What's Obscene? Google Could Have an Answer
Matt Richtel

Judges and jurors who must decide whether sexually explicit material is obscene are asked to use a local yardstick: does the material violate community standards?

That is often a tricky question because there is no simple, concrete way to gauge a community's tastes and values.

The Internet may be changing that. In a novel approach, the defense in an obscenity trial in Florida plans to use publicly accessible Google search data to try to persuade jurors that their neighbors have broader interests than they might have thought.

In the trial of a pornographic Web site operator, the defense plans to show that residents of Pensacola are more likely to use Google to search for terms like "orgy" than for "apple pie" or "watermelon." The publicly accessible data is vague in that it does not specify how many people are searching for the terms, just their relative popularity over time. But the defense lawyer, Lawrence Walters, is arguing that the evidence is sufficient to demonstrate that interest in the sexual subjects exceeds that of more mainstream topics — and that by extension, the sexual material distributed by his client is not outside the norm.

It is not clear that the approach will succeed. The Florida state prosecutor in the case, which is scheduled for trial July 1, said the search data may not be relevant because the volume of Internet searches is not necessarily an indication of, or proxy for, a community's values.

But the tactic is another example of the value of data collected by Internet companies like Google, both from a commercial standpoint and as a window into the thoughts, interests and desires of their users.

"Time and time again you'll have jurors sitting on a jury panel who will condemn material that they routinely consume in private," said Mr. Walters, the defense lawyer. Using the Internet data, "we can show how people really think and feel and act in their own homes, which, parenthetically, is where this material was intended to be viewed," he added.

Mr. Walters last week also served Google with a subpoena seeking more specific search data, including the number of searches for certain sexual topics done by local residents. A Google spokesman said the company was reviewing the subpoena.

Mr. Walters is defending Clinton Raymond McCowen, who is facing charges that he created and distributed obscene material through a Web site based in Florida. The charges include racketeering and prostitution, but Mr. Walters said the prosecution's case fundamentally relies on proving that the material on the site is obscene.

Such cases are a relative rarity this decade. In the last eight years, the Justice Department has brought roughly 15 obscenity cases that have not involved child pornography, compared with 75 during the Reagan and first Bush administrations, according to Jeffrey J. Douglas, chairman emeritus of the First Amendment Lawyers Association. (There have been hundreds involving child pornography.) Prosecutions at the state level have followed a similar arc.

The question of what constitutes obscenity relies on a three-part test established in a 1973 decision by the Supreme Court. Essential to the test has been whether the

material in question is patently offensive or appeals to a prurient interest in sex — definitions that are based on “contemporary community standards.”

Lawyers in obscenity cases have tried to demonstrate community standards by, for example, showing the range of sexually explicit magazines and movies available locally. A better barometer, Mr. Douglas said, would be mail-order statistics, because they show what people consume in private. But that information is hard to obtain.

“All you had to go on is what was available for public consumption, and that was a very crude tool,” Mr. Douglas said. “The prospect of having measurement of Internet traffic brings a more objective component than we’ve ever seen before.”

In a federal obscenity case heard this month, Mr. Douglas defended another Florida pornographer. In the trial, Mr. Douglas set up a computer in the courtroom and did Internet searches for sexually explicit terms to show the jury that there were millions of Web pages discussing such material. He then searched for other topics, like the University of Florida quarterback Tim Tebow, to demonstrate that there were not nearly as many related Web sites.

The jury was evidently not swayed, as his client was convicted on all counts.

The case Mr. Walters is defending takes the tactic to another level. Rather than showing broad availability of sex-related Web sites, he is trying to show both accessibility and interest in the material within the jurisdiction of the First Circuit Court for Santa Rosa County, where the trial is taking place.

The search data he is using is available through a service called Google Trends (trends.google.com). It allows users to compare search trends in a given area, showing, for instance, that residents of Pensacola are more likely to search for sexual terms than some more wholesome ones.

Mr. Walters chose Pensacola because it is the only city in the court’s jurisdiction that is large enough to be singled out in the service’s data.

“We tried to come up with comparison search terms that would embody typical American values,” Mr. Walters said. “What is more American than apple pie?” But according to the search service, he said, “people are at least as interested in group sex and orgies as they are in apple pie.”

The Google service does, however, show the relative strength of many mainstream queries in Pensacola: “Nascar,” “surfing” and “Nintendo” all beat “orgy.”

Chris Hansen, a staff lawyer for the national office of the American Civil Liberties Union, called the tactic clever and novel, but said it underscored the power of the Internet to reveal personal preferences — something that raises concerns about the collection of personal information.

“That’s why a lot of people are nervous about Google or Yahoo having all this data,” he said.

One question is whether the judge in the case will admit the data as evidence; it was given only in a deposition this month. Mr. Walters said he was confident the information would be allowable given that there has been a growing reliance on such data.

Russ Edgar, the Florida state prosecutor, said he was still assessing whether he would try to block the search data’s use in court. He declined to discuss the case’s

specifics, but said that the popularity of sex-related Web sites had no bearing on whether Mr. Edgar was in violation of community standards.

“How many times you do something doesn’t necessarily speak to standards and values,” he said.

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