

Child Pornography in Cyberspace: An Analysis of the Legal Framework

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Abstract – Millions around the planet delve in the internet world for research, finance, retail purchases, banking transactions and what not. However much thought is not given about the legal ramifications involved in these transactions. Most people think internet synonymous with the World Wide Web, but it is not. The Internet is a network of Computer networks. Because the internet is a coalition of networks throughout the world, no one organization owns the Internet. The internet was designed as a collaborative environment and therefore was not a high security environment. Founded by academics the open exchange of information became a basic tenet of the internet. The sudden expansion of World Wide Web commercial usage has raised numerous legal issues regarding privacy, security and copyright and trademark infringement and obscenity.

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INTRODUCTION

The manifold growth in the reach of internet has in turn facilitated the increase in the opportunities of cyber-crime. The exponential amplification of internet on global scale has also led wider scale of cyber crimes which include apart of cracking and hacking, the crimes such as child pornography, corporate espionage, piracy of software, extortion, fraud, money laundering etc.

The rapidly changing horizons of everything cyber related has kept the law enforcement agencies in tenterhooks and left them grappling with legislations infiltrated with gaping holes and marred by insufficiency. One of the vices of the cyberspace is the dissemination of obscene materials and ideas. With the continuing growth of literally thousands of adult-oriented sexually explicit web sites, concern and controversy have arisen regarding censorship and the legal issues surrounding it. Traditionally, governments and courts have found it difficult to define or distinguish prohibited obscene or indecent materials. Courts have always taken a dim view regarding the dissemination of material considered to be harmful to children.

CHILD PORNOGRAPHY AND ITS IMPLICATIONS

“The problem of Internet child pornography can be divided into three components—the production, distribution, and downloading of images. In some cases, the same people are involved in each stage. However, some producers and/or distributors of child pornography are motivated solely by financial gain

and are not themselves sexually attracted to children.”[1]

Child pornography in cyberspace poses a set of challenges to deal with. Some of them are viz:

1. The internet being decentralized: There is no single controlling organization or agency.
2. The complexities in regulation of cyberspace: the liabilities of ISP (internet service providers), and the ever going debate of society's well being and protection on one hand and the freedom of speech
3. The variables in legislations and cross jurisdictional differences in law.
4. The technological acumen of paedophiles on internet: there are very high level offenders with skills to evade security protocols.
5. The fast changing internet universe: The rapidly changing specs of the internet makes sometimes difficult to catch up with the perpetrators of crime.
6. Tracking becomes difficult or almost impossible with mind boggling traffic on the cyberspace.

ISSUES AND CHALLENGES OF CHILD PORNOGRAPHY ON INTERNET

"The main concern of legislators and parents in relation to Internet content is child pornography. This has been the case ever since paedophiles started to use the Internet for circulating pornographic materials related to children. In most cases, child pornography is a permanent record of the sexual abuse of an actual child (except in the case of pseudo-photographs, which are discussed below). An understanding of the special way in which child pornography is child abuse, is crucial to an understanding of the whole problem of child pornography." [2]

There are certain issues pertaining to child pornography and legalities

The freedom of speech:

"Censorship reflects a society's lack of confidence in itself. In fact it goes on to denote an authoritarian regime.

Unlike adult pornography, child pornography does not enjoy any constitutional protection.[3] In *New York v. Ferber*, [4] the Court held that a statute that prohibits the distribution of child pornography may be constitutional even if it fails to satisfy any element of the *Miller* test, provided it is designed to prevent the abuse of children.[5] The Court reasoned that the state's compelling interest in safeguarding children clearly outweighs any value child pornography might possess as expression.[6] In *Osborne v. Ohio*, [7] the Court went one step further and held that, unlike adult obscenity, [8] authorities could prohibit the possession of child pornography in an individual's home.[9] In this way, the Court showed that freedom of expression may be subordinated to the overriding state concern of prevention of child abuse. The U.S. Supreme Court has made this assessment and correctly found that child pornography falls outside the scope of First Amendment protection.[10]

The Consenting adult defence in Child Pornography:

In the case of child pornography, the consenting adult defence is not applicable. In the following case, although the U.S. Supreme Court reversed and remanded the decision on procedural grounds, it upheld a state statute that was designed to protect minors from pornography.

As far as cyberspace is concerned, it should be obvious individuals who possess, sell, and distribute child pornography in e-commerce will be held criminally liable, irrespective of where or in what context the pornographic material is disseminated and accessed.

Issue of Right of Privacy:

The level or amount of privacy we should expect depends on whether we are in what is usually considered to be a public or private place. What is done in the privacy of one's home should be entitled to more privacy than what does in a public park or airport. However, laws may prohibit certain acts even if they occur in the privacy of one's home. An important and current "right to privacy" question that affects child pornography is: should individuals have the right to use encryption so sophisticated that law enforcement is unable to enforce the laws.[11] Encryption though is a very necessary step for many internet facets and transactions. The law enforcement agencies are concerned if the encryption system becomes impregnable. Taking relevance of discussion on right of speech and expression we can say that there is no right to possess or distribute child pornographic materials.

Issue of International Jurisdiction:

There is no rigid international jurisdictional law. In the case of United States, regarding the harms of child pornography, it is clear that the United States has the legislative jurisdiction to make the production and possession of child pornography a crime. Is it also reasonable for a U.S. court to then assert jurisdiction over a child pornographer halfway around the globe? The answer is a qualified yes.[12] When government agencies seek to act beyond or across national boundaries, their jurisdiction is additionally defined and limited by rules of international law. That is in order for a governmental agency to have power to act internationally both its constitutional and international law must allow it to do so. The internet having a world reaching domain it becomes quite impossible to harmonise the definitions of what is acceptable to one community and undesirable in other customs.

The Problem with the Identification:

Verifying online identification is a very debilitating hurdle in investigation. Multiple users wane the possibility the zeroing on the offenders. Who posed the photographs may become a very difficult task to find for the law enforcement agencies. The ability on internet for anonymous posting creates a different problem from other set of crimes done in the physical world. However the use of cyberspace leaves a trail which has to be followed gathering certain skill.

OBSCENITY LAWS IN INDIA

The legal provisions regulating the aspect of obscenity in India are sections viz; 292, 293 and 294 of the Indian Penal Code ("IPC"), [13] and section 67 of the IT Act, 2000. "The Indian Government has recognized the need for

blocking obscene and pornographic websites. In an order dated 27 February 2003, the central Government has laid down the procedure for blocking of pornographic websites. The Computer Emergency Team- India (CERT- IND) has been mandated as the only authority for such issuance of directives regarding the blocking of aforementioned sites. It is the prerogative of CERT-IND, after due verification of the veracity of the complainant and being adequately content of such action to instruct the Department of Telecommunication to block the website in question. DOT, under whose control the Internet Server Providers (ISPs) are functioning will ensure the blocking of websites and inform CERT- IN accordingly.”[14]

Law relating to child pornography in the IT ACT.[15]

Section 67B in the IT ACT[16] shall make it an offence to publish or transmit material depicting children in sexually explicit acts in electronic form, and facilitating online child abuse’. In section 67B, ‘child sex abuse images’ or ‘child pornography’ as it generally referred as, is not defined specifically. The act of making available electronic child pornography can be inferred from a combined reading of clauses (a) and (b). The term ‘sexually-explicit’ has not been defined. As pointed out in sub-section 2.3, the term ‘child’ has not been explained in the context of online children. What would constitute ‘abuse’ under clause (d) has not been specified. Regarding this, one meaning of abuse can be the offence of online sexual enticement and solicitation for offline abuse. A different manifestation of sexual abuse could be through means of technologies such as real time dissemination and transmission of images and videos by web camera. As pointed out earlier, the collection of ‘sexually-explicit’ images of a child in electronic form is made an offence under clause (b) of section 67B, as recommended by the ICMEC study in 2008.[17]

The status of the online child under the IT Act has not been clarified, so the law should be interpreted to treat children under 16 years of age as victims in need of care and protection. The fear of victimisation in the current criminal justice system discourages the child or the parent to come forward to report abuses to the law enforcement agencies and hence needs to be change.

“The IT Act has given due importance to the seriousness of electronic crimes against children, by attributing punishment that makes the offence under section 67B cognisable and non-bailable. As per the proviso in section 77A, the Court shall not compound any offence where imprisonment exceeds three years. So an offence under section 67B is non-compoundable, too.[18] Yet another safeguard that can be made applicable to child sexual abuse content is the section 66E of the IT Act which criminalises the intentional or knowing capture, publishing or transmitting the image of a private area

of any person without his or her consent, under circumstances violating the privacy of that person, in circumstances where a person can have a reasonable expectation that (i) he or she could disrobe in privacy, without being concerned that an image of his private area is being captured; or (ii) any part of his or her private area would not be visible to the public, regardless of whether that person is in a public or private place.[19] This protection of privacy is very relevant in cases of child sexual abuse images that are increasingly being captured on mobile cameras.”[20]

It is heartening to see that the section on child pornography (s.67B)[21] has been drafted with some degree of care. It talks only of sexualized representations of actual children, and does not include fantasy play-acting by adults, etc. The cursory reading of the section however is ambiguous on the aspect as to whether a drawing depicting children can also be deemed to be inferred as an offence as per the concerned section. Unfortunately, the section covers everyone who performs the conducts outlined in the section, including minors. So a person who is capable of having sex legally may not record such activity (even for private purposes) until he or she turns eighteen.[22]

SUGGESTIONS AND RECOMMENDATIONS

While the ‘Sweetie’ sting operation to trap paedophiles shocked the world by busting a global child pornography ring, what is especially shameful is the fact that India was placed third — only after the US and the UK — in terms of adults watching the computer-generated Filipino child perform sexual acts online. The US had 254 adults watching the video live while the UK had 110. India was a close third with 103.[23]

Some of the measures that could be a step towards fighting child pornography on the cyberspace could be mentioned as such:

A. *Increased patrolling on the internet:*

The investigation ambit to grow there must be a mechanism more skilful than the perpetrators to follow them up. Keeping in mind the privacy aspect there has to be a sophisticated and effective manner to increase the oversight of the internet.

B. *Better police training:*

i) Better technical training:

It is disheartening to note that police lag behind in the skills to match with the offenders as far as cyberspace crimes are concerned. There has to have a efficient training facility. The offenders when caught should be coerced to share their skill with

the police professional as well. The personnel should be updated walk with the advancement on the internet front.

ii) **Sharing and cooperation within departments:**

There should be close nexus with the departments and police personnel to fight this crime. And there must be the proper exchange of information.

C. Key Escrowed Encryption

Key escrowed encryption is controversial.[24] So controversial, in fact, that the politicians are now seeking other, more politically expedient means to get the same information.[25] This, however, is a mistake. Key escrowed encryption is a constitutionally viable plan that should be implemented as part of a reasonable research procedure. If the keys to all encryption codes are placed in the hands of a "trusted third party," and government access is strictly limited to situations when a valid search warrant has been issued, as has been proposed, then individual privacy is no more encumbered than under pre-existing wiretap laws.[26] Thus, since it would not be detrimental the accused and would facilitate law enforcement by enabling them to de- scramble transmissions by child pornographers, escrowed encryption should be developed and used.[27]

D. The Technical Aspect:

Keeping an obscenity score of IP addresses will help come out with exact idea of its history of traffic. The p2p sharing mechanism may become more malicious in the coming future. The p2p sharing nodes have to be specifically monitored though the network infrastructure is challenging but it has to be effectively addressed.

E. Universal Enforcement Jurisdiction:

The extradition of child pornographers should become specifically less stringent and be followed with vigorous approach. The foreign countries should cooperate taking whatever measures could be taken.

F. International Cooperation:

There has to be harmonious cooperation globally. The perpetrators could belong to any country and they target anywhere in the world .the international child pornographers ring to be caught there has to be an efficient and effective consensus of laws and allowance of sharing information. Law enforcement agents should not be impeded while investigation in foreign countries and for that to be the international law allegiance is very important.

Differences in the definition of cyber child pornography have been complicating the prosecution of cyber child pornographers around the globe, and

the problems of jurisdiction is stubborn and here to stay without multilateral consensus. Recent international efforts of experts trained in cyber child porn detection and coalitions formed that encompass wider geographic ranges may enable law enforcement agencies to work together more effectively to curb this heinous and violent crime.[28]

A review of the history and current status of child pornography laws yields several conclusions. First, there continues to be a strong political appetite to expand the laws' scope and its punitive consequences. Second, legislators and criminal justice personnel are strongly inclined to enforce these laws. Child pornography initiatives generally attract positive media attention and exemplify a strict moral agenda from the government. Third, the rhetorical discourse of the child pornography crusade has shifted its focus from the harm posed to actual children to one of moral depravity of offenders. It has also moved to a risk-based presumption that child pornography consumers are at high risk of molesting children.[29]

While some view pornography as normal and an obvious thing there is an understanding and common consensus that child pornography is a diabolic and damning aspect of it. The internet making it freely available to wider audience and dissemination becoming largely anonymous has made it easier for the indulgence of those to savour in the commission of perpetrating the heinous offense of child pornography. It is a matter of grave concern as a child of tender age is unaware of the ways of the world and becomes a very easy prey. We cannot just rely on the police or law enforcement agencies to work out their ways through this dark alley of child pornographers ring. The parents should take responsibility and inculcate in the children a nature of being cautious in the use of internet and keep a tab on their usage with reasonable space to their privacy.

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