

Obscenity on the Internet: a Challenge to Intellectual Freedom in the United States

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This article addresses one of the greatest challenges to intellectual freedom as the new millennium begins – obscenity on the Internet. It begins with a discussion of *United States v. Thomas*, a case concerning obscenity and pornography on the Internet, and examines how U. S. courts have dealt with

the First Amendment and obscenity throughout the years. It explores the possibility of imposing a national standard for obscenity for a “virtual” community, and concludes with a discussion of how the courts may impact everyone’s – especially a child’s – constitutional right to receive information.

Introduction

In the United States, intellectual freedom embodies the belief that everyone must receive free access to all kinds of information (Robbins 1996). The *Intellectual Freedom Manual*, a practical guide for librarians detailing how to apply intellectual freedom principles, advocates that intellectual freedom exists when

1. all individuals have the right to hold any belief on any subject and to convey their ideas in any form they deem appropriate, and when
2. society makes an equal commitment to the right of unrestricted access to information and ideas regarding the communication medium used, the content of the work, and the viewpoints of both the author and receiver of information. (*Intellectual Freedom Manual* 1996)

The notion of intellectual freedom is derived from the First Amendment of the United States Constitution. The First Amendment guarantees freedom of speech by mandating that “Congress shall make no law abridging the freedom of speech.” An individual’s right of free speech is,

however, not absolute. Several forms of speech – e.g. defamation and obscenity – are not protected by the First Amendment. American jurisprudence has also afforded different levels of protection for speech depending on the method by which it is communicated or transmitted.

One of the newest and most promising forms of telecommunications is the Internet. This article addresses one of the greatest challenges to intellectual freedom as the new millennium begins – obscenity on the Internet. The article begins with a discussion of *United States v. Thomas*, a case concerning obscenity and pornography on the Internet, and examines how U. S. courts have dealt with the First Amendment and obscenity throughout the years. The article explores the possibility of imposing a national standard for obscenity for a “virtual” community, and concludes with a discussion of how the courts may impact everyone’s – especially a child’s – constitutional right to receive information.

In *United States v. Thomas* (1966) Robert and Carleen Thomas, owners of a computer bulletin board system called the Amateur Action Bulletin Board System (AABBS), were convicted for know-

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ingly distributing and transporting obscene material in interstate commerce. The couple had sent computer-generated sexually explicit images from their home-based business to a postal inspector in Tennessee. Robert Thomas received a jail sentence of thirty-six months; Carleen received thirty months. In 1996, the Sixth Circuit Court of Appeals upheld the couple's conviction, concluding that the proper location for determining the local community standard, applying the first prong of the *Miller v. California* obscenity test, could be the place where the material is transmitted. The defendants argued that the advent of new computer technologies (e.g. bulletin board systems on the Internet) requires a new definition of "community" for determining whether material is obscene. The community standard, they argued, should be based upon the community of cyberspace and not the geographical area where the material was sent. The Sixth Circuit concluded that, under the facts of this case, it was not necessary to adopt a new community standard definition. The court found that access to the AABBS was limited by an application process before the materials could be received. The court explained that

if defendants did not wish to subject themselves to liability in jurisdictions with less tolerant standards for determining obscenity, they could have refused to give passwords to members in these districts, thus precluding the risk of liability. (*U.S. v. Thomas* 1996)

In recent years the Internet has become the subject of much debate over content regulation. Content regulation directly conflicts with the tenets of the First Amendment freedom of speech provision. At the core of the dilemma is the fact that the Internet has no obvious borders within which to define a geographic community (Edick 1998). Because the Internet exists internationally, problems necessarily arise when other countries differ, as they will, in their respective definitions of obscenity. This article examines the existing obscenity law in the United States and proposes a national community standard for the first prong of the *Miller v. California* obscenity test. The justification for this proposal is two-fold. First, a national standard would obviate the need for vendors of pornographic material to either [1] attempt to ascertain each local community standard for every place in which they conduct business or [2] attempt to restrict the content of their

pornographic material to pass constitutional muster under the least tolerant community, thereby limiting some constitutionally protected material from being disseminated. Second, a national standard would prevent federal prosecutors from forum shopping to obtain a guaranteed conviction.

Overview of the applicable law

The First Amendment to the United States Constitution provides that "Congress shall make no law abridging the freedom of speech." Obscenity is one of the few types of speech that is afforded no constitutional protection (*U.S. v. Roth* 1957). The seminal case in obscenity law is the English case of *Regina v. Hicklin* (1868). *Hicklin* stands for the proposition that material is obscene if it corrupts the minds of those who are open to immoral influences. Many states adopted language similar to this when writing their own obscenity laws. Because under these statutes adults would be limited to reading only material fit for children, the courts in the 1950s found these statutes to be overly broad. In 1957, the Court in *United States v. Roth* began to develop a new test for obscenity. Roth was charged with mailing to others sexually explicit material from a pornographic book. The Court defined obscenity as "material which deals with sex in a manner appealing to prurient interest," and held that it was not protected speech under the First Amendment. Under *Roth*, material may be found to be obscene if "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest" (*U.S. v. Roth* 1957).

Almost a decade later, the Supreme Court revisited the obscenity definition in *Memoirs of a Woman of Pleasure v. The Attorney General* (1966). The Court added to the obscenity test the element that the material must also be "utterly without redeeming social value," thereby making the prosecution of obscenity cases very difficult. This definition afforded First Amendment protection to even material with very limited literary value.

In *Miller v. California* (1973), the Supreme Court repudiated the "utterly without redeeming social value" requirement and formulated the present day test for obscenity. The defendant, Marvin Miller, had been convicted by the Superior Court

of California of violating California's obscenity statute. Miller, who owned and operated a large mail-order pornography organisation, mailed five unsolicited advertising brochures containing sexually-explicit words, pictures, and drawings to a restaurant in Newport Beach. The restaurant manager and his mother opened the envelope; neither had requested any brochures and subsequently reported the incident to the police.

In reviewing Miller's conviction, the Court adopted a three-part obscenity test. In determining whether material is obscene, the jury must decide (1) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to prurient interest; (2) whether the work depicts or describes sexual conduct (defined by state statute) in a patently offensive way; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. The Court confined the states to regulating only "hard core" pornography. Although the Court did not define "hard core" pornography, it cited the following two examples: (1) "patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated"; and (2) "patently offensive representations or depictions of masturbation, excretory functions, and lewd exhibition of the genitals" (*Miller v. California* 1973).

While the *Miller* Court stated that juries should use a local, rather than national, standard in determining the prurient interest component, the "serious value" test was subjected to a national standard four years later in *State v. Smith* (1977). The standard was again re-examined a decade later in *Pope v. Illinois*. (1987). The Court in *Pope* stated that the "serious value" prong should be viewed under a reasonable person standard, viewing the material as a whole (*Pope v. Illinois* 1987, 497). Significantly, despite all the refinement, the Court continues today to struggle with the shortcomings and vagueness of the obscenity test.

Not surprisingly, the U. S. judicial branch is not alone in regulating obscenity. The U.S. Congress has prohibited the transportation of obscenity through interstate commerce or the facilities of interstate commerce. However, new technology has called into question the sufficiency of existing obscenity laws. (18 U.S.C. Sec. 1465 1994) In *Thomas*, the obscene matter transported was digital data – a string of binary codes via a telephone

line (Kabalka 1996). The court held that this obscene material offended the local community of middle Tennessee where the transmission was received. With today's transmission of obscenity over the global Internet, a national standard for obscenity should be adopted.

Argument for a national Internet obscenity standard

When discussing obscenity on the Internet, "the core of the problem is trying to fit a new medium of communication into existing law which cannot, as it stands, adequately cope with technological advances" (Friedman 1996). Although the United States Supreme Court has denied certiorari to rehear the *Thomas* case, another case factually similar to *Thomas* should be heard to allow for consideration of a national standard for the unique Internet community. The *Thomas* court stated that under these facts (i.e., where the defendant could ascertain the users' local community via the application process), there was no need to adopt a new definition of community for obscenity prosecutions. The court based its rationale on the axiom that federal courts should not reach constitutional questions not squarely presented by the facts of the case (*U.S. v. Thomas* 1996). This finding raises several interesting issues. First, a user of the Internet is not always required to enter an address to receive access to a bulletin board service, nor will a user necessarily be truthful when entering demographic information such as name and address. Second, a user can access the Internet from a variety of locations – at home, at work, and even in foreign countries. How can a vendor of pornographic information ascertain where the user is located each time he accesses the service? A national community standard recognises that users of the Internet are not restricted to geographical boundaries (Swenson 1998). Finally, a national community standard eliminates the lowest-common denominator effect and forum shopping by federal prosecutors. Therefore, vendors would no longer need to determine each local community standard nor restrict the content of their material to what the least tolerant community would deem "fit." Each of these considerations is discussed below.

The Internet is a communications network capable of exchanging a vast amount of digital

information on almost any imaginable topic. Linked through telephone lines, computer modems, and service providers, users can transfer information globally. Users can presently communicate with each other through numerous modes of communication (i.e., text, video, pictures, sound, etc.). Information is communicated and transformed when a user linked to the Internet allows users, even worldwide users, to access a file from his computer. A user then has the capacity to alter and reconfigure it on the worldwide network. Once information is posted on the Internet, it is difficult to ascertain its origin and control and prohibit alterations (Petrie 1997). Pornography, in the various forms of images, pictures, movies, sound, and sexually explicit text, is popular on the Internet. Worldwide users can easily post pornography to a bulletin board as well as download material to their computers, all of which can be done without the bulletin board operator's knowledge (Swenson 1998). Even if the bulletin board operator wanted to regulate this activity, administratively it would be difficult. Once a password is known, access is available worldwide from any computer with a modem.

The rationale behind the *Miller* test was to prevent the dissemination of obscene materials to minors. The Court concluded that the states have a legitimate interest in protecting minors within their borders (Swenson 1998). The Court promulgated the three-prong test for obscenity and stated that the prurient interest requirement was to be defined under local community standards. (*Miller v. California* 1973; *Hamling* 1974) The local community standard has been defined as follows:

Contemporary community standards are set by what is in fact accepted in a community as a whole; that is to say, by society at large or people in general; and not by what some persons or groups of persons may believe the community as a whole ought to accept or refuse to accept. It is a matter of common knowledge, of which the Court takes judicial notice, that customs change, and that the community as a whole may from time to time find acceptable that which was formerly unacceptable, and not infrequently may find presently acceptable that which some particular group of the population may regard as an unacceptable appeal to the prurient interest. (Swenson 1998)

In determining contemporary community standards, the jury may consider as evidence

what appears in contemporary magazines, books, newspapers, television, motion pictures, novels, and other media of communication that are freely available in the community as a whole.

The dissent in *United States v. Miller* and *Hamling v. United States* argued that the local community standard was unconstitutionally vague and would lead to the dispensing of unevenhanded justice. (*Miller v. California* 1973; *Hamling v. U. S.* 1974) In *Hamling*, the dissent argued that the appropriate community standard should be a national standard because of the manner in which the product was distributed. There, the defendant mailed allegedly obscene brochures with sexually explicit material to the public. The brochure advertised an illustrative version of the presidential commission's report on obscenity and pornography (*Hamling v. U. S.* 1974). Under the local community standard, the majority would require national pornography distributors who send their products through interstate commerce to be familiar with the standards of every community in which their goods are sent. Because these standards vary by community, the vendors are forced to conform to the most restrictive standard that satisfies the First Amendment. As a result, legal censorship is coerced and each community, regardless of its prevailing community standard, will be denied access to sexually-oriented material deemed only by the most conservative communities to be obscene (Swenson 1998).

In *United States v. Thomas*, the court was challenged to consider the uniqueness of the Internet and its global scope. Although the defence argued for a national standard, the Court held that the local Tennessee community standard was the proper standard. Furthermore, the Court concluded that prosecution was proper in either the place where the material originated or the location of its transmission. Future courts should re-examine the holding of the *Thomas* case. The court failed to realise the uniqueness of the Internet. Part of the rationale for a local community standard is that communities are diverse and have different values and tastes. However, Internet users comprise a universal community in which people communicate instantaneously as if they lived next door to each other. The proper community standard should be one where the members of the virtual community can themselves define obscenity. Under the *Miller v. Cali-*

fornia test, the community is judged based upon the proximity of its members and their own proclivities and tastes. This approach is simply impractical for the Internet. Computer technology, as evidenced by the Internet, has allowed individuals to create diverse and unique communities of people who share similar interests and communicate with each other about those common interests. These communities do not possess geographic borders and should not be compared to communities with definable boundaries. Internet users can communicate with other users throughout the world from the privacy of their own homes and may actually feel more connected to users from other states and continents than to their physical neighbours. Members of the Internet community should determine the national (or, more accurately, international) obscenity standard for Internet users. Pornographic distributors on the World Wide Web would know the applicable obscenity standard for the Internet and could effectively regulate the content of their bulletin board services, web sites, etc., accordingly. Vendors would not have to ascertain where the users are located or have to develop new technologies to block certain localities. First Amendment freedom of speech assurances are of paramount importance and would be better safeguarded in this manner (Swenson 1998).

A national standard for Internet users would curtail censorship. A national standard would also eliminate forced homage to the least restrictive community standard and the potential for forum shopping by federal prosecutors. A local community standard creates a market in which vendors can only distribute material that conforms to the standards of the most conservative communities (Swenson 1998). Conformance to this current standard clashes with the freedom of speech guarantees of the First Amendment. Internet distributors cannot possibly tailor pornography to be specifically appropriate for each community; therefore, they have to distribute pornography that is appropriate for the least tolerant jurisdiction. Essentially, the least tolerant jurisdiction sets the standard for the rest of the nation. Yet, a least tolerant community may be comprised of only a minority of Internet users. Thus, non-Internet users of the least tolerant communities may be able to impose on the majority an overly restrictive standard based on

their specific and not-so-widely-held beliefs. This approach circumvents the fundamental purpose of the First Amendment – the constitutional right to view protected material. Finally, the local community standard allows federal prosecutors to forum shop. Prosecutors may charge defendants with obscenity violations in any jurisdiction in which the materials have been distributed. Consequently, federal prosecutors will try defendants in the most conservative/least tolerant communities to ensure a conviction. The Due Process Clause of the Fourteenth Amendment entitles defendants to fair notice as to where they may be prosecuted. If a defendant can be prosecuted in any jurisdiction in which the Internet is accessible, due process may be denied.

Advocates of a national community standard for the Internet should lobby the courts for an obscenity standard that reflects the tastes and proclivities of the global Internet community. Obscenity should remain as unprotected speech, but the people determining the community standard should be the users of the Internet. This approach furthers public policy in many ways. Vendors who distribute pornography on-line will have clear guidelines as to permissible and impermissible material. A national standard affords vendors fair and adequate notice as required by the Due Process Clause of the Fourteenth Amendment. Users of the Internet could access pornography on a day-to-day basis without fear of penalty. Although possession of obscenity by an individual is not illegal, transference of it is. Consequently, if vendors could no longer post obscene materials on the Internet, this would eliminate the illegal transference of it by individual users. With clear laws and a national obscenity standard, society as a whole will benefit.

Freedom of information for children

When discussing whether children and teenagers should have the same access to all materials as adults, the issue of total access becomes more tenuous. The American Library Association (ALA) has advocated for many years that

“[a] person’s right to use a library should not be denied or abridged because of origin, age, background or views. All limitations on minor’s access to library and services violate [the Library Bill of Rights]”

The word 'age' was incorporated into Article V of the Library Bill of Rights because young people are entitled to the same access to libraries and to the materials in libraries, as are adults. (*Intellectual Freedom Manual* 1996)

The ALA has been unequivocal in its printed policies that (1) access for children should not be restricted, and (2) a librarian should not abrogate the role of the parent. Only the child's parents should determine what is suitable and appropriate material for only their child.

The California Library Association Intellectual Freedom Committee has also adhered to the position that children have a constitutional right to unrestricted access to the library. The *California Intellectual Freedom Handbook* states that

the role of the parent is to guide their child's reading choices within their own family. It is a family matter how the parent and child communicate about borrowing habits, something to be decided between them. The library must not intervene in the relationship by communicating for either party. The library's role is to provide access to materials for all and to insure absolute privacy. (*California Intellectual Freedom Handbook* 1992)

In 1998, the ALA's president, Ann K. Symons, stressed her allegiance to the core values of librarianship in "When Values Conflict." The core values she listed were:

intellectual freedom, equity of access, free access to information for individuals, privacy for individual users and user records, professional neutrality (balanced collections), fair use as it applies to copyrighted material, social responsibility (including diversity), preservation of the cultural record, and the right of users to a safe environment for intellectual exploration.

With the advent of the Internet and the availability of voluminous amounts of information including sexually explicit content, Symons emphasises that intellectual freedom conflicts with social responsibility to the community especially when minors are involved. She approaches the struggle from a more moderate position of suggesting a compromise between the two values without stating of what that compromise would consist. The answer should be forthcoming, however, in the final draft of the "*Libraries: An American Value*" set to be approved at the ALA's 1999 Midwinter Meeting (Symons 1998).

The courts in the last two decades have taken a more ambiguous approach than the ALA in dealing with children and free access to information.

One of the most important cases to date concerning freedom of access for children is *Board of Education of Island Trees Union Fire School District v. Pico*. (1982). This case arose when the board of education removed several books from a school library. The books were characterised by the board as being "anti-American, anti-Christian, anti-Semitic, and just plain filthy." The board insisted that the removal of these books was justified on the oft-cited grounds that the board of education has a moral obligation to protect the students from what they perceive as dangerous material. The books that were removed were not mandatory reading assignments but rather elective reading. Although this type of action was not indigenous to the school district, it was happening with greater frequency. That is, the board of education was removing books solely because they felt the books were in opposition to the proper curriculum requirements (*Intellectual Freedom Manual* 1996). The Supreme Court chose to hear this case to decide whether

the First Amendment imposes limitations upon the exercise by a local school board of its discretion to remove library books from high school and junior high school libraries. (*Board of Education v. Pico* 1992)

In a plurality opinion, an opinion in which a majority of the judges can concur on the outcome of the case but not completely on the rationale for the judgement, the Pico Court announced that there are limits to the measures and methods that secondary school authorities may employ to control the morality of the students within their school districts. Essentially, the Court stated that school boards cannot arbitrarily decide which books to remove from the curriculum because this action violates the First Amendment. The Court also stated that children do have a constitutional right to receive information. The *Intellectual Freedom Manual* summarises this case well by stating:

The courts have interpreted the First Amendment's free-speech guarantee to disable a public school official from claiming parentlike authority to make arbitrary and unappealable decisions about the books available to students. In upholding the students' right to sue in this case, a clear majority of the judges agreed that school boards do not have the unfettered authority to select library books, and First Amendment rights are implicated when books are removed arbitrarily. An overwhelming majority of the Court also condemned politically motivated book

removals. Although the Court held that the First Amendment prevents governmental officials from denying access to ideas with which they disagree, the justices strongly suggested that decisions based on educational suitability would be upheld, particularly where a regular system of review using standardized guidelines were followed. (*Intellectual Freedom Manual* 1996)

In 1988, the Supreme Court upheld censorship within an educational setting. In *Hazelwood School District v. Kuhlmeir*, the Court held that a principal's decision to remove two pages from a school newspaper prepared as part of the curriculum for a journalism class did not violate students' free speech rights. The excised pages discussed a student's experiences during her pregnancy and another student's experience and opinions surrounding his parents' divorce (*Hazelwood v. Kuhlmeir* 1988). The principal acted because he believed the articles contained too much sexual content and inappropriately discussed personal details about a divorce without presenting the parents' version of the details. The principal directed the class to withhold the two pages containing these stories even though other remaining articles on those pages were permissible for publication. His rationale was that there was not enough time to revise the articles. The Court ruled that

school-sponsored expressive activities can be subjected to content control as long as the censorious conduct is reasonably related to legitimate pedagogical concerns. (*Intellectual Freedom Manual* 1996)

The struggle of minors' access to the Internet continued in the 1990s. In 1996, Congress promulgated the *Communications Decency Act (CDA)* in an effort to prevent children from accessing pornographic material over the Internet (Sander 1999). The *CDA* criminalised the transmission of "indecent images" and pictures that are "patently offensive" by "contemporary community standards" to minors via the Internet. (Public Law # 104-104, sec. 502(2)) The American Civil Liberties Union (ACLU) immediately challenged the Act as being unconstitutional. In 1997, in *Reno v. ACLU*, the Court held that the *CDA* was in fact unconstitutional. The Court ruled that the Internet must be afforded the highest level of First Amendment protection. For this Act to be constitutional, the government's interest must not only be compelling but the means for accomplishing the objectives of the Act must be the least

restrictive possible. Although the Court found that the protection of children is a compelling state interest, other lessor restrictive means, such as filtering software, are available to achieve the government's goals. The Court also reiterated the notion that "the interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." (*Reno v. ACLU* 1997)

Congress' second attempt to legalise censorship in the 1990's is a watered-down version of the *CDA* called the *Child Online Protection Act (COPA)*. *COPA* mandates that commercial Web site operators who present sexually explicit material that can be deemed harmful to children verify that visitors to their Web site are adults. (47 U.S.C. sec. 231, Pub. L. No. 105-27 (188)). The Act was also designed to protect the privacy interest of children by forbidding the release of personal information by the Web site operators. (144 Cong. Rec. #9902-01 Title 11 sec. 202 daily ed. Oct. 7, 1998) In February 1999, a federal judge enjoined *COPA* because its provisions abridged adults' access to constitutionally protected material. In November 1999, a federal appellate court heard oral arguments to determine whether the injunction should be lifted (*Pittsburgh Post-Gazette*, Nov. 14, 1999). The appellate court will most likely examine *COPA* under the strict scrutiny standard, as it did with the *CDA*. That is, the court will decide whether the regulations restricting speech on the Internet promote a compelling government interest and if the regulations are narrowly tailored to achieve the government's interest and no less restrictive means to accomplish this objective are available (Sanders 1999). The district court determined that *COPA* is a content-based regulation of both obscene and non-obscene sexual expression (*Reno v. ACLU* 1999). The federal government does have a compelling interest in ensuring that no harm befalls children. However, the government failed to show that *COPA* was the least restrictive method to promote the government's interest.

One other court has ventured further in the censorship battle by expressing distaste even for Internet filters. In *Mainstream Loudoun v. Loudoun County Libraries* (1948), a federal district court judge ruled that the library's filtering policy violated the First Amendment. Also, examining the library's policy under strict scrutiny, the court

found that the library's policy was over-inclusive in that it limited Internet access for all patrons to material that would be innocuous to children. The district court also determined that the policy was not narrowly tailored because at least three lessor restrictive alternatives existed: privacy screens around the Internet terminals, a library employee available to monitor usage, and the installation of Internet filters on only those computers used by minors. Finally, the court expressed concern over the fact that the library would consider abrogating its role in material selection to a software filtering publishing company.

Conclusion

Freedom of speech should be protected. The American forefathers wanted to ensure that the United States would remain a free society. A free society is one in which its members can choose what to read and what to think. All members of society, including its children, should be allowed to read about and discuss all points of view, even unpopular ones. Unpopular beliefs bring forth awareness, and have value in expression even if not pervasively held. Only by the fierce protection of the First Amendment will American society remain free and be best able to meet the issues and challenges of the new millennium.

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Notes

1. With the advent of new technological advances, such as the Internet, Americans must adhere to those values that have made this country flourish. The First Amendment's freedom of speech is of paramount importance. Speech, regardless of its popularity, must be protected to ensure that all factions of society are given a voice that can be heard. If the United States is to remain a free, democratic society, all citizens must have access to information and be encouraged to think and speak for themselves and evaluate conflicting points of view and expression.

2. Obscenity is unprotected speech. Pornography, art, and erotic literature are protected speech. Clear standards are necessary to enable communities, including virtual communities on the Internet, to understand what is regulated and criminalised. A national community standard may eliminate confusion.
3. Intellectual freedom includes freedom of access to information for all of society, including children. This country's youth must be exposed to conflicting ideas. Under the guidance of their parents, educators and librarians, they will learn the value of critical thinking for the new millennium.

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