

Ch13

I. Law of Obscenity

- a. Regulation of obscenity continues to be a difficult challenge because:
 - i. The Miller test leaves flexibility for interpretation
 - ii. New technologies have made adult content readily available
 - iii. Feminists claim pornography objectifies women
 - iv. Conservatives feel that pornography harms family values
- b. Obscenity
 - i. A narrow class of material defined by the Miller test, sometimes referred to as hard core pornography
 - ii. It is legally defined, therefore not protected by the 1st amendment
- c. Indecent Material
 - i. Material that may be sexually graphic, referred to as adult material or sexually explicit material
 - ii. Is protected by 1st amendment
 - iii. You can regulate indecent material
 - iv. Exchanged between adults, keep younger people away from this
- d. Pornography
 - i. No legal significance
 - ii. Offensive to some people
- e. Early Law of Obscenity
 - i. **1815**: 1st obscenity prosecution in the US occurred
 1. Jessie Sharpless was fined for exhibiting a painting of a man "in an imprudent posture with a woman"
 - ii. **1821**: Peter Holmes was convicted for publishing an erotically enhanced version of John Cleland's *Memoirs of a Woman of Pleasure*
 - iii. **1873**: The Comstock Act, the most comprehensive federal statute adopted
 1. The law declared that all obscene books, pamphlets, pictures and other material were nonmailable
 2. Remains in federal law today**
- f. The Hicklin Rule
 - i. Work is obscene if it has a tendency to deprave and corrupt those whose minds are open to such immoral influences and into whose hands it might fall
 - ii. Under this definition, if it is not fit for a child it is not fit for an adult
 - iii. Supreme Court abandoned this rule
- g. Roth-Memoirs test
 - i. Has 3 parts:
 1. The dominant theme of the material taken as a whole must appeal to prurient interest in sex
 2. A court must find that the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters
 3. Before something can be found to be obscene, it must be utterly without redeeming social value

- ii. Test is narrower than the Hicklin rule
 - h. The Miller Test
 - i. Marvin Miller was prosecuted because he sent 5 brochures advertising erotic books and films to a restaurant in Newport Beach
 - ii. Chief Justice Warren Burger and four other members of the high court agreed that material is obscene if the following standards are met
 1. **An average person, applying contemporary local community standards, finds that the work, taken as a whole, appeals to prurient interest.**
 - a. The trier of fact makes this decision. Can be the trial judge but more commonly it's the jury
 - b. In most jurisdictions, the term "local standards" has been translated to mean "state standards"
 2. **The work depicts in a patently offensive way sexual conduct specifically defined by applicable state law**
 - a. Patent offensiveness is also to be judged by the trier of fact using contemporary standards
 - b. Hard core pornography
 3. **The work in question lacks serious literary, artistic, political or scientific value**
 - a. The judge decides whether a work has serious value
- II. Controlling obscenity
 - a. Scienter: guilty knowledge
 - i. Whether the defendant was knowledgeable about the contents before it was sold, published, or distributed
 - b. Postal Censorship
 - i. The supreme court ruled that the use of mail in the US is a privilege not a right
 - ii. It's illegal to send obscenity through the mail regardless of how it is delivered
 - iii. The 1973 Comstock Act provides basic authority for the US Postal Service to regulate the flow of erotic material in the mail
 - iv. "Postal patrons who have received unwanted solicitations for what they define as obscene material can request the Postal Service to inform the mailer that they no longer wish to receive such material"
 - c. Film Censorship
 - i. Censorship of motion pictures by cities and states is an infrequent occurrence today. This is due to:
 1. So called adult theaters have become virtually extinct in the internet age
 2. Most commercial theaters don't show movies rated NC-17
 3. A voluntary film rating system by the Motion Picture Association of America (G, PG, PG-13, R, and NC-17) has satisfied the concerns of most people worried about the content of the movies

4. Motion pictures were not granted 1st amendment protection until 1952

III. Regulation of Nonobscene Erotic Material

- a. Sexually oriented businesses (SOBs)
 - i. Strip clubs, adult video stores and adult theaters- are subject to 2 types of local laws:
 1. Zoning regulations
 - a. When cities zone SOBs they use one of 2 approaches:
 - i. Clustering the businesses into a single area (red light district)
 - ii. Dispersing them across the community, usually to remote industrial areas
 - b. *Renton v Playtime Theaters, Inc.* upheld an ordinance in Washington state prohibiting adult theaters from locating within 1,000 ft of any residential zone, family dwelling, church, park, or school
 2. Expressive conduct regulations
 - ii. Attacks on Arts and Pop Culture
- c. Erotic materials in cyberspace
 - i. The Communications Decency Act
 1. Made it a crime to transmit indecent material or allow indecent material to be transmitted over public computer networks to which minors have access.
 - ii. The Child Online Protection Act
 1. Statute prohibits commercial Web sites from knowingly transmitting to minors (people under 17) material that is harmful to them
 2. Strict scrutiny – the government must prove that COPA restricts no more speech than is necessary to achieve the goal of making the internet safe for minors
 3. COPA never took effect
 - iii. The New “Dot XXX” domain
 1. Hasn’t been used

IV. Definitions

- a. Viewpoint based discrimination
 - i. Always unconstitutional
 - ii. Government can’t pick a side and ONLY censor that side
- b. Intermediate scrutiny
 - i. Review for content neutral laws
 - ii. Justified by a substantial interest, not a complete ban on communication
 - iii. Narrowly tailored

CH 14

I. Immaterial Property Law

- a. **Copyright**: an area of law that deals with intangible property (person can’t touch or hold). It protects the CREATOR