A QUICK PRIMER ON FEDERAL & STATE OBSCENITY LAWS

I. What Is Pornography?

1. The term "pornography" is a generic, not a legal term. As noted by the Supreme Court in its *Miller v. California,* 413 U.S. 15 (1973) obscenity case:

   > "Pornography" derives from the Greek (harlot, and graphos, writing). The word now means "1: a description of prostitutes or prostitution 2. a depiction (as in a writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement." Webster's 3rd New Intern. Dictionary [Unabridged 1969].

2. The 1986 Attorney General's Commission on Pornography defined pornography as, "Material that is predominantly sexually explicit and intended primarily for the purpose of sexual arousal."

II. What Is Obscenity?

The 1973 landmark case, *Miller v. California, supra* (as modified by two subsequent cases) established a three-pronged test for determining whether a "work" (i.e., material or performance) is obscene and, therefore, unprotected by the First Amendment. To be obscene, a judge and/or a jury must determine:

1. That the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; AND

2. That the work depicts or describes in a patently offensive way, as measured by contemporary community standards, sexual conduct specifically defined by the applicable law; AND

3. That a reasonable person would find that the work, taken as a whole, lacks serious literary, artistic, political and scientific value.

Examples of "hardcore sexual conduct" that an obscenity law could include for regulation under the second prong of the test are patently offensive representations or descriptions of:

1. Ultimate sexual acts, normal or perverted, actual or simulated
2. Masturbation, lewd exhibition of the genitals, excretory functions, and sadomasochistic abuse

Side note: Typical "hardcore pornography" (e.g., a magazine, video or Web site) consists of little if anything more than one depiction of hardcore sex after the other (i.e., it's "wall-to-wall" sex).

III. Obscenity Is Not Protected By The First Amendment

A. First Amendment does not protect "every utterance"

The First Amendment reads: "Congress shall make no law …prohibiting the free exercise [of religion]; or abridging the freedom of speech or of the press."

No one in their right mind would say the First Amendment bestows on religious fanatics the right to kill "unbelievers;" and not even the ACLU says that the freedom of speech is absolute. As Justice Brennan put it in *Roth v. United States*, 354 U.S. 476, 483 (1957):

> "In light of this history, it is apparent that the unconditional phrasing of the First Amendment

was not intended to protect every utterance."

The FIRST AMENDMENT QUESTION is not *whether* we should draw lines but rather *where*. The Supreme Court has drawn lines at, among other things, treason, inciting a riot, libel, perjury, threats, fraud, false advertising, copyright, harassment, child pornography, and *obscenity*.

In *Roth*, Justice Brennan also noted (at 481) that the Supreme Court had "always assumed that obscenity is not protected" by the 1st Amendment. The *Roth* Court held (at 485) that obscenity is "not within the area of constitutionally protected speech or press."

B. The difference between an exchange of ideas and commercial exploitation of obscenity

In the 1973 obscenity case, *Miller v. California,* 413 U.S. 15, at 34-35, the Court said:

> The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a "misuse of the great guarantees of free speech and free press" . . . "The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political or social changes desired by the people"…But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.

Rest assured that our nation's founding fathers did not lay their fortunes, sacred honor and lives on the line so that citizens could produce and distribute pornography.

C. Enforcement of obscenity laws is not "censorship"

There is a difference between a prior restraint upon publication and a subsequent punishment. As the Court stated in *Near v. Minnesota*, 283 U.S. 697, at 714, 716 (1931):

> "…the main purpose of such [freedom of speech and press] constitutional provisions is 'to prevent all such previous restraints upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare"… On similar grounds, the primary requirements of decency may be enforced against obscene publications.

IV. Governmental Justifications For Obscenity Laws

1. Mr. Justice Harlan, concurring in *Roth v. United States* (at 502) said:

   > The State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards.

2. *Paris Adult Theater I v. Slaton,* 413 U.S. 49 (1973), the Supreme Court identified several valid governmental interests that justify a prohibition on obscenity:

   a. [W]e hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even if it is feasible to enforce effective safeguards against exposure to juveniles and to passersby...These include the interest of the public in the quality of life and total community environment, the tone of

commerce…and, possibly, the public safety itself. [at 57-58]

b. Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature... could quite reasonably determine that such a connection does or might exist. In deciding *Roth*, this Court implicitly decided that a legislature could legitimately act on such a conclusion to protect the social interest in order and morality. [at 60-61]

c. The sum of experience...affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. [at 64]

d. As Mr. Chief Justice Warren stated, there is a "right of the Nation and of the states to maintain a decent society." [at 59]

V. Federal Obscenity Laws

Federal laws relating to obscenity crimes are contained in the following titles/sections of the U.S. Code:
TO OBTAIN TEXTS OF THESE SECTIONS, GO TO: HTTP://USCODE.HOUSE.GOV

18 U.S.C. 1461 -- Mailing obscene matter
18 U.S.C. 1462 -- Importation or use of a common carrier to transport obscene matter
18 U.S.C. 1464 -- Broadcasting obscene language
18 U.S.C. 1465 -- Interstate transportation of obscene matter
18 U.S.C. 1466 -- Wholesale and retail sale of obscene matter which has been transported in interstate commerce (*must be engaged in business of selling or transferring obscenity*)
18 U.S.C. 1468 -- Distribution of obscene matter by cable or satellite TV
47 U.S.C. 223 -- Making an obscene communication by means of telephone

Sections 1462 and 1465 cited above also prohibit distribution of obscenity on the Internet. "Dealing in obscene matter" is also a predicate offense under the Federal Racketeer Influenced and Corrupt Organizations (RICO) statute. (Title 18, Section 1961-1968).

The 93 U.S. Attorneys (*each state has at least one*) enforce the Federal obscenity laws. FBI Agents, Postal Inspectors and Customs Officers investigate violations of Federal obscenity laws.

VI. Obscenity And The Internet

In 1996, in the case of *United States v. Thomas,* 74 F.3d 701 (6th Cir. 1996), *cert. denied*, 519 U.S. 820 (1996), the Sixth Circuit U.S. Court of Appeals was presented with the issue of defining "community" in order to determine whether materials that had been transported over the Internet were obscene.

Defendants operated a computer bulletin board system (BBS) from their home in California. A postal inspector in Tennessee became a member of their service and subsequently received images by means of a computer and by mail. The couple was convicted by a jury in the Western District of Tennessee for violating federal obscenity laws [18 USC 1462 and 1465] in connection with their operation of their BBS.

The couple appealed the case to the Sixth Circuit. Their appeal was based on the assertion (among other

grounds) that the trial venue was improper because it was in Memphis, where undercover Federal agents accessed and downloaded files, not in California; and it was unclear which community's standards should apply in determining whether the contents of a nationally-accessible BBS are obscene.

In upholding the convictions, the Court of Appeals rejected defendants' argument that the materials should have been judged by the community standards of California rather than Tennessee. The Court stated (in part): "Furthermore, it is well established that there is no constitutional impediment to the government's power to prosecute pornography dealers in any district into which the material is sent."

In 2000, the U.S. Court of Appeals for the Third Circuit invalidated the Child Online Protection Act because the law uses "community standards" in determining whether sex material is obscene for minors. In 2002, the Supreme Court reversed the Third Circuit (*Ashcroft v. ACLU*, No. 00-1293), with five judges concluding that federal obscenity laws were not unconstitutional as applied to the Internet.

VII. State Obscenity Laws

Workable statewide obscenity laws exist in 40 states. In some states, cities and counties can also enact obscenity laws. These laws can encompass both obscene materials and performances. The prosecuting attorney of each county or judicial district enforces these laws. State and local police may make arrests.

Alaska, Maine, New Mexico, Vermont and West Virginia do not have a statewide obscenity law. Montana and South Dakota have totally ineffective state laws. New obscenity laws are needed in these states. Maine, New Mexico and South Dakota, however, allow local control of obscenity. In Oregon, Colorado, Hawaii, and New Mexico the State Supreme Court either invalidated [Oregon] or greatly weakened obscenity laws. Amendments to the state constitution are needed.

VIII.Public Opinion

Almost three in four (73%) U.S. adults think that viewing pornographic websites and videos is morally unacceptable, according to a national survey conducted in July 2006 by Harris Interactive. A national survey conducted in November 2005 by Harris Interactive found that more than three out of four (77%) adult Americans support the Justice Department's effort to enforce federal obscenity laws.

Prepared by Bob Peters: **MORALITY IN MEDIA, INC.,**