NATIONAL CENTER ON SEXUAL EXPLOITATION

Obscenity Law Fact Sheet

Federal Law

Current federal law prohibits distribution of obscene material (hardcore pornography) via the **Internet**, television (including cable/satellite TV), hotel/motel TV, common carriers such as FedEx and UPS, through the mails, through wholesalers, and in retail establishments. The U.S. Department of Justice has refused to indict on any new adult obscenity cases since 2008, but of course, that does not change federal law. In fact, the DOJ did prosecute pornographer Ira Isaacs for obscenity distribution, a case indicted by the previous administration, and got a conviction in Los Angeles in 2012. The conviction was upheld by the U. S. Court of Appeals for the Ninth Circuit in 2014.

The ninety-four 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;
- 47 U.S.C. 223 – Making an obscene communication by means of telephone;

State Law

Virtually every state has its own obscenity law which prohibits intrastate retail distribution of obscene material.

Obscenity: Not Constitutionally Protected Speech

Obscenity is not within the area of constitutionally protected speech or press. Several court decisions are relevant, particularly:

Chaplinksy v. New Hampshire, 315 U.S. 568 (1942)
Roth v. United States, 354 U.S. 476 (1957)
Miller v. California, 413 U.S. 15, (1973)

In *Chaplinksy* the U. S. Supreme 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 . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality (571-572).

In *Roth* the Court noted that, "At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press"(483).

The First Amendment was intended to protect ideas and debate, not obscene material. The *Miller* Court said: "[T]o 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…press'" (34).

Defining Pornography and Prosecuting Obscenity

The word pornography is a generic, not a legal term. Like all speech, pornography is presumptively protected unless shown otherwise. However, if the pornography is obscene it is *not* protected speech. A court ultimately needs to determine if the specific pornographic material meets the legal definition of obscenity.

In *Miller* and subsequent cases the Supreme Court established a very workable and understandable three-part legal test to determine if material is obscene, indicating that the basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the average person, applying contemporary community standards would find that the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether a reasonable person would find that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller gave specific examples of material that may constitutionally be regulated as obscene: "It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion: (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" (25).

Note that obscenity may involve even normal sex or simulated sex. The acts need not be acts which some or even the majority would find in and of themselves offensive. It is the exploitation of the sex act or acts that count.

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." More recently, in *Ashcroft v. ACLU*, 535 U.S. 564 (2002), the Supreme Court rejected a constitutional challenge to application of obscenity laws **to the Internet.**