

原 著

The Discussion Process on the Legal Definition of Indecency/Obscenity in Relation to Media Characteristics in Japan

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Abstract

This article analyses the discussion process on the legal definition of indecency/obscenity in the Japanese courts from the perspective of media characteristics. In the article, how media characteristics affect the decisions in actual trials involving print, visual, and telecommunication media cases will be examined. The article reveals that an early criminal court decision, made in 1957 and amended in the 1980s, concerning the indecency/obscenity of the book *Lady Chatterley's Lover* has occupied a dominant position ever since. In other words, in the process of discussing these issues, the media characteristics are not taken into account.

keywords: Constitution, Freedom of Speech in Japan, Indecency, Obscenity, Media characteristics

1. Introduction

The aim of this article is to investigate the linkage between the legal definition of indecency/obscenity and media characteristics in Japan. The diffusion of the Internet made the media use quite individualised. It means not only the increase of media choices for audiences but also the transmission routes and types of indecent/obscene object are multiplied. In this situation, the definition could be diverse because the way how indecency/obscenity is expressed would be different depending on each medium. However, there are few researches that pay attention to the relationships between media characteristics and the legal definitions of indecency/obscenity, which will be scrutinised in this article.

Since the definition of legal terms is negotiated in court judgements, mainly the Supreme Court, and in academic theories, this article analyses ten judgements in Japan concerning indecency/obscenity. They include cases involving print, visual, and telecommunications media. Then, Japanese academic theories will be investigated from two perspectives: the legally protected right of Article 175 and the criteria of indecency/obscenity.

The article comes to three conclusions about indecency/obscenity. First, the fixed definition of indecency/obscenity has regulated Japanese trials from 1980s to this day. Second, decisions about 'indecency/obscenity objects' and the conditions of 'distribution' vary over time and depend on the characteristics of each medium. Third, in dominant academic theory, factors like the characteristics of the media are not taken into consideration from the perspective of legal stability.

2. Indecency/obscenity in Japanese Legal System

2-1. Freedom of Speech in the Japanese Constitution

To make the argument clear, this article briefly explains freedom of speech in Japan because the Constitutional value that conflicts with indecency/obscenity is obviously freedom of speech. The corresponding text of the Japanese Constitution is as

follows.

Article 21

Freedom of assembly and association, as well as speech, press and all other forms of expression, are guaranteed. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.

The reason why freedom of speech is important is that it is concerned with self-realisation and self-government. In a democratic society, ruler and ruled must be identical, and if freedom of speech is restricted, such a situation would never exist. Therefore, freedom of speech takes priority over any law that tries to restrict it. Moreover, the 'marketplace of ideas' is also founded on the value of free speech. This theory means that truths always overcome falsehoods, a way of thinking appears that implies the prohibition of censorship.

After the development of the mass media, especially broadcasting, most people are situated as receivers of information and the media came to have power. In this situation, the purpose of Article 21 will not be realised if only right of sender is assured because some important information may be concealed by them. Hence, it is generally accepted that a so-called 'right to know' is also guaranteed in Article 21. That is to say, in Japan, freedom of speech is considered to have three different characteristics: civil liberty, the right to vote, and the rights of society.

From this perspective, ideally, all information and knowledge should be shared in society, including indecent/obscene subjects. However, in reality, they are sometimes prohibited from publication for some reason and with court approval. Next, this article shows the provision of regulations in Japanese criminal law.

2-2. Indecency/obscenity in Japanese Criminal Law

In Japanese criminal law, crimes of indecency/obscenity are prescribed in Articles 174 and 175. Article 175, which regulates the distribution of obscene objects and the definition of indecency/obscenity, was amended in 2011 to add the provisions for the distribution of indecent/obscene documents by communications technology. The specific texts of Article 175 are as follows [1].

(Distribution of Obscene Objects)

Article 175

Paragraph 1. A person who distributes, sells or displays in public an obscene document, drawing, electromagnetic recording medium or other objects shall be punished by imprisonment with labour for not more than two years, a fine of not more than 2,500,000 yen or a petty fine, or imprisonment and a fine shall be imposed cumulatively. The same shall apply to a person who distributes an obscene electromagnetic recording medium or other objects by telecommunication.

Paragraph 2. The same shall apply to a person who possesses the same or keeps an electromagnetic recording medium for the purpose of distribution for a fee.

(Article 175 before 2011)

A person who distributes, sells or displays in public an obscene document, drawing or other objects shall be punished by imprisonment with work for not more than 2 years, a fine of not more than 2,500,000 yen or a petty fine. The same shall apply to a person who possesses the same for the purpose of sale.

Such crimes are considered to be against public morals, alongside gambling and the destruction of graves or places of worship [2: 495]. In Article 175, 'document, drawing or other objects' is considered to include all media, such as pictures, films, audiotapes, and hard disks. To investigate the legal definition of indecency/obscenity in relation to media communication, this article focuses on Article 175, which regulates the distribution of such documents. According to Yamaguchi [2: 501], indecent/obscene documents can be spread widely because such properties are fixed in each document: thus, they violate social morality rapidly, unlike normal public indecency (Article 174). Therefore, how indecency/obscenity is situated in and spread by each medium is also important. From the above-described arguments, this article analyses actual judgements of indecency/obscenity from each medium: print, visual, and telecommunications. From these considerations, this article focuses on the definition of

'indecent/obscenity documents' and the kinds of factors that meet 'distributes, sells or displays in public' in Article 175.

3. The Cases about Indecency/obscenity in Japan

3-1. Print Media Cases

The definition of indecency/obscenity was constructed in judgements from the 1950s to the 1980s in relation to several books. This article investigates four judgements of the Supreme Court. First, the trial of *Lady Chatterley's Lover* is important for understanding indecency/obscenity in Japan and in England, where the novel was originally published in 1928. In Japan, the book was translated and published in 1950, 22 years after England. It was then immediately prohibited from publication. The first trial started in 1952 and the Supreme Court trial [3] concluded in 1957. The Supreme Court explicitly recognised this novel as a masterpiece: '[I]t could be assumed that the author has an incredible sense of art' and this book is a kind of art. On the other hand, it pointed out that the problem was whether the book included '“indecent/obscene” elements'; if it did, its publication would constitute the distribution of obscene objects (Article 175). The *Lady Chatterley's Lover* trial resulted in some important judgements that restricted latter cases. First, as in previous cases, it showed that even freedom of speech, which is guaranteed in the Constitution, is not an absolute idea, and that it sometimes conflicts with public welfare. According to the judgement, the definition of an 'indecent/obscene document' is 'a document which stimulates or excites one's sexual desire too much, insults the sexual shame of normal people, and harms the general sexual morality' [3]. This definition was cited from a previous judgement, which was first made in 1951, and the *Lady Chatterley's Lover* judgement is important because it confirmed and fixed the decision. Obata [4] pointed out that this decision had been carried over from pre-war to post-war, though the end of the war had provided brand new Constitution that permits freedom of speech in Japan. It also provided the criterion that 'whether a document is regarded as an indecent/obscene work or not should be judged by conventional wisdom' [3]. Moreover, the judgement concluded that even if a work has high artistic quality, insofar as it has indecent/obscene elements, the entire book remains indecent/obscene. It also held that criminal intent under Article 175 did not require consciousness of actually engaging in indecency/obscenity; simply knowing that the work contained such text constituted evidence of intent. As a whole, it could be said to be a very strict decision. In regard to the reason why the post-war court in 1957 could not show the different vision from pre-war court about indecency/obscenity, Obata insisted as follows.

In summation, the court has continuously endorsed the idea that the maintenance of morality and sexual order in society is of the utmost importance in the public sphere, whereas the consumption of sexual materials should stay within the private sphere [4: 266].

On the other hand, according to Obata, the judgement seems 'to let society foster the process of change, autonomously deciding what is acceptable and what is not [4: 266]' in post-war period. That is, the judgement had recognised the change of the definition of indecency/obscenity in future. In that process, the factors like change of the media environment could also be taken into account.

Second, in 1961, the publisher of the Marquis De Sade's novel *Juliette* was put on trial for indecency/obscenity: the Supreme Court trial [5] finished in 1969. In 1959, a publisher had translated the long novel into Japanese and published it. In this trial, the definition of indecency/obscenity was cited from the *Lady Chatterley* case: that is, (1) a document that stimulates or excites a person's sexual desire too much, (2) insults the sexual shame of normal people, and (3) harms the general sexual morality. In the first trial, the district court handed down a decision of not guilty because the novel did not meet the second condition. According to the judgement, *Juliette* does not insult sexual shame of normal people because most of the sexual descriptions related to brutal scenes such as murder, whipping, and immolation, so readers would never feel sexually aroused by them. However, the second trial and the Supreme Court found the publisher and the translator guilty. The Supreme Court cited the *Lady Chatterley* judgement and found *Juliette* to be an indecent/obscene document. One point had changed from the former judgement, namely, that 'the decision of indecency/obscenity must be considered not on the basis of part of the document, but all of it' [5], whereas formerly the judgement was based on just a part of the work.

A notable point in this case is that Judge Tanaka opposed the judgement in terms of the definition of indecency/obscenity. According to him, although the definition provided by the *Lady Chatterley* case was reasonable to some extent, it could not

provide an absolute norm. He warned that ‘the definition of indecency/obscenity is not a fixed and absolute criterion, but relative and variable’ [5]. Tanaka also claimed that while the Supreme Court held that the ‘sexual shame of normal people’ is one of the criteria of indecency/obscenity, it depends on the circumstances: place, time, and environment. This criticism is quite reasonable, but in addition, the characteristics of the media should also be taken into account.

Third, this article deals with the case of the work of Kafu Nagai, a Japanese novelist, the final judgement [6] of which was issued in 1980. In 1972, the short story ‘*Yojohan: Undercoat of Fusuma*’ appeared in a magazine, and immediately the president and the editor were charged under Article 175 because the story contained some sexual descriptions. In the judgement, the three conditions of indecency/obscenity from former cases were still maintained, but this one provided new criteria about interpretation, as follows.

In judging the indecency/obscenity of a document, the degree and types of explicit and detailed descriptions of sexuality, the importance of such descriptions in the whole of the document, the relationships between ideas that appear in the document and such descriptions, the composition and development of the document, and the extent to which its artistic quality and depth of thought reduce sexual stimulation must be taken into consideration. From these perspectives, and considering the whole of the document, it must be examined whether the document provokes readers’ sexual interests [6].

It then showed that whether a document meets the three conditions is decided by considering these things in their entirety, including contemporary way of thinking. Although this framework is reasonable because it limits the range of punishment of indecency/obscenity, it is still very ambiguous. In this case, after careful consideration, the work was deemed an indecent/obscene document.

Fourth, this article should argue the case of the photographic album of Robert Maplethorpe [7], which was concluded in 2008. The judgement declared that the album is not an indecent/obscene document with a criteria in which *Yojohan* case had shown. According to that, even if some pages of the album contain actual image of genitalia, it is not immediately contaminate ‘the whole of the document’. According to Obata [8], the judgement ‘does not suggest a liberalized approach to deregulating sexually explicit expression in the near future in Japan’ [8: p.547], while the criteria of indecency/obscenity had been deregulated between 1957 and 1973 in United States.

From these four cases, a transition in indecency/obscenity can be found. In the *Lady Chatterley* case, the three conditions were confirmed in the Supreme Court and even if just a part of document had an element of indecency/obscenity, the whole of the document would be regarded as indecent/obscene. Then, the *Juliette* judgement showed that indecency/obscenity must be evaluated in terms of the document as a whole. After that, the judgement in *Yojohan* case added the determination criteria, and the Maplethorpe case was dealt with it in 2008. From the above analysis, in paper media, it could be considered that indecency/obscenity decisions have come to be lenient, but it does not mean that they can be maintained in future.

3-2. Visual Media Cases

First, a high court judgement [9] in 1966 concluded that pre-developed visual data, that is, a movie film, constitutes an indecent/obscene document because of its ‘potential indecency/obscenity’. According to the judgement, ‘everyone can handle a development process easily by simple scientific manipulation’ [9], and the simplicity of the process makes its distribution and selling possible. It is notable that even though people cannot see any indecency/obscenity in blank film, it is nonetheless regarded as an indecent/obscene document because of its property as a medium.

Next, to consider the indecency/obscenity of films, this article refers to a high court judgement [10] of 1969: the case of the Japanese film *Black Snow*. The film was distributed in 1965 and its sexual scenes were regarded as a problem. In Japan, all films must pass the inspection of the Administration Commission of Motion Pictures Code of Ethics, and *Black Snow* passed it. Hence, the intent of the defendant was denied and as a consequence the high court issued a judgement of not guilty. On the other hand, the film was evaluated as an indecent/obscene document. The high court claimed that the realism, impression, and psychological effect of film as a medium cannot be compared with print. Moreover, uneducated people and children could be affected and even normal people might find the movie an indecent/obscene text. Therefore, the description of sexual scenes in films requires painful effort. These two judgements are considered to be evidence of diversity in indecency/obscenity

interpretation depending on media characteristics.

3-3. Telecommunications Media Cases

For considering indecency/obscenity in recent technology – telecommunications media, including the Internet – it is important to focus on two aspects of Article 175, namely, the kind of factors that constitute ‘distributes, sells or displays in public’, and the definition of ‘indecent/obscene objects’, because only then can the way the courts take the characteristics of each medium into account be found.

In the district court level, there is a suit [11] that dealt with the indecency/obscenity of a telephone service in 1991. Dial Q2, a fee-charging Japanese telephone service that no longer exists, was invented for general services such as news or telephone consultation, and it collected service fees and telephone rates together. However, not long after, it came to be exploited by the porn industry. In this case, the service provider relayed indecent/obscene audio material as digital signals in a sound reproducing machine, and consumers could listen to them by calling its number. The court decided that the service provider did ‘distribute, sell or display’ indecent/obscene documents in public because ‘everyone could enjoy its contents from any place at any time’ [11]. Similarly, a district court judgement [12] in 1997 determined that the distributors of an image editing software called FLMASK, which enabled users to conceal and reveal indecent/obscene pictures easily, also ‘distributed, sold or displayed’ indecent/obscene documents in public. From these cases, it can be seen that the court tried to keep up with new technologies in its indecency/obscenity judgements.

From around 2000, the Internet spread rapidly in Japan, and consequently new forms of indecent/obscene documents appeared. Döring [13: 1090] accurately depicts the relationship between pornography and the Internet as follows.

Clearly, the Internet is not merely a new distribution channel for standard forms of commercial and mainstream pornography. In the area of amateur pornography, for example, the Internet has facilitated the development of new collective forms of production, distribution, and reception.

In this situation, the judgement [14] in 1996 decided that the establishment of websites providing indecent/obscene documents to an unspecified large number of people would meet the condition of ‘distributing, selling or displaying in public’ because ‘in Japan, the amount of Internet users is increasing, and many users, including children, can easily access to the website and browse indecent/obscene images from anywhere’ [14]. This argument is almost the same as that in the case of Dial Q2 and FLMASK explained above. Moreover, the judgement also specifies one characteristic of the Internet as follows: ‘Considering the rapid popularisation of Internet, it could be said that it will provoke copycat crimes’. The easiness of copycat crimes is one criterion that distinguishes the Internet from other types of media. At this time, whether a document met the conditions of indecency/obscenity or not and the appropriateness of the conditions themselves were hardly examined. Moreover, the definition of an indecent/obscene ‘object’ is still a problem in the digital world. On this point, a Supreme Court judgement [15] in 2001 said that ‘the hard disks of a host computer that included indecent/obscene documents could themselves be indecent/obscene objects’ [15]. According to the judgement, this case met the condition of ‘distributing, selling or displaying in public’ as well as the two cases above. The decision about the distribution of indecent/obscene material over the Internet was cited repeatedly in subsequent cases [16].

In 2011, Article 175 was amended and the provisions for telecommunications were added. The text was obviously affected by the arguments that this article has described above. At the end of the analysis of the precedents, this article deals with a recent case [17] in which the new provisions were applied. Although this case is still pending in the Supreme Court, it seems useful to refer to it because the judgement could be regarded as a consequence of negotiations about indecency/obscenity as a whole. The defendant, an artist, was charged on three grounds: displaying a plaster statue of her genitalia, uploading the 3D data of her genitalia on an electromagnetic recording medium for distribution and distributing CD-Rs including the data for a fee. The first resulted in a judgement that the statue is not an indecent/obscene document under the definition given in the *Lady Chatterley* judgement. This insisted that ‘the definition enables normal people to understand adequately whether or not a document meets the conditions of indecency/obscenity’, and the ambiguous and uncertain point of indecency/obscenity is not the issue, but just the concept itself. In the decision concerning the indecency/obscenity in these documents, the judgement also took several

criteria into account: the general acceptability of an idea, its form and ways of representation, the proportion of the part that includes indecent/obscene elements and the extent to which the work's artistic quality and depth of thought reduce sexual stimulation. Then, whether the documents provoke readers' sexual interests was examined. This kind of overall consideration was previously shown in the 'Yojohan' judgement. With the same definition and criteria, the district court and the high court regarded the latter two items indecent/obscene digital data. Although the defendant alleged that a 3D print should be considered to be a new kind of art and is more or less edited, and even if judgements agreed that the works seemed to have some artistic quality and depth of thought, the fact that 'everyone can identify the picture as being of genitalia' [17] is evidence of its indecency/obscenity.

From the analysis of judgements, it can be seen that the definition and the criteria of indecency/obscenity had been determined by the 1980s and have not changed since, even though most of the defendants complain of their ambiguity. On the other hand, courts take media characteristics and new technologies into account in their interpretation of 'distribution' and 'objects', the other conditions of Article 175. Next, this article investigates Japanese academic theories about indecency/obscenity.

4. The Trajectories of Academic Theories

As the basis for considering Japanese academic theories of indecency/obscenity, this article discusses whether it is possible to construct the concept of indecency/obscenity from the perspectives of the 'effects of documents' or the 'actual acceptance of audiences'. There are many studies focusing on the effects of pornography. For example, Paolucchi et al. [18] conducted a metaanalysis of 46 empirical studies, ranging from 1962 to 1995 and mainly in United States, on the effects of pornography. The article concluded as follows.

The results are clear and consistent; exposure to pornographic material puts one at increased risk for developing sexually deviant tendencies, committing sexual offenses, experiencing difficulties in one's intimate relationships, and accepting the rape myth [18: 50].

On the other hand, Ybarra et al. [19] investigated the link between intentional exposure to X-rated material and sexually aggressive behaviour among 10 to 15 year olds. According to their argument, 'Not all youth who engage in sexually aggressive behaviour consume violent X-rated material, and certainly not all youth who consume violent X-rated material engage in sexual aggression' [19: 16]. To explain why such a difference resulted, this article cites another one. Watanabe [20] pointed out that research into effects do not show causal relationships but correlations. That is, even if empirical studies indicate a relationship between violent characteristics among the users or consumers of indecent/obscene objects, it does not mean that the objects are the causes of such characteristics.

These previous studies imply that it is difficult to show how indecent/obscene documents actually affect audiences. From this argument, therefore, it is impossible to reconstitute indecency/obscenity from the perspective of effects. Likewise, audience research has a problem although it seems effective in defining indecency/obscenity. The tradition of audience research – and cultural studies, which underpins its theoretical foundation – has revealed how political power penetrates the daily lives of people unconsciously and hegemonically. It can also scrutinise the way identities change through its qualitative methods, such as ethnography and interviews. In this way, indecency/obscenity may seem to be understandable in terms of how it is received by actual people. However, considering the law-making process, this is also impractical. In Japan, as in most democratic countries, only the Diet has legislative power. Since a majority decision, in other words, a quantitative survey, conflicts with audience research because of its representativeness, the fact that audience studies can reveal specific transitions in identity do not have any practical meaning in that process. According to the discussions above, it could be concluded that the interpretations and judgements of the courts, which are sometimes affected by academic theories, are the only basis for indecency/obscenity, even if their criteria are still ambiguous. A Japanese constitutionalist, Ito [21], claimed that 'clearer criteria are required in the conditions of Article 175' [21: 158]. If that is the case, the interpretation of the court itself is a problem. That is, the arbitrary administration of indecency/obscenity must be avoided, and the definition should be made increasingly clear. Japanese academic theory always tries to cope with this.

Atsumi et al. [22] have pointed out that Japanese academic theories about indecency/obscenity have tried to prevent arbitrary intervention by the courts. This article classifies several theories from two perspectives: the way they think about the 'legally protected right of Article 175' and 'the criteria of indecency/obscenity'. According to Yamaguchi [2], it is difficult to grasp the former. The traditional and dominant theories regard it in terms of public sexual order and sexual morality, as well the *Lady Chatterley* judgement, the ambiguity of which this article has described. However, some theorists disagree with it because if the contact is based on free volition, no harm would exist; in other words, there are no victims. From this point, what is legally protected in Article 175 is the right not to see indecent/obscene documents and to protect children from them. Yamaguchi [2: 496] insisted that though this explanation should be chosen, it is difficult to interpret the actual text of Article 175 in this way. In addition, there are several other interpretations. For example, according to some, the protection of children or relief from the discomfort of knowing that indecent/obscene material is under distribution should be protected legally. However, the former is criticised for lack of proof of the harmfulness of indecent/obscene documents to children, as this article also discussed above. The latter could be regarded as a paraphrasing of dominant opinion, on public sexual order and sexual morality. From these arguments, it is reasonable to regard the right protected under Article 175 as that of public sexual order and sexual morality. However, it also means that the ambiguity has not been resolved and thus should be taken into account in the interpretations of determination criteria.

There are three main criteria for the determination of indecency/obscenity, based on legal comparison, the 'relative concepts of indecency/obscenity' and the theory of hard-core pornography. First, some insist that it is useful to compare the right that is violated by the indecent/obscene document with the benefit that the document produces for society, artistically, ideologically and academically. Then, when the former outweighs the latter, it is worthy of punishment. However, unfortunately, this does not solve the ambiguity of indecency/obscenity. That is, both of the objects being compared are still ambiguous. Furthermore, Atsumi et al. [22] asserted that such views focus on the educational aspects too much and ignore the documents' entertainment aspects.

Second, the idea of the relativity of the concepts of indecency/obscenity is influential. This view rejects any objective and absolute definition of indecency/obscenity. Instead, it tries to consider the total circumstances around an indecent/obscene document: its means of distribution, the range of recipients and so on. The dissenting opinion of Judge Tanaka in the *Juliette* case, which this article described before, could be regarded as having taken this position. However, Yamaguchi [2] pointed out the problem with this approach clearly: far from reducing ambiguity, this approach offers a criterion that extends the definition of indecency/obscenity. It could be said that the theory is dangerous because it permits courts to scrutinise the contents of art and education.

Third, in recent academic circles, it has been considered appropriate to prohibit only hard-core pornography. According to Yamaguchi [2], when interpreting indecency/obscenity, the courts should not make any determination on the basis of the contents of a document, only whether the document expresses a kind of ideology.

In Japanese theories, it could be said that legal stability is the first priority in indecency/obscenity decisions. As a result, only relativist concepts of indecency/obscenity are able to take media characteristics into consideration, but from this perspective, the theory concerning hard-core pornography seems to be the most reasonable one.

5. Conclusion

The definition of indecency/obscenity, first made in 1957 and supplemented in subsequent judgements up to the 1980s, is still in use as a criterion in Japanese courts, even though it involves ambiguity to some extent. However, the definition of 'indecent/obscene objects' and the conditions of their 'distribution' varies across the ages and depends on the characteristics of each medium. That is, print and visual media are considered to have differences in their potential for indecency/obscenity and its effects, while telecommunications media make it easy to find recipients. The courts also consider new technologies, such as hard disks, to be indecent/obscene objects.

By contrast, the dominant or latest Japanese academic theories about indecency/obscenity do not regard the different media characteristics to be a factor in the definition of indecency/obscenity from the perspective of legal stability.

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国内判例における「わいせつ性」に関する議論の変遷

—メディア特性の観点から—

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要 旨

本稿は、日本国内の判例における「わいせつ性」の法的定義に関する議論の変遷について、メディア特性の観点から分析するものである。本稿では、印刷・映像・通信といったメディアごとに固有の特性が、関連判例におけるわいせつ性の定義や議論のなかでどのように立ち現れているか精査する。具体的な判例の検証により、1957年に成立し、1980年代に修正がなされた「チャタレイ夫人の恋人」事件におけるわいせつ性に関する定義がその後も支配的な地位を占めており、そこにおいては、法的安定性の観点から、メディア固有の特性が必ずしも考慮されていないことが明らかになった。

キーワード：表現の自由、わいせつ物頒布等の罪、メディア特性