Obscenity and the Internet: A Case Study of U.S. Law
ความลามกและสื่ออินเทอร์เน็ต: กรณีศึกษากฎหมายอเมริกัน

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ABSTRACT

U.S. Law makes a sharp distinction between public communications that are indecent, which are generally permissible, and obscene, which are prohibited and subject to legal penalties. This study analyzes the way that laws have been interpreted over time, focusing specifically on how the Internet has complicated the way obscenity has been interpreted in the courts. In the current state of law, whether a work is obscene or not will be determined by community standards existing where it is received. Moreover, obscenity is judged subjectively by courts without a need to consult experts. Nevertheless, obscenity laws can be understood as protection for the majority, in the name of a universal good.

Keywords: *Obscenity, Indecency, Internet, U.S. Law*

บทคัดย่อ

กฎหมายอเมริกันกำหนดไว้ชัดเจนว่า การสื่อสารสาธารณะที่เข้าข่ายอนาจารนั้น โดยทั่วไปแล้วสามารถเผยแพร่สู่สาธารณะได้ แต่การสื่อสารสาธารณะที่เข้าข่ายลามกเป็นสิ่งต้องห้ามต่อการเผยแพร่ และผู้เผยแพร่ต้องได้รับการลงโทษทางกฎหมาย การศึกษาครั้งนี้วิเคราะห์แนวทางที่กฎหมายอเมริกันฉบับต่างๆ ได้รับการตีความจากอดีตจนปัจจุบัน และให้ความสนใจศึกษาว่าในสถานการณ์ปัจจุบัน สื่ออินเทอร์เน็ตได้สร้างความซับซ้อนให้แก่วิธีการตีความสื่อลามกในชั้นศาลอย่างไร ซึ่งความซับซ้อนเกิดขึ้นเมื่อกฎหมายตีความว่าเนื้อหานั้นๆ จะเข้าข่ายลามกหรือไม่ให้ขึ้นอยู่กับมาตรฐานของชุมชนที่ผลงานนั้นๆ ไปปรากฏ ยิ่งไปกว่านั้น การตัดสินว่าเนื้อหานั้นๆ จะเข้าข่ายลามกหรือไม่ยังขึ้นอยู่กับความคิดเห็นของศาลโดยมิจำเป็นต้องรับฟังความคิดเห็นของผู้เชี่ยวชาญแต่อย่างใด กระนั้นก็ตาม กฎหมายสื่อลามกนี้สามารถเข้าใจได้ว่า เป็นไปเพื่อปกป้องคนหมู่มากในนามแห่งความดีงามสากลนั่นเอง

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Introduction

The Internet is a global and decentralized network that connects people worldwide. It is an information sharing system that encourages freedom of expression in a practical way, as Internet users can both produce and receive information. The Internet has become particularly popular among those message producers who cannot gain access to mainstream media or other public communication channels. It is also popular among information seekers who wish to receive content that cannot be gotten through traditional media.

It is estimated that in 2013, more than 84% of United States residents were Internet users (The World Bank, 2014). This number had grown from only 0.8% in 1990 and 43.1% in 2000 (U.N. Data, 2014). The number of users thus indicates the importance this medium has come to represent in American society. For comparison, Internet users in Thailand in 2013 estimated to amount to 28.9% of residents (The World Bank, 2014).

On the surface, the Internet seems to satisfy most parties—"partaking in unrestrained forums that debate religious, political, and social concerns" (Hackett, 2008). Yet, there can be problems related to misuse of the Internet, particularly in the area of content that challenges social norms. In the U.S., restrictions on obscenity are guided by the First Amendment which protects every kind of speech including hate speech, political speech, and indecent speech but not obscene speech. In this context speech can refer to any communication including images and text. As a result, those who communicate by public means must consider whether a speech may be judged obscene or indecent and thus whether or not it will be granted legal protection. In other words, the difference between indecency and obscenity is that indecency is fully protected in the print media, on the Internet, and partly protected in cable and broadcast media, whereas obscenity is restricted and thus denied protection by the First Amendment. It is therefore not allowable in any public communication medium (Middleton & Lee, 2008).

However, the advent of the Internet has rendered obscenity standards problematic. This is caused by the nature of the medium—it travels without visible boundaries, which creates challenges to both senders and receivers because different communities may hold different cultural, political, and economic values. Sexually explicit material that is qualified as indecency in a sender's community might be found obscene in receivers' communities. This study explores the United States' approach to regulation of obscenity on the Internet, asking whether obscenity laws, particularly current constitutional standards are appropriate for this global channel of communication.

This study is made up of four parts: Part I investigates the history of obscenity laws and the landmark cases important to the development of obscenity standards. Part II explores the first legal case involving transmission of obscenity on the Internet. Part III discusses the Communications Decency Act and the *Nitke v. Gonzales* case. Part IV presents the conclusions and discussion.

Part I: The history of obscenity law and the landmark cases

Historically speaking, obscenity has always been considered illegal in the U.S. The first law on the subject dates back to 1712 when the colonial legislature in Massachusetts made it a crime to publish: "any filthy, obscene, or profane song, pamphlet, libel or mock sermon" (Overbeck, 2009; Sadler, 2005). A century later in 1821, Vermont passed a law to prohibit the publication

and distribution of obscene material. At the national level, the U.S. Congress passed the Tariff Act of 1842 banning the "importation of all indecent and obscene prints, paintings, lithographs, engravings and transparencies" (Overbeck, 2009; Sadler, 2005). In 1857, the Tariff Act was amended to cover printed material as well. In 1865, obscenity received further restrictions when Congress passed a law that banned postal mailing of obscene materials.

A key point in the history of obscenity lawmaking in the US was in 1873 when Congress passed the Anti-Obscenity Act or the Comstock Act. This act was influenced by the British case of *Regina v. Hicklin* (1868). According to the Hicklin Test, a work is pronounced obscene based on two criteria: "(a) looking at an individual passage taken out of context and (b) looking at its effect on the most sensitive and susceptible people in the society" (Sadler, 2005). In other words, if at least one sentence of a book is found obscene, the entire work of literature would be labeled obscene. The Comstock Act not only adopted the Hicklin definition of obscenity, but also gave power to the Post Office to determine whether materials were obscene and, if so, gave it authority to confiscate the materials. Since the Hicklin Test was very strict, even some pieces of classical literature were subject to interpretation as obscene.

The Hicklin Test was employed in American court cases for more than six decades. In 1933, Judge John Woolsey reviewed James Joyce's *Ulysses*. However, he refused to follow the Hicklin Rule and instead he devised two new criteria for obscenity: (a) the work must be judged as a whole and (b) it must be weighed by its effect on the average person (United States v. One Book Called "Ulysses," 1933). The U.S. Court of Appeals in *U. S. v. One Book Entitled Ulysses by James Joyce (Random House, Inc., Claimant)* (1934) upheld the decision. However, up to that date the U.S. Supreme Court had not yet laid out a definition of obscenity.

Obscenity was finally given a legal definition in 1957 in *Roth v. U.S.* (1957). Samuel Roth was convicted under federal statutes for mailing obscene material. The U.S. Supreme Court upheld the conviction and ruled that:

> The standard for judging obscenity, adequate to withstand the charge of constitutional infirmity, is whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest (Roth v. U.S., 1957, pp. 354 U.S. 488-489).

Roth v. U.S. was considered a landmark case because it not only brought about the first concrete description of obscenity, known as a three-part obscenity test, but it also led to the court's decision that obscene materials and speech are not protected by the First Amendment. The Supreme Court decision stated that:

> Obscenity is not within the area of constitutionally protected freedom of speech or press either (1) under the First Amendment, as to the Federal Government, or (2) under the Due Process Clause of the Fourteenth Amendment, as to the States (Roth v. U.S., 1957, pp. 354 U.S. 481-485).

However, the definition of obscenity based on the Roth Test was challenged on three counts: 1) it remained unclear who qualified as the average person, 2) what community to be referenced to and who determined community standards, and 3) what does prurient mean and what type of material would appeal to "prurient interests?" (Sadler, 2005). In their dissenting opinions Justices

Douglas and Black stated that the Roth Test "gives the censor free reign over a vast domain" (Roth v. U.S., 1957, pp. 354 U.S. 509). It gave juries the power to "censor, suppress, and punish what they don't like" (Roth v. U.S., 1957, pp. 354 U.S. 512). And, according to the dissenting opinion, the community standards rationale was "too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment" (Roth v. U.S., 1957, pp. 354 U.S. 512; Sadler, 2005).

Indeed, at least two major cases—*Manual Enterprises, Inc. v. Day* (1962) and *Jacobellis v. Ohio* (1964)—demonstrated the potential confusion posed by the three-part test. In the 1960 *Manual Enterprises, Inc. v. Day* case, the Judicial Officer of the Post Office Department conducted an administrative hearing and ruled that the Manual Enterprises' magazines were not only obscene, but they provided information on where obscene materials could be gotten. This, in the judgment of the Judicial Officer, disqualified them from postal services under two different provisions of 18 U.S.C. § 1461, more commonly known as the Comstock Act. In addition, the Judicial Officer determined that the magazines had no "literary, scientific or other merit" and "would appeal to the 'prurient interest' of such sexual deviates, but would not have any interest for sexually normal individuals" (Manual Enterprises, Inc. v. Day, 1962, pp. 370 U.S. 478).

As a result, the Post Office barred the shipment of the magazines, and the Court of Appeals affirmed the decision. However, in 1962 the U.S. Supreme Court reversed the judgment. Justices Harlan and Stewart concluded that the magazines could not be deemed obscene as defined by 18 U.S.C. § 1461, because they were not "beyond the pale of contemporary notions of rudimentary decency." Their ruling also found that they were not "so offensive on their face as to affront current community standards of decency" something the justices defined as "patent offensiveness" or "indecency." Finally, therefore under those circumstances the question of the intended audience of the magazines was found to be irrelevant (Manual Enterprises, Inc. v. Day, 1962, pp. 370 U.S. 481-491).

The Manual Enterprises, Inc. case provided an example of how the obscenity standard could create uncertainty. In this case, both lower and appeals courts agreed on the decision but the U.S. Supreme Court had a different opinion. Another case, *Jacobellis v. Ohio* (1964), brought about another fussy issue of adjusting of the definition of "community" for community standards.

This case was about the French film, *Les Amants,* which had been shown in about 100 cities, indicating that the movie was not deemed obscene in at least these cities. However, in 1963, Nico Jacobellis, a movie theater manager, was convicted of violating Ohio's obscenity law for possessing and exhibiting this movie. According to Ohio law, *Les Amants* was judged obscene and thus should not be on exhibition to the public. In 1964, the U.S. Supreme Court reversed that lower court decision. Justices Brennan and Goldberg concluded that: "The film is not obscene under the applicable standard" (Jacobellis v. Ohio, 1964, pp. 378 U.S. 196). The court offered two important principles:

> The question of the proper standard for making this determination has been the subject of much discussion and controversy since our decision in *Roth* seven years ago. Recognizing that the test for obscenity enunciated there—"whether, to the average person, applying contemporary community standards, the dominant

> theme of the material, taken as a whole, appeals to prurient interest," 354 U.S. at 354 U.S. 489—is not perfect, we think any substitute would raise equally difficult problems, and we therefore adhere to that standard. The "contemporary community standards" by which the issue of obscenity is to be determined are not those of the particular local community from which the case arises, but those of the Nation as a whole (Jacobellis v. Ohio, 1964, pp. 378 U.S. 192-195).

However, Chief Justice Warren sided with Justice Clark who disagreed with Justice Brennan's national standard:

> It is my belief that, when the Court said in *Roth* that obscenity is to be defined by reference to "community standards," it meant community standards—not a national standard, as is sometimes argued. I believe that there is no provable "national standard," and perhaps there should be none. At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one. It is said that such a "community" approach may well result in material's being proscribed as obscene in one community but not in another, and, in all probability, that is true (Jacobellis v. Ohio, 1964, p. 378 U.S. 201).

An agreement on "contemporary community standards" therefore remained unsettled. Even so, as a result of this case, Justice Brennan's national standard continued to be applied for another decade. Then in 1973, in *Miller v. California* (1973), the U.S. Supreme Court handed down another decision that held that there could be no "fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.' This thus confirmed the need for local judgments about obscenity set within communities rather than at a broad countrywide level. In their decision, the justices observed that "to require a State to structure obscenity proceedings around evidence of a *national* "community standard" would be an exercise in futility (Miller v. California, 1973, p. 413 U.S. 31).

Miller v. California (1973) was considered another landmark case as it led to an accord on the use of local community standards rather than national standards. It also established the Miller Test to determine what constitutes obscene material. The Miller Test relied on these three criteria to judge a work obscene:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, *(Roth, supra,* at 354 U.S. 489), (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value (Miller v. California, 1973, pp. 413 U.S. 24-25).

As can be seen, the Miller Test was actually based on the Roth Rule—the first condition was derived from the definition of obscenity in *Roth v. U.S.* (1957). Nevertheless, the term "prurient interest" in the Roth Rule was not spelled out. The court in *Miller v. California* provided a definition of prurient interest as "a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance" (Miller v. California, 1973, p. 413 U.S. 37). Another term, "patently

offensive," was offered for the second criterion, but it was not defined by the court. It is assumed to follow Justices Brennan and Fortas in *Memoirs v. Massachusetts* (1966) that ". . . the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters" (Memoirs v. Massachusetts, 1966, p. 383 U.S. 418).

The Miller Test has been applied up to the time of this writing in 2014. Along a complex route spanning more than two decades, the test was most challenged when the first Internet obscenity case came before the courts in 1996. The next section discusses how distant communication on the Internet complicates the application of the Miller Test when it is unclear which community standard should be used to evaluate material—that of senders or receivers.

Part II: The first Internet obscenity case

In 1991, Robert Alan Thomas and his wife Carleen opened the Amateur Action Computer Bulletin Board System from their home in California. Their electronic bulletin board offered sexually explicit photographs for sale, but before gaining access to their system, customers had to file an application to become members and to receive a password. The Thomases also sold and delivered sexually explicit videotapes to members across the country.

In 1993, a complaint in the Western District of Tennessee prompted a U.S. Postal inspector to conduct an undercover investigation. Thereafter, in 1994 a grand jury indicted the Thomases for violating Tennessee's obscenity laws. In *United States v. Thomas* (1996), the Thomases challenged the court on two central issues relating to the then emerging computer technology community standards and the definition of obscenity.

On the first issue, the Thomases argued that due to the implications arising from the new technology, a new definition of community would be required. Their bulletin board connected widely to people in cyberspace so it was not appropriate to use "the geographical locale of the federal judicial district of the criminal trial" (United States v. Thomas, 1996). They argued that existing community standards created chilling effects, as bulletin board operators could not know who accessed materials made available via the Internet. Consequently, they would be forced to self-censor their work—and therefore unfairly limit their freedom of speech—in order to avoid violating the most restrictive community standards accessible by the Internet (United States v. Thomas, 1996).

On this count, the court responded that the Thomases instructed their customers to provide personal contact information via the bulletin board membership process. Applicants were thereby screened before a password to access the board was made available; therefore, they would have known who and where the customer was. The court concluded that:

> Thus, Defendants had in place methods to limit user access in jurisdictions where the risk of a finding of obscenity was greater than that in California. . . . This is not a situation where the bulletin board operator had no knowledge or control over the jurisdictions where materials were distributed for downloading or printing.... under the facts of this case, there is no need for this court to adopt a new definition of "community" for use in obscenity prosecutions involving electronic bulletin boards (United States v. Thomas, 1996).

In addition, the court stated broadly which community would be applicable to determine online obscenity:

> "venue for federal obscenity prosecutions lies in any district from, through, or into which" the allegedly obscene material moves, according to 18 U.S.C. § 3237. This may result in prosecutions of persons in a community to which they have sent materials which is obscene under that community's standards though the community from which it is sent would tolerate the same material (United States v. Thomas, 1996).

Secondly, on the issue of the definition of obscenity, on appeal the Thomases argued that the district court was wrong for instructing the jury that "the government was not required to present expert testimony regarding the prurient appeal of the materials at issue" (United States v. Thomas, 1996). The court responded to this issue by citing the Supreme Court's decision in *Hamling v. United States* (1974) "The Supreme Court has consistently recognized that "expert testimony is not necessary to enable the jury to judge the obscenity of material which . . . has been placed into evidence" (United States v. Thomas, 1996). In other words, in any obscenity case, judges and juries would have sufficient knowledge of prurience so that no expert testimony would be needed.

Once again, the court's decision in *United States v. Thomas* did not clarify which community standards applied to the Internet. Instead, the court opened interpretation to the locality of reception of content, allowing Internet speech or material to be prosecuted essentially in any jurisdiction. While this decision clarified how obscenity was to be judged, it created severe concerns for any person whose Internet site supplied explicit content that might be deemed offensive somewhere in the world. Providers would naturally fear that authorities might choose to try cases in the most narrowly restrictive communities. The following case is an example of the kind of "fear" which led to an attempted court action against the Communications Decency Act.

Part III: The Communications Decency Act and *Nitke v. Gonzales*

In 1996, Congress enacted the Communications Decency Act (CDA) as a part of the title V—obscenity and violence—of the Telecommunication Act of 1996 (Federal Communications Commission, 1996). This act was aimed to regulate indecent material on the Internet to protect minors. However, section 502(2) of the CDA was challenged by many organizations including the American Library Association, the American Civil Liberties Union, and the Electronic Frontier Foundation (Citizens Internet Empowerment Coalition, 1996; Overbeck, 2009, p. 424). This provision made it a crime to display patently offensive material at any Website where minors could see it. It stated that:

> Whoever—(1) in interstate or foreign communications knowingly— (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs. . . (Citizens Internet Empowerment Coalition, 1996).

The U.S. Supreme Court in *Reno, Attorney General of the United States, et al. v. American Civil Liberties Union et al.* (1997) overturned this indecency section as a violation of the First

Amendment, due to its overly broad inclusiveness. The court penned that: "(d) Regardless of whether the CDA is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for First Amendment purposes" (Reno, Attorney General of the United States, et al. v. American Civil Liberties Union et al., 1997, p. 521 U.S. 845). With this decision, the court clarified the status of the Internet, indicating that it should be less restrictive than print media. It noted the many regulatory restraints on broadcast media that were brought into force on the grounds of the scarcity of spectrum allocations and on the pervasiveness of radio and television, but found that "these cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to the Internet" (Reno, Attorney General of the United States, et al. v. American Civil Liberties Union et al., 1997, p. 521 U.S. 845).

The triumph of American Civil Liberties Union relieved many parties of the responsibility to self-censor their materials for fear of indecency charges. However, the case did not challenge the CDA's banning of obscene materials. The reason for this was obvious—the history of laws and legal decisions made it clear that obscenity receives no protection from the First Amendment. As a result, the Supreme Court remained silent on this issue. In *Nitke v. Gonzales* (2005), (formerly *Nitke v. Ashcroft*, 2003), the obscenity provision of the CDA was challenged producing a chilling effect among artists.

In 2001, Barbara Nitke—a faculty member at New York City's School of Visual Arts who was an artistic photographer producing works that portrayed sexually explicit acts—along with the National Coalition for Sexual Freedom and the National Coalition for Sexual Freedom Foundation, filed a suit to challenge the constitutionality of the CDA. They sought a judgment that the CDA was unconstitutional because of its overly broad scope and therefore asked for a permanent injunction against its enforcement (Nitke v. Ashcroft, 2003). Nitke wrote on her Website explaining her fear of prosecution that:

> When I decided to create a website of my fine art photography work in early 2001, I asked John Wirenius and other lawyers what they thought would be legally permissible. I was told that my images of loving SM[3] couples and people behind the scenes on porn sets might be acceptable in New York where I live, but obscene to people living in other areas. Therefore it was impossible to say what was safe for me to put on a website and be within the law. . . . If they found my photographs there objectionable, they would have the power to go to their local district attorney's office and demand that a federal obscenity case be brought against me under the CDA. I would then be facing huge legal fees, fines and jail sentences. I would have to go to their community to defend myself, which would prevent me from making a living in New York, and I would most likely have to declare bankruptcy after receiving the first few bills for legal services (Nitke, 2009)

In 2005, the court argued in the *Nitke v. Gonzales* case that the evidence was not sufficient for the court to decide regarding 1) the total amount of speech that is implicated by the CDA, 2) how many of those sites might be considered obscene, and 3) how many of them would be considered obscene in at least one community while considered

[3] SM refers to sadism & masochism—the authors.

not obscene in others. The court then concluded that:

> Because we decide the case on the basis of the failure of the plaintiffs to establish substantial overbreadth, we need not and do not reach the issues of whether some of the works that plaintiffs present as examples of chilled speech would be protected by the social value prong of the Miller test, whether current technology would enable plaintiffs to control the locations to which their Internet publications are transmitted, or whether the CDA's two affirmative defenses provide an adequate shield from liability. . . . we conclude that the plaintiffs have not met their burden of proof with respect to the only claim remaining in this action, their overbreadth challenge to the CDA. . . (*Nitke v. Gonzales*, 2005).

Nitke appealed the decision to the U.S. Supreme Court and the high court sustained the lower court's ruling in 2006 (*Nitke et al. v. Gonzales*, 2006). The case thus did not bring a new decision helpful to artists like Nitke. The attempt to overturn the CDA's obscenity provisions was never considered by the court. This left to the judgment of artists the necessity of censoring their works before posting them online. Upon the high court's decision Nitke wrote on her Website that:

> I am deeply disappointed and believe the court's decision was motivated by the current conservative political climate, and not based on the constitution or the law. The good news is that we have proved that the current obscenity laws do not work when applied to the Internet. We have also been successful in drawing public attention to attempts by the radical religious right to force our government to criminalize adult expression on the Internet (Nitke, 2009).

Nitke's desire to receive from the court a standard to distinguish obscenity from indecency has never been fulfilled. The court's decision in her case seems to suggest that the court prefers not to provide a clear standard but to leave it open for any jurisdiction to make decisions on a case by case basis.

Part IV: Conclusion and discussion

Two conclusions can be drawn from analysis of these legal cases. Keeping in mind that obscenity, according to the Miller Test, pertains to those cases without "serious literary, artistic, political, or scientific value" (Miller v. California, 1973). Such a definition implies that obscenity might conflict with existing norms of society. That being the case, the government has felt obligated to control obscene communication—those found guilty of infractions can face serious penalty.

First, it is clear that juries and courts have made their judgments subjectively. The court in *United States v. Thomas* ruled that it is not necessary to have expert testimony in an obscenity case (United States v. Thomas, 1996), where defendants were found culpable. The artists whose work includes sexually explicit portrayals will be particularly affected by this subjectivity because they also will be subject to a jury's determination of their work as good art versus bad art: Newill (2007) observed that "Often well-known and established artists who incorporate obscenity into their work are praised as revolutionary, whereas less well-known, fringe artists who dare to push boundaries and challenge current cultural norms are persecuted". This explanation clarifies

why Nitke felt rulings threatened her speech and artistic expression.

Because Nitke posted her art work on Websites, she, unlike the Thomases (United States v. Thomas, 1996), had no way to know which norms and social values would be applied to her work. In the current legal environment, her work can be subject to the legal judgments of any state, or even Federal obscenity laws. Any person whose art or communication message pushes the boundary of decency must have second thoughts about sharing that work via the Internet now that the U.S. Supreme Court has failed to offer guidelines for content providers and failed to make a determination on whether the CDA's content regulation of the Internet is overbroad.

Although the court in *Miller v. California* (1973) eventually applied local standards in a relevant community, the court in *United States v. Thomas* made it even more complicated by suggesting that the applicable local community could be "any district from, through, or into which the allegedly obscene material moves" (United States v. Thomas, 1996). Artists like Nitke clearly face questions on whether website visitors dispersed in localities around the world would find their works to have serious value. Again, there are some fundamental questions raised in *Roth v. U.S.* (1957) about who would be qualified to determine community standards and values in cases involving explicit contents. One could conclude that community standards as applied currently act essentially as a kind of censorship.

A second conclusion is that obscenity laws could be seen as protection for the majority, in the name of a universal good. Minorities such as Jacobellis, Miller, the Thomases, Nitke and kindred communicators have to suffer the consequences by conforming to the limiting rules of a conservative community standard. The key question is whether this conformity will balance properly against the loss of access to art that may be challenging. Because the U.S. Supreme Court has declined to weigh in on such cases there has been no direct answer to this question. Understandably, the artistic and societal merits represented by works will inevitably produce disagreements, leaving these kinds of artistic expressions to be defined by juries as good art or bad art without reference to any legal standard.

Undoubtedly, anyone who disseminates content of an explicit sexual nature on the Internet will take little comfort from the rules on obscenity if courts continue to allow the current legal situation to prevail. However, some scholars have proposed appealing ways out of this dilemma. For instance, Lewis (1999) suggested that: "The appropriate line should be drawn by virtue of whether a person is harmed by the manufacture, distribution, or viewing of the material in question". In fact, throughout the history of obscenity cases, the courts' decisions were based on a protectionist approach. It might be interesting to find out whether there is truly an association between consuming obscene materials and criminal behavior. On this point Newill (2007) proposed an extreme solution:

> To create an atmosphere of free speech as contemplated under the First Amendment, obscenity must be treated as protected speech under the Constitution, regulation should occur only in a few circumstances, and the community standard should be replaced with a clear and present danger test.

The clear and present danger concept mentioned by Newill was a test established in *Brandenburg v. Ohio* (1969). In it, a clear and present danger is applied to determine whether a speech act would provoke an imminent lawless action. In *Brandenburg*

v. Ohio, the U.S. Supreme Court ruled that Ohio's criminal syndicalism law violated Brandenburg's right to free speech:

> Freedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action (Brandenburg v. Ohio, 1969, p. 395 U.S. 444).

Compared with the court decision in *Brandenburg v. Ohio*, the CDA's obscenity provision seems to be overly vague and broad. In fact, the nature of the Internet is not pervasive nor is it an intruder (Doherty, 1999). Internet users have to pay for their service and invest time and energy to search for subject matter of interest to them. This level of investment points to the fact that users must make an effort to access obscene materials. Therefore, it would be unfair to impose a burden on content providers while excusing users from responsibility. Unfortunately, the court viewed it differently, as it asserted that "If Defendants did not wish to subject themselves to liability in jurisdictions with less tolerant standards for determining obscenity, they could have refused to give passwords to members in those districts, thus precluding the risk of liability" (United States v. Thomas, 1996). In the end, there is no clear way to know the precise limits of obscenity standards on the Internet. As Handelman (1995) noted, since the Constitution does not protect obscene speech, people need to be aware of how their public expressions will be evaluated. And the standard applied needs to be adaptable to changes that occur in technologies through which speech is conveyed.

Even though recognizing the need for judgments based on community standards, courts have been unwilling to provide guidelines or criteria to be applied by judges and juries in determining whether any particular public communication fits the definition of obscene. Whether or not this is due to the inherent difficulty in defining the concept is not clear. As Supreme Court Justice Potter Stewart famously acknowledged in his concurring opinion on *Jacobellis v. Ohio,* though it was difficult to define the concept of obscenity, "I know it when I see it." On the other hand, courts' hesitancy to define obscenity could be understood as an effort to avoid limitations to open communication, as any set of criteria could be misapplied to restrict freedom of speech.

In short, the U.S. justice system recognizes the necessity to protect free speech, even including hate speech and indecency, in order to promote what John Stuart Mill called an open marketplace of ideas. However, all precedent cases to pass through U.S. courts have found that obscenity is not protected under these terms and can be prohibited from public channels of communication. The difficulty lies in determining how the courts and the public at large distinguish indecency from obscenity. Present constitutional obscenity standards remain ambiguous and leave it to courts to determine whether obscenity standards have been violated in any given community. But this situation has created a chilling effect for Internet content providers. What is needed to reduce chilling effects is either legislation or case law that recognizes the unique characteristics of online communication platforms that have been engendered by this new technology.

Finally, it may be useful to compare US laws on obscenity with Thailand's legal framework. Even though Thailand's legal system is based upon civil law, meaning that Thai laws rely mainly on its Constitution and statutes not precedent

cases, the country faces issues similar to ones in the US. In particular there is uncertainty on obscenity standards applied to all works in Thailand. For instance, Donavanik (2007) has noted that Thai artists face a lack of clarity on whether their erotic artworks can be copyrighted. According to the Thai Copyright Act B.E. 2521 and B.E. 2537 (years 1978, 1994 respectively), any artwork that is deemed obscene cannot be patented because such material would be in violation of Thailand's Criminal Law Act, Section 287[4]. The key question is: How can Thai artists know whether their artworks fall within the definition of obscenity and not erotic art, since there exists no clear standard? One example involved a Thai movie entitled "*Atan Nummun Pai*" (released in 1983, Case no. 3705/2530) that portrayed sex scenes (Attahakul, 2009; Donavanik, 2007). The Supreme Court ruled that the movie could not be copyrighted due to its obscene content. Attahakul (2009) found that the decision was based upon Thai Copyright Act B.E. 2537, which states that any copyrightable work must not contain prohibited material and must meet Thai moral standards. One of the Supreme Court judges on this case, Parinya Deepadung, wrote that if the filmmaker edited obscene portions from the movie it could be patented (Donavanik, 2007). The problem with this suggestion was that the plaintiff could not know which parts of the content would be judged obscene since there was no well-defined standard available. To make such judgments, artists have to rely on broad moral customs, thus leaving them subject to the opinions of judges and audiences members.

Shytov (2010) presented another view of uncertainty on obscenity standards. He observed that Thailand has had very few pornography cases that reached the Supreme Court. He pointed out that obscenity cases relating to the Internet might be caused by a weakness in Section 287 that focuses on obscenity for trade purpose. At present, there are many obscene and indecent works available on the Internet without charge. He suggested that the law needs amendment to address this new online platform which offers so much free access to pornography. In addition, although Thailand Criminal Law Institute (1998) suggested that the Thailand Criminal Law Act, Section 5 enables Thailand to punish any Internet content providers who violate Section 287, Thai courts and Thai police have encountered difficulties in requesting an extradition of offenders, because it must be shown that the content was considered obscene in the originating country as well. This

[4] Section 287 of Thai Penal Code stated that "Whoever (1) for the purpose of trade of trade or by trade, for public distribution or exhibition, makes, produces, possesses, brings or causes to be brought into the kingdom, sends or causes to be sent out of the kingdom, brings or causes to bring, or spreads by any means whatever, any document, drawing, print, painting, printed matter, picture, poster, symbol, photograph, cinematograph film, audio or video tape or any other thing which is obscene, (2) carries on trade, or takes part or participates in the trade concerning the aforesaid obscene material or thing, distributes or exhibits to the public, or hires out such material or thing; (3) in order to assist the circulation or trading of the aforesaid obscene material or thing, advertises or spreads the news by any means whatsoever that there is a person committing the act which is an offence according to this Section, or advertises or spreads the news that the aforesaid obscene material or thing may be obtained from any person or by any means, shall be punished with imprisonment not exceeding three years or fine not exceeding six thousand baht, or both."

situation is similar to the cases of *Jacobellis v. Ohio* (1964) and *United States v. Thomas* (1996) where obscenity was defined differently based on each community's moral standards. In the end, it falls back to the fact that there is no clear-cut standard enabling one to pin down whether any Internet content is obscene. In other words, there is no clear agreement on "contemporary community standards," and therefore obscenity judgments remain unsettled. Such obscurity not only burdens law enforcement agencies but also artists of erotic works and Internet content providers.

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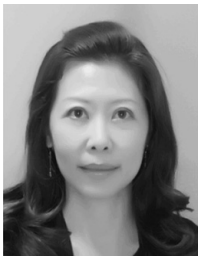

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