

MASS MEDIA AND SOCIETY

Pornography Law



Introduction

One of the areas of speech/expression the Supreme Court has steadfastly said that is NOT protected by the First Amendment is pornography. It is illegal. If that's true, why does it seem like there is so much of it around? The problem is in the definition. What is pornography to you and me may simply be smut or eroticism to others. At one point one Supreme Court justice was led to define pornography this way:

I can't define it, but I know it when I see it.

We're going to look at the evolution of the Supreme Court's definition of what is pornography.

Again, while there is no national pornography law, per se, the Supreme Court's decisions provide a national guideline that states must weigh their laws against.

Roth decision (1957)

While obscenity law dates back to at least 1712, today's definition begins with the Supreme Court's 1957 Roth vs. U.S. case. Prior to this case, state routinely passed laws against obscenity and pornography that outlawed it because kids might get exposed to it. That would be like the United States outlawing cigarettes or liquor because kids might smoke or drink. Hmmmmm . . .

The court ruled that state governments could not outlaw all eroticism or smut just to protect kids. Adults who wanted access to it had the right to it. But not PORNOGRAPHY. And to help curb pornography, the court started down its route to try and define pornography. It came up with a three-part definition.

- . . . whether to the average person, applying contemporary community standards,
- . . . the dominant theme of the material as a whole
- . . . appeals to the prurient interest.

Sounds simple enough. But who is the average person? What does you mean by contemporary community standards? Actually, courts felt pretty comfortable with defining the average person. They had enough experience with juries and the word "peer" to handle that.

Prior to this decision, states also often looked at books and magazines and if only one part of it fell into the category of "pornographic" the whole work was considered illegal. That way even the Bible might be defined as pornographic --see the Song of Solomon" in the Old Testament. Now, however, the dominant theme of the work, taken as a whole, had to be considered.

"Appeals to the prurient interest" means that it is intended to stir up sexual desires in you.

Jacobellis vs. Ohio (1964)

In 1964 the court had to revisit its definition and clarify that "community" standard. Whose community standard were you supposed to apply? If you were a magazine dealer, for instance, did you have to know the standards for every community in the country? How could you possibly have a national distribution of your product that way? The net result would be to use a standard that was the most conservative standard in the nation.

The court ruled that the Constitution demanded a national standard. You couldn't get as liberal as New York City or San Francisco wanted, but you couldn't get as conservative as Des Moines wanted.

Memoirs of Woman... (1966)

In 1966 the Memorials of a Woman of Pleasure case --you'll find some strange case names in pornography cases-- also known as the Fanny Hill case, the court had to refine the definition again. In keeping with its penchant for three-part tests, the court combined the three parts of the previous test into one and added two more parts.

...Whether to the average person applying contemporary community standards, the work taken as a whole, appeals to the prurient interests;
... the work is patently offensive; and
... the work is utterly without redeeming social value.

So now to be pornographic, the work had to more than just arouse sexual desires, it had to be patently offensive. Further, it had to lack social value.

Miller vs. California (1973)

But the court was not through yet. Prosecutors found the definition to be lacking in specifics, so in 1973 the court came up with a refined definition in the Miller vs. California case that serves as the basis of today's definition. There have been clarifications, but the definition still stands.

1. An average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest.
2. The work depicts or describes, in a patently offensive way, sexual conduct, and the applicable state law specifically defines what depictions or descriptions are prohibited.
3. The work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Further, the court reversed its earlier ruling and said that local communities, or at least regions, could tighten up standards if they wanted.

Prosecutors needed help in defacing what "patently offensive" meant. They thought they knew, but their prosecutions were constantly being overturned because the phrase is vague. So the Supreme Court said states had to define what types of depictions would not be allowed. This meant that states must pass laws that contain lists of all kinds of perversions that would not be allowed to be pictured or described. You want something that appeals to prurient interests read those laws!

The Court also refined the third prong of the test and came up with its famous LAPS test: Lacks

Literary, Artistic, Political or Scientific value. Of course, what is art? Art is in the eye of the beholder. Politics could include the politics of male-female relationships in society. Scientific value could include psychologists prescribing a "porno" movie to couples experiencing marital problems. In other words, each time the Court attempted to narrow the definition, it made it more difficult to define true pornography.

Telecommunications Act of 1996

And then along came the Internet. Time magazine once included a cover article that declared that the majority of Internet content, including e-mail, contained pornography. This led Congress to pass the Communications Decency Act as part of its 1996 sweeping update of the law that regulates broadcasting in this country: The Telecommunications Act of 1996.

Title V, the Communications Decency Act, made it illegal for anyone to post or cause to be posted any "indecent" material on the Internet. Designed to curb smut, the law could also outlaw such legitimate Web sites as the American Cancer Society or other sites that explained to women how to self-check themselves for breast cancer. Or AIDS sites designed to explain the proper use of a condom in safe sex.

The American Civil Liberties Union immediately challenged the act as being too vague. It was also unenforceable when applied to an estimated three-quarters of smut that was being posted on Web sites in other countries. The Supreme Court agreed and the Act was declared unconstitutional. Congress has since been trying to pass another law that would withstand a Court challenge.

Part of the problem is that Congressional leaders look at the Internet as being more like television than like print media. When we get into the next section we'll look at how broadcast media in this country are regulated in ways we would never consider regulating print content . . . and why. But the closest relationship the Internet has to broadcast media in this country is that the content is delivered to your home electronically (like cable TV) and that you view it on a monitor that bears a striking resemblance to a television set. But the way in which we interact with the content is more in line with print media in this country.

Since then Congress has tried at least twice more to control pornographic content on the Internet with the Child Internet Protection Act and by requiring public libraries to install software filters that would block out sexually explicit sites. Courts found CIPA to be too vague, again, and the filtering process flawed.

But in June 2003, the Supreme Court upheld the idea that the government should not have to provide access to porn sites, especially for children. The court said that it was okay to require libraries that receive federal funds --many do, but not all-- to install software filters on their public-use computers to protect children. However, since those sites are technically okay for adults, adults may ask that the filters be disabled. This will cause libraries to situate their computers to protect passers-by from exposure to unwanted sites.

Reading Assignment

You should be reading the chapter on media law in your textbook to get more information about media law and the First Amendment.

Exercise

How might the current definition of pornography help curb pornography in this country and how might it make it more difficult to curb pornography?

Note that when submitting the answer start the subject line with:

J100x - YourLastName - Pornography

Send to rcameron@cerritos.edu