THE STANDARDS OF A CHILD'S LIBRARY: THE IRRATIONALITY OF THE OBSCENITY DEFENSE TO COPYRIGHT INFRINGEMENT

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Introduction

That obscenity spawns a myriad of social problems is evidenced by the expressions of concern voiced by both the public and private sectors of society. But to recognize the existence of a problem does not mean that every and all measures designed to meet the problem have to be sustained. In the first place, a solution is only as effective as the problem it seeks to solve is well-defined. In the second place, a solution that overreaches itself may result in counterproductivity.

That copyright protection should include within its ambit the broadest possible scope of writings is attested to by the constitutional and legislative intent of the law. But there remains a primordial distaste for including within its intended ambit the protection of obscene works. In fact, the theories underlying the recognition of the obscenity defense to copyright infringement, discussed subsequently, are literal expressions of this distaste.

This then, is an attempt to examine the rationality of recognizing the obscenity defense in copyright infringement cases by juxtaposing the concept of copyrightability and the concept of obscenity. To this end, it would perhaps be best to begin with the latter.

The Concept of Obscenity

To define 'obscenity' is to begin to define the problem. The very etymology of the word is speculative as it has been suggested that it is a derivation of the Latin *ob,* meaning 'to,' 'before' or 'against' and *caenum* meaning 'filth,' or of the Latin *obscurus* meaning 'concealed,' or even a corruption of the Latin *scena* meaning 'what takes place off stage.'[1] And even though the connotative meaning of the word is more familiar than its denotative one, what the word connotes is not all that precise either. It has been said that it includes notions of what is offensive to decency, what is filthy or disgusting; connections to the concept of shame and the scatological and the sexually lascivious; a significant relation to the morally corrupting; and even a function of expressing attitudes of disgust and contempt which depend

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[1] Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment,* 123 U. PA. L. REV. 45, 47-48 (1974).

for its shocking and bracing effect on the impropriety of its use.[2] A reasonable conclusion is that it is a subjective concept, relying on a standard imposed not by objective reality but by a subjective one. In this regard it is thus akin to the concept of the beautiful, and there lies the irony.

This subjectivity has made the concept temporal in nature — undeniably, the concept is reflective of the times. Thus, it has continuously evolved, as evidenced by the treatment accorded, and the tests employed, by the courts in dealing with the concept of obscenity.

In the 19th century, the prevailing test enunciated by the Queen's Bench in the case of *Regina v. Hicklin*[3] to determine whether or not a work was criminally obscene was its tendency, even if the whole work was not morally objectionable, to deprave or corrupt *those whose minds were open to such immoral influences* and into whose hands a publication or other work charged as being obscene may have fallen. This test formulated by then Chief Justice Cockburn found application in the United States even until the 20th century. But its continued application and its emphasis on the susceptible persons of a community had started to jar even the Courts. In 1913, Judge Learned Hand protested his very own application of the *Hicklin* rule, thus:

> I hope it is not improper for me to say that the rule laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time . . . I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses. Indeed, it seems hardly likely that we are even today so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standards of a child's library in the supposed interest of a salacious few, or that shame will for long prevent us from adequate portrayal of some of the most serious and beautiful sides of human nature. . . .
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> Yet if the time is not yet when men think innocent all that which is honestly germane to a pure subject, however little it may mince its words, still I scarcely think that they would forbid all which might corrupt the most corruptible, or that society is prepared to accept for its own limitation those which may perhaps be necessary to the weakest of its members. If there be no abstract definition such as I have suggested, should not the word "obscene" be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived at here and now? . . . To put thought in leash to the average conscience of the times is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy.[4]

Understandably, the *Hicklin* rule was eventually abandoned. The Courts, in determining the question of obscenity, evaluated the entire work and

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[2] *Id.*, at 48-50.
[3] 3 L. R. QB 360 (1868), cited in *People v. Kottinger*, 45 Phil. 352 (1923).
[4] United States v. Kennerley, 209 Fed. 119 (SDNY 1913).

its offensiveness to the average person in the community[5] — what the French would call *l'homme moyen sensual* who played the same role of "hypothetical reagent" as the reasonable man did in the law of Torts.[6] An intent standard was similarly introduced — the Courts evaluated the intention or lack of it of the author to appeal to the prurient interest of the public.[7]

In 1957, the United States Supreme Court had occasion to once again deal with the problem in the case of *Roth v. United States*.[8] In dealing with the dispositive question of whether obscenity is utterance within the area of protected speech and press, the Court maintained that it was implicit in the history of the First Amendment that obscenity was utterly without redeeming social importance, borrowing the decision in *Chaplinsky v. New Hampshire*.[9] In this earlier case, it was observed that

> such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[10]

The Court thus categorically held that obscenity was not within the area of constitutionally protected speech or press. But to determine these constitutional boundaries, the Court had to arrive at a definition of obscenity and this they did:

> Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.[11]

The Court was thoroughly aware of the need to set standards for judging obscenity so as to safeguard the protection of freedom of speech and press for material which did not treat sex in a manner appealing to prurient interest. The test thus applied was whether to the *average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.*

In 1966 the United States Court, in *Memoirs v. Massachussetts*,[12] radically altered the extremely generalized *Roth* concept. In a plurality

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[5] E.g., United States v. One Book Called "Ulysses," 5 F. Supp. 182 (1933), Parmelee v. United States, 113 F. 2d 729 (1940).

[6] Lockhart and McClure, *Literature, The Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295, 341 (1948).

[7] E.g., United States v. One Book Called "Ulysses," 5 F. Supp. 182 (1933).

[8] 354 US 476 (1957).

[9] 315 US 568 (1942).

[10] Chaplinsky v. New Hampshire, cited in *Roth v. United States*, note 8 at 485.

[11] Roth v. United States, note 8 at 487.

[12] 383 US 413 (1966).

opinion of only 3 Justices the Court maintained that 3 elements *must* coalesce:

> it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters and (c) the material is utterly without redeeming social value.[13]

The inclusion of the third element became an issue in itself since it laid a heavy if not impossible burden on the prosecution, so much so that in 1973 the Court in *Miller v. California*[14] established a new set of guidelines:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest;
> (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.[15]

The Court went on to give "plain examples" of what could be defined for regulation under (b) of the standard, explicitly referring only to "patently offensive hardcore" representation.[16]

The end result was this — the *Hicklin* rule was completely abandoned, the *Roth* pronouncement that obscenity is unprotected speech was affirmed as was the contemporary community standard of the *Roth* decision, a national obscenity standard was thus rejected, and the third part of the *Memoirs* proscription was eliminated thus relieving the prosecution from proving that a work was *utterly* without redemming social value and instead requiring mere proof of an abscene of *serious* value.

In arriving at this amalgamation, the *Miller* Court had to evaluate what it called the "somewhat tortured history" of the concept of obscenity — a history which, at least from *Hicklin* to *Roth,* Philippine jurisprudence had unfortunately inherited.

In 1923, the Supreme Court of the Republic of the Philippines, in *People v. Kottinger,*[17] through Justice Malcolm, defined obscenity as something offensive to chastity, decency or delicacy. The Court felt no further need to elaborate, maintaining that the words themselves were descriptive, in common use and understood by every person of average intelligence.

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[13] Memoirs v. Massachusetts, note 12 at 418.
[14] 413 US 15 (1973).
[15] Miller v. California, note 14 at 24.
[16] The Court listed the following:
(a) Patently offensive representation or description of ultimate sexual acts, normal or perverted, actual or simulated,
(b) Patently offensive representation or description of masturbation, excretory functions, and lewd exhibition of the genitals.
[17] 45 Phil. 352 (1923).

But the Court adopted the *Hicklin* test fully, which was then prevailing in the United States, without caveat nor protest.

By 1955, the Court began speaking of a possible intent standard. Justice Montemayor in *People v. Go Pin*[18] emphasized the use for which the work was intended, maintaining that if a work is used for art's sake rather than for commercial purposes then no offense would have been committed. In spite of the introduction of the intent standard, however, the test was still basically that of the *Hicklin* mold — the Court was intent on protecting those who, including the youth, because of their immaturity, were not in a position to resist and shield themselves from the ill and perverting effects of the work.

In 1957, the Court, in the case of *People v. Padan*[19] and again through Justice Montemayor, implied the possible relaxation of standards in this wise:

> One might claim that there was involved the element of art; that connoisseurs of the same, and painters and sculptors might find inspiration in the showing of pictures in the nude, or the human body exhibited in sheer nakedness as models in tableaux vivants.[20]

The Court thus acknowledged the possible artistic merit of allegedly obscene works but nevertheless drew the line with regard to patently offensive exhibitions:

> In it there is no room for art. One can see nothing in it but clear and unmitigated obscenity, indecency and an offense to public morals, inspiring and causing as it does, nothing but lust and lewdness, and exerting a corrupting influence specially on the youth of the land.[21]

The unbridled outrage evident in the decisions of the Supreme Court did not leave the Court of Appeals unmoved. As late as 1971, the Appellate Court in *People v. Angeles*[22] maintained that the test in determining obscenity was whether there is a tendency to deprave or corrupt those whose minds were open to immoral influences. The *Hicklin* test, it would seem, had not as yet been abandoned by Philippine courts.

In 1985, the Supreme Court had occasion to determine what the proper test should be once the issue of obscenity is raised as against the constitutional right to freedom of expression. Given such a formulation of issues, the Supreme Court understandably adopted the *Roth* doctrine which precisely addressed this constitutional issue. Thus, then Chief Justice Fernando in *Gonzales v. Kalaw Katigbak*[23] commended for approval this statement of Justice Brennan in *Roth*:

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18 97 Phil. 418 (1955).
19 101 Phil. 749 (1957).
20 People v. Padan, note 19 at 752.
21 People v. Padan, note 19 at 752.
22 C.A.-G.R. No. 06034-CR, June 13, 1971.
23 G.R. No. 69500, July 22, 1985, 137 SCRA 717 (1985).

> All ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas; even ideas hateful to the prevailing climate of opinion — have the full protection of the guarantees, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.[24]

Consequently, even though the Court recognized the difficulty of determining what is obscene, the formulation of *Roth* was deemed persuasive. Thus, the test, which bears repeating, is this — whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.

Unfortunately the case made no mention of the *Memoirs* nor the *Miller* decision and what thus remains is the unadulterated *Roth* test, a test which has been criticized as extremely generalized as to be almost vague. And for good reason.

Mention has already been made of the "tortured history" of the concept of obscenity. Yet the *Miller* decision which precisely traced this history may have merely contributed to Chief Justice Burger's characterization. The dissenting opinion of Justice Douglas in *Miller* identified the problem of vagueness in constitutional terms — he maintained that obscenity is not mentioned much less defined in the Constitution. Thus,

> there are no constitutional guidelines for deciding what is and what is not "obscene." The Court is at large because we deal with tastes and standards of literature. What shocks me may be sustenance for my neighbor. . . . We deal here with a regime of censorship which, if adopted, should be done by constitutional amendment after full debate by the people.[25]

He concluded in this fashion:

> We deal with highly emotional, not rational, questions. To many the Song of Solomon is obscene. I do not think we, the judges, were ever given the constitutional power to make definitions of obscenity.[26]

Not that the writer of the majority opinion was blind to this problem of vagueness. There was full awareness that except for the *Roth* decision no majority of the Court was ever able to agree on a standard for obscenity.[27]

But the mere fact that the *Roth* decision was a majority opinion did not mean that it was or is a thoroughly workable definition. Justice Warren in his concurring opinion in *Roth* regarded the decision as a "sweeping formula" which failed to answer the question raised before the Court:

> The Court seems to assume that "obscenity" is a peculiar genus of "speech and press," which is as distinct, recognizable, and classifiable as poison ivy is among other plants.[28]

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[24] Roth v. United States, cited in Gonzales v. Kalaw Katigbak, note 23 at 725.
[25] Miller v. California, note 14 at 40-41.
[26] Miller v. California, note 14 at 46.
[27] Miller v. California, note 14 at 22.
[28] Roth v. United States, note 8 at 497.

Such an assumption is even more inherent in the decisions of the Supreme Court of the Philippines. As earlier mentioned, the Court in *People v. Kottinger* felt that there was no need for an exact definition of obscenity. And, unfortunately, the Court in *Gonzales v. Kalaw Katigbak* was constrained by the very nature of the case before it—it being a certiorari petition, the question before the Court was whether or not there was a grave abuse of discretion. Thus, with regard to the issue of whether or not the film *Kapit sa Patalim,* subject of the petition, was obscene based on the *Roth* test, no categorical statement was made. The Court instead had this to say:

> That there was an abuse of discretion by respondent Board (of Review for Motion Pictures and Television) is evident in the light of the difficulty and travail undergone by petitioners before *Kapit sa Patalim* was classified as "For Adults Only," without any deletion or cut. Moreover its perception of what constitutes obscenity appears to be unduly restrictive. This Court concludes then that there was an abuse of discretion. Nonetheless, there are not enough votes to maintain that such an abuse can be considered grave. Accordingly certiorari does not lie.[29]

Thus, even though the Court fully adopted the *Roth* test, it did not illustrate how it could be applied with respect to a particular work alleged to be obscene. The vagueness is compounded by the fact that the Court found support for its decision to deny certiorari by quoting from the Answer of the respondent Board:

> The adult classification given the film serves as a warning to theater operators and viewers that some contents of *Kapit* are not fit for the young. Some of the scenes in the picture were taken in a theater-club and a good portion of the film shots concentrated on some women erotically dancing naked or at least nearly naked, on the theater stage. Another scene on that stage depicted the women kissing and caressing as lesbians. And toward the end of the picture, there exists scenes of excessive violence attending the battle between a group of robbers and police. The vulnerable and imitative in the young audience will misunderstand these scenes.[30]

Clearly the Answer alluded to the *Hicklin* rule which was specifically rejected by the Court.

And so, it remains to be seen how the prevailing *Roth* test will be made workable in this jurisdiction, how any current standard of obscenity, for that matter, will be applied by the Courts. Perhaps, the only caveat that can be sounded is that any compulsion to fix any standard of morality will result in one that necessarily falls a shade behind the times it seeks to reflect. The result can only be irrelevance.

The Obscenity Defense to Copyright Infringement

The Statutory Framework

Section 13 of Act No. 3134, titled the Copyright Law of the Philippine Islands, provided that

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[29] Gonzales v. Kalaw Katigbak, note 23 at 728.
[30] Note 29, *supra.*

> No immoral or unchaste work shall be copyrighted. If it shall be discovered, after a work has been copyrighted, that the said work is, in the opinion of the Attorney General, of the nature indicated, the copyright secured shall become null and void, and the proprietor shall also be subject to criminal prosecution. Copies of the work deposited and instruments of writing in relation thereto filed with the Philippine Library and Museum shall be destroyed by the Director of the Philippine Library and Museum if so ordered by the Department Head.

Act No. 3134, however, was expressly repealed by Presidential Decree No. 49, the Decree on Intellectual Property. Section 13 of the repealed Act finds no counterpart in the Decree and the immediate conclusion is that no such limitation exists under the new law. Yet the conclusion may be more apparent than real and, in fact, more hasty than immediate.

It is axiomatic that the history of Philippine copyright law has been one of expansion in the types of work accorded protection. This is no less true in the history of American copyright law to which the new law still turns for definitions and criteria. The United States Copyright Act of 1909[31] provided protection to "all the writings of an author," and its 1976 Amendments,[32] clarifying the concept, provided that

> Copyright protection subsists in original works of authorship fixed in any tangible medium of expression now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

Presidential Decree No. 49 contains no such general provision but the classification of protected works embodied in its second section[33] cannot be said to be any more restrictive.

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[31] 17 USC §4.

[32] 17 USC §102.

[33] Section 2. The rights granted by this Decree shall, from the moment of creation subsist with respect to any of the following classes of works:

(A) Books, including composite and cyclopedic works, manuscripts, directories, and gazetteers;

(B) Periodicals, including pamphlets and newspapers;

(C) Lectures, sermons, addresses, dissertations prepared for oral delivery;

(D) Letters;

(E) Dramatic or dramatico-musical compositions; choreographic works and entertainments in dumb shows, the acting form of which is fixed in writing or otherwise;

(F) Musical compositions, with or without words;

(G) Works of drawing, painting, architecture, sculpture, engraving, lithography, and other works of art; models or designs for works of art;

(H) Reproductions of a work of art;

(I) Original ornamental designs or models for articles of manufacture, whether or not patentable, and other works of applied art;

(J) Maps, plans, sketches, and charts;

(K) Drawings or plastic works of a scientific or technical character;

(L) Photographic works and works produced by a process analogous to photography, lantern slides;

(M) Cinematographic works and works produced by a process analogous to cinematography or any process for making audio visual recordings;

(N) Computer programs;

(O) Prints, pictorial illustrations, advertising copies, labels, tags, and box wraps;

(P) Dramatizations, translations, adaptations, abridgements, arrangements and other alterations of literary, musical or artistic works or works of the Philippine

The American Copyright Act of 1976 contains no prohibition regarding the copyrightability of immoral or unchaste works as it allowed no implication of a content-based restriction. Neither did its 1909 precursor. And yet the obscenity defense in copyright infringement cases has long been held to inhere in the American law and, it may be argued, in Philippine copyright law as well.

The argument is closely linked with the avowed purpose of the law as constitutionally expressed. The United States Constitution delegates to Congress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[34] In a similar vein the Constitution of the Republic of the Philippines provides:

> (1) The State shall promote scientific research and invention. The advancement of science and technology shall have priority in the national development.
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> (2) Filipino culture shall be preserved and developed for national identity. Arts and letters shall be under the patronage of the State.
>
> (3) The exclusive right to inventions, writings, and artistic creations shall be secured to inventors, authors, and artists for a limited period. Scholarships, grants-in-aid, or other forms of incentives shall be provided for specially gifted citizens.[35]

Copyright laws are clearly derivatives of such constitutional grants and the protection they provide, so the argument goes, excludes works with immoral content precisely because these works contribute nothing to the fulfillment of the constitutional purpose.

But the law alone is not the alleged basis of the obscenity defense.

Jurisprudential History

In the 1800s, a certain Dr. Priestly brought an action[36] for damages to property allegedly destroyed during a riot. The defendants claimed as a defense that the doctor was in the habit of publishing works injurious to the government but failed to produce evidence to support this claim. Chief Justice Eyre of the King's Bench maintained that such evidence would have been admissible if produced. And thus, the foundation of the doctrine that no property right at law exists in illegal or immoral publications was laid, albeit on the basis of an erroneous premise.

Government as herein defined, which shall be protected as provided in Section 8 of this Decree;

(Q) Collections of literary, scholarly, or artistic works or of works referred to in Section 9 of this Decree which by reason of the selection and arrangement of their contents constitute intellectual creations, the same to the protected as such in accordance with Section 8 of this Decree;

(R) Other literary, scholarly scientific and artistic works.

[34] U.S. Const. art. I, sec. 8, cl. 8.

[35] Const. art. XV, sec. 9.

[36] Discussed in Wilinson, *Copyright — The Obscenity Defense in Actions to Protect Copyright*, 46 FORDHAM L. REV. 1037, 1038 (1978).

The "property theory" which was basically a theory of courts of law, found its counterpart in the "unclean hands theory" adopted by courts exercising equity authority. Thus a plaintiff tainted by the illegality of publishing an obscene work could not enjoy the benefits of equitable remedies.[37] A third theory, and perhaps the underlying premise of these theories, maintained that courts were the conservators of public morality and that it was their duty to uphold public virtue and to discourage and repel whatever tends to impair it.[38]

It was this theory that primarily found application in the United States. In the case of *Martinetti v. Maguire,*[39] the court held that both the plaintiff's and the defendant's works were uncopyrightable not only because of a lack of originality but also because, as suggested by the court, of their immoral content. The court was even more emphatic in *Shook v. Daly*[40] — the rights of the writer are secondary to the rights of the public to be protected from what is subversive of good morals.

And so armed with these doctrines and a standard of obscenity that was, at best, nebulous, American courts found these works, inter alia, obscene: Edmund Wilson, *Memories of Hecate County;* Henry Miller, *Tropic of Cancer* and *Tropic of Capricorn;* Eskine Caldwell, *God's Little Acre*; Lillian Smith, *Strange Fruits;* D. H. Lawrence, *Lady Chatterley's Lover;* and Theodore Dreiser, *An American Tragedy.*[41]

However, in 1980, the United States Supreme Court in a landmark decision denied[42] the petition for certiorari to review the decision penned by Circuit Judge Godbold in the case *Mitchell Brothers Film Group v. Cinema Adult Theater.*[43] Judge Godbold in no uncertain terms maintained that the affirmative defense of obscenity could not be sustained:

> The infringers' attempt to immunize their illegal acts by wrapping themselves in the mantle of a "public injury" caused by plaintiffs is antithetical to the purpose of these laws.

Two years later, the Supreme Court again denied[44] a petition for certiorari in the case of *Jartech, Inc. v. Clancy*[45] thus affirming Chief District

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37 Stockdale v. Onwhyn, 108 Eng. Rep. 65 (KB 1826), discussed in Schmaltz, *Problems in Giving Obscenity Copyright Protection: Did Jartech and Mitchell Brothers Go Too Far?,* 36 VAN. L. REV. 403, 405 (1979).

38 Schmaltz, *Problems in Giving Obscenity Copyright Protection: Did Jartech and Mitchell Brothers Go too Far?,* 36 VAN. L. REV. 403 ,405 (1979).

39 16 F. Cas. 920 (no. 9173) (CC Cal. 1867), discussed in Schmaltz, *op. cit.,* note 38 at 406.

40 49 How. Pr. 366 (NY S. Ct. 1875), discussed in Schmaltz, *op. cit.,* note 28 at 407.

41 See Mitchell Brothers Film Group v. Cinema Adult Theater, 604 F. 2d. 852, 857 (1979).

42 445 US 917 (1980).

43 604 F. 2d. 852 (1979).

44 103 S. Ct. 179 (1983).

45 666 F. 2d. 403 (1982).

Judge Muecke's reliance on *Belcher v. Tarbox*[46] where the Ninth Circuit Court of Appeals stated:

> There is nothing in the Copyright Act to suggest that the courts are to pass upon the truth or falsity, the soundness or unsoundness, of the views embodied in a copyrighted work. The gravity and immensity of the problems, theological, philosophical, economic and scientific that would confront a court if this view were adopted are staggering to contemplate. It is surely not a task lightly to be assumed, and we decline the invitation to assume it.[47]

The obscenity defense in copyright infringement cases was finally rejected.

Copyright of Obscene Works

The attempt to establish standards by which obscenity may be determined has always been plagued by the problem of vagueness — a result of the subjective and temporal nature of the concept. Both the penal and censorship laws deal with the problem in abstract terms.[48] Interpretatve administrative rulings, though precise, create a *stasis* in the law and are more often than not rendered irrelevant by the passing of only a few years.[49] Decisions of the court lose their preclusive effect for similar reasons. And in the United States, plurality decisions which seem to characterize obscenity cases carry little value as precedent.[50]

This is, of course, not to say that the attempts should be abandoned altogether. It is merely to say that a case where obscenity is raised in issue, more often than not a criminal one, is largely an individual matter involving, as it does, elements peculiar and personal to the case alone.[51] This is because, in a penal case, the emphasis is on the particular conduct involved:

> It is not the book that is on trial: it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the material is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting.[52]

Hence, the decisions,. discussed previously, of the Supreme Court and the Appellate Court in criminal obscenity cases. Hence too, the relevance of an intent standard.

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[46] 486 F. 2d. 1087 (1973).

[47] Jartech, Inc. v. Clancy, note 45 at 406.

[48] Gonzalez, *The Public Interest v. The Prurient Interest: Obscenity in the Movies,* 58 PHIL. L. J. 88, 101-104 (1983).

[49] *Id.,* at 104-105.

[50] Miller v. California, note 14 at 22.

[51] It is important to note that the attempts at, and the objections to, establishing a standard of obscenity were made in decisions in criminal cases. *Roth, Memoirs* and *Miller* all involved criminal obscenity statutes.

[52] Roth v. United States, note 8 at 497.

But when it is precisely the book or writing as defined in the law on copyright that is on trial, the emphasis on conduct and intent lose much of their meaning. It is the work itself that becomes determinative of the issue and a content-based evaluation becomes imperative. And yet it is axiomatic that copyright law does not concern itself with qualitative standards nor artistic, literary or scientific merit. It has been said that the individual perception of the beautiful is too varied a power to permit a narrow and rigid concept of art.[53] Thus, to allow the obscenity defense in copyright infringement cases would precisely be to permit a narrow and rigid concept of art because of the exercise of the similarly varied power of the individual perception of the obscene. To wit:

> And it is blood and flesh which are here given us. Drink, food, laughter, desire, passion, curiosity, the simple realities which nourish the roots of our highest and vaguest creations. The superstructure is lopped away. This book brings with it a wind that blows down the dead and hollow trees whose roots are withered and lost in the barren soil of our times. This book goes to the roots and digs under, digs for subterranean springs.[54]

The "book" Anaïs Nin was describing in 1934 was Henry Miller's *Tropic of Cancer*, a book which, as earlier mentioned, was considered by the American Court as obscene in 1935.[55] On the other hand, there is this statement of Karl Shapiro to consider regarding James Joyce's *Ulysses*:

> I have always been amused by the famous decision[56] of Judge Woolsey who lifted the ban on *Ulysses*, although it was certainly a fine thing to do and it is a landmark case we can be proud of. Woolsey said various comical things, such that he could not detect the "leer of the sensualist" in Joyce's book, and that therefore (the logic escapes me) it is not pornographic. . . . And, in order to push his decision through, Judge Woolsey stated that *Ulysses* "did not tend to excite sexual impulses or lustful thoughts," and he closed his argument with the elegant statement that although the book is "somewhat emetic, nowhere does it tend to be an aphrodisiac." Emetic means tending to produce vomiting and I doubt that Joyce savored that description of his masterpiece. The implication, of course, is that vomiting is good for you and lustful thoughts not. Now everyone who has read Ulysses knows that the book is based largely on the lustful thoughts and acts of its characters and that Joyce spared no pains to represent these thoughts and deeds richly and smackingly. *Ulysses* is, since the Judge used the word, a pretty *good* aphrodisiac, partly because of Joyce's own religious tensions.[57]

Should not, then, this varied power of perception be viewed simply as the result of the prismatic effect of a work, any work, on the sensibilities of various individuals, without the need for determining which of the various perceptions is right or wrong.

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[53] Mazer v. Stein, 347 US 201, 214 (1954).

[54] Anais Nin, Preface to Henry Miller, *Tropic of Cancer*, Copyright 1961 by Grove Press, Inc.

[55] Mitchell Brothers Film Group v. Cinema Adult Theater, note 43 at 857..

[56] United States v. One Book Called "Ulysses," note 7.

[57] Karl Shapiro, *The Greatest Living Author*, copyright 1960 by Karl Shapiro, Introduction to Henry Miller, *Tropic of Cancer*, copyright 1961 by Grove Press, Inc.

Arguably, an allegedly obscene work, particularly if it is characterized as "patently offensive hardcore" representation or description does not promote scientific research and invention nor does it develop culture, arts and letters to warrant State patronage.[58] But to limit the argument to this framework is to misconceive the purpose and ambit of copyright law.

The legislative determination of how best to serve the constitutional purpose is evident in the law itself. It is apparent that the promotion and development of science, arts and letters is achieved by allowing the broadest possible scope of works to be accorded copyright protection, disregarding any content-based restriction. To do otherwise, would be to vest an awesome power in the courts — one, though they may be qualified to wield, would be impossible to control. Instead, the power is left to the workings of the "marketplace of ideas," to the probable audience of the work. In this sense, the copyright law, unlike censorship statutes, are forward-looking, as indeed they should be. Thus, the constitutional purpose of copyright law must be viewed as

> an invitation to creativity. This is an expansive purpose with no stated limitations of taste or governmental acceptability. . . . The pursuit of creativity requires freedom to explore into the grey areas, to the cutting edge, and even beyond.[59]

In this framework, the obscenity defense would, therefore, not only constrict the scope of acceptability of the written word but would cast a decidedly "chilling effect"[60] on the creativity of an author. The vagueness that dogs the concept of obscenity is precisely the cause of this effect — with a dearth of adequate standards, the author shys further away from the cutting edge, unable to ascertain the point at which writing exceeds the bounds of protection.

Noteworthy is the fact that the impact of the obscenity defense is felt not by creators of "patently offensive hardcore" representations and descriptions but by authors of works that express an artistic, literary or scientific theme or plot with "varying degrees of sexual saturation."[61] It is inconceivable that persons engaged in promoting hardcore pornographic works would intend to seek copyright protection in case of infringement. Such a public acknowledgement of authorship would not after all exempt them from incurring delictual or quasi-delictual liability. The recent American case of *Jartech*[62] illustrates the problem that may arise if an infringement action is brought in relation to an obscenity case. The case began with a nuisance abatement action against adult movie theaters which under a city ordinance were considered a nuisance for screening obscene films. Evidence

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58 CONST. art. XV, sec. 9.
59 Mitchell Brothers Film Group v. Cinema Adult Theater, note 43 at 856.
60 Mitchel Brothers Film Group v. Cinema Adult Theater, note 43 at 860.
61 Green, *The Obscenity Defense to Copyright Revisited,* 69 Kentucky L. J. 161, 178 (80/81).
62 Jartech, Inc. v. Clancy, note 45.

consisted of five films which were allegedly obscene, screened in said theaters and surreptitiously copied. The owners of the theaters in turn filed an infringement action for the unauthorized copying of the films. The infringement action however did not prosper due to the finding of "fair use" and the application of the said doctrine to the case. Although the obscenity defense was rejected as previously discussed, such a rejection did not negate the abatement case against the theater owners. *Jartech* clearly illustrates that the nonrecognition of the obscenity defense in infringement cases does not result in the exemption from liability under anti-obscenity laws.

But in purely infringement actions where the defense is raised, the courts are left with the task of determining the extent of "sexual saturation" of the work alleged to have been infringed. This in turn requires a value judgment as to "whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value."[63] But such a determination is beyond the realm of copyright law which deals only with the basic conditions of originality and fixation.

Implicit in the protection accorded to writings of an author is the monetary gain fostered by such protection. Thus, through copyright law, private interests are harnessed to serve the public good. The reason, therefore, in refusing protection to obscene works is that absent such protection, the creator would have no guarantee of exclusiveness to his work and the rewards consequent thereto. The hoped for result is the eventual inhibition from creating obscene works.[64] But the reasoning fails simply because the work has precisely been already created and in fact copied. At this stage, that is, after creation and infringement, the withdrawal of protection becomes counterproductive. Both the work and the copy remain accessible to a public unfettered by a threat of an infringement case.

This is not to argue that copyright protection of works of this nature effectively dissuades from any form of infringement. It is to say that a withdrawal of protection cannot and does not inhibit the creation of obscene works.

Finally, there is the very real financial problem which arises from the denial of copyright protection to works which are allegedly obscene based on the rather vague standards established in criminal obscenity cases prevailing now. Conceivably, past errors may simply be repeated — just as obscene works of the past are now considered works of great literary merit, so too can obscene works of the present be considered the classics of times yet to come. Very little is gained in presuming that the present arbiters of morality hold the monopoly on infallibility.

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[63] Miller v. California, note 14 at 22.
[64] Green, *op. cit.*, note 61 at 178.

Conclusion

The vagueness of obscenity standards coupled with the purpose of the copyright law lead to the conclusion that the elimination of the provisions on the uncopyrightability of obscene works must be construed as a "legislative denial" of the obscenity defense to copyright infringement. The copyright law has no relevance as a censorship statute and to view it as such is to lose sight of its fundamental purpose.

The very real social problem of obscenity demands measures that adequately and effectively serve as solutions. But it should not breed a paranoia that blinds society to other relevant areas of concern. The right to creativity and the freedom to express it is one such area.

One final point: The possibility of reducing the treatment of Ideas to the "standards of a child's library" is very real. Perhaps, in this instance, it would not be amiss to err on the other side of caution.

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