1. Introduction

I’ve named these notes Pornography, but inevitably they must also consider obscenity and even words like profanity and indecent since these adjectives have been used extensively in legal efforts, and are still used by the FCC in their regulatory actions.

In these notes I’ll primarily be looking at the situation in the US, with minimal references to laws in other countries (often because I’m ignorant about the laws in most countries). For Fall 2007 the semester project will make you do research on the laws in a number of other countries.

Most of the time pornography is used in the sexual context, although possibly it should also include violence. Similarly, the word obscene can be broadly used, but here I’ll mainly be looking at the word in the sexual context. The Reese Report, which I’ll discuss below, pointed out that it is a legitimate use of the word to say that the number of people killed by intoxicated drivers is obscene or that war is obscene, but they also restricted themselves to the sexual use.

Part of these notes will be spent on the major attempts that have been made to legislate against the distribution of pornography over the Internet, beginning with the mammoth Communications Decency Act in 1996. For more details I’ve provided links to the text of different legislative efforts and in most cases to important court opinions.

As you go through these notes you’ll find that in the US most adult-oriented Internet sites are legal, as they are protected by the Constitution. The point at which they become illegal is when they portray real or simulated child pornography or when the materials are
delivered to children. You’ll also find that what is legal or illegal varies dramatically between countries, even if they have similar legal systems. For example if two legally married 16-year-olds in Montana make a video of their sexual activities for personal use, then in the US they would be breaking the law because they possessed the video. In England it would be completely legal.

The usual estimate is that at least 10% of all online traffic on the Internet and 25% of all Internet searching are adult-content. There are over 100,000 webmasters running over 1,000,000 adult sites, worldwide. The online “adult entertainment” business is estimated at between $1.5 billion and $3 billion per year and growing rapidly.

2. Obscenity vs. Pornography

There is a big difference between how the laws judge obscenity vs. pornography. In most cases adults can freely view and distribute pornography in the US, as long as it is not seen by children under the age of 18, while obscene material is illegal to view or possess in most places. The Federal government and 41 states have obscenity laws (Montana is one of the nine states that don’t). I’ll discuss differences in some other countries later in these notes.

The history of pornography through the ages, and of legal attitudes towards it, is well described in the Meese Report, which is the usual name used for the Attorney General’s Commission on Pornography, Final Report, 1986, which is at http://www.porn-report.com/. While the Report stated that attempting to define pornography was futile, they went ahead anyway and defined it as meaning “only that the material is predominantly sexually explicit and intended primarily for the purpose of sexual arousal.” Their definition of obscenity was “material that has been or would likely be found to be obscene in the context of a judicial proceeding employing applicable legal and constitutional standards” which is so circular that it seems useless. At 1960 pages it is a huge report, which at times is strange to read. For example in the introduction to the report the Commission spends much of their space complaining that budgetary and time constraints ($500,000 and one year) made it very hard for them to do a good job. I’ve read parts of the report but have never attempted to make it through the whole thing.

The major conclusion of the Meese Report, made without any serious research backing because they said that they didn’t have a big enough budget to do research, was that pornography was linked to violence towards women including rape and murder. The Report was criticized extensively.

Under current federal law material is obscene if:

- An average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest;
- The material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law; and
• The material, taken as a whole, must lack serious literary, artistic, political, or scientific value.

A problem with this definition, in terms of the Internet, is how to define the community. When this definition was first used, for example in attempts to prosecute book sellers, the law would use the standards of the community in which the book store was located. Now, if someone makes questionable pages available on the Internet, it is unclear whether the community is Internet users, or whether a prosecutor can choose to try a prosecution in a town that they select, and then use the standards there, since the material is effectively distributed everywhere.

3. History

The first debates about Internet pornography were based around the alt.sex newsgroup, when reading this newsgroup became the most common activity on the networks. Most of the computers on the early Internet were mainframes at universities, accessed through terminals. The MSU Honeywell mainframe was, for example, the 83rd computer on NSFNet, when that was the dominant network.

This first national debate about pornography vs. censorship on the Internet occurred when the Stanford administration realized what their students were reading and announced that carrying alt.sex was against a new university regulation. The Computer Science faculty led the fight against this by claiming that access to what they agreed was indecent material was a free speech issue, and that they would not support censorship. When the university went ahead with the policy the CS faculty said that they would not oppose the policy, but that also they would not help, on principle, to enforce it. Since nobody else on campus knew how to block a newsgroup from appearing on the server, the university gave up and alt.sex continued at Stanford.

At MSU the main stated concern was not based directly on censorship issues, but was usually framed in the statement “What will happen to our funding when a legislator’s daughter brings home some of this stuff?” (They never seemed to worry about the sons of legislators.) However at MSU that was about as far as the debate went, and at times we had the highest distributed newsgroup traffic of any site in the world, which always looked pretty cool on newsgroup activity maps.

Now, of course, the number of sexually explicit sites on the Web makes the old debates about alt.sex look ridiculous. Explicit high quality pictures and videos of all kinds of sexual acts are freely available, with an increased tendency to claim that the participants are teens, although usually qualified by claiming that all “models” are age 18 or over. There is also the much darker side of this traffic where, for subscription and relatively secretly, child pornography is available.
There have been a number of legislative efforts in the US to control the flow of pornography over the Web, although most have been successfully challenged in the courts, with the exception of child pornography laws, which typically have made it through challenges through the Supreme Court.

When legislation is successful, in many cases enforcement can be difficult because a significant amount of the harder core materials, and in particular of the subscription material, comes from outside the US, in countries which don’t care if their citizens make money selling live sex shows or other material to US customers. As a result most legislation looks at four parts of the cycle, production, receipt, possession, and distribution. Even if the production is outside US control, prosecutions can be made for, for example, receipt and possession of child pornography, and also for redistributing the material to others.

4. Communications Decency Act (CDA)

The Communication Decency Act of 1996 (CDA), which was signed into law as part five of the Telecommunications Act of 1996 in February 1996, was the most significant effort to control explicit material on the Internet. It was immediately challenged in the courts, and was overturned by the US Supreme Court in June 1997, after a short but divisive life. There were 11 main sections to the act: Section 502: Obscene or Harassing Use of Telecommunications under the Communications Act of 1934, Section 503: Obscene Programming on Cable Television, Section 504: Scrambling of Cable Channels for Non-Subscribers, Section 505: Scrambling of Sexually Explicit Adult Video Service Programming, Section 506: Cable Operator Refusal to Carry Certain Programs, Section 507: Clarification of Current Laws Regarding Communication of Obscene Materials Through the Use of Computers, Section 508: Coercion and Enticement of Minors, Section 509: Online Family Empowerment, Section 551: Parental Choice in Television Programming, Section 552: Technology Fund, and Section 561: Expedited Review. I.e., it was a huge and far-ranging act and Congress anticipated in the last section that it would undergo a constitutional challenge, which was correct. The full text of the bill can be found at http://www.epic.org/free_speech/CDA/cda.html, although much of it is not easy reading.

Immediately after the signing of the bill EPIC\footnote{Electronic Privacy Information Center.} and the ACLU challenged the law, and in June, 1996, under the expedited appeals specified in Section 561 of the CDA, a three-judge special appeals court ruled that the act was an unconstitutional infringement of the First Amendment’s guarantee of free speech. In June 1997, in a 9-0 ruling, the US Supreme Court upheld the lower court decision and struck down the CDA. In particular the court decision determined that phrases in the bill that referred to “indecent transmission” and “patently offensive display” were too vague. Two justices (Justice O’Connor and the Chief Justice) partially disagreed with the crushing opinion that had been written by Justice Stevens. Justice O’Connor wrote in her summary that “I write
separately to explain why I view the Communications Decency Act of 1996 (CDA) as little more than an attempt by Congress to create "adult zones" on the Internet. Our precedent indicates that the creation of such zones can be constitutionally sound. Despite the soundness of its purpose, however, portions of the CDA are unconstitutional because they stray from the blueprint our prior cases have developed for constructing a ‘zoning law’ that passes constitutional muster.” The complete text of the Supreme Court Decision, which is interesting reading, can be found at http://www2.epic.org/cda/cda_decision.html.

There was a surprising amount of national discussion about the CDA while it was going through the courts. Locally, KUSM televised a forum and selected Sara Jayne Steen (Dean of L&S until July 2006) and me as the two campus experts on pornography to be on the show along with legal experts from out of town. The key issue in all of the debates was the lack of specificity in the word “indecency” and the phrase “patently offensive” which lay at the heart of the CDA.

5. Child Online Protection Act (COPA)

After the demise of the CDA a new law was passed called the Child Online Protection Act (COPA) or CDA II or Son of CDA by its detractors. It attempted to protect minors from exposure to sexually explicit materials by requiring a credit card or other appropriate technologies to access such materials. The appeals courts, for different reasons, blocked enforcement of COPA, and the US Supreme Court, in June 2004, upheld the lower court injunctions in a 5-4 decision. In particular they said that “COPA was not the least restrictive means available for the Government to serve the interest of preventing minors from using the Internet to gain access to harmful materials.” The text of the bill, the history of the appeals, and the text of the decisions can be found through http://www.epic.org/free_speech/copa/.

6. Children’s Internet Protection Act (CIPA)

The Children’s Internet Protection Act (CIPA) is the only major legislation which ultimately survived legal challenges. The act required schools to block access to materials that were harmful to minors, and these sections of the act were not challenged. The act defines “harmful to minors” as:

(2) HARMFUL TO MINORS.--The term “harmful to minors” means any picture, image, graphic image file, or other visual depiction that-- (A) taken as a whole and with respect to minors, appeals to a prurient interest in

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2 We both hope that the real reason for the selections was that at the time I was Head of Computer Science and Sara Jayne was Head of English. We suspect that the fact that both of us are known to be very willing to make our opinions clear, on any matter, was a secondary factor.
nudity, sex, or excretion;
(B) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and
(C) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.

The contentious part of the bill was the part that pertained to libraries, and the challenge to the bill was led by the American Library Association. The stated purpose of this part of CIPA is to “forbid public libraries to receive federal assistance for internet access unless they install software to block obscene or pornographic images and to prevent minors from accessing materials harmful to them.” The District Court ruled against CIPA because “any public library that complies with CIPA’s conditions will necessarily violate the first amendment.” In June 2003 the US Supreme Court, in a 6-3 decision, overturned this opinion and approved the legislation as constitutional. The big issue with CIPA was how to block children from viewing materials that were harmful to them without also blocking adult patrons, which all agreed would be unconstitutional. The solution was that adults must be able to request that the librarians turn off the filters so that they could view all sites. While the lower court believed that this would, through embarrassment, effectively stop most adults from accessing the sites, the majority on the Supreme Court did not agree that this was too much of a burden. Chief Justice Rehnquist’s majority opinion did, however, say that if a library was unable to turn off the filters when requested to do so, then that could lead to another appeal. The American Library Association has a page giving links to the text of the CIPA legislation as well as the text of the court opinions and their (ALA) commentary on the bill at http://www.ala.org/ala/washoff/WOissues/civilliberties/cipaweb/legalhistory/legalhistory.htm.

7. Child Pornography

In 1982, in a case that unanimously supported a New York law against child pornography, the justices said that depictions of children engaged in sexual conduct is “a category of material outside the protection of the First Amendment.” All states now have laws against both the production and viewing of child pornography, although most prosecutions are now under federal laws. US Code, Title 18, 2252A, includes penalties against “any person who knowingly receives or distributes any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any

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3 The assistance that would be lost is primarily through the federally funded e-rate program that provides up to 90% of the communication costs, including phones and Internet access costs, for schools and public libraries. See http://www.sl.universalservice.org/overview/ for a summary of the program. The percentage discount for libraries is based on whether they are rural (higher discount) or urban, and on the percentage of students eligible for school lunch programs in the local public school.


5 http://straylight.law.cornell.edu/uscode/html/uscode18/sec_18_0002252---A000-.html
means, including by computer” or “in the special maritime and territorial jurisdiction of
the United States, or on any land or building owned by, leased to, or otherwise used by or
under the control of the United States Government, or in the Indian country (as defined in
section 1151), knowingly possesses any book, magazine, periodical, film, videotape,
computer disk, or any other material that contains an image of child pornography.” There
are also federal laws against the production of child pornography.

Federal penalties for a first time offense of possessing any images of child pornography
are up to five years in prison, and increase significantly if the person has any previous
related convictions in state or federal court.

Child pornography does not have to meet any obscenity definitions. Any image which
either shows a child engaged in explicit sexual conduct or even conveys the impression
that it shows a child engaged in explicit sexual conduct, even if this sexual conduct is, of
itself, legal, is banned. So two things that need to be noted here:

1. If it appears that the participants are under 18 then the images are illegal. One
issue that is currently not yet resolved is whether it is legal for an adult site to
make a video of a sexual act of, for example, a person over 18 who is sucking a
lollipop and has her hair in braids, but where the site points out that all
participants are at least 18. If it is believable that the participant is under 18, then
the law says that the viewing of these materials are illegal, even if the participants
are actually over 18.

2. As I mentioned above, the images are illegal even if the acts themselves are
completely legal. Federal child pornography laws apply to images of children
under the age of 18, whether or not they are produced in the US or anywhere else
in the world. However age of consent laws vary significantly not only throughout
the world, but also within different states or other subdivisions of countries.6
Some are weird; for example in Western Australia the age of consent for
male/female and female/female sex are both 16, but for male/male it is 21. In
many places, including in the US, it is perfectly legal for children aged 16 (or
younger in some places) to have sex. So if you are legally married and are aged
16 then it would be illegal under federal law to possess a sexual image of you and
your spouse, or for anyone else to receive or possess such an image.

The federal government makes major efforts to root out child pornography, including
doing coordinated sweeps of people who have been detected downloading images
depicting child pornography. At least one of these has led to the removal and search of a
PC on campus by the FBI, with the assistance of MSU computer personnel, and the
immediate resignation of a faculty member (not in Computer Science).

Some other countries have been much less aggressive in their legal enforcement of child
pornography laws. For example in Canada in December 1998, British Columbia
Supreme Court Judge Duncan Shaw held that Vancouver pedophile Robin Sharpe was
not guilty of possessing child pornography because the “exploration of material depicting

6 http://www.ageofconsent.com/ageofconsent.htm
children as vehicles of sexual gratification was an integral part of Mr. Sharpe’s character and his freedom of expression and conscience, and also an essential part of his intimate and private life.” This ruling was overturned by the Supreme Court of Canada three years later, but they modified the Canadian laws to permit freedom of expression as a valid defense, in addition to the existing defense of artistic merit. For example they explicitly allowed, for private use, images of sexual activities between 14-year-olds who are old enough, in BC, to give consent. At the retrial Mr. Justice Shaw decided that the 243 pages of the material in question was artistic, and again acquitted Sharpe on charges related to that but sentenced him to four months of house arrest for 517 pictures of 91 different naked young boys, who he had mainly photographed himself in Asia. This relatively light sentence led to considerable protest from a number of Canadian groups.

8. Differences in Laws Between Different Countries

In these notes I’ve been mainly concentrating on the US laws related to pornography, but obviously different countries have very different moralities, which lead to very different laws. Even very similar legal systems have some significant differences with respect to these laws.

E.g., in Britain there is no legal definition of pornography, and while there is a tradition to put sexually explicit magazines on high shelves in stores and to not sell them to children, there is no legal requirement for either part. So it is completely legal for children to acquire and view pornographic material, including over the Internet. Another difference is that in Britain the creation of child pornography is directly linked to the age of consent. So since it is legal in Britain for people to consent to sex at age 16, it is only illegal to make or view pictures of people under 16, who by definition couldn’t consent to them being made. Note that this only refers to images of children under 16, not also to images that appear to be of children under 16, which is another difference when compared to the US laws. The only other kind of pornography that is banned is material considered obscene, which in England means that it is judged to have a tendency to deprave and corrupt the intended audience, which is considered to be a very hard burden to prove, as the intended audience might in most cases already be considered to be fairly depraved. So in summary the only real restriction under British law is that images of children under the age of 16 are child pornography and cannot be either made or viewed.

Another difference between national laws has been that some countries, notably France and Germany, have passed laws that make it illegal for ISPs to let illegal material, in particular child pornography, enter their countries. This has caused significant problems for the ISPs, who, in most countries, don’t attempt to block sites.

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7 http://www.realwomenca.com/pamphlets/01_child_porn.htm
8 http://www.care.org.uk/anon/thelaw/
9 Pornographic magazines are called top-shelf magazines in England as a result.
9. .xxx Top-Level Domain

In 1996 it was proposed that a “virtual red-light district” be created on the Internet through the use of a new top level domain named .xxx. The idea was that any adult sites which were willing to agree to certain constraints should use this suffix instead of, for example, .com\(^{10}\). On June 1, 2005, ICANN\(^{11}\) (which is responsible for the Internet naming system) gave tentative approval for the new HLD after an extensive opportunity for public comments. However on August 15\(^{th}\) the US government, through the Commerce Department, urged a delay in the decision because of unprecedented opposition from the public, and from unnamed other countries, and the ICANN initially decided to reconsider their approval and to delay the final decision until September 16, 2005. This got delayed by negotiations with ICM Registry (see below) who claim that they met all of ICANN’s requirements, but on May 10, 2006, the ICANN Board reversed their previous decision and voted 9-5 against the establishment of the .xxx registry. The last vote on this was on March 30, 2007, when ICANN once again voted against the creation of the .xxx domain.

The proposal for the .xxx domain had been developed and led by a company called ICM Registry, Inc., which was created in 1996 with the goal of getting approval for the .xxx domain. Their goals for the domain were that it will be voluntary, will obviously be restricted to adult oriented sites, and that all sites under the domain will follow a set of good practices. There was also a requirement that only legal sites will be allowed to use the .xxx name system, which I assume (without confirming it) means that the sites must be legal under US laws.

The ICM Registry’s efforts in this area had been supported by a number of organizations whose goals are to protect children and combat child pornography, including WiredKids, which testified that “Creating the .xxx top-level domain gives parents a valuable tool to protect their children from inappropriate content on the Internet.” In addition, IFFOR, which is a broad based association which includes people from child safety organizations and the adult entertainment industry, was a strong supporter of the ICM Registry’s efforts.

The ICM Registry met the conditions imposed on them by ICANN, and so on June 1, 2005, ICANN began technical and commercial negotiations with the ICM Registry to establish the new top level domain.

The late opposition to the proposal came as a surprise because there hadn’t been any significant opposition during the public comment period, and there had been significant support from many online child support organizations. The information on the reasons for the opposition has not been well described, but comments attributed to Michael Gallagher, Assistant Secretary for Communications and Information at the Commerce Department, say that “they have received nearly 6000 letters and emails expressing concerns about the impact of pornography on families and children and objecting to

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\(^{10}\) There are currently over 250 top-level domains, many of which are for different countries like .uk.

\(^{11}\) Internet Corporation for Assigned Names and Numbers
setting aside a domain suffix for it.” He also said in his letter to Vint Cerf, Chair of ICANN, that this level of negative response was unprecedented, and that the ICANN should take more time to evaluate these concerns. In addition, on August 12, 2005, the Chairman of ICANN’s Government Advisory Committee (GAC), Mohamed Tarmizi, sent an email to the ICANN board saying that there was a possibility that the governments of several nations would write to the board expressing opposition to the .xxx proposal.

The Family Research Council, a conservative organization which “promotes the Judeo-Christian worldview as the basis for a just, free, and stable society,”\(^\text{12}\) expressed concerns that the .xxx domain would legitimize pornographers, which seems to be the basis for the opposition.

The one month delay in the ICANN approval process was requested by the ICM Registry because they did not want the issue to undermine the integrity of the ICANN approval process. Because of its dominant role in the establishment of the Internet the US government has a veto over ICANN decisions, and they were clearly concerned that the veto would be used to overturn the .xxx decision. They said that during this month delay they (the ICM Registry) would enter into discussions with the Commerce Department and the ICANN GAC to “discuss the concerns they are hearing and to provide information on the ways in which we think that the creation of a voluntary top level domain for responsible providers of adult online entertainment can help to make the Internet a more family-friendly environment.”

The ultimate defeat of the .xxx registry has led to complaints, including from dissenting board members, that the US has too much influence over ICANN, even though the US has claimed that it wants its decisions to be internationally motivated.

For a summary of many of the issues associated with the .xxx domain, there is a request for comments called .sex Considered Dangerous from the Internet Society, RFC 3675, from 1984 before the build up of major controversy, at http://tools.ietf.org/html/rfc3675.

10. Discussion

This is a very messy problem because the debate has to include issues like personal freedom, freedom of speech, protection of children, morality, some people believing strongly that viewing pornography can lead to antisocial behavior and even rape, and so on.

Whatever one’s views are on pornography, it is clear that most attempts to legislate how adults can behave sexually and consensually in the privacy of their homes have ultimately failed. The most important case in this area was the 2003 decision by the US Supreme Court, in a 6-3 vote, to overturn the Texas sodomy laws with language so strong

\(^{12}\) From http://www.frc.org/get.cfm?c=ABOUT_FRC.
that it was said to “enshrine a broad constitutional right to sexual privacy.” Justice Kennedy, in the majority opinion said that “The petitioners are entitled to respect for their private lives,” and that “the state cannot demean their existence or control their destiny by making their private sexual conduct a crime.” The three dissenters (Justices Scalia, Rehnquist, and Thomas) said that the court “has taken sides in the culture war” and “has largely signed on to the so-called homosexual agenda.”

An interesting exception to the right of sexual privacy, of possible relevance to the viewing of pornographic materials, is the law concerning pornography and television in the US. On broadcast television the “wardrobe malfunction” at the Super Bowl, where there was a very brief view of Janet Jackson’s minimally covered breast, led to the Federal Communications Commission (FCC) unanimously deciding on a fine of $27,500 for each of the 20 Viacom-owned TV stations, whereas after 8:00 pm MST HBO can show movies with an A/O rating with frontal nudity that simulate sex. The difference here is that there is a regulatory authority, the FCC, which can determine who gets different broadcast bandwidths and through this what can be broadcast, and is given legal authority to do so. These laws bar obscene broadcasts at any time and indecent or profane programming between 6 am and 10 pm. The Internet does not have this kind of regulatory authority because, like cable TV, the public airways are not being awarded to certain Internet companies, and so with the exception of child pornography people can, in general, look at whatever they want if nobody else is also forced to see the material.