
COPYRIGHTING THE ILLICIT: LEGAL CHALLENGES OF OBSCENE AND ILLEGAL WORKS

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ABSTRACT

This article examines the complex relationship between copyright law and the classification of works deemed obscene or illegal, with a particular focus on the Indian legal framework. It highlights the challenges encountered by copyright holders due to the lack of clear statutory provisions and the limited development of jurisprudence regarding the copyrightability of such works under the Copyright Act, 1957. The article aims to shed light on the legal ambiguities surrounding the protection of controversial content and the implications for creative expression and intellectual property rights in India.

The article highlights the problem of lack of statutory provisions as well as jurisprudence on this issue. It seeks to analyse the legal frameworks of United States, United Kingdom, Canada, Australia and certain civil law jurisdictions in order to be able to find out an answer for the Indian context. The study further aims to analyse the practical issues that the authors of works face due to automatic grant of copyright as well as enforcement of such rights in case of illegal or obscene works. The questions that this article seeks to answer are whether copyright law is truly content neutral and since copyright protection is automatic, whether the authors of illegal/obscene works can and should benefit from protection once infringement occurs. Going ahead, the article calls for a more well-defined legal framework; one that strikes a thoughtful balance between protecting artistic expression and upholding societal values and ethical standards. It emphasizes the need for clearer laws, dedicated mechanisms for adjudicating such cases, and stronger enforcement strategies to address the ongoing challenges surrounding copyright protection for content that falls into legally and morally contentious areas.

Keywords: Copyright, Obscene content, Illegal content, Creative Expression, Content Neutrality.

Introduction

Within the realm of copyright law, there exists a conundrum between the rights of the author and obscenity and illegality of the works. This conundrum is evident especially in countries such as India where the legal system finds it difficult to address this issue of whether works considered illegal or obscene should be protected under the Copyright Act. The goal that copyright seeks to achieve is safeguarding artistic expressions and promoting innovation, however, both regulators and legislators face difficulty in this regard.

The Copyright Act, 1957 is the legislation governing copyrights in India. The act is completely silent when it comes to protection for illegal or obscene works. The only qualification that is required under the Copyright Act for copyright to subsist in a work is 'originality'.¹ Thus, as long as the work is original in nature and it falls within the six categories of work as provided under Section 13 of the Act, copyright subsists in the same. However, there are other legislations such as the Indian Penal Code, 1860 and Information Technology Act, 2000 which threaten the works by prohibiting the circulation of obscene works in India. Thus, the question that arises is whether it would practically be possible to exploit such works which are illegal or obscene in nature even if copyright subsists in the same.

India lacks legal provisions as well as judicial interpretation in this regard. The complexities arising out of the entangled relationship between copyright and morally objectionable content is not readily answered in the Indian context however, some of the answers may be found in the judicial decision of other jurisdictions such as United States, United Kingdom, Canada and certain civil law jurisdictions. Owing to the lack of legal guidelines, the authors and owners of copyright as well as law enforcement organizations are all left clueless when it comes to such legal requirements.

Further, the advent of digital technology and internet has intensified the difficulties relating to such illicit content especially pornographic works. These have in essence blurred the conventional lines and raises doubts regarding the applicability of the copyright law in its true essence in the modern era. Thus, a comprehensive legal framework that balances both the protection of copyright as well as social and ethical interests seem to be the need of the hour.

¹ Section 13 Copyright Act

This article aims to examine the copyright dilemma pertaining to illegal and obscene works in India and conduct a comparative study with the legal systems in the US, Canada, Australia, UK and civil law jurisdictions.

Content Neutrality of copyright

The legislation of the country may refuse to let the copyright in a particular work be enforced on the ground of public policy. Thus, technically any person may make use of the work without obtaining permission from the copyright holder, however subject to the laws in place. This category of public domain is kind of fragile due to evolving social standards and the necessity for users to adhere to laws governing the use of content with such characteristics.

As far as the international instruments relating to copyright are concerned, according to the Berne Convention national laws have the option, but not the obligation, to authorize, regulate, or forbid the distribution, display, or showcasing of any work or creation if deemed necessary by a competent authority.²

In *U.S.- Section 110(5) of the U.S. Copyright Act*³ the WTO panel opined that Article 17 does not encompass the outright denial of copyright protection. The panel further held that the countries may control the content under the enforcement refusal provision. In this case, Section 110(5) of the US Copyright Act provided exceptions to copyright protection for certain cases such as face-to-face teaching activities at non-profit educational institutions. These exceptions were provided for performance and display of certain works only. However, the WTO panel found that this provision went beyond what is permitted under Article 17 of the Berne Convention, which requires that exceptions to copyright protection be limited and should not prejudice the legitimate interests of the author.

Countries differ significantly in their approach to permitting the refusal of copyright enforcement. In the United Kingdom, courts have a longstanding tradition of ruling that copyright enforcement can be against public policy if the content of a work is deemed highly objectionable. Similarly, Chinese legislation supports the refusal of enforcement in cases where

² Berne Convention for the Protection of Literary and Artistic Works, art. 17, Sept. 9, 1886 as revised at Paris on July 24, 1971 and amended in 1979, 1161 U.N.T.S. 3 (1886).

³ United States- Section 110(5) of the United States Copyright Act WT/DS160/24/Add.222, WTO Dispute Settlement Panel, (Nov. 9, 2001).

it would contravene applicable laws.

Evaluating content neutrality of copyright

The necessity of assessing the content of a work within copyright law is a subject of debate, particularly concerning obscene/illegal works. Some courts believe that the provisions of copyright were not meant to protect illegality or immorality.⁴ While a work may possess the requisite originality for copyright protection, its societal value or potential harm remains in question. The ethical dimensions of copyright law have been largely overlooked in academic discourse, with discussions primarily focused on issues like immorality, such as pornography, or legality, such as obscenity.⁵ However, if examined from a broader lens, the copyrightability of illegal/ obscene works is warranted.⁶ This examination should explore whether copyright law should maintain content neutrality in such cases.⁷ To ascertain the necessity of restrictions relating to content in copyright, it is imperative to weigh the advantages and disadvantages thereof.

Drawbacks of content based restrictions

Implementing restrictions relating to content within copyright could lead to several adverse consequences, which maintaining content neutrality could prevent.⁸ Initially, such restrictions might hinder the creation of certain works.⁹ Authors may refrain from producing content due to uncertainty surrounding its copyright eligibility, resulting in a burden on both creators- who must speculate on copyrightability- and consumers- who may struggle to discern the protected works from unprotected works, fearing potential infringement. Consequently, restrictions relating to content could suppress creativity and free expression, ultimately stifling innovation for future generations.¹⁰ Moreover, from a normative standpoint, copyright law is intended to foster creativity rather than impede it, but restrictions relating to content may hinder the

⁴ Bullard v. Esper, 72 F. Supp. 548 (1947).

⁵ Robert C. S., *Constitutional Protection of Obscene Material Against Censorship*, 31 S. Cal. L. Rev. 301, 305 (1958).

⁶ Franklin W., *Immorality, Obscenity and the C.R.*, 6 S.D.L. Rev. 109, 110 (1961).

⁷ Jeremy P., *C.R. in Obscene Works: Some British and American Problems*, 6 Anglo-Am. L. Rev. 138, 149 (1977).

⁸ N. A. Palumbo, *Obscenity and Copyright*, 22 S. Tex. L.J. 87, 93 (1981).

⁹ Mitchell Brothers v. Film Grp., 604 F.2d at 856.

¹⁰ A. Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 Vand. J. Ent. & Tech. L. 799, 801 (2008).

creation and dissemination of diverse forms of expression.¹¹

Secondly, restrictions relating to content on registration might inadvertently facilitate the circulation of problematic materials. With more works becoming ineligible for copyright protection, individuals could freely use such materials without authorization or payment, potentially exacerbating societal harm associated with illegal or morally questionable works.

Thirdly, restrictions relating to content would grant significant authority to copyright registrars, necessitating judgments on the morality or legality of works beyond their typical scope of operation.¹² This could lead to concerns about government censorship, as registrars, acting as government agents, would wield the power to refuse registration based on moral or legal grounds. Additionally, expecting registrars or even judges to assess the moral or legal merit of works could introduce subjective biases and challenges, as aesthetic evaluations are not typically within the purview of copyright law.

Moreover, in today's globalized copyright landscape, implementing restrictions relating to content could lead to discrepancies in copyright protection between the United States and other jurisdictions.¹³ This means that works deemed illegal in the U.S. might still be profitable in countries without such restrictions, or where the threshold for restrictions relating to content is lower.¹⁴ This raises questions about whether works illegal in the U.S. but legal elsewhere would only receive protection in those foreign countries.¹⁵ Additionally, artists may opt to publish exclusively in countries with more lenient copyright regulations. While international agreements aimed at harmonizing intellectual property laws could mitigate this issue to some extent, challenges persist due to variations in criminal statutes across different nations, making comprehensive harmonization difficult to achieve.

Benefits of restrictions relating to content

Conversely, there exist several arguments in favour of implementing restrictions relating to content within copyright law, which could enhance the legal framework.¹⁶ Initially,

¹¹ N. Chaney, *Cybersex: Protecting Sexual Content in the Digital Age*, 11 J. Marshall Rev. Intell. Prop. L. 815, 820 (2012).

¹² J. Ferguson, *The Obscenity Defense Denied*, 9 W. St. U. L. Rev. 85, 95 (1981).

¹³ D. Markel, *Can Intellectual Property Law Regulate Behavior*, 113 Harv. L. Rev. 1503, 1504-05 (2000).

¹⁴ Kurt L., *Problems in Giving Obscenity Copyright Protection*, 36 Vand. L. Rev. 403 (1983).

¹⁵ E. S. Rogers, *Copyright and Morals*, 18 Mich. L. Rev. 390, 390 (1920).

¹⁶ *New York v. Ferber*, 458 U.S. 747, 747 (1982).

withholding copyright protection from undesirable works could deter their creation by eliminating economic incentives, thus potentially reducing criminal activity and societal harm. Moreover, certain illegal works may inflict additional negative consequences on society, such as causing offense, promoting criminal behavior, undermining moral values, and damaging social cohesion.

Secondly, restrictions relating to content on illegal works might facilitate compensating victims of crimes.¹⁷ By allowing victims or their representatives to pursue infringement claims, this approach offers an additional avenue for seeking redress for harm caused by the works in question.

Lastly, the absence of restrictions relating to content might be perceived as governmental endorsement of illegal activities by granting federal protection to illicit materials. Therefore, restricting registration of such undesirable works could be viewed as a means of preventing government sanctioning of harmful content.

In conclusion, while both advantages and disadvantages exist in case of restrictions relating to content in copyright law, a quantitative analysis suggests that the benefits outweigh the drawbacks, thus advocating for a content-neutral stance. However, qualitatively, the adverse effects of providing copyright protection to illegal works may outweigh the advantages of maintaining content neutrality to some extent. Therefore, I propose a modest solution in the subsequent section to address the perceived injustices resulting from the purported neutrality approach of current copyright law.

Enforcement of Obscene/illegal works

The international law

Article 17 of the Berne Convention¹⁸ is an important provision in international copyright law that addresses the balance between copyright protection and the authority of sovereign states to regulate the circulation and presentation of works within their territories. This provision acknowledges the right of member states to enact legislation or regulations to permit, control,

¹⁷ R. L. Green, *Defense of obscenity in Copyright*, 69 Ky. L.J. 161, 174-75 (1980).

¹⁸ Berne Convention, *supra* note 4, art. 17.

or even prohibit the circulation, presentation, or exhibition of any work or production, as deemed necessary by the competent authority.

Article 17 of the Berne Convention provides flexibility to individual nations in order to exercise control over the dissemination of creative works within their borders. Such a control may be exercised for various reasons, such as the maintenance of public order, cultural preservation, and the protection of national security interests. Thus, this provision also acknowledges the power of states to indulge in censorship of content that may be contrary to public interest or morality in a particular nation.¹⁹

Article 17 of the Berne Convention highlights the flexibility given to member states in setting rules for how creative works are shared and protected within their borders. By allowing countries to make their own laws or regulations on this matter, the Convention acknowledges that each nation has its own legal and cultural systems. It aims to respect these differences while still encouraging creativity and the spread of knowledge.

A point worth noting here is that while Article 17 lets member states put limits on private rights to protect public order or other important concerns, these limits must still follow the basic principles of the Berne Convention. This includes respecting the rights of authors and creators. Also, any restrictions set by member states should be fair and not unfairly block the flow of information or people's enjoyment of cultural works.

In short, Article 17 of the Berne Convention helps balance the rights of copyright holders with the needs of member states to control how creative works are shared within their borders. It respects each country's authority while also supporting the goals of copyright protection and the free exchange of ideas and culture around the world.

Jurisdictional Analysis

United Kingdom and commonwealth jurisdictions

There is a longstanding practice within English courts of withholding copyright protection from works deemed objectionable on the grounds of public policy. This denial effectively places

¹⁹ Ricketson And Ginsburg, *International Copyright And Neighbouring Rights* 15.02 (2 nd ed. 2005).

such works in the public domain, allowing anyone to copy or publish them, provided they adhere to other applicable laws, such as those concerning defamation or obscenity.²⁰

Historically, copyright has been denied for various reasons, including if a work is considered obscene, immoral, defamatory, blasphemous, or intended to deceive the public. The legal ramifications and basis for these exclusions in the UK have been uncertain. Lord Eldon, for instance, was known for refusing protection to works that offended public morals, although before the Judicature Act, this typically involved the equity court declining to grant an injunction rather than outright denial of copyright.²¹

In the case of *Glyn v. Weston*, Younger J. famously denied copyright for Eleanor Glyn's novel "Three Weeks," arguing that copyright couldn't subsist in a work with such a grossly immoral tendency.²² The House of Lords, in *A-G v. Guardian Newspapers*,²³ referred to Glyn's case, along with others involving works calculated to deceive the public, as instances where equitable relief was refused.

Subsequent rulings, such as *Yelland*,²⁴ further clarified the courts' stance, stating that a court might refuse to enforce copyright if a work obscene, immoral or may hamper family life or public safety. In essence, rather than outright denying copyright, English courts, in such cases, exercise their inherent jurisdiction to decline enforcement of copyright, effectively placing the works in the public domain.

Australia

While the English court decisions denying relief remain unchallenged, modern common law courts exhibit a reluctance to refuse copyright enforcement based on policies like the protection of public morals.²⁵ This trend is evident in Australian jurisprudence, as seen in the Full Federal Court's ruling in *Venus Adult Shops*.²⁶ In this case, the Court expressed reservations about adopting a legal standard rooted in subjective value judgments and psychological

²⁰ Graham Greenleaf & David Lindsay, *Public Rights: Copyright's Public Domains* 109 (1 st ed. 2018).

²¹ *Venus Adult Shops Pty Ltd v. Fraserside Holdings Ltd* (2006) 70 IPR 517 at [13].

²² *Glyn v. W. F. Film Co.*, [1916] 1 Ch 261.

²³ *A-G v. Guardian Newspapers*, [1990] 1 AC 109 at 294.

²⁴ *Hyde Park Ltd. v. Yelland*, [2001] Ch 143.

²⁵ J. Phillips, *Copyright in obscene works*, 6 Anglo-Ameri. L. Rev. 138, 168 (1977).

²⁶ *Venus Adult Shops v. Fraserside Ltd.*, (2006) 70 IPR 517.

apprehensions beyond their comprehension.

The Court clarified that Australian law lacks a statutory basis for denying copyright protection to material that violates community standards. Furthermore, while such considerations might influence the awarding of discretionary remedies, the Court emphasized that such discretion is limited in scope.

Canada

The stance adopted by the Australian court aligns closely with Canadian legal principles. In the case of *Pasikniack v. Dojacek*,²⁷ Fullarton JA asserted that unless the sale of a book constituted an offense, there existed a right to seek injunctions against copyright infringement, even if the book was allegedly obscene. In a concurring opinion, Dennistoun JA acknowledged the possibility of denying copyright in works intended to deceive the public but saw no grounds for withholding an injunction if the work was genuine and not intended to defraud.

Both Fullarton and Dennistoun JJA emphasized that if the sale of a book amounted to an offense, damages would not be available. In the case of *Aldrich*,²⁸ Davies J examined the copyright law concerning obscene works, concluding that while the Canadian Act didn't automatically deny copyright in such materials, courts wouldn't award damages if the work was illegal and no compensable act had occurred. However, the Court held that injunctions could still be granted to prevent infringements of even obscene works.

United States

Before 1909, US copyright law explicitly excluded obscene materials from copyright protection. However, the 1909 US Copyright Act did not carry forward this provision, allowing for the registration of all works by an author. In the significant US case of *Mitchell Brothers*,²⁹ Judge Godbold observed that the omission of the obscenity exception in the 1909 Act indicated a deliberate policy to grant copyright protection regardless of content. The court explained that by removing content restrictions on copyrightability, Congress has determined that fostering creativity aligns with the Constitution's goals. Congress recognized that authors shouldn't have to worry about both the marketability of their work and the evaluation of its worth by

²⁷ *Pasikniack v. Dojacek*, [1929] 2 DLR 454.

²⁸ *Aldrich v. One Stop Video Ltd* (1987) 39 DLR (4th) 362.

²⁹ *Mitchell Brothers Film Group v. Cinema Adult Theatre*, 604 F 2d 852 (5th Cir 1979).

government officials. Additionally, Judge Godbold noted that protecting all works, both obscene and non-obscene, avoided practical difficulties in determining obscenity and potential First Amendment issues.

While Mitchell Brothers suggested that relief for copyright infringement wouldn't be denied to obscene works, a New York court, in the case of *Devils Films*,³⁰ declined to issue an injunction to halt the publication of infringing copies of pornographic videos due to public policy against distributing unlawfully obscene materials. In this instance, the court also rejected the notion that it lacked discretion to deny remedies in such cases.

Civil law jurisdictions and Ordre Public Exclusions

In civil law systems, the counterpart to exclusions based on public policy is addressed within the doctrine of *ordre public*. This doctrine originates from the state's sovereign police power and results in the prohibition or nullification of unlawful actions. One notable instance of the application of this doctrine to reject copyright protection was seen in Article 4 of China's 1990 Copyright Law,³¹ which, among other provisions, stipulated:

"Works the publication and/or dissemination of which are prohibited by law shall not be protected by this Law."

Works that failed to pass the "content review" conducted by Chinese authorities, on grounds such as unconstitutionality or immorality, were denied copyright protection. This included portions of works that were edited to meet the requirements of the content review. In 2007, the United States filed a complaint with the World Trade Organization (WTO) regarding Article 4 of China's 1990 Copyright Law, alleging inconsistency with Articles 5(1) and 5(2) of the Berne Convention which has also been referenced under Article 9.1 of the TRIPs Agreement. Articles 5(1) and 5(2) establish minimum obligations for copyright protection of works without requiring formalities.

The WTO Panel opined that the impugned provision of the Chinese legislation, by completely denying copyright to works or part of the works and not providing for content review, conflicted with the provisions of Berne Convention. Additionally, the Panel opined that such

³⁰ *Devils Films, Inc. v. Nectar Video*, 29 F Supp 2d 174 (SDNY 1998).

³¹ Copyright Law of People's Republic of China of 2010, art. 4, CN031 (2010) (China).

denial results in deprivation of effective enforcement remedies to be exercised by judicial authorities as provided for u/a 41.1 of TRIPs. Although China argued that Article 4 didn't remove copyright from the works but simply denied protection, the Panel disagreed, stating that denial of protection rendered the right essentially meaningless.

Regarding Article 17 of the Berne Convention, which allows members to limit rights to maintain public order, the Panel clarified that while this grants power to control the circulation, presentation, or exhibition of works, it does not permit the complete elimination of copyright for a particular work. Consequently, the Panel didn't address whether the content review process conflicted with the prohibition against formalities.

Ultimately, the Panel's decision allowed China to continue its censorship regime, as long as it refrains from completely eliminating copyright, as copyright and government censorship serve different purposes and interests.

From the lens of India

In the context of India, there are laws in place to prohibit works deemed obscene, encompassing photographs, literature, audio, cinematographic works, and their associated commercial rights. These regulations aim to uphold public morality and decency through censorship. The Indian Penal Code outlines criminal offenses related to the production, sale, advertisement, distribution, and similar actions involving obscene works. However, it's important to note that these laws do not pertain to the Copyright per se. Exceptions exist for works used for religious purposes or those related to ancient monuments.³² Distinct penalties are imposed for actions involving individuals under the age of 21 or activities carried out in public spaces that cause annoyance.³³ Criminal Sanctions are applicable to works depicting paraphilic acts of unnatural intercourse.³⁴

The POCSO Act not only makes it a criminal offense but also imposes penalties³⁵ for the indecent, obscene, or pornographic depiction or utilization of children, whether for personal consumption or distribution.³⁶ Additionally, it addresses the storage of such material with

³² Indian Penal Code of 1860, § 292, No. 45 (1860) (India).

³³ Indian Penal Code, *supra* note 36, § 294.

³⁴ Indian Penal Code, *supra* note 36, § 377.

³⁵ Pocso, 2012, § 14, No. 32 (2012) (India). (*hereinafter*, POCSO)

³⁶ Pocso, *supra* note 40, § 13.

commercial intent.³⁷ The Information Technology Act of 2000 prohibits the publication and transmission of obscene or sexually explicit materials in electronic format.³⁸ It also addresses actions involving materials depicting children in obscene, indecent, or sexually explicit manners, establishing criminal consequences for such activities.³⁹

The Indecent Representation of Women Act, 1986, prohibits and imposes penalties for the portrayal of women in a manner that is derogatory or demeaning, which may lead to the corruption of public morality. This encompasses various offenses such as advertisements, publication, production, sale, distribution, or circulation.⁴⁰ Meanwhile, the Central Board of Film Certification (CBFC) evaluates movies concerning public decency⁴¹ and human sensibilities, refusing certification for films deemed obscene. However, it's noteworthy that the Cinematograph Act does not provide clear definitions for terms like vulgarity, obscenity, or pornography.

Similarly, there are advertising codes that prohibit indecent, vulgar, repulsive, and offensive themes in advertisements, which internet intermediaries must comply with to avoid legal liabilities.⁴² Online intermediaries are also required to curate their content according to 2021 rules, as per the law in force.⁴³ However, the expansion of the internet and pornography into newer versions may complicate the enforcement of penal legislation against obscene and pornographic works, potentially dissuading many independent authors and content owners from seeking enforcement of their commercial rights through the courts.

While all these provisions majorly talk about obscenity, the courts in India have struggled to find out what would really amount to obscenity in any given scenario. The courts have come up with a few tests in order to assess whether a particular work is obscene in nature.

The Hicklin's test

This test was established in the English case *Regina v. Hicklin*.⁴⁴ In this case it was opined that

³⁷ Pocso, *supra* note 40, § 15.

³⁸ IT Act, 2000, § 67, No. 21, Acts of Parliament 2000 (India).

³⁹ IT Act 2000, *supra* note 43, § 67A and 67B.

⁴⁰ The Indecent Representation of Women (Prohibition) Act 1986, § 2(c), 6, 3 and 4, No. 60, Acts of Parliament 1986 (India).

⁴¹ The Cinematograph Act 1952, § 5B, No. 37, Acts of Parliament 1952 (India).

⁴² Programme and Advertising Codes, The Cable Television Network Rules, Rule 6, Rule-7 (1), (2) (iii), (iv), (vi), (vii) (1994).

⁴³ IT (Intermediary Guidelines) Rules, Rule 3 (2021).

⁴⁴ *Regina v. Hicklin*, 11 Cox C.C. 19 (1868).

the test for obscenity involves assessing whether the material has the potential to morally corrupt and deprave individuals who are susceptible to such influences and may come across the publication.

The application of obscenity standards in Indian courts has been a challenge. The flawed Hicklin test, traditionally used for this purpose, has resulted in inconsistent rulings across different cases. For instance, despite containing explicit sexual content, *“Lady Chatterley’s Lover”*⁴⁵ was not deemed obscene. Similarly, in the *Samaresh Bose case*, mere references to sex were not considered obscene.⁴⁶ The film *“Bandit Queen,”* which featured nudity,⁴⁷ and an advertisement for a nude painting by *M.F. Hussain* were also not found to be obscene.⁴⁸ Even Ekta Kapoor’s web series *“XXX: Uncensored”* faced allegations of obscenity, but the court did not rule it as such.⁴⁹

In the United States, regulations distinguish sexually explicit broadcasts from non-sexual content to safeguard minors,⁵⁰ even though nudity in films is not necessarily classified as obscene.⁵¹ The landmark *Roth v. United States* case⁵² established that the overall theme of a work, rather than isolated elements, determines obscenity. The *Jacobellis v. Ohio* case clarified that only hardcore pornography qualifies as obscene.⁵³ Only in the Mitchell Brothers’ case did federal courts acknowledge copyright protection for obscene works under the First Amendment.⁵⁴

The Contemporary Community Standards Test

Hicklin test homed the conflict between expression and obscenity since a very long time. Although Indian courts rarely applied this test as rigidly as in England, they were hesitant to abandon it entirely.⁵⁵ The need for a replacement had been evident for some time until the *Aveek Sarkar*⁵⁶ case in 2014. This case, involving a nude photograph of Boris Becker and his

⁴⁵ Ranjit Udeshi v. State, (1965) AIR 881.

⁴⁶ S. Bose & Anr. v. A. Mitra., (1986) AIR 967.

⁴⁷ Bobby Art Int. v. Om Pal & Ors., (1996) SC Civil App. No.7522 of 1996.

⁴⁸ M. Husain v. Rajkumar Pandey., (2008) 2 JCC 1433 DEL.

⁴⁹ Ekta Kapoor v. State Of M.P., (2020)MP HC M.Cr.C.No.28386/2020

⁵⁰ Cohen v. California, (1971) 403 U.S. 15.

⁵¹ Barnes v. Glen Theatre, (1991) 501 U.S. 560.

⁵² Roth v. United States, (1957) 354 U.S. 476.

⁵³ U.S. v. One Book Named Ulysses, (1933) 5 F. Supp. 182 (S.D.N.Y).

⁵⁴ Mitchell Brothers Film Group v. Cinema Adult Theater, (1979) 604 F.2d 852.

⁵⁵ Abhinav Chandrachud, Republic of Rhetoric 140 (Penguin Random House India 2017) 140.

⁵⁶ Aveek Sarkar v. State of West Bengal, (2014) 4 SCC 257.

fiancée Barbara Feltus published in a German magazine and reproduced in a Bengali daily, highlighted the lower judiciary's overemphasis on procedural aspects in obscenity cases, potentially neglecting substantive law. The Supreme Court later criticized this approach, suggesting that judicial precedent should have guided the magistrate's decision and that the High Court could have intervened to ensure justice. However, merely reforming the law would be insufficient without procedural reforms and encouragement of judicial discipline.

Justice KS Radhakrishnan's judgment in *Aveek Sarkar's* case emphasized that the Hicklin test was not suitable for determining obscenity. He argued that nudity alone cannot be considered obscene; rather, materials that incite lustful thoughts must be evaluated based on contemporary community standards. The balance between societal norms and individual preferences was crucial in determining obscenity.

The issue of contemporary community standards was further explored in the case of *Devidas Ramachandra Tuljapurkar v State of Maharashtra & Ors.*⁵⁷ The Supreme Court considered the balance between creative freedom and obscenity, particularly in reference to historically respected personalities. The court noted that references to such figures could significantly impact community standards, especially when coupled with creative works. Despite these observations, the decision favored the publisher and printer, who had issued an unconditional apology, leaving the poet to defend himself in the ongoing trial.

However, these cases also demonstrate the courts' tendency to focus on external moral considerations rather than aesthetic factors. Obscenity continues to be shaped by societal norms, leaving little room for artistic interpretation. Section 292, which deals with obscenity, has often been exploited by conservative elements to impose their moral standards. This is particularly problematic in a diverse country like India, where cultural differences can lead to varying interpretations of what constitutes obscenity. Social dynamics, such as caste, class, and religion, frequently play a significant role in how such cases are perceived and managed. This is exemplified by instances like that of Surya Wagh, a poet whose work sparked controversy for its critique of Brahmins, particularly considering his own background from a lower caste.⁵⁸

⁵⁷ Devidas Ramchandra Tuljapurkar v. State of Maharashtra & Ors., (2015) 6 SCC 1.

⁵⁸ Smita Nair, *Awarded, Then Trashed: Goa Poet Hounded for Questioning Brahmins*, The Indian Express (Last visited Apr. 9 2024, 9:28 pm) <https://indianexpress.com/article/india/goa-former-bjp-mla-vishnu-surya-wagh-poet-hounded-for-questioning-brahmins-4896000/>.

Conclusion and Suggestions

While the Berne Convention of 1886, the Universal Copyright Convention of 1952, the TRIPS Agreement of 1995, the WIPO Copyright Treaty of 1996, the WIPO Performances and Phonograms Treaty of 1996, and the Budapest Convention on Cybercrime of 2001 all acknowledge automatic protection and copyrights for original works across various categories, they do not specifically exempt obscenity. The laws criminalizing acts related to obscene works also do not mention copyright aspects of the work at all. National have agreed to combat obscenity at the municipal level, which includes penalizing associated commercial rights such as the right to store and sell such materials. Moreover, the inconsistent application of Article 17 within the Berne Convention contributes to confusion among creators. Because copyright registration isn't mandatory, authors often find themselves unsure about which countries they can enforce their rights in. This uncertainty weakens their ability to protect their work and undermines the effectiveness of copyright laws in addressing issues of obscenity.

Moving forward, there's a pressing need for a comprehensive censorship system to regulate the distribution of obscene or illegal content to audiences. This system should strike a balance between upholding public morality and ensuring that entire works aren't unfairly kept from the public domain. Additionally, efforts should focus on aligning copyright laws across different jurisdictions to offer authors and rights holders clearer guidance.

Suggestions-

1. ***Clarity and Consistency in Laws:*** Clearer and more consistent legal rules, both within countries and across the globe is the need of the hour. It's important to align copyright laws from different jurisdictions so that authors, owners, and performers know exactly how their rights are protected, even for works that some might consider obscene or illegal.
2. ***Updating International Agreements:*** International agreements like the Berne Convention should be revisited to deal directly with the issue of obscenity. These should provide for clear guidance on how copyright law applies in these situations. This might mean setting standards or principles to help decide when copyright protection can be limited or even taken away because of a work's content.

3. ***Specialized Courts or Panels:*** Creating special courts or panels that specialize in handling cases involving obscene or illegal works could be thought of. These groups would have experts who understand both copyright law and censorship issues. That way, they can make fair decisions based on a deep understanding of the law and the context of each case.
4. ***Strengthening Enforcement:*** We need better ways to enforce copyright law, especially when it comes to stopping the spread of obscene or illegal content. This might involve closer cooperation between law enforcement, internet companies, and platforms that host content. Together, they can work to find and remove content that violates copyright laws.