revoke their consents.

Each Actor’s consents can be linked to the Digital Watermark and the Overall Specific Consent for a Work can be managed using blockchain based “Smart Contracts” that certify that a Work has Specific Consent based on verifying the consents for each related Actor.

Considerations for Producers

Each Producer requires a formal registration on a secure centralized database called the “Producer’s Consent Registry”. Registration includes: Full and proper details of the company including Company structure, significant shareholders/owners & beneficial ownership information; Names and contact details of all responsible parties involved with the production.

Producers must be licensed and certify that all Works are produced in compliance with the regulations, including those related to:

- Liability and accident insurance (before, during and after production)
- Health testing before and after the production of the Work
- Preservation of the human rights and dignity of all Actors at all times including race, sex, nationality, ethnicity, language, religion, or any other protected status.
- Compliance with all applicable national, regional and local business and health & safety regulations
- Compliance with any local, regional, provincial or federal licenses or permits required

Producers must prevent of depictions or actual events of:

- Non-consensual activities,
- Human trafficking,
- Money laundering / organized crime / terrorist activities or the participation of individuals involved in such activities,
- Legal or illegal substance abuse,
- Harm, degradation or abuse of the physical, sexual, psychological or emotional wellbeing of all participants involved with the production.

Producers must register each Work on the Producer’s Consent Registry, prior to the start of production and obtain a unique digital watermark for each Work and ensure that the digital watermark is properly embedded in each copy of the Work. They must ensure that all of their Works, published or not, are digitally watermarked and that the watermark is maintained through the entire editing, remixing, re-purposing, distribution and re-distribution of the Works regardless of initial, intermediate or final formats or media.

Any related promotional or derivative materials are considered to be unique Works and require their own unique digital watermarks and consents.

Production, transmission, distribution, use, or possession of a Work with an invalid or falsified watermark is an offense.

Producers are responsible for obtaining and verifying Express Initial Consent on the Actor’s Consent Registry from all Actors involved with, or depicted in, the Work before commencing the Work. If a Work has Specific Consent suspended or revoked or is otherwise found to be invalid, Producers must immediately prevent further distribution.

Producers may edit or modify a Work to remove all parts or segments of a Work in which an Actor who has revoked or suspended their consent appears, however, any costs associated with the modification and/or creation of this new Work is born by the Producer.

Producers must permanently destroy any Work, or related materials, digital or analog, that has had Specific Consent revoked by one or more of the Actors where that Work cannot be otherwise be edited or modified to remove that Actor from the Work. Certification of removal or destruction of the Work must be communicated directly to the Actor no later than the 14th day after the revocation of Specific Consent.

Producers or Distributors may not directly or indirectly contact or otherwise attempt to induce the Actor to reinstate their Specific Consent.

Before distribution, Producers must certify that they have been fully compliant with all applicable regulations.

Producers may suspend or revoke their consent for the distribution of a Work at any time.

Specific Consent management and production registration for Producers could be managed through a secured web-based site, with physical or digital submission and verification of documents. Verification of Specific Consents can be managed through blockchain technology and “smart contracts” managed on that blockchain.

Considerations for Distributors

Each Distributor requires a formal registration on a secure centralized database called the “Distributor’s Consent Registry”. Registration includes: Full and proper details of the company including Company structure, significant shareholders/owners & beneficial ownership information; Names and contact details of all responsible parties involved with the distribution.

All promotional materials and content, regardless of format, must preserve the human rights and dignity of all Actors at all times including race, sex, nationality, ethnicity, language, religion, or any other status.

All promotional materials created are considered unique Works, requiring registrations as new Works.

Before receipt, storage or delivery of any content or Work, the Distributor is responsible for verifying:

- The digital watermark is valid and properly related to the Work
- That Express Initial Consent and Express On-going Consent is present and valid by checking the Actor’s Consent Registry and the Producer’s Consent Registry

Distributors must ensure that the digital watermark is present on all Works in their possession, or on their servers, or on other forms of short and long term storage at all times.

If a Work in their possession is found to not have a valid watermark or valid Specific Consent, they must immediately prevent any further transmission or distribution of the Work, preserve any related records and data, and to report and cooperate with the appropriate authorities to investigate and, if possible resolve the issue.

Transmission, use, or possession of a Work with an invalid Specific Consent or a false watermark is an offense.

Failure to preserve any related records and data, and to report invalid watermarks to and cooperate with the appropriate authorities to investigate breaches of this regulation is an offense.

Distributors must verify and record that Specific Consent is present for each Work:

- Before receipt of the Work onto the systems or any storage device,
- At least once in every 24 hour period and
- Before each Work is displayed or transmitted to a Consumer, regardless of whether the content displayed is free or paid

Specific Consent management and registration for Distributors could be managed through a secured web-based site, with physical or digital submission and verification of documents. Verification of Specific Consents for Actor’s and Producer’s can be managed through blockchain technology and “smart contracts” managed on that blockchain.

Considerations – Consumers

Consumers of a pornographic Work must ensure that the digital watermark indicating Specific Consent is present and valid on all Works in their possession, on their servers, devices, or on other forms of short and long term storage under their control at all times.

Possession of any Work without a valid watermark indicating Specific Consent is present is an offense

Consumers must verify Specific Consent is present and valid before each Work is retrieved, stored, transmitted, displayed or otherwise consumed, regardless of how or when the Work is received or if the Work is free or paid.

Verification of Specific Consents can be managed through blockchain technology and “smart contracts” managed on that blockchain.

Summary

The current pornographic ecosystem has consistently proved that they are incapable of regulating themselves in a way that is compatible with the public interest. This includes common and continued exploitation of Actors who are arguably the most vulnerable members of the ecosystem.

Many of the current issues surrounding the pornographic ecosystem can be addressed through a combination of legal and regulatory measures.

These measures include:

1. Modernizing the definition of a pornographic Work to include existing and future potential technologies,
2. Creating a feasible technological framework that allows an independent authority to be able to verify compliance with the regulations,
3. Verifying that proper consent exists all the way through from creation to distribution and consumption of all pornographic Works produced, distributed and/or consumed in Canada,

“Consent is not JUST an event”

4. Enhancing an Actor’s ability to manage their consent to participate in a pornographic Work and the distribution of that Work, including retaining their right to withdraw their consent for on-going display of pornographic Works, if they so choose, and
5. Establishing a set of responsibilities for all parties and meaningful criminal and civil penalties for non-compliance.

These proposed regulations can best be summed up with the phrase “Consent is not JUST an event”.