

The Whole Truth: Evaluating the ‘As a Whole’ Requirement of the *Miller* Test

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I. INTRODUCTION

In the old days, applying the ‘taken as a whole’ requirement in obscenity cases¹ was simple: The book must be read from cover to cover, the movie must be watched from beginning to end, and the magazine must include both the pictures and the articles. But the advent of modern technology has complicated the ‘taken as a whole’ element, and presents some difficult challenges for both the courts and litigants in obscenity prosecutions.

Modern digital media is presented in a variety of forms and formats. Films can be chopped, ripped and edited in infinite ways with simple media software. Website users are now permitted to download portions of feature-length films and combine clips together to create their own favorite compilation set from a variety of different producers. Hardcore internet television services allow the same kind of content manipulation and display.² Websites present perhaps the most difficult challenge since their content changes on a routine basis, imposing both a temporal and a spatial component of the ‘whole’ work. It is also often difficult to determine where one site leaves off and another begins with the increased use of linking and framing technology, coupled with the sharing of traffic, content and members by and between competitors. The practice of “hot-linking” creates yet another set of concerns as to whose content the user is actually viewing when accessing a particular image or video clip.

¹ The well-known *Miller* Test requires that allegedly-obscene materials be taken as a whole when considering the prurience and serious value prongs of the *Miller* Test. See *Miller v. California*, 413 U.S. 15 (1973).

² For an example of such a service, see www.FireTv.com.

II. LEGAL ANALYSIS

A. The Cases

It should be no surprise, then, that the courts have struggled with the ‘as a whole’ requirement, and are poised to render some problematic decisions. This whole issue is complicated by the fact that state and federal prosecutors are intentionally parsing out individual sections of media from larger works, and alleging those discrete portions to be obscene. For example, in the case of *U.S. v. Extreme Associates*,³ the Government downloaded a number of individual video clips from the ExtremeAssociates.com website, and indicted each clip as a separate obscene work. The ‘as a whole’ legal challenges in that case remain pending after years of litigation, and probably will not be resolved until the case actually goes to trial. In the Red Rose federal obscenity case,⁴ the Government identified six (6) individual written stories from the Defendant’s erotic text site, and charged each story as a separate obscene work. That case was resolved by plea agreement before the ‘as a whole’ issues could be litigated. Judge Susan Bucklew, presiding in the *U.S. v. Paul Little, et. al.*⁵ (Max Hardcore) case, permitted the Government to show only portions of the allegedly-obscene videos at issue, because the jurors seemed to be getting uncomfortable when viewing the material in open court.⁶ The defense was forced to introduce the remainder of the movies at issue, allowing prosecutors to blame the defense for forcing the jury to sit thorough hours and hours of extreme erotica.⁷ Some of the counts on which the defendant was indicted arose from portions of his website, and not the site

³ *U.S. v. Extreme Associates Inc.*, 352 F.Supp.2d 578 (W.D. Pa. 2005), *rev’d* 431 F.3d 150 (3d Cir. 2005), *cert. den.* 547 U.S. 1143 (2006), *remanded to* Case No. 05-1306 (W.D. Pa.)

⁴ *U.S. v. Karen Fletcher*, Case No. 2:06-cr-00329-JFC (W.D. Pa.).

⁵ Case No: 8:07-cr-00170-SCB-MSS (M.D. Fla).

⁶ K. Graham, “Juror Asks to View Less Porn in Court,” *St. Petersburg Times* (May 30, 2008), which can be viewed at: <http://www.tampabay.com/news/courts/criminal/article537208.ece>.

⁷ M. Kernes, “Closing Arguments In Max Trial Reveal Prosecution's True Agenda,” *AVN.com* (June 6, 2008), found at: <http://www.avn.com/law/articles/30592.html>.

as a whole. Ultimately, the jury convicted Mr. Little on every count, including those associated with online content.

At the state level, prosecutors in Polk County, Florida, have, on at least two occasions, selected separate pictures and/or video clips from larger websites, and charged those distinct segments as obscene.⁸ In one of those cases, prosecutors identified 100 images, out of hundreds of thousands residing on a user-generated content website – none of which had been produced or even seen by the Defendant – as the basis for the obscenity prosecution.⁹ The trial judge used a few pictures isolated from the remainder of the content on the web pages as a basis for revoking the Defendant’s bond – finding probable cause that the images were obscene. Fortunately, the appellate court rendered an emergency ruling reversing the bond revocation order, and freeing him from this illegal incarceration.¹⁰ Both of the Polk County cases were resolved by favorable plea agreement before the court had an opportunity to rule on the ‘as a whole’ issues, so the question remains open.

B. The Legal Decisions

The existing law on the ‘as a whole’ issue does not completely answer the question with regard to digital media forms, but does support a favorable interpretation for the adult industry. By way of review, the *Miller* Test for obscenity is as follows:

- “Obscene” means the status of material which:
- (a) the average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
 - (b) depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and,

⁸ *State of Florida v. Tammy Robinson and Herbert Robinson*, Case Nos. CF-99-01463-A-XX & CF-99-01465-A-XX (Fla. 10th Cir. 2001); *State of Florida v. Christopher M. Wilson*; Case No. CF-05-7738 (Fla. 10th Cir. 2006).

⁹ *Wilson*, *supra*.

¹⁰ *Wilson v. Judd*, Case No.: 2D05-6073 (Fla. 2d DCA 2005).

(c) taken as a whole lacks serious literary, artistic, political, or scientific value.¹¹

It is well-established that the courts must apply all of the prongs of the *Miller* Test when evaluating allegedly-obscene material, and the omission of any part of the *Miller* analysis constitutes reversible error by the court.¹² Put another way, the failure to strictly apply all elements of the *Miller* Test, including the ‘as a whole’ requirement, constitutes a fundamental denial of constitutional rights of the Defendant.¹³ Since the adoption of the *Miller* Test in 1973, the courts have uniformly required that materials be evaluated in their entirety, instead of in isolation, before they can be declared obscene.¹⁴

The requirement that materials be evaluated as a whole is critical when applying the ‘serious value’ prong. It is often the case that serious value can be found in the parts of the work that the Government overlooks or fails to present to the jury. The ‘value’ prong was formulated in the Supreme Court case of *Roth v. United States*,¹⁵ wherein the Court rejected the segmented review approach of earlier cases, instead adopting the requirement that: “the books, pictures, and

¹¹ This definition is taken from § 847.001(10), *Fla.Stat.* (2007) [Emphasis Added] but is representative of the test applied by the courts throughout the nation.

¹² See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (Where the Court struck down portions of the Child Pornography Prevention Act due to its failure to include certain elements of the *Miller* Test.

¹³ *Id.*

¹⁴ See, e.g., *Penthouse International, Ltd. v. McAulzfe*, 610 F.2d 1353, 1367 (5th Cir. 1980) (rejecting the state solicitor general's argument “that each article and pictorial presentation is a ‘work’ and a magazine is merely a conglomeration of these works resulting in a ‘volume’”); *United States v. One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934) (requiring Government to look at entirety of book “Ulysses” and not individual excerpts taken therefrom); *United States v. Miscellaneous Pornographic Magazines, etc.*, 526 F.2d Supp. 460 (N.D. Ill. 1981) (agreeing that obscenity determination cannot be based solely on pictures in a publication, and that relevant text in same publication must be translated first in order to assess whether, “taken as a whole,” material is obscene); *Moses v. County of Kenosha*, 649 F.Supp. 451, 456-457 (E.D. Wis. 1986) (holding that “taken as a whole” requirement applies to “prurient interest” test and “serious value” test, but not to “patent offensiveness” test); *State v. Walden Book Co.*, 386 So.2d 342 (La. 1980) (agreeing that “taken as a whole” requirement applied to entirety of a magazine); *People v. New Horizons, Inc.*, 616 P.2d. 106, 109-110 (Colo. 1980) (tracing historical derivation of “taken as a whole” requirement to *Regina v. Hicklin*, L.R. 3 Q.B. 360 (1868), and striking obscenity statute for allowing possibility that obscenity of a magazine could be determined solely based on its photos without taking into account any accompanying text); and *Leech v. American Booksellers Assn., Inc.*, 582 S.W. 2d 738, 749 (Tenn. 1979) (striking Tennessee obscenity statute's definition of “taken as a whole” because it allowed the possibility that newspapers and other periodicals could be found obscene based on separate pieces of writing or photographs within such newspapers or other periodicals)

¹⁵ 354 U.S. 476 (1957).

circulars, must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion.¹⁶

Later, the Fifth Circuit Court of Appeal, in *Penthouse v. McAluiffe*,¹⁷ reaffirmed the importance of the ‘as a whole’ requirement, and ruled that magazines must be considered in their entirety, and not as a volume of separate “works” in the form of individual pictures.¹⁸ That court concluded that Supreme Court precedent requires that magazines must be considered as whole works, even though made up of individual articles and pictures.¹⁹ The only conceivable exception would be where valuable material is inserted as a “sham” such as where hardcore images are interspersed throughout the Bible.²⁰ In this regard, another court observed that “[t]he inclusion of serious literary matter in significant proportions may preclude a finding that a magazine is obscene, even though the magazine contains items; photographs for example, which standing alone would be found obscene under the *Miller Test*.”²¹ Other courts have issued similar rulings.²²

The ‘as a whole’ requirement also comes up in the context of evaluating probable cause to issue search warrants. The United States Supreme Court ruled that the magistrate considering issuance of a search warrant must either review, or consider descriptions of, the entire movie or magazine to allow for the required determination of obscenity which, in this context, must be made with “scrupulous exactitude.”²³

¹⁶ *Id.* at 490 [Emphasis Added].

¹⁷ 610 F.2d 1353 (5th Cir. 1980).

¹⁸ *Id.* at 1367.

¹⁹ *Id.* at 1368.

²⁰ *Id.*

²¹ *City of Urbana v. Downing*, 539 N.E.2d 140, 148 (Ohio 1989).

²² *U.S. v. Thevis*, 484 F.2d 1149, 1155, 1157 (5th Cir. 1973); *U.S. v. Toushin*, 714 F.Supp. 1452, 1460-61 (M.D. Tenn. 1989)

²³ *Stanford v. Texas*, 379 U.S. 476, 481-85 (1965), see also *Roadan v. Kentucky*, 413 U.S. 496, 504 (1973).

The Florida Supreme Court had an opportunity to evaluate the importance of the ‘as a whole’ requirement in *Ladoga Canning Corporation v. McKenzie*,²⁴ wherein the court considered the propriety of injunctions issued by the lower court, prohibiting future distribution of certain identified obscene material, along with “other printed materials which violate the provisions of Florida Statute Section 847.011(1)(a).” The problem was, that these “other printed materials,” were not specifically identified by the court’s orders, and had never been found obscene. Instead, the lower court merely recited the *Miller* Test, and enjoined the sale of materials which depicted eleven (11) specific actions or poses, apparently finding that the materials depicting this sexual conduct were automatically obscene under the *Miller* standards. The Appellants challenged the injunctions as a prior restraint on First Amendment-protected expression. The Florida Supreme Court agreed, and noted the following:

The *Miller* Court made it clear that the portrayal of sexual conduct, without more, does not render a publication obscene. The determination of obscenity must be based on an examination of the work as a whole, rather than isolated passages.²⁵

The court found, in invalidating the injunctions, that publications may not be suppressed merely because they contain certain poses or actions, since materials must be considered as a whole work, instead of in isolated parts.²⁶

Most recently, the United States Supreme Court considered the ‘as a whole’ requirement as it pertains to website content, when discussing the constitutionality of the Child Online Protection Act, (COPA).²⁷ Initially, it should be noted that COPA requires speech to be considered ‘as a whole.’²⁸ However, on the Internet, speech by different content providers, on

²⁴ 370 So.2d 1137, 1141 (Fla. 1979).

²⁵ *Id.* at 1141 [Citations omitted].

²⁶ *Id.*

²⁷ *Ashcroft v. ACLU*, 535 U.S. 564.

²⁸ 47 U.S.C. § 231(e)(6)(C).

different computers around the world, is seamlessly linked together, making such determinations unwieldy. Justice Kennedy noted in his concurrence in the COPA case, “It is unclear...what constitutes the denominator – that is, the material to be taken as a whole – in the context of the World Wide Web.”²⁹ Justice Kennedy went on to note that “it is unclear whether what is to be judged as a whole is a single image on a Web page, a whole Web page, an entire multiple Web site, or an interlocking set of Web sites.”³⁰ Although information on the Web is contained in individual computers, the fact that each of these computers is connected to the Internet through World Wide Web protocols allows all of the information to become part of a single body of knowledge and may appear to be a single integrated system. *ACLU v. Reno*, 31 F. Supp. 2d 473-74. Justice Kennedy further suggested that the lower courts would need to answer “the vexing question of what it means to evaluate Internet material ‘as a whole,’ when everything on the Web is connected to everything else.”³¹

In light of the above, it appears that the existing law on the subject favors an interpretation of the *Miller* Test requiring consideration of an expansive amount of interrelated material when evaluating the obscenity, *vel non*, of a work. Parsing a single image, or set of images, from a larger website fails to include the required context of the material in the obscenity consideration, therefore possibly violating the First Amendment.

III. ANALYSIS

The Government will likely continue its efforts in ‘cherry picking’ extreme content from larger works, in the hopes of convincing juries that these individual segments are obscene, without regard to the remainder of the work. This is often problematic, since it is the remainder

²⁹ *Ashcroft v. ACLU*, 535 U.S. at 601; see also *ACLU v. Reno*, 31 F.Supp.2d at 484, ¶ 17 (E.D. Pa. 1999) (“From a user’s perspective [the Web] may appear to be a single, integrated system.”).

³⁰ *Ashcroft v. ACLU*, 535 U.S. at 593 (Kennedy, J. Concurring).

³¹ *Id.* at 600.

of many works that give the graphic portions context and meaning. If the courts allow a larger work to be branded ‘obscene’ based on a select image or passage, publishers and content producers will need to become increasingly concerned as to whether they will be prosecuted on obscenity grounds for portions of their works. If even a small segment of the material is considered shocking or objectionable by a potential jury, the publishers and producers may be found guilty without regard to the greater meaning provided by the remainder of the work at issue. For a user-generated content site, the liability concerns resulting from such legal theory will likely scare off many future operators, since webmasters of such sites cannot control the nature of the content posted without personally reviewing each image or video before it is posted to the site – a task that is impractical for a typical user-post site.

The ‘as a whole’ requirement provides an important safeguard against overzealous prosecutors seeking to capitalize on the worst aspects of a production or a work in order to obtain an obscenity conviction. Prosecutors should not be allowed to claim that digital media should be treated any differently when it comes to the application of the ‘as a whole’ requirement of the *Miller* Test. While the interconnectedness of media on the Internet, for example, may complicate the application of the *Miller* Test – including its ‘as a whole’ requirement – neither prosecutors nor the courts should be permitted to disregard the sound policy considerations supporting this critical element of the legal evaluation. The First Amendment mandates that serious value be judged by considering the work as a whole.

For many works, it is the non-explicit portions that give the graphic depictions context and meaning. For example, in the *State v. Wilson* prosecution referenced above, the very graphic images and video clips posted by users had a much different impact on the viewer when considered on their own, in isolation, as compared to the impact on the viewer when considered

in conjunction with the often humorous and insightful comments posted by the creator or other viewers. These comments were carefully excised by the prosecution from the pictorial content, to avoid any appearance of ‘value’ when shown to the judge. This sort of contextual manipulation should be patently rejected by the courts as an affront to the constitutional protection afforded erotic media under the First Amendment. To the extent that prosecutors are allowed to alter the meaning and impact of sexually-explicit works by changing the manner and context in which they were intended to be presented, it is the government that should be accused of creating any ‘obscene’ works that result from such manipulation.

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