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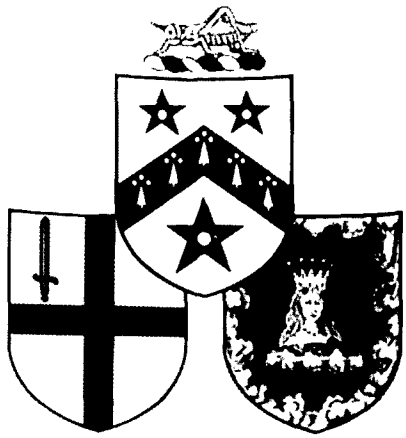

THE INTERNET AND ELECTRONIC COMMERCE

Lecture 4

PORNOGRAPHY, CENSORSHIP AND DEFAMATION

by

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Illegal and Harmful Content on the Internet

In the context today's lecture, it is necessary to distinguish between problems of a differing nature thus:

(1) it is one thing to talk of child pornography, which is illegal and punishable by the criminal law, and

(2) quite another to refer to the fact that children may have access to pornographic material intended for adults which, while being harmful to the child's development is not necessarily illegal for adult consumers.

In the first case, one is dealing with illegal content which is outlawed in all areas of society, whatever the age of the potential consumers and whatever the medium used. Whereas in the second case what is involved is a form of what could be considered as harmful content, access to which is permitted to adults only and is, therefore, forbidden to minors. In this context, it should be noted that the definition of "minor" varies between jurisdictions.

Many other types of content found on the Internet are considered to be illegal by the laws of most States. These include:

- Paedophilia,
- trafficking in human beings,
- the dissemination of documents of a racist nature,
- terrorism and
- various forms of fraud (for e.g. credit card fraud, and offences against intellectual property).

All of these issues are covered by differing legal regimes and instruments at national and international levels. With relevance to these issues the parties involved in the Internet including;

(1) authors;

(2) content providers;

(3) server operators who store the documents and make them available;

(4) network operators;

(5) access providers; and

(6) users

are bound by existing general law. Within one jurisdiction what is illegal off-line is also illegal on-line, and it is up to the State to ensure respect for the law.

In the case of harmful content, it must be emphasised that certain types of material may be seen as offensive in one jurisdiction, but not in another; for example, contact expressing political opinion or religious beliefs, etc. What is considered harmful depends on cultural differences and varying legal traditions.

Paedophilia and Deviant Pornography

The demand for pornography on the Internet is concerned less with hard core films than with material of a deviant nature; sado-masochism, bondage, paedophilia and zoophelia. New services like the Internet make such material more visible and more easily accessible, while also being less easy to control than the traditional media. The Internet has thus become a new meeting place for paedaphiles. On the world-network, they obtain addresses, plan meetings and view pornographic films whose actors and victims are children. Their activities are giving rise to a rapidly expanding criminal industry. The paedophiles communicate using certain codes; their exchanges are difficult for outsiders to trace, as they make clandestine use of the service of institutions above all suspicion, such as universities and museums. One has also to take account of so called "virtual pornography", which consists exclusively of synthesised images. In such cases no human being is actually exploited. However, it is felt probable by those sections of the population with expert knowledge in the area that paedophiles who see such images may subsequently attack children.

As stated earlier, it is state law that governs the behaviour of citizens in this area. It is therefore necessary to look at the legislation and case law to ascertain the different reactions to illegal content on the Internet in selected countries.

Present situation in the United States.

In the United States, the country most effected so far by these problems, congress past the Communications Decency Act (CDA) on 1 February 1996. A number of associations attacked this law on constitutional grounds, invoking the first amendment to the US Constitution which states that "any law affecting freedom of expression must employ the least restrictive means". On June 12 1996 the CDA's opponents obtained a favourable decision when three federal judges in Philadelphia declared it unconstitutional. Subsequently the US Supreme Court upheld that decision in Janet Reno, Attorney General of the United States, et al., Appellants v American Civil Liberties Union et al., No.96 – 511, decided June 26 1997. This case is important because it reflects the thinking of the US Supreme Court on the

effect of the US constitution on both child pornography and adult pornography. An extract from the judgement of Mr Justice O'Connor with whom the Chief Justice concurred is attached. The full text can be found at http://www.aclu.org/court/renovacludec.html.

In another action a US court has pronounced as unconstitutional the statute which outlaws computer created child pornography.

A US federal judge in Portland, Maine has held a statute outlawing "simulated" child pornography as "unconstitutional". The law in question had been passed to deter the trading of child pornography over computer networks. This law had eliminated the previous requirement for prosecutors to prove that the subject of the pornography was real and recent rulings on child pornography cases have tended to interpret the Pornography Prevention Act 1996 in such a way as to criminalise "fake" child porn. Indeed the Justice Department argues that fake pornography can incite the same reaction as live pornography in paedophiles. But the adult film industry argued that the child pornography statute was designed to protect minors not, for example, adults who look youthful. It is expected that the judgement will be challenged in the US Court of Appeals in Boston.

In another action, a residents group in Virginia have raised a lawsuit in the US District Court for the eastern district of Virginia against the library board of Loudon County. They are challenging the board policy of using Internet blocking software in all their library computers to prevent access to "adult" sites. The plaintiffs claimed that this policy violates their constitutional rights as contained in the first and fourteen amendments. The library board by contrast has argued that this restriction on access was no more than an extension of their long-standing policy of not stocking pornography in books, magazines or video form. The judge rejected the board's analogy of these media with the Internet on the basis that it "misconstrued the nature of the Internet" and refused to dismiss the case. In her written ruling the judge held that the library board could not adopt and enforce content based restrictions on access to protect Internet speech in the absence of a compelling State interest. It therefore appears that in the US the existence of the right to free expression is overriding any policy of the protection of the rights of children.

EU Law

Within the 15 European Union countries the circulation of information via international networks is by its nature a cross-boarder phenomenon, and is therefore governed by the legal frame-work of the internal market and its competition rules, notable Articles 59 & 60 of the EC Treaty. The principle of Community Law applied under Articles 59 and 60 is clear; that a provider of services must be enabled to offer services unimpeded in the rest of the member States. National Governments may, however, operate exceptions to this freedom to provide services in specific cases and subject to stringent conditions, by instituting discriminatory restrictions for reasons of law and order, state security or public health.

Freedom of expression is, it may be said in order to simplify, is the freedom of all the express themselves and communicate. This freedom, fundamental to any democratic society, has two aspects;

(1) on the one hand everyone has the right to communicate and disseminate information and ideas to others, and

(2) on the other, everyone has the right to receive information and ideas.

The European Court of Justice case law has incorporated, on the basis of the general principles which it is the Courts function to uphold, the concept of Fundamental Human Rights and in particular, the Universal Declaration of Human Rights, the UN covanent in respect of civil and political rights and the European Conventional Human Rights (ECHR). The ECHR is a convention of the Council of Europe. It has 40 parties from Western Europe and from former members of the USSR. All member states have signed the ECHR convention.

Within the countries that make up the EU and the Council of Europe there is also a right to freedom of expression that is contained in Article 10 of the ECHR. However there are significant differences between the freedom of expression in the ECHR and that in the US constitution. In particular, the ECHR's right is qualified by what is called a derogation clause which permits a state to enact exceptions to freedom of expression where three cumulative conditions exist.

These are;

- the exception must be provided for by the law in clear and precise form;
- it must correspond to an imperative social need; and
- it must be proportionate.
- It must also entail a legitimate goal such as national security, crime prevention, the protection of morality or the protection of the reputational rights of others. In practice, these exceptions give the state wide latitude.

The Convention also contains general other rights, not found in the US Constitution, which must be balanced with the right to free expression where there is a conflict between them. For instance, the right to privacy under Article 8 of the ECHR states:

> (1) Everyone has the right of respect for his private and family life, his home and his correspondence; and
>
> (2) there shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others.

The EU approach to action to combat illegal and harmful material on the Internet.

1. Illegal Content

The EU has decided that it is up to the member States in the EU to apply the law by detecting illegal activities and punishing the perpetrators. However, in the case of a world wide network like the Internet one has to ask how it is possible for individual states to impose a law having such a limited field of application.

2. Encouragement of Self Regulation

In the UK the Internet Service Providers Association and the London Internet Exchange have joined forces with the Safety Net Foundation with a view to taking self-regulation measures concerning illegal documentation on the Internet. A code of conduct has been drawn up with the aim of providing a ranking system for news groups and a hotline allowing members of the public to report content which they believe to be illegal. The Safety Net Foundation will try to track down troublemakers and invite them to withdrawal the illegal documents from the network. In the case of a refusal, the Foundation will ask the site operator to take action against the user and report the matter to the UK police. Similar initiatives have been taken in Germany and in the Netherlands.

3. Withdrawal of files from Service

Once informed by the National Self Regulatory body or a similar organisation in another country, of the illegal character of the contents stored of the server, the provider will have to take steps to remove the material concerned. However, this process is not 100% effective, as users can always go to another server.

4. Blockage at the Access Provider Stage

A number of service providers have taken the initiative of drawing up a black list, consisting of a number of sites and a number of very specific types of message which they will in future refuse to admit on their service. This approach remains of purely symbolic usefulness, as there is nothing to stop users from bypassing their local server and connecting to another. However, on an international basis, this process has been implemented by a number of countries, a good example being Singapore. However, the same by-pass argument applies where Singapore citizens may connect to the Internet through an Internet service supplier in, say ,Malaysia.

A second method is to monitor the entire content of the information transmitted to subscribers. Filtering software would react, for instance to certain key words and could disconnect the user or suppress the undesirable data enroute. Solution of this type, apart from being technologically cumbersome, pose a number of problems, particularly one of semantics. For

example, in 1995 the Internet service provider American Online tried to intercept messages containing a number of words with sexual connotations, including "breast". As a result it blocked a news group offering counselling services to woman with breast cancer.

In 1995, policies were proposed in several countries, including the USA, to restrict the distribution of certain kinds of material over the Internet. In many but not all cases, protection of children was the stated goal for such policies.

The focus on restricting inappropriate material at their source is not well suited to the international nature of the Internet, where an information source may be in a different legal jurisdiction than the recipient. More over, materials may be legal and appropriate for some recipients but not others, so that any decision about whether to block at the source would be incorrect for some audiences.

PICS, Platform for Internet Content Selection, is a set of technical specifications that facilitate recipient-centred controls on Internet content rather then sender-centred controls. Filtering software sits between a child (or any Internet user) and the available content. It allows access to some material, and blocks access to other materials. The first and most important distinction that PICS introduces is a separation between labelling and filtering. A label describes the content of something. A filter makes the content inaccessible to some audiences. While both labelling and filtering may introduce social concerns, the concerns are somewhat different. More general, there are six roles that could all be filled by different entities; (1) set labelling vocabulary and criteria for assigning labels; (2) assigned labels; (3) distribute labels; (4) write filtering software; (5) set filtering criteria; and (6) install/run filtering software.

PICS itself actually fulfils none of these roles. PICS is a set of technical specifications that makes it possible for these roles to be played by independent entities. As an example, The Recreational Software Advisory Council (RSACi) and SafeSurf have each defined labelling vocabulary and criteria for rating. They each wrote down a vocabulary in a machine-readable format that PICS specifies. RSACi has four categories in each vocabulary; language, nudity, sex and violence. SafeSurf has more categories. However even though RSACi and SafeSurf have each specified a labelling vocabulary and criteria for assigning labels, neither of them actually assign the labels. They leave it up to the authors of documents to apply to criteria to their own documents or self label as PICS document calls it.

However it should be noted that Electronic Frontiers Australia (EFA) has condemned the RSACi Internet labelling system on the grounds that it is parochial, inflexible and archaic. The RSACi rating system is the creation of the United States based recreational software advisory council. Originally a scheme for rating computer games, it is now, in conjunction with the Platform for Internet Content Selection (PICS) being used to rate Internet content. It is probably the most widespread PICS-based rating system in use in the worldwide web. The RSACi homepage claims that over 15,000 sites use

their system. The EFA state "The RSACi system has no way of distinguishing material with artist, literary, or scientific value. It is in this regard atavistic a return to the era when Shakespeare was bowdlerised and the penises were chiselled off classical statues." "The definitions used in determining the 4 ratings for language, nudity, sex and violence, were clearly chosen with computer games in mind and lack the flexibility required for a wider range of materials." "It is ludicrous that such a system should be applied to novels, on-line libraries, art galleries and other such resources". "RSACi also displays a bazaar combination of explicitness and total subjectivity. The definition of "revealing" for example, refers to "the display of cleavage that is more then half the possible length of such cleavage" but also contains the phrase "which a reasonable person would consider to be sexually suggestive and alluring".

"Application of RSACi to the global Internet is blatant religious and cultural bigotry. It is most distressing that a Government agency such as the Australian Broadcasting Authority has labelled its own website with RSACi and is encouraging others to do likewise".

5. The Need for Internet Users to be Traceable

Network users are normally traceable by their name. However where there are legitimate reasons for a user to wish to remain anonymous it should be allowed to use an identifiable pseudonym.

6. Creation of a Cyber Police Unit Within Europole

The powers of Europole have been enlarged to cover actions against paedophilia and trafficking in children and woman.

7. Parental Control Software

The challenge here is to preserve the freedom of expression to which Internet users are so attached while making it impossible for minors to stumble on pornographic, racist, or violent sites.

8. Action within various States

UK Law

There are three statutes forming the legislation to combat pornography however occurring in the UK. These are:

- The Obscene Publications Act 1959 (OPA)(7 & 8 ELIZ 2 C66)
- The Obscene Publications Act 1964
- The Criminal Justice and Public Order Act 1994 (CJPOA 1994) which specifically deals with problems of pornography on the Internet.
- Telecommunications Act 1984

- Common law offence of Conspiring to Corrupt Public Morals (Shaw v DPP [1962] AC 220.

(Publication of obscene matter is a common law offence and appears to have originated with R v Curl (1727) 2 Stra 788. It may be noted that the common law offence is wider in its definition than Section 1 of the act).

The House of Commons, Home affairs Community, First Report on Computer Pornography, HMSO 1994, should also be noted.

Section 1 of the Obscene Publications Act 1959 gives the test for obscenity in the following terms;

(1) For the purposes of this act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having all relevant circumstances, to read, see or hear the matter contained or embodied in it.

(2) In this Act "article" means any description of article containing or embodying matter to be read or looked at or both, any sound record, and any film or other record of a picture or pictures.

(3) For the purposes of this Act a person publishes an article who - (a) distributes, circulates, sells, lets on hire, gives, or lends it, or who offers it for sale or for letting on hire; or (b) in the case of an article containing or embodying matter to be looked at or a record, shows, plays, or projects it, or where the matter is data stored electronically, transmits that data.

(4) For the purposes of this Act that any matter recorded on it is included by him in a programme included in a programme service.

(5) Where the inclusion of any matter in a programme so included, would if that matter were recorded matter, constitute the publication of an obscene article or the purposes of this Act by virtue of subsection 4 above, this Act shall have effect in relation to the inclusion of that matter in that programme as if it were recorded matter.

(6) In this section "programme" and "programme service" have the same meaning as in the Broadcasting Act 1990.

The Obscene Publications Act 1964 states in section 1(2)" for the purpose of any proceedings for an offence against the said section two a person shall be deemed to have an article for publication for gain if with a view to such publication he has the article in his own issue, possession or control".

The test for obscenity as laid down in section 1(1) is based on the well known test as formulated by Cockburn CJ in R v Hicklin (1868) LR 3QB 360 at 376: "whether the tendency of the matter charged is obscenity is to deprave and corrupt those whose minds are open to such immoral influences into whose hands such a publication might fall".

The test for obscenity depends on the article itself, and the purpose or intention of the publisher is immaterial. R v Shaw [1962] AC 220.

Note that obscenity and its tendency to deprave and corrupt are not necessarily limited to matters of sex and that an indecent or sexual explicit article is not necessarily obscene. John Calder (Publications) Ltd v Powell [1965] 1 QB 509.

It has also been judicially stated that the jury should be directed to consider, in cases involving allegations of obscenity, first, the number of readers they believe would tend to be corrupted and depraved by the book, etc., secondly the strength of the tendency to corrupt and deprave, and thirdly the nature of the corruption or depravity. R v Calder & Boyers Ltd [1969] 1 QB 151.

An article is not necessarily obscene for the purposes of the act because it is repulsive, filthy, loathsome, or lewd. R v Anderson [1972] 1 QB 304.

The Act is not merely concerned with the corruption of the innocent but protects equally the less innocent from further corruption and the addict from feeding his addiction the proposition that readers whose morals are already in a state of depravity or corruption are incapable of being further depraved is fallacious. DPP v Whyte [1972] AC 849. There is also authority for saying that "persons" here means significant proportion of likely readers etc and not the minute lunatic fringe. R v Calder & Boyes Ltd [1969] 1 QB 151.

In R v Arnolds: R v Fellows (1996) The Times 27 September 1966, Section 43 of the Telecommunications Act 1994 makes it an offence to "send by means of a public telecommunications system, a message or other matter that is grossly offensive or of an indecent, obscene or menacing character" and is an imprisonment offence with a maximum term of 6 months. In addition to dealing with indecent, obscene or offensive telephone calls the Act also covers the transmission of obscene materials to the telephone system by electronic means. In Fellows & Arnold (The Birmingham University Case), Fellows & Arnolds were charged with a total of 18 counts under the Protection of Children Act 1978, Obscene Publications Act 1959 and the CJPOA of 1994 which as stated earlier, widened the definition of publication to include computer transmission. In this case the West Midlands Police Commercial Vice Squad was contacted by US customs saying that they had identified a site in the UK. The Vice Squad officers then swooped on the department of metallurgy at Birmingham University and discovered thousands of pictures stored in the computer system of youngsters engaged in obscene acts. The material could be accessed through the Internet across the world. Fellows had built up an extensive library of explicit pornography called "The Archive" featuring children as young as three on a computer at Birmingham University where he worked. The judge ruled that the computerised images could be legally regarded as photographs setting a legal precedent that the pornographic computer image was in law, the same as a photograph. After the ruling of the trial judge Fellows admitted four charges of possessing indecent photographs of children with a view to distributing them, and one of possessing obscene photographs of adults for publication. Arnold also admitted distributing indecent photographs of

children. Fellows was jailed for 3 years and Arnold for 6 months for providing Fellows with up to 30 pornographic pictures of children. Mr Justin Owen stated that "the pictures could fuel the fantasy of those with perverted attitudes towards the young and they might insight sexual abuse of innocent children".

In R v Anderson Lord Widgery CJ delivered the judgement. Referring to the obscene publications act 1959, His Lordship stated that "there is a specific test for obscenity and in charges under that act it is this test which is to be applied, and it is in this form. Section 1 of the act provides:

(1) "for the purpose of this act an article shall be deemed to be obscene if its effect or (where the article comprises 2 or more distinct items) effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

(2) In this act "article" means any description or article containing or embodying matter to be read or looked at or both, any sound recording, and any film or other record of a picture or pictures". "It is in our view quite clear from section 1 that where one has an article comprising a number of distinct items, the proper view of obscenity under section 1 is to apply the test to the individual items in question. It is equally clear that if, when so applied, the test shows one item to be obscene that is enough to make the whole article obscene."

Section 4 of the 1959 Act contains a "public good" defence. Under this section the defence can be put in respect of an obscene article that its publication is desirable in the public good, and this section specifically provides that the opinion of experts as to literally, artistic, scientific or other merit of such an article may be omitted.

"It is for you as a jury, so the law says, to decide whether taken as a whole, it is likely to deprave or corrupt a significant portion of people who are likely to read it... in fact, (it may not be) so difficult and formidable task for you as might first appear. The words "obscene" in the dictionary sense is "repulsive", "filthy", "loathsome", "lewd". In considering it in its legal sense in each of these five charges because it is mentioned in each one - that is the approach to it, which I wish you to adopt."

The R3 Safety Net

The R3 Safety Net is a UK initiative developed in discussions facilitated by the Department of Trade and Industry between service providers, the metropolitan Police and the home office. The immediate in particular focus of these proposals is on child pornography, although the approach may also be applicable in the future to other types of illegal material available on the Internet.

The R3 Safety Net's approach incorporates 3 elements; (1) Rating - a legality indicator for the "normal" content of each news groups, and assistance in rating activities including the adoption and promotion of PICS; (2) Reporting – a hotline for complaints about illegal material; and (3) Responsibility –content providers should take responsibility for rating their own pages.

The approach establishes an independent foundation to support the adoption of Internet service providers and users of responsible policies based on rating and reporting of illegal material which will provide a hotline for complaints.

THE NETHERLANDS

In May 1996, the Dutch Internet providers community established a hotline or central facility for reporting of child pornography on the Internet. This was supported by the Ministry of Justice. The reporting facility operates on a voluntary basis and is financed by Dutch Internet providers. The Dutch National Criminal Intelligence Service has also been involved. It is reported that the service has functioned very satisfactorily.

ITALY

The law on child pornography passed authorising police to set up trap web-sites. On 3 August 1998 the Italian passed Law 269/98 aimed on combating prostitution, pornography and sexual tourism relating to children. The Law is applicable to acts performed in Italy and abroad, if an Italian citizen, or a foreign citizen acting in association with an Italian citizen, is involved. The law inter alia makes it a criminal offence to distribute, including by telematics, pornographic material showing persons under the age of consent, or information aimed at enticing or sexual exploitation of minors, and it separately punishes the wilful act of distribution of child pornography even if performed free of charge. Some Italian Internet service providers (ISPs) fearing that law may be construed as enacting criminal responsibility of the ISPs for facilitating access to paedophile information on the internet, have barred distribution from the user Use-net new servers of non-Italian news groups known as potentially carrying this kind of information. In addition to extending and intercepting powers of the public prosecutor in this area, the law mandates police forces to establish contrast activities. The telecommunications police are expressly mandated to establish contrast measures on the telematic networks or public telecommunications networks. The telecommunications police can inter alia, at the request of the public prosecutor establish trap web sites, trap chat areas or act on the Internet under false identities in order to identify and prosecute offenders.

FRANCE

A proposal for an agreement on international co-operation with regard to the Internet was presented to a working party of the OECD by France in 1996. It provides for signatories to set up national regulatory framework including a code of conduct, with mutual exchange of information on the regulations

adopted and an agreement to co-operate in order to approximate national practices with regard to the Internet. The proposal also includes a section on dudicial and Police co-operation, in particular relating to use of networks for the purpose of terrorism, drug trafficking in organised international crime.

On 16 February 1998 the tribunal de Grande Instance of le Mans found the head of staff of the president of the counsel of the Sartre department guilty of violating articles 227/23 and 227/24 of the French Criminal Code, making the production, storage, marketing and transmission of pornographic images of minors by any means a criminal offence and to have misused the office equipment for his personal benefit. The civil servant had downloaded about 1000 child pornography files using the only computer of the office connected to the Internet, and paying the service with a credit card. The file saturated the computer hard disk and the maintenance service found the content.

GERMANY

Germany has made proposals to improve self-regulation of the Internet content by extending the existing self-regulatory system for content in the press and broadcasting. Providers offering harmful content are to be required to appoint commissioners for the protection of young persons who are to act as points of contact and advisors for users. Providers are also given support for setting up joint self-regulatory facilities. Initiative makes it clear that the criminal law and law in protection of minors applies to the Internet content, even if it is only stored in a volatile manner.