NATIONAL CENTER ON SEXUAL EXPLOITATION

Obscenity Law Fact Sheet

Federal Obscenity Laws

Current federal law prohibits distribution of obscene material (hardcore pornography) via the Internet, television (cable/satellite/broadcast and including hotel/motel pay channels), common carriers such as FedEx and UPS, U.S. mails, and wholesalers and retailers.

The U.S. Department of Justice has not enforced federal obscenity laws *vigorously* since the Reagan/Bush presidencies and has not commenced *new* adult obscenity cases against major *commercial* distributors of 'adult' obscenity for nearly a decade. But that does not negate federal obscenity laws. In fact, the DOJ did prosecute pornographer Ira Isaacs for commercial distribution of 'adult' obscenity, a case indicted by the previous administration, and got a conviction in Los Angeles in 2012. The conviction was upheld by the Ninth Circuit in 2014.

The 94 U.S. Attorneys (each state has at least one) enforce federal obscenity laws. FBI agents, postal inspectors and customs officers investigate violations of federal obscenity laws including:

- 18 U.S.C. 1461 – Mailing obscene matter;
- 18 U.S.C. 1462 – Importation or use of a common carrier to transport obscene matter and use of computer to distribute obscene material;
- 18 U.S.C. 1463 – Mailing obscene matter on wrappers or envelopes;
- 18 U.S.C. 1464 – Broadcasting obscene language;
- 18 U.S.C. 1465 – Production with intent to distribute interstate, interstate transportation of, or distribution via computer of obscene matter;
- 18 U.S.C. 1466 – Engaging in the (wholesale or retail) business of selling or transferring obscene matter;
- 18 U.S.C. 1466A – Producing, distributing, receiving, or possessing with intent to distribute obscene visual representation of the sexual abuse of children;
- 18 U.S.C. 1468 – Distribution of obscene matter by cable or satellite TV;
- 18 U.S.C. 1470 – Transfer of obscene material to minors;
- 47 U.S.C. 223 – Making an obscene communication by means of telephone.

- "Dealing in obscene matter" is also a predicate offense under the Federal Racketeer Influenced and Corrupt Organizations (RICO) statute. (Title 18, Section 1961-1968).

State and Local Obscenity Laws

Workable statewide obscenity laws exist in 40 states. In some states, cities/counties can also enact obscenity laws. These laws prohibit obscene materials and performances. The prosecuting attorney of each county/judicial district enforces these laws. State/local police make arrests.

Alaska, Maine, New Mexico, Vermont and West Virginia do not have a statewide obscenity law, and Montana and South Dakota have defective state laws. New obscenity laws are needed in these states. Maine, New Mexico and South Dakota, however, allow local control of obscenity. In Oregon, Colorado and Hawaii the State Supreme Court invalidated [Oregon] or greatly weakened obscenity laws. Amendments to state constitution are needed in these states.

Governmental Justifications for Obscenity Laws

In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), the Supreme Court identified several governmental interests that justify a prohibition on obscenity:

- "In an unbroken series of cases extending over a long stretch of this Court's history, it has been accepted as a postulate that 'the primary requirements of decency may be enforced against obscene publications.' [*Near v. Minnesota*, 283 U. S. 697 (1931)]" (57).
- In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, ***even if it is feasible to enforce effective safeguards against exposure to juveniles and to passersby***. . . These include the interest of the public in the quality of life and total community environment, the tone of commerce…and, possibly, the public safety itself (57-58). [***Italics*** added. **Because of Supreme Court decisions, there are no laws requiring Internet pornographers to shield children from their wares.]**
- The sum of experience . . . affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex (64).

Obscenity Is Not Constitutionally Protected Speech

In *Chaplinksy v. New Hampshire*, 315 U.S. 568 (1942), the Court clarified that obscenity laws do not raise constitutional problems: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . [S]uch utterances are no essential part of any exposition of ideas, and . . . any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" (571-72).

In *Roth v. United States*, 354 U.S. 476 (1957), the Court noted that while obscenity law was not as fully developed as libel law when the First Amendment was adopted, "there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech . . ." (483). The Court went on to hold that obscenity is "not within the area of constitutionally protected speech or press" (485).

In *Miller v. California*, 413 U.S. 15 (1973), the Court stated: "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment" (23) . . . "The dissenting Justices sound the alarm of repression. But . . . to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a 'misuse of the great guarantees of free speech and free press'" (34-35).

Contrary to what some may think or say, the First Amendment does not protect Internet obscenity. See, e.g., *Ashcroft v. ACLU*, 535 U.S. 564, 585 (2002); *Nitke v. Gonzalez*, 413 F. Supp.2d 262 (S.D.N.Y. 2005), *aff'd,* 547 U.S. 1015 (2006); *United States v. Extreme Associates*, 431 F.3d 150 (3rd Cir. 2005), *cert. den*., 547 U.S. 1143 (2006).

Defining Pornography and Obscenity

The 1986 Attorney General's Commission on Pornography defined pornography as, "Material that is predominantly sexually explicit and intended primarily for the purpose of sexual arousal." The word "pornography," however, is not a legal term; and like all speech pornography is presumptively protected by the First Amendment unless shown otherwise. However, if the pornography is found to be obscene, it is *not* protected speech. A jury or judge(s) ultimately determines if the specific pornographic material meets the legal definition of obscenity.

In *Miller* and later cases the Supreme Court established a test to determine if material is obscene:

- Whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
- Whether the average person, applying contemporary community standards would find that the work depicts or describes, in a patently offensive way, hardcore sexual conduct; **and**
- Whether a reasonable person would find that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller also provided examples of sexual conduct that can be regulated:

- "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated;
- (b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals" (413 U.S. at 25). [In *Ward v. Illinois*, 431 U.S. 767 (1977), the Supreme Court added "sado-masochistic" conduct to its list.]

Under *Miller*, even "normal" or "simulated" sex can be obscene. As the *Roth* Court observed, however, ". . . sex and obscenity are not synonymous. Obscene material . . . deals with sex in a manner appealing to the prurient interest" (354 U.S. at 487).

Other Considerations

There are other considerations that should be kept in mind regarding Supreme Court obscenity precedents. It is not constitutionally significant that the person to whom obscene material is distributed is a willing adult. In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973), the Court stated: "We categorically disapprove the theory . . . that obscene, pornographic films acquire constitutional immunity . . . simply because they are exhibited for consenting adults only." Nor does the right to possess obscene material assume a right to receive it. In *United States v. 12 200-Ft. Reels*, 413 U.S. 123, 128 (1973), the Court reaffirmed that: "We have already indicated that the protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others…Nor is there any correlative right to transport obscene material in interstate commerce."