5 Law and rapid technical change: a case study

English law has long tried to suppress pornography, though the boundaries to what counts as criminally obscene have fluctuated down the decades. One can debate how far the law ought to intervene in this area. Some would argue that looking at porn is a private thing that does not harm others, and may even do some good by providing a form of sexual release for lonely men who might otherwise pester women. Others urge that porn harms women in general by promoting a degraded perception of their status. Most people who see no harm in adult porn would regard porn involving children as a special case, since making it brutalizes the children involved.

For the purposes of this book, it is not necessary to discuss the moral rights and wrongs of outlawing porn, or where the boundary should lie between legal titillation and illegal obscenity. The reason to look at the topic here is that it offers an unusually clear case study of the difficulty law has in adapting to rapidly-changing technologies. We saw in chapter 2 that this is one respect in which IT law is a distinctive area of law. The case study will also illustrate the way in which law has to interact with highly technical matters through the woolly medium of everyday language. Language is not a precision instrument, but it is all we have; law has somehow to make language precise despite itself.

Circulating pornography was a crime under the Common Law, but this is one of the many pieces of Common Law which was eventually superseded by statute law. The chief statute covering the porn trade is the *Obscene Publications Act 1959*.

5.1 Film versus video

When the Obscene Publications Act was passed, obscene publications came either as what we nowadays call "hard copy" – books and magazines printed on paper – or as reels of cine film. (Showing a film to members of the public is "publication": to "publish" something just means to make it public, not necessarily using ink on paper.) The first big technical innovation for porn after the Act was video recording. When video technology arrived, the porn industry was glad to adopt it. (For one reason, if you trade in illegal goods it is obviously convenient for their nature not to be apparent from a casual inspection, as it might be to anyone who looked at a few frames of a cine film.)

So it came as an unwelcome shock to the authorities when the first case under the Obscene Publications Act relating to videotapes, namely *R.* v. *Donnelly & ors* (1980),[28] was thrown out by the Crown Court judge who heard it, not because the films were not obscene but because they were not films. Donnelly and his fellow defendants had rooms in Soho where they showed blue movies to paying customers. Because their technology involved displaying pictures on a television screen controlled by electrical impulses generated from a videotape, rather than shining a light through successive frames of a cine film, the attempt to prosecute them failed.

The Obscene Publications Act forbids publication of an "obscene article" (or possession of an obscene article with a view to publishing it for gain), and it defines the word "article" in the following words (here labelled **A** for ease of reference later):

A

> In this Act "article" means any description of article containing or embodying matter to be read or looked at or both, any sound record, and any film or other record of a picture or pictures.

To a non-lawyer that sounds pretty comprehensive, and it is obvious that when Parliament passed the Act they would have wanted it to cover blue movies irrespective of the recording technology used. Nobody would dispute that. But under English law, what Parliament might have wanted is irrelevant. What matters is the wording of the act they passed. If judges were allowed to say "it is obvious that X would have been made illegal if anyone had thought of X when the law was drafted", the next step would be for them to say "it is obvious to me that X ought to be illegal, so I find you guilty" – and the law would become whatever individual judges happened to want it to be.

After the prosecution case in *R.* v. *Donnelly & ors* was presented, the defence made three points:

1. a videocassette is not an "article" in the sense of the Obscene Publications Act;
2. the showing of the videotape was exempt from prosecution, under wording in the Act (not quoted here) relating to films shown in ordinary commercial cinemas;
3. alternatively, since the display technology was the same as that of television broadcasting, the display was shown "in the course of television", which would again exempt it under other wording in the Act.

Each of these points requires explanation. Point (2) relates to the fact that films are already controlled in Britain through the official censorship system which awards the familiar certificates (U, PG, X, and so forth) and refuses any certificate to some films. Because Parliament saw this as an adequate means of controlling the film industry, it did not want also to burden that industry with the possibility of prosecutions brought by individuals who happened to object personally to particular films; so the Obscene Publications Act was worded to disallow that (except in special circumstances not relevant to this case). Likewise with (3): television at that period was produced just by the BBC and one national authority for commercial television, and in 1959 their internal safeguards were presumably seen as making private prosecutions for obscenity on television redundant.

As for (1): the defence pointed out that law requires an "or other" phrase, such as "any film *or other* record of a picture or pictures" in passage A, to be interpreted narrowly. It is a standard principle of English law that the "other" things in a list like this must be understood as covering only things of the same kind as whatever appears before "or other". So for instance if a statute refers to "houses flats or other buildings", then "other buildings" in this context will cover other types of dwelling, but not, say, churches – this is one of the ways in which the law achieves precision and avoids open-ended vagueness despite the inexactness of the English language.[29] But a videocassette is not the same physical kind of thing as a film, so it is not an "article" as defined by the Act.

The judge agreed with point (1), which meant that whether points (2) and (3) were right or wrong, the prosecution must fail. He directed the jury to find the defendants not guilty.

5.2 The Attorney General seeks a ruling

If this Crown Court decision had stood as a precedent, it would have meant that there was no possibility of prosecuting pornography that used video technology (which soon became the standard medium for porn films), short of new legislation by Parliament; and Parliament never has enough time for all the big things it wants to do, let alone filling in strange little gaps in wording of statutes which it has already passed.[30]

The defendants in this particular case had been acquitted and there could be no question of reopening that. But when the Attorney General (the officer in overall charge of criminal prosecutions) believes that an acquittal may have been mistaken in law, he can seek to prevent it becoming a precedent to be followed in future cases, by asking the Court of Appeal to rule on the legal point. The Court of Appeal is above Crown Courts in the hierarchy, so it can overrule a precedent they set. The acquitted defendants can choose to be represented in such a referral, and on this occasion – *Attorney General's Reference (no. 5 of 1980)* – they were represented. The gap in the law was highly advantageous to their business, and they evidently hoped to keep it that way.

At the Court of Appeal, Donnelly et al. were represented by a new advocate, who took a rather different line from the argument which had brought them success in the Crown Court. He focused on another passage in the Obscene Publications Act, which defines "publication":

B

For the purposes of this Act a person publishes an article who –

a) distributes, circulates, sells, lets on hire, gives, or lends it, … ; or
b) in the case of an article containing or embodying matter to be looked at or a record, *shows, plays or projects* it. [Italics added]

Clause (a) of passage B did not apply in this case – the videocassettes were not handed over to the customers; and, the advocate argued, clause (b) did not apply either. The customers were not "shown" the videocassettes: that would be pointless, there is nothing to see except magnetic tape whose contents are invisible. The advocate argued that the videocassettes were not "played" either; the court accepted that what mattered was how ordinary words like "play" would have been understood "by ordinary literate persons" at the time the Act was passed, and by that criterion (the advocate contended) "play" would apply only to a sound recording. The word that would certainly apply to a cine film is "project"; and that means (he claimed) projecting light behind the film to throw an image onto a screen. Nothing like that happens with video technology.

The three Appeal Court judges did not accept this argument. Their judgement conceded that the videocassettes had perhaps not been "shown", but the words "play" and "project" were both appropriate to the new technology. A tape recorder also uses magnetic tape whose contents are invisible to the eye, and it is said to be "played" (though the judgement seems not to have considered the claim that "play" refers in ordinary parlance to sound recording only). As for "project", etymologically this word means "throw forward", and video does involve throwing a beam of electrons against the coated screen of a cathode ray tube to create the picture.[31] The Court of Appeal found that the Crown Court had misinterpreted the statute; in consequence, future prosecutions similar to *R.* v. *Donnelly & ors* could lead to convictions.

But it was a close-run thing. Although no-one would ever seriously suppose that Parliament could have wanted to outlaw obscene cine films but allow the same films on videocassette, the Act they passed succeeded in outlawing both only because of tiny points about how "ordinary literate" people use words in everyday speech.

5.3 Pornography meets the internet

Technology does not stand still. Another major development for the porn industry was the internet. It is obvious that distributing porn via the internet, so that men can access it in the privacy of their homes, will create a large new market among those who would hesitate to visit sleazy sex shops.

Indeed, although it is not often discussed, the truth is that after the internet was made available for commercial use in the early 1990s, the porn industry were pioneers in developing business models which function successfully with this medium. Again, the technical innovation has created problems for the law.

The problems as they existed when the internet was first commercialized were surveyed in detail by Colin Manchester.[32] Manchester concluded that, without new legislation

> legal control is likely to become increasingly ineffective as computer pornography becomes more prevalent and replaces videos as the dominant medium for the dissemination of obscene material

Although there are also other statutes relating to pornography (for instance a law specifying what imported material should be confiscated by the Customs), much of Manchester's analysis related to the Obscene Publications Act, including the interpretative precedent established by the Attorney General's reference to the Court of Appeal in 1980. Let us look at why Manchester felt that the internet was making it difficult to prosecute under that Act.

Internet porn involves data held on hard discs and transmitted over phone lines. So a first question is whether a hard disc, or the data on a disc, counts as an "article" in the sense of passage **A**. We saw that the Crown Court judge in *R.* v. *Donnelly & ors* accepted that a videocassette was not an "article" for these purposes, because it is not a thing similar to a film and hence by the strict rules of legal interpretation cannot be included under the description "any film or other record of a picture or pictures". Since the Court of Appeal declared the Crown Court decision to be erroneous, it might seem that by implication that Court accepted that a videocassette *can* be an "article" – in which case perhaps there would be no reason not to extend this word to cover a hard disc also. For Manchester, though, it was not entirely certain that the Court of Appeal finding did have that implication; the judgement did not make it crystal clear that this was the appeal judges' reason for overturning the Crown Court decision.

But in any case, to convict someone for distributing porn over the internet it might be necessary to establish that the information on a hard disc, rather than the disc itself, counts as an "article" – we saw that the defendants in the videocassette case did not hand over the videocassettes to their customers, and certainly hard discs do not travel physically over the internet. Manchester saw it as by no means clear that the information on a disc could be an "article containing or embodying matter to be read or looked at", which is one of the alternative definitions in passage **A**, because "information is intangible whereas 'article' here suggests something of a tangible nature". The data on the disc *might*, on the other hand, come under one of the two other definitions: either "any sound record" (if it is porn with a sound track rather than pictures alone), or "any film or other record of a picture or pictures" (if the Court of Appeal decision is taken to establish that "or other" in this context does not have to mean only "things like films").

From a computing point of view, it may seem that the linguistic difficulties stem in part from the choice of the words "information" or "data" to describe the contents of a hard disc. The information on a disc is of course organized into files, and it might be much easier for the law to accept that "a file" can be "an article" than to accept that "information", which does not sound like something that comes in well-defined units, can be "an article" or "articles". Computationally, it will seem absurd that this kind of choice between words could have important implications. But, for the law, it can.

5.4 Are downloads publications?

Be that as it may, even if the law accepts that internet porn, or the discs on which it is stored, count for the Obscene Publications Act as "articles", that would be only a first step towards satisfying the requirements of the Act. There also needs to be *publication*, or an intention to publish for gain.

If the obscene article is the disc itself, then Manchester thought it unlikely that making its contents available over the net would count as "publishing" the disc. Under the (a) clause of passage **B**, the disc is not distributed, circulated, sold, or the like; it remains attached to its fileserver. And under the (b) clause, one would not describe making the contents available for downloading as "showing", "playing", or "projecting" the disc itself.

On the other hand, it may be more appropriate to talk about "publication" of an obscene article if the "article" is the information on the disc (or part of it). To make the disc contents available for downloading could be described as "distributing" or "circulating" it (clause (a)). Admittedly, the data travels not directly to the user but only to a client computer – Manchester pointed out that the user still has to access it, but he argued that this is only like the fact that someone who receives porn through the post has to unwrap the package containing it in order to see it. The law would not treat that as contradicting the proposition that the porn has been published to the user.

Actually, one might think that this last point is not the real legal problem: on the Web, someone who downloads a picture to his machine normally does see it immediately without taking further action. But the downloading is initiated by the user, whereas words like "publish", "distribute", and so forth sound like actions by the person controlling the server. However, the Web was still fairly novel when Manchester was writing, so it may be that he was thinking of other methods of transferring files over the internet, such as ftp.

As for clause (b) of passage **B** with respect to information on the disc, Manchester suggested:

> it might be said that a person "projects" the information onto the receiving computer, when transmitting it electronically, in that the information is thrown forward or thrown onto the receiving computer through the medium of the telephone line. Secondly, it might be said that a person "projects" the information when, having transmitted it to the receiving computer, it is displayed on the visual display unit (VDU) attached to that computer.

Thus, although the words "show" and "play" do not fit this case, Manchester believed that "project" probably does (though, again, he ignored the point that it is not the owner of the hard disc who initiates the download).

5.5 Censoring videos

All in all, while Manchester believed it was possible that a court would interpret the Obscene Publications Act as covering internet porn, he felt far from certain. And with another, more recent statute also concerned (among other things) with the control of pornography, the *Video Recordings Act 1984*, Manchester found it fairly clear that it would *not* cover what was then the latest technology.

The point of the Video Recordings Act was to subject videos, other than innocent home and educational videos and the like, to a censorship régime such as already operated for cinema films, with X-rated videos being restricted to licensed sex shops, and some videos refused any certificate. (Part of the problem in *Donnelly & ors* was that, in 1980, censorship did not extend to videos.) To achieve this, the Act had to identify the class of things to which it applied; it called them "video works", and defined that term as follows:

C

"Video work" means any series of visual images (with or without sound) –

a) produced electronically by the use of information contained on any disc or magnetic tape, and
b) shown as a moving picture.

That is, both (a) and (b) must be true of an item before the Video Recordings Act says anything about that item.

But Manchester pointed out that, by the 1990s, video games were beginning to be stored on chips rather than discs or tapes, in which case clause (a) of passage **C** would not apply and they would not be covered by the Act. Furthermore some newer computer games and videos, including pornographic ones, were interactive: a series of still pictures is shown, and the user makes changes to the pictures displayed. These are not "shown as a moving picture" (clause (b) of **C**), so the Act would not catch them either. Yet Manchester was writing only about a decade after the Act was passed.

5.6 The difficulty of amending the law

None of the gaps in the law which Manchester identified would be difficult to cure (he felt) with brief amendments to the relevant statutes. The Parliamentary committee dealing with home affairs had recommended some changes in 1994, and Manchester suggested others. But we have seen that Parliamentary time is scarce. It just is not possible to amend a law whenever a problem is found in its wording.

Furthermore, it might not be hard to devise wording to deal with technological innovations that have *already occurred* – but, by the time Parliament has gone through the careful, long-drawn-out procedures to incorporate those amendments into the law, technology will have changed again. It is now over ten years since Manchester was writing, and the pace of innovation in IT has probably been even faster over this period than it was before.

5.7 *R. v. Fellows and Arnold*

Manchester could only surmise how the Obscene Publications Act and the other laws he discussed would be interpreted in connexion with internet porn. What ultimately matters is how courts actually do interpret them. So let us now look at the leading internet-pornography case, which was heard the year after Manchester's article appeared: R. v. Fellows and Arnold (1996).

Fellows was a member of the computer support team in a university department, and he used its equipment to maintain an "archive" of thousands of pornographic pictures accessible over the internet by password; he supplied the password to people who contributed further material to the archive, Arnold being one of these. The archive included a child-pornography section, so Fellows and Arnold were prosecuted under the Protection of Children Act 1978 as well as under the Obscene Publications Act. They were convicted in the Crown Court, whose judgement answered some of the questions raised in Colin Manchester's article, but not all of them – as he pointed out in a second paper.[33] The defendants appealed, and the Appeal Court judgement made detailed references to points raised in Manchester's second article, giving us an unusually complete "audit trail" of the gradual development of legal certainty about a novel phenomenon.

5.8 Allowing downloads is "showing"

So far as the Obscene Publications Act is concerned, we recall that one crucial issue was whether the obscene article had been "shown, played, or projected" (see passage **B**). The Crown Court judge decided that it had.

Counsel for Fellows had taken up the point which Manchester's earlier discussion had seemed to ignore: he argued that "showing" means something more active than just letting someone else download from a server. He asked: suppose a picture was left out on a library table and someone made the library key available, would that person be said to have "shown" the picture to another person who used the key and looked at the picture? The advocate evidently expected the answer "no", but the Crown Court judge held that "to give the key to someone who the donor knew would use it to enter the library in order to look at the picture would amount to a showing when the viewer did exactly that." And the Appeal Court judges agreed. They accepted that "show" might require active conduct by Fellows, but

> it seems to us that there was ample evidence of such conduct on his part. He took whatever steps were necessary not merely to store the data on his computer but also to make it available worldwide… He corresponded by Email with those who sought to have access to it and he imposed certain conditions before they were permitted to do so. He gave permission by giving them the password.

So making pictures available for downloading is, legally, "showing" the pictures (at least if the person who puts the pictures on the server actively controls access to them in the various ways described in the quotation above – it might perhaps still be argued that someone who merely makes a picture freely available to all comers on the Web has not "shown" them the picture). Since these pictures were "shown" in legal terms, the law did not need to decide whether they were also "projected".

For the Appeal Court judges, the other issue which Manchester had seen as crucial, namely whether the "obscene article" in a case like this is the disc itself or the data on the disc, did not seem to arise. The defence argued that "it could not be said that the article, namely the disc, was shown, played or projected"; the response in the Appeal Court judgement was "the data stored in the disc was 'shown, played or projected'…within the ordinary meaning of those words", and there was no explicit awareness of the possibility that these two quoted statements could both be true. (The Court of Appeal did not refer to Colin Manchester's earlier paper, which had discussed this issue at length. His second paper, which the Court did refer to, mentions it only briefly, mainly in order to point out that in future cases it might cease to be an issue, because a new statute had introduced more clarity on this point.)

So not only is it unpredictable how a debatable issue will be resolved, but it can even be unpredictable which issues will be seen as requiring resolution.

5.9 What is a copy of a photograph?

So much for the Obscene Publications Act. But we saw that *Fellows and Arnold* involved child pornography, which is covered by a separate statute, the *Protection of Children Act 1978*; and here too the defence found ways of arguing that technological change had made the law inapplicable.

Some of the points were the same. The issue whether allowing people to download pictures amounts to showing them the pictures arose under both statutes. (The Crown Court judge in fact developed his "key to the library" analogy in connexion with the charges under the Protection of Children Act, though by implication he applied the analogy equally to those under the Obscene Publications Act.) But the Protection of Children Act offered further possibilities for defeating the prosecution.

This Act makes it an offence to possess "any indecent photograph of a child…with a view to [its] being distributed or shown by himself or others…", and it specifies that:

D

> references to an indecent photograph include an indecent film, a copy of an indecent photograph comprised in a film…references to a photograph include the negative as well as the positive version.

The defence argued, first, that what was stored on the server (though it was derived from photographs) was not itself photographs.

The Crown Court judge consulted a standard English dictionary, which defined a "photograph" as "a picture or other image obtained by the chemical action of light or other radiation on specially sensitised material such as film or glass", and he agreed that what was on the disc was not "photographs"; as the Court of Appeal judgement put it, "There is no 'picture or other image' on or in the disc; nothing which can be seen."

However, passage **D** covers not only an original photograph but also "a copy of an indecent photograph". Oddly, at neither hearing is the defence recorded as having discussed the immediately following words, "comprised in a film"; the defence line, rather, was that if the disc contained copies of indecent photographs, the law would apply, but it did not contain that. The original of a photograph, by the dictionary definition, is the photographic negative. (Bear in mind that in 1996 neither the dictionary nor the Court of Appeal were thinking about digital cameras.) Passage **D** specifies that a positive print taken from a negative also counts as a "photograph". A photocopy of a print, looking more or less the same as the print, would be a "copy of a photograph"; but a set of 0s and 1s on a hard disc (it was argued) is not a copy of a photograph.

The Crown Court judge rejected this suggestion that "'a copy' must mean a copy which can be seen and appreciated to be a copy without any further treatment", drawing an analogy with the kind of secret writing that children used to do (and perhaps still do) with lemon juice:

> At one time it was quite common to use invisible ink which would become visible on heating. If, using such ink, the words of a document were repeated, would that be a copy? Even though the words could not be deciphered without heating the ink, there would, in my judgment, be a copy.

The Court of Appeal agreed that the wording of the 1978 Act did not limit the meaning of "copy" in the way suggested by the defence.

But the defence argued that newer legislation did imply such a limit. The *Criminal Justice and Public Order Act 1994* had included a section amending passage **D** in the Protection of Children Act to make the term "photograph" explicitly include "data stored on a computer disc or by other electronic means which is capable of conversion into a photograph". If the 1994 Act found it necessary to say this, the defence urged, then under the 1978 Act (which was what was in force when the alleged offences were committed) the word "photograph" must *not* have included "data stored on a computer disc…". To a layman it sounds like a telling point.

The Court of Appeal rejected it, on the basis of reasoning which was logically very subtle. If a given statute refers to X and Y, and X is capable of being understood either in a broad sense which would include Y as a special case, or alternatively in a narrow sense in which it contrasts with Y, then the legal rule is that the mention of Y will be a reason for taking X in the narrow sense – otherwise it would be redundant to mention Y. If we set X = "copy of a photograph" and Y = "data stored on a computer disc", it might look as though the reference to Y requires us to interpret X narrowly as not including data on a computer disc. But in the present case we are not dealing with two passages in the same statute. According to the Court of Appeal, once the 1994 statute was in force, wording Y in that statute might impose a narrow interpretation on wording X in the 1978 statute *as it applied in the future* (though this would make no difference in practice, because activities previously prosecuted under the 1978 statute would now be prosecuted with more certainty under the 1994 statute). However, the later statute could not affect the proper interpretation of 1978 wording as it applied to activities *before the later statute was in force* (as in this case).

Otherwise, Parliament in 1994 would have been legislating retrospectively – it would have been laying down new law to apply not just from that time forward but back into the past. Retrospective legislation is normally regarded as taboo and a characteristic of tyrannical régimes (since it is impossible for individuals to ensure that their actions are legal, if the actions come first and the law is invented later). The Westminster Parliament has very occasionally legislated retrospectively, but this is always controversial and therefore widely discussed – there was no hint at all that the 1994 Act was intended to function retrospectively.

5.10 Uncertainties remain

The defence had further arguments which we shall not examine here; they were weaker, and all were rejected by the Court of Appeal, which upheld the convictions. Readers may well feel that they have seen quite enough of *Donnelly & ors* and *Fellows and Arnold* already; they may suspect me of heaping up tiny details in order to exaggerate the difficulties which technological change poses for the law. If so, let me assure them that I have not done that. On the contrary, I have tried to set aside all the inessential issues raised in the various hearings, in order to focus just on the main points which illustrate the real nature of the problems. (I could easily have made this chapter *very* much longer, without looking at any further statutes or cases!)

Furthermore, although both of these cases led eventually to the law being declared to be what Parliament doubtless wanted it to be, either case could easily have gone the other way – the videocassette case did, initially. And although some doubts which IT has created have now been resolved, there will surely be others.

For instance, in *Fellows and Arnold* all the discussion of "copies" was about cases where the copied pictures were identical to the originals, as far as possible given the limits of the technology. But nowadays most home computers come with image-editing software which makes it easy to modify photographs, in ways ranging from simple adjustments to contrast or colour balance, to sophisticated modification of pictorial content. Porn merchants might well want to apply this technology to their stock in trade – probably they already do. Is an indecent picture which has been deliberately altered to look different from the original still a "copy" of the photograph?

The 1994 Act defines a concept of *pseudophotograph* for "an image, whether made by computergraphics or otherwise howsoever, which appears to be a photograph", so people cannot escape conviction by saying that their pictures never involved the use of a camera. But what if a photo is processed to look like an oil painting with visible brushstrokes, in the style of the Impressionists or of the Old Masters? – that takes just a mouse click within an image-editing package. For some porn users, by creating an atmosphere of gentility surrounding the obscene content this could add to the thrills. Is an indecent photograph which has been edited so that it does *not* "appear to be a photograph" still a photograph or pseudophotograph, for the purposes of the laws on obscenity and child protection? So far as I know no relevant case has yet come before the courts.

5.11 The wider implications

A point to make about this case study is that the difficulties which the law encountered in catching up with technology depended in part on the fact that we were looking at criminal rather than civil law. One established principle for interpreting the language of statutes is that in criminal cases, where individuals are threatened with loss of liberty, wording must be construed particularly narrowly in the defendant's favour. It might be difficult to find an area of civil law where technological change has been creating quite so many clear illustrations of legal obsolescence – though the same sort of thing does happen in the civil law, if less frequently.

Another point is that this is one respect in which Continental-style legal systems may be better placed than ours. Because the Continental approach is to write laws in terms of broad principle and to encourage judges to "fill in the gaps", interpreting written statutes by reference to the purpose of the legislation as much as to the precise wording on paper, difficulties comparable to those we have studied in the case of computer pornography might well be less likely to arise on the Continent.

The English tradition has seen the "purposive" Continental approach to law as mildly shocking and not really appropriate for a free society: since states have so much power over their subjects, that power needs to be tightly restrained, with individuals who wield a share of state power (such as judges) allowed as little discretion as possible about how they use it. Now that Britain is in the EU, our legal establishment has had to compromise with Continental-style approaches in areas where the EU is making law, but it has not found the compromises easy. (Laws about obscenity, and indeed most of the criminal law, remains a field where Britain and the other EU member states retain their independence.) The episodes examined in this chapter, though, suggest real advantages in the Continental approach. Views differ about how far pornography should be criminalized; but most people will agree that if some activity is objectionable enough for society to outlaw it, then we do not want people to escape conviction merely because of changes in society's technical infrastructure.

Lastly, the main lesson to draw is about the contrasting timescales of law and IT. Some statutes we have looked at were risking obsolescence because of technological development within a decade of being drafted. For the law, ten years is not a long time – and it should not be. A society in which laws changed overnight whenever someone in authority spotted something amiss, with no time for in-depth consultation of knowledgeable parties, careful consideration of possible knock-on consequences, and so forth, would be an uncomfortable society to inhabit (to put it mildly). But, for information technology, three or four years ago is "the old days". Think back ten years, and it is hard to remember what our technology was like at that prehistoric period.

This tension between contrasting timescales makes IT law a distinctive area within law as a whole.