Pornography, the Internet and the Law

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I should start with several disclaimers. First I am not a lawyer. By training I am a mathematician, by profession I am an IT professional. I have read extensively, and written, about the topic that I’m going to be talking about this evening and I believe that what I have to say is accurate but there are certainly gaps in my knowledge and these could lead me to say some things that are misleading.

Second, as with most legal topics, the need to condense material to fit into the confines of a talk such as this – let alone the need stop one’s audience from going to sleep – means that much detail, which might be of critical importance in any particular instance, has to be omitted.

Finally, I have tried as far as possible not to let what I have to say reflect my own views, except briefly at the end. Nevertheless, I’m sure some of my own prejudices will come through.

Until around 1980, countries were able to exert a very considerable control over what their inhabitants read, listened to, or watched. Books published in the country could be censored and books imported could be controlled by customs. Radio broadcasts originating in the country could be censored, as could television programmes, films, video tapes and plays. The control was not, of course absolute. Television and radio programmes transmitted from neighbouring countries – and, indeed, short wave radio transmitted from almost anywhere – could be received by those with suitable equipment, although regulations forbidding the sale of short wave radios were enacted in some countries to try to close this loophole. And illicit material could be smuggled into the country or even produced within it, witness the Russian *samizdat*. But, on the whole, the control was reasonably effective. Its extent varied widely, of course, but some measure of censorship was imposed by more or less every country. At least in those countries where the censorship was restricted to material of a sexual, violent or blasphemous nature, most people accepted, and even welcomed, it.

The advent first of satellite television and then of the Internet and the World Wide Web changed all that. Not for the first time, technological change affected the feasibility of enforcing a particular area of the law. It is now very difficult for a country to enforce effective control over what its citizens can read, look at or listen to, and such control can only be exerted by draconian measures that will not command majority support in most countries.

In this talk I shall be largely concerned with the control of pornographic material, partly because this is the issue that creates the greatest public concern, and partly because it illustrates better than anything else the difficulties of controlling what is disseminated over the Internet.

**UK Law relating to Pornography**

We need to start by looking at the law relating to pornography, in whatever form. (I should point out that the term pornography is not normally used in UK law.) The key legislation in
the UK is the Obscene Publications Act 1959 [OPA]. This defines an obscene article as one ‘tending to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the material embodied in it’. It makes it an offence to publish obscene material or to possess such material with the intention of publishing it. It does not make it an offence simply to possess it for one’s own pleasure. It states that a person shall not be convicted of an offence under the Act if it is proved that publication of the article in question is justified as being for the public good on the grounds that it is in the interests of science, literature, art or learning, or other objects of general concern. And it states explicitly that the opinion of experts as to the literary, artistic, scientific or other merits of an article may be admitted in any proceedings under the Act.

In contrast to the Obscene Publications Act, the Protection of Children Act 1978 [PCA], as subsequently amended, makes it an offence simply to possess indecent photographs involving children. ‘Indecent’ in this context means sexually explicit, a much weaker test than ‘tending to deprave and corrupt’. ‘Photographs’ includes films, videos, and so-called pseudo-photographs, for example, images produced by computer graphics to look like photographs. For the purposes of the Act, ‘child’ used to mean someone under the age of 16. However, the Sexual Offences Act 2003 extends this to the age of 18, with the proviso that it is no offence is committed if the possessor of the photograph and the subject of the photograph are married or living together in a long-term relationship.

The differences between the OPA and the PCA are crucial. They can be summarised as follows:

<table>
<thead>
<tr>
<th>Obscene Publications Act</th>
<th>Protection of Children Act (as amended)</th>
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</thead>
<tbody>
<tr>
<td>Applies to text, images, and audio</td>
<td>Applies only to images</td>
</tr>
<tr>
<td>The test is whether the material, taken as a whole, tends to deprave and corrupt those who are likely to hear, see, or read it.</td>
<td>The test is indecency.</td>
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<tr>
<td>Mere possession is not an offence; there must be publication or intent to publish.</td>
<td>Mere possession is an offence.</td>
</tr>
<tr>
<td>Artistic merit, etc is a defence.</td>
<td>Artistic merit is not a defence.</td>
</tr>
</tbody>
</table>

Famously, Penguin printed 200,000 copies of *Lady Chatterley’s Lover* immediately the OPA became law, and sent 12 of them to the Director of Public Prosecutions, challenging him to prosecute. This he did, but the defendants were cleared after a much publicised trial in which a variety of distinguished witnesses (including E M Forster, Raymond Williams, and a bishop) testified to the merits of the book and the chief prosecution counsel rhetorically asked the jury whether they would wish their wives or their servants to read the book.

Over the years, courts and juries have changed their views about what might tend to deprave and corrupt. In particular, the legalisation of male homosexuality (female homosexuality was never illegal) in 1967 meant the mere description of homosexual behaviour was no longer to be regarded as tending to deprave and corrupt. It is still the case that descriptions of illegal sexual behaviour are likely to be regarded as obscene (but the defence of artistic merit can still be applied although successive changes in the law have meant that less and less is actually illegal).

It is worth noting that the availability of material on the Web significantly affects the nature of the group of people to come into contact with it, whether deliberately or accidently. This could mean that material that does not breach the OPA when it is found in magazines kept on the top shelf of the newsagent’s shop and not sold to under 16s, could well breach the OPA...
when made available on the Web. I am not aware of any instance in which this point has been made use of.

The legal situation in other countries varies widely: in Denmark, there are no obscenity laws and the only restriction on the sale of pornographic material is that it must not be sold to persons under the age of 16. However, the taking and sale of sexually explicit photographs of children under the age of 15 is forbidden. The situation in Sweden and Germany is similar except that there are certain restrictions regarding the depiction of sexual violence.

The situation in the United States is immensely complicated because of conflicts between state laws and federal laws and because of the interpretation of the first amendment to the constitution. I do not have time to go into this.

**Enforcement through the Criminal Justice System**

Enforcement, in the UK and elsewhere, has, in recent years, concentrated on indecent material involving children under the age of 16, so-called child pornography. There are several reasons for this:

- most countries have laws that, in some way or another, criminalise child pornography, so that it is comparatively easy to get international co-operation;
- there is public support for action against child pornography, because it is perceived as damaging to the children involved, while public support for action against other, obscene material is much less strong;
- in the UK, it is much easier to get a conviction under the PCA than under the OPA.

Nevertheless, there are practical difficulties. Different countries have different ages of consent, so what is considered child pornography in one country may not be so considered in another country. More seriously, perhaps, the enthusiasm with which laws relating to child pornography are enforced is very variable, so much child pornography emanates from countries in which the enforcement of such laws is weak or non-existent.

I should point out that there are concerns about the fairness of some of the procedural practices used in child pornography cases and some of these are highlighted in a BCS position statement on the subject.

**The Position of ISPs**

The 2002 E-Commerce Regulations sought to clarify the legal position of ISPs in relation to criminal or civil liability arising in relation to material that they transmit. Essentially, the question is whether an ISP can be considered to be publishing the material that it transmits. This is a key question that applies, for example, to defamatory material as well as to material that might be in contravention of the Obscene Publications Act or the Child Protection Act.

The regulations are, in detail, quite complicated but, essentially, they absolve an ISP from any criminal or civil liability for the material it transmits provided that it acts expeditiously to remove or render inaccessible any material that might give rise to such liability as soon as it becomes aware of its presence. In the case of an ISP providing a hosting service, the immunity does not cover cases where the offending material is being stored under the authority or control of the ISP; this would include cases where the material was subject to editing by the ISP or where it was produced by employees of the ISP (or, in the case of a university, by students).

(Incidentally, these regulations, despite some weaknesses, are remarkable for the fact that whoever drafted them clearly had a pretty good idea of how the Internet and ISPs actually operate.)

The problem with the regulations is that they put the ISP into the position of a censor. When an ISP receives a complaint, it has little choice but to remove the offending material, if there is a *prima facie* case for believing that there might be a legal liability.

A separate issue concerning ISPs is whether they can be required to reveal the identity of a subscriber. In the UK, the Data Protection Act provides the subscriber with considerable protection and a court order is likely to be required in order to force an ISP to hand over information about a subscriber. The arguments tend to revolve around cases involving defamation or breach of copyright rather than breaches of the OPA or PCA, since court orders
would be readily obtainable where a clear criminal offence was involved. As ever, the situation in the US is much more complicated.

**Other Means of Enforcement**

A number of very naïve ideas have been canvassed as ways to detect obscene material passing over the Internet. These have been based, for example, on the presence of certain words in texts, or on the idea that software could be written to detect obscene images. Would that computational linguistics and image processing were even within sight of such ambitious goals! There are, however, two much more realistic approaches.

**The Internet Watch Foundation**

In the UK, the Internet Watch Foundation (IWF) was set up in 1996 to monitor and, where desirable and possible, take action against illegal and offensive content on the UK Internet. It has the support of the UK government, the Police and the Internet service providers. It can act against “websites, newsgroups and online groups that:

- contain images of child abuse, originating anywhere in the world.
- contain adult material that potentially breaches the Obscene Publications Act in the UK.
- contain criminally racist material in the UK.”

The IWF operates a ‘hot-line’, through which members of the public can report any Internet content that they believe may be illegal. The IWF will locate and assess the material. If the material is considered illegal and falls within the IWF remit, the IWF will pass the information to the Police and inform the ISP that is hosting it. If images of children originating in other countries are involved, it will also inform Interpol and the Police in the countries concerned.

The IWF receives around 20,000 complaints per year, of which about a third relate to material that is assessed as being potentially illegal. In the first full year of IWF operation, 18% of the illegal material was traced to sources within the UK. By 2005, this had been reduced to less than 0.4%.

The IWF maintains a database (updated daily) of URLs of sites containing illegal images of children. None of the sites currently in the database are in the UK. The members of the IWF, which means all the major ISPs amongst others, attempt to block all access to sites in that database.

Under the Electronic Commerce Regulations (2002), already mentioned, if ISPs are left to deal directly with complaints from the public, they will inevitably feel they have to remove all the material complained about, regardless of whether it is potentially illegal, in order to keep their immunity from prosecution. If the complaints are routed through the IWF, an ISP only receives those that the specialised staff at the IWF believe relate to potentially illegal material. Complaints about material that is offensive to the complainant but not potentially illegal never reach the ISP.

**The Internet Content Rating Association**

The Internet Content Rating Association is an international, independent organization whose mission, it claims, is “to help parents to protect their children from potentially harmful material on the Internet, whilst respecting the content providers’ freedom of expression.” Its board includes representatives from the major players in the Internet and communications markets, including AOL, BT, Cable and Wireless, IBM, Microsoft and Novell.

The ICRA provides a framework that enables content providers to label their sites or individual pages systematically with labels that describe the nature of the content under such categories as nudity and sexual content, bad language, violence, use of drugs and alcohol, and so on. The content provider fills in a questionnaire. This is submitted to the ICRA site, which generates the label and sends it back so that the provider can paste it on to his site. The technology used is the Platform for Internet Content Selection (PICS) developed by the World Wide Web Consortium (W3C). This is a specification for a standard way of labelling the content of Web pages.
The ICRA provides filter software, which can be used to control which sites and pages can be accessed. A user can download and install this software and then configure it to allow access only to Web pages and sites that satisfy particular labelling criteria. This allows parents discretion about how they control their children’s use of the Internet. Some parents may be quite unconcerned about their children viewing material involving nudity but may feel that they want to protect them from violent images, a common view in Sweden, for example. Others may take the opposite approach.

In addition to developing its own filter software, the ICRA is in discussion with suppliers of browsers in an effort to persuade them to make their browsers read and act on the ICRA labels.

The ICRA approach will only be successful if enough content providers can be persuaded to label their sites or pages and to label them accurately. It is argued that it is very much in the interests of content providers to label their sites, since many users will set the filter so that unlabelled content is inaccessible. Furthermore, there is little point in labelling the content misleadingly because the content providers have no interest in attracting to their sites people who are not going to be interested in the material available. In any case, users who feel that a site is misleadingly labelled can complain to ICRA who will investigate.

There is, in practice, a difference between British and US attitudes here. Americans are very concerned to prevent children having access to sexually explicit material of any sort, or even material that simply involves nudity. In other words their concern is in protecting their own children from material that they believe to be harmful. For this reason, the ICRA has its origins in the USA. In contrast, the British are much more concerned with the harm that child pornography does, both to the children involved in producing it and to the customers who use the material. This explains why the IWF was founded here.

Conclusions

In order to take effective action in the UK against a website that distributes pornographic material, it is necessary first:

- to establish that the material is indeed illegal, that is, is obscene within the meaning of the 1956 Act or that it is indecent material involving children;
- to identify the person responsible for the offending site, which may require the co-operation of his ISP, which co-operation may not necessarily be forthcoming.

In practice, most of the offending sites are overseas, often in countries that do not have effective laws (or effectively enforced laws) relating to these topics. In this case, it is necessary either to seek extradition of the offender – a lengthy, costly and often unsuccessful process – or persuade the local law enforcement agencies to take action – again, something that is not easy to do. For either of these possibilities to be feasible, it is essential that the site is breaking the law of the country in which it is located. This may well not be the case.

To summarise, if material on the Web violates the OPA, it probably doesn’t come from a UK site and there’s not much that can be done about it. Even if it is from a UK site, it’s unlikely that much will be done about it because of the difficulty of bringing a successful prosecution. If it violates the PCA, however, it is much more likely that action can, and will be, taken, both against possessors of the material in this country and the publishers abroad.

My own views

I have tried to keep my own views out of this talk so far but, if you will forgive me, I would like to finish, very briefly, by explaining my views.

I have always felt that it is a strange quirk of both the law and social attitudes, that criminal acts of the most extreme kind, including murder, can be freely described in print – indeed, are written about and read by persons of the utmost respectability – while descriptions of sexual activities that are legal and widely practised have been subject to strict control that has only been slowly relaxed over the last 50 years. In particular, it was considered a breach of the Obscene Publications Act to describe or depict any sexual act that was itself illegal but it was in no way considered illegal to describe murders in considerable detail and ladies of such
impeccable moral rectitude as the late Dame Agatha Christie made a very good living out of so doing.

I find some of the sexually explicit material on the Web very unpleasant but I cannot myself get het up about it, whether it’s on the Web or elsewhere, except – and it is a very important exception – that I worry about the depiction of violent sexual activity and rape, because I cannot help but believe that, despite the lack of convincing evidence, in at least some instances this will encourage some people to indulge in such behaviour. Indeed, for this reason, I am concerned about any material that depicts extreme violence, whether or not there is a sexual element.

My main worry about web content is, however, completely different. It relates to material explaining how to manufacture weapons, bombs of any sort, including nuclear, chemical and biological weapons. While much such material has been available in large reference libraries, anyone showing undue interest in it could be asked to account for himself. This is not the case when the material is available on the Web and the reader can be assured of complete anonymity. I have, however, no useful suggestions about how this problem might be tackled.

Sources

The following legislation has been referred to, directly or indirectly in this talk.

*Obscene Publications Act 1959.*
*Protection of Children Act 1978.*
*Criminal Justice Act 1988.* Section 160 amends the PCA to make mere possession of child pornography an offence.
*Criminal Justice and Public Order Act 1994.* Amends the PCA to include pseudo-photographs.
*Sexual Offences Act 2003.* Sections 45 and 46 increase to 18 the age below which the PCA applies, though with some exceptions.

All acts of the UK Parliament from 1988 onwards are available over the web, as is all secondary legislation (e.g. the E-Commerce Regulations) from 1987. Access is through the web site of the Office of Public Sector Information: [http://www.opsi.gov.uk/](http://www.opsi.gov.uk/).

Earlier legislation must be consulted in printed form. Most major public libraries hold copies, as do academic libraries in universities that teach law.

When reading the text of acts of parliament and of secondary legislation, it should be borne in mind that the text presented is that of the legislation in its original form. It may well have been amended by subsequent legislation but this will not be apparent. Thus, important changes to the Protection of Children Act 1978 were made by the Criminal Justice Act 1988, the Criminal Justice and Public Order Act 1994, and the Sexual Offences Act 2003, and these changes are not apparent simply from reading the original act.

The question of ‘extreme’ material that does not involve children is discussed at some length in the Scottish Parliament consultation document ‘Consultation: On the possession of extreme pornographic material’. At the time of the talk, this was available on the web at [http://www.scotland.gov.uk/Publications/2005/08/30112423/24266](http://www.scotland.gov.uk/Publications/2005/08/30112423/24266)