

CHILD PORNOGRAPHY : A COMPARATIVE STUDY OF INDIA, USA AND EU

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INTRODUCTION

Child pornography² is a multi-billion dollar international sex trade industry. INTERPOL has cited Germany as one of the major producers of child pornography, with the Netherlands and the United Kingdom as the major distribution centers. United States is one of the largest markets of demand for child pornography, though more interest has shifted to South East Asia in recent years. The development of child pornography is fuelled by mainly two factors, the inception and availability of home movies, videos, digital cameras, computers and software, which made the making of child pornography relatively cheap and secondly, the development of Internet technology, which has increased ease of production and distribution of this material to amazing heights.

There is constant debate as to how the child pornography industry can be stopped. One of the major aspects of the debate is answering seemingly simple question: how does one define the age of a minor? This is because; different countries set different age for "hardcore" pornography and "soft-core" pornography.

Commonly, scenes are more important than plot in determining whether a film or play constitutes child pornography. However, most countries' laws provide an exception for materials that have artistic merit, example being *Lolita* (the novel and films).

On September 24, 1999, Michael David Rostoker was arrested in San Jose, California for "traveling to engage in sex with a minor and enticing someone under 18 into sexual activity."³ He was a forty-one-year-old engineer, chief executive officer of a software

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² *Child pornography on the internet: an examination of the international communities proposed solutions for a global Problem* , George Ivezaj, 8 MSU-DCL J. Int'l L. 819

³ *Erin McCormick & Jim Herron Zamora*, Slave Trade Still Alive in U.S.: Exploited Women, Children Traffic[k]ed From Poorest Nations, S.F. Examiner, Feb. 13, 2000, at A1, available in *LEXIS, News Library, S.F. Examiner File*. He was charged with section 18 U.S.C. ' 2422 (1986) (prohibiting anyone from "using the mail or any facility or means of interstate or foreign commerce ... [to] knowingly persuade [], induce

research company and a well-known and respected patent attorney. Yet, socially, he had a secret of sorts. His sexual partner was a child who lived in Vietnam, twelve hundred miles from his home in San Jose. He was indicted and held on a two million dollar bond.

In another California case, police posed as a thirteen-year-old girl and apprehended thirty-four-year-old Patrick Naughton, an executive vice-president of Infoseek Corporation, for attempting to have sex with a "child."⁴ Infoseek is Disney's partner in the Go Network Internet portal. Once a "rising star" at Disney, he had been hand-picked to head up Disney's new search engine for youth, Go.com. Naughton also assisted in the development of ESPN.com. Disney has always aggressively defended its position as a leader in the protection of children using the Internet and specifically its portals, Disney.com and ESPN.com. The undercover police officer repeatedly told Naughton that "she" was only thirteen. Still, Naughton insisted on meeting for a physical relationship. He was nabbed by police at a Santa Monica pier waiting to meet the "girl." The police seized his laptop, which stored sexually explicit images of children.

CHILD PORNOGRAPHY ON THE INTERNET

Child pornography seemingly is an underground and isolated activity⁵. Dig deeper and one is accosted with disturbing numbers that sicken and frighten individuals.

Approximately [1,500] people from around the world join the preteen erotica trading

[], entice [], or coerce [] any [minor] individual ... to engage in prostitution" or other sexual crimes).

It was not an isolated incident. In the case of "*Bruce Orwell & Kara Swisher*", Infoseek Executive, Due for Disney Post, Charged With Luring Minor on Internet, *Wall St. J.*, *Sept. 20, 1999*, at B8. Patrick Naughton was convicted in December of 1999 under the Child Pornography Protection Act of 1996. Id;

Also Lisa Bowman, Patrick Naughton Faces Retrial (*Jan. 5, 2000*) <<http://www.zdnet.com/zdnn/stories/news/0,4586,2417667,00.html>>; Dennis Taylor, Sex and the Executive: Recent Cases Involving Executives and Minors Could be Related to Job Stress, *Bus. J.*, *Dec. 17, 1999*, at 21

⁴ Bruce Orwell & Kara Swisher, Infoseek Executive, Due for Disney Post, Charged With Luring Minor on Internet, *Wall St. J.*, *Sept. 20, 1999*, at B8. Patrick Naughton was convicted in December of 1999 under the Child Pornography Protection Act of 1996. Id; see also Lisa Bowman, Patrick Naughton Faces Retrial (*Jan. 5, 2000*) <<http://www.zdnet.com/zdnn/stories/news/0,4586,2417667,00.html>>; Dennis Taylor, Sex and the Executive: Recent Cases Involving Executives and Minors Could be Related to Job Stress, *Bus. J.*, *Dec. 17, 1999*, at 21 (discussing the way stress may prompt sexual compulsiveness).

⁵ Pedowatch, Pedophilia on the Internet: The IRC's Undernet provides pedophiles a safe bastion, where the trading of child pornography is socially acceptable (visited 5/9/99) <http://pedowatch.org/pedo_text.html>. IRC channels are not unlike the chat rooms you see offered by Internet providers like AOL or ICQ. IRC channels are internationally accessible and are often seen as a "medium free for thought and communications." The difference is that these chat rooms are not "proprietary", meaning they are accessible to anyone who has an Internet connection and have very little in the way of regulations.

channels on Internet Relay Chat's Undernet each day. "Paedophiles[sic], defined as those who are primarily sexually attracted to prepubescent children, account for a significant portion of the market. However, there is a new growing segment of child pornography consumers."

There are over 4 million web sites.. Over 20% of on-line child pornography is limited to Usenet⁶ newsgroups and bulletin boards. It is largely within these groups and chat rooms where pedophiles produce sell and exchange this illicit information. Child pornography is prevalent and accessible to everyone at anytime. The problem is how does the global community stop this infestation into the Internet?

There is a fine line countries need to walk when they dealing with the concept of regulating the Internet. If regulation begins, where does it end? The Internet can be equated to a Pandora's Box. Once it is opened, how does one close it? Restrictions on the Internet may cause the same problems. The United States, the European Union and its member states, in particular the United Kingdom and Germany, each take their own stance on whereto draw the line, for the time being. However, as the Internet changes, so will governmental laws and legislation.

UNITED STATES APPROACH

While the United States has taken a "hands off" approach toward regulating the Internet in the past, it has become more aggressive, and has begun to step in "when it makes sense" in policing and convicting those individuals in the child pornography industry. Congress created a comprehensive statute, the Child Pornography Prevention Act, defining child pornography quite broadly. It defines child pornography as any visual depiction of a minor; any person under 18 years old, which is produced by any means, of sexually explicit acts or conducts where:

its production involved the use of a minor engaging in sexually conduct, or;

⁶ "Usenet is a collection of online discussion groups that are accessible from a large number (at least tens of thousands) of Internet sites." Usenet Address: What is Usenet? (visited 05/15/00) <<http://usenet-addresses.mit.edu/usenet.html>>.

such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;

such visual depiction has been created, adapted or modified to appear that an 'identifiable minor' is engaging in sexually explicit conduct; or

it is advertised, distributed, promoted or presented in such a manner as to convey the impression that it is a visual depiction of a minor engaging in sexually explicit conduct.

By drawing on a broad definition of what is and is not child pornography, the United States allows the court system to punish pedophiles across the board, and an effort to not allow any one criminal to slip through the cracks. One of the main concerns of this new act was that pornographic photographs of children that are computer generated would be subject to the same scrutiny that the "real" images would be. The concern was that this law would be considered too broad and would come under scrutiny in the court system. Congress argued that "[C]omputer-generated child pornography results in many of the same types of harm, and poses the same danger to the well-being of children, as photographic child pornography, and provide a compelling governmental interest for prohibiting forms of child pornography " The Court of Appeals echoed the same attitude by holding that the Child Pornography Prevention Act's purpose to prohibit this type of material "was intended to target only a narrow class of images: visual depictions which are virtually indistinguishable to unsuspecting viewers from unretouched [sic] photographs of actual children engaging in identical sexual conduct."

Though the United States has a clear and defining law of what is and what is not child pornography, it remains reluctant to pass any legislation that would require the Internet Industry to be accountable for the information on the Internet that its servers provide.

THE EUROPEAN COMMUNITY AND THE MEMBER STATES

The European commission has always recognized that the Internet, because it has become so essential to our society, may need to be free of any regulations and those concerns may

actually outweigh the problems with pedophiles on the net.⁷ However, this view suffered major setback when two cases of child pornography became highly publicized.⁸ Due to general European outrage, the European Union shifted into high gear to attempt to enforce greater control over the Internet. While the EU attempts to gain a stronger grip, most of its efforts have been focused on child pornography.

On January 25, 1999 the Multiannual Action Plan on promoting safer use of the Internet by combating illegal and harmful content on global networks, was adopted by the European Parliament (EP) and the Council of the European Union (CEU).⁹ While the EP and the CEU recognized that "the Internet offers positive benefits in particular in education, by empowering consumers, lowering the barriers to the creation and distribution of content and offering wide access to even richer sources of digital information." It also recognized that it was essential to make the Internet a safer place for children. The concern was that though the numerical amount of harmful and illegal content that traveled through the Internet seemed small, that amount could have adverse effect on the "necessary favorable environment for initiatives and undertakings to flourish." The EP and CEU stated that the Internet was to be a safer place, and that they would combat the illegal and harmful information, particularly child pornography, with their new plan.

⁷ 1997 WL 263531 (C.E.A.) Official Journal of the European Communities Information and Notices, 97/C91/108

⁸ Barry James, 2 Pedophilia Cases Stir Action by EU: Dutch Investigate an Internet Ring; Belgians Seize Video Cassettes, International Herald Tribune (visited 5/10/00) <http://www.iht.com/IHT/BJ/98/bj071898.htm>. National Morkhoven Task Force, an anti-pornography group, was the ones who actually revealed the Dutch porn-ring. The images found in the raid, included pictures of infants as well as older children being raped and abused.

⁹ Action Plan on Promoting Safer Use of the Internet, Decision No. 276/1999/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 January 1999, adopting a Multiannual community Action Plan on promoting safer use of the Internet by combating illegal and harmful content on global networks. (visited 5/5/99) <<http://www2.echo.lu/iap/decision/en.html>>. This

The plan¹⁰ called for cooperation from the Internet industry and the member nations to set up voluntary industry self-regulations and content-monitoring systems, to help limit the flow of illegal material on the Internet. It asserts that "hot-line" reporting mechanisms will support these self-regulations in cooperation with local law-enforcement by allowing the public to call in, reporting sites that contain illegal material.

Part of this new plan was based upon the continued support of the EU on the self-regulation approach to child pornography on the Internet, with the hope that the Industry itself would police itself. It is true that self-regulation is needed in the battle against child pornography; governments alone cannot police and tend to every area of the Internet where pedophiles may hide.

It is the belief of the CEU that in order to have an actual effective battle in this war against child pornography, there must be an increased and well functioning co-operation between all nations. Internet criminal activity can be punished swiftly and with an ease of administration would allow extradition and judicial cooperation. Article 9 of the proposed treaty¹¹ clearly lays out what the offenses of child pornography are and a proposed definition of a minor: [j8] Article 9 - Offenses related to child pornography

¹⁰ This plan is to continue for four years, beginning January 1, 1999 and will go until December 31, 2002. The financial framework for this plan is an estimated ECU 25 million (approximately \$25-27 million U.S.). See, Mr. G. M. Borchardt, Director European Commission, Taking Stock: Activities of the European Commission in the Fight Against Child Pornography, The International Conference Combating Child Pornography on the Internet, 29 Sept. - 1 Oct. Vienna, Hofburg (visited 5/10/00) <http://www.stop-childpornog.at/pa_borchardt.html>.

The Action Plan distinguishes four main activities:

- Creating a safe environment, in particular by setting up a European network of hotlines and encouraging self-regulation and codes of conduct;
- Developing filtering and rating systems, by demonstrating their benefits and facilitating international agreements on rating systems;
- Encouraging full-scale awareness actions;
- Support actions, such as assessing legal implications, co-ordination with similar international activities and evaluating the impact of Community measures.

¹¹ "Draft Convention on Cyber-Crime", First draft of International Convention released for Public Discussion, Council of Europe (visited 5/11/00) <<http://conventions.coe.int/treaty/en/projects/cybercrime/htm>>. "This legally-binding text aims to harmonise[sic] national legislation in this field, facilitate investigations and allow efficient levels of co-operation between the authorities of different States.

1. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law when committed without right and intentionally the following conduct:

- ✓ offering, distributing, transmitting or [otherwise] making available child pornography through a computer system;
- ✓ producing child pornography for the purpose of its distribution through a computer system;
- ✓ possessing child pornography in a computer system or on a data carrier;

2. For the purpose of paragraph 1 above "child pornography" shall include pornographic material that visually depicts:

- a. a minor engaged in a sexually explicit conduct;
- b. a person appearing to be a minor engaged in a sexually explicit conduct;
- c. realistic images representing a minor engaged in sexually explicit conduct.

3. For the purpose of paragraph 2 above, the term "minor" is to be defined by each Party, but shall include in any case all persons under [14] years of age.

The general idea of the treaty is to bolster international co-operation when dealing with criminal matter via the Internet. It is the hope of the creators of this treaty that if uniform laws dealing with Internet crimes cannot be achieved, at least there can be reciprocal legislation and national laws so that criminals can be caught prosecuted and justice would be administered with relative ease. It should be noted that the drafters hope to achieve some clarification that the terms "pornography material" and "sexual conduct", with regard to children, should be governed by national standards. The purpose of the convention is established the minimum standard for each of the participating parties would have to attain in order to be in compliance with the treaty.

There is also a key element missing to this new proposal. The drafters of the treaty never address the Internet servers and their duties and responsibilities. Unlike Germany, which has imposed some liability on the ISPs, the EU is still holding on to the futile hope that the Internet Industry as a whole will help the crack down on child pornography. Yet there are no numbers or statistics that clearly show the Industry in Europe has made a true

effort in trying to combat child pornography on the Internet.¹² Where the European Union as a community has fallen short of punishing these criminals, the individual members such as the United Kingdom, Germany, France and the Netherlands have begun to exact the rules, laws and punishment these offenders deserve.

THE UNITED KINGDOM

The United Kingdom has not yet settled on a definition of pornography, but it has taken a stance on child pornography. The Protection of Children Act (PCA) 1978¹³ has not changed much since it was first adopted by Parliament. The PCA states that it is an offense for a person-

1. to take, or permit to be taken or to make, any indecent photographs or pseudo-photo-graphs or a child;
2. to distribute or show such indecent photographs or pseudo-photographs.¹⁴

Surprisingly, Parliament has not had to alter much of the laws dealing with child pornography, even in the face of Internet development. However, one of the main definitions that Parliament has had to alter was the definition of a photograph.¹⁵ The definition of a photograph did not include electronic data under section 7(4) of the PCA and was widely criticized. In response to cases and pressure from the public, Parliament ordered the Criminal Justice and Public Order Act 1994. Section 84(4) amended the PCA stating "data stored on a computer disc or other electronic means which is capable of conversion into a photograph." There have been only a few minor changes due to the

¹² Padraig O'Morian, Minister warns Internet firms on child porn, The Irish Times-On the Web, Mar. 15, 2000 (visited 5/10/2000) <<http://www.ireland.com/newspaper/ireland/2000/0315/hom24.htm>>. Ireland's Minister of State for Children "commenting on the failure by Internet providers to promote their own self-regulation initiative on child pornography on the home pages of their Websites."

¹³ Cyber-Rights & Cyber-Liberties(UK) Report, Who Watches the Watchmen: Part II - Accountability & Effective Self-Regulation in the Information Age, Relevant United Kingdom Legislation Dealing with Child Pornography (visited 5/6/99) <<http://www.leeds.ac.uk/law/pgs/yaman/child.htm>>.

¹⁴ Section 7(7) gives the definition of "pseudo-photographs." Under (7) pseudo-photos are any images, whether they are made by either camera or computer-graphics.

¹⁵ The United Kingdom prosecutors were unable to prosecute offenders of child pornography laws because they were creating photos using computer software, such as Adobe or MS Publishers. The offenders were superimposing the faces of children on to adult bodies or onto other children's bodies. At the time there was no law prohibiting such acts.

Internet, otherwise the laws in the United Kingdom have held steadfast. Despite the fact that the laws making child pornography illegal have not changed significantly, the United Kingdom has changed the way that it prosecutes those found guilty of such offenses. Section 160 of the Criminal Justice Act (CJA) 1988 has set the standard on how parties are found guilty of contributing to the child pornography industry,¹⁶ but it is surprisingly easy on the criminals in comparison to the United States punishment. While laws here in the United Kingdom are clear, "it is an offense for a person to have any indecent photographic or pseudo-photograph of a child in his possession," the sentencing is difficult to understand. The offense under 160 (1) is considered a serious offense, yet the criminal can only be subject to a maximum imprisonment of six months.

Despite such short prison sentences, the United Kingdom has taken an additional step towards regulating child pornography on the Internet. There is a new watchdog patrolling the Internet in the United Kingdom; the Internet Watch Foundation (IWF). The IWF began in 1996 to address child pornography on the Internet.¹⁷ "It is an independent organization which aims to implement the proposals jointly agreed by the government, the police, and two major United Kingdom Internet service provider trade associations, ISPA [[Internet Service Providers' Association] and LINX [London Internet Exchange]."¹⁸ The majority of the work comes from running its hotline facilities, which allows people who find illegal material on the Internet, an organization to report them to. Then the reports are verified by IWF and the police are notified and hopefully, that source of illegal material is removed from the Internet.

One of the more famous cases in the United Kingdom was "Operation Cathedral."¹⁹ In September 1998, the largest international investigation by the United Kingdom police²⁰,

¹⁶ Section 160 of the Criminal Justice Act 1988.

¹⁷ Review of the Internet Watch Foundation, (visited 5/5/99) <[http:// www.kpmgiwf.org](http://www.kpmgiwf.org)>. While the IWF began as an organ to help find all illegal material on the Internet, its primary focus deals with child pornography.

¹⁸ Since 1997 the IWF has been funded solely by the United Kingdom Internet Industry. Id. See also, Internet Safety Net to Tackle Child Porn, R3 Safety-Net - Rating Reporting Responsibility - For Child Pornography & Illegal Materials on the Internet, Sept. 23, 1996. <<http://www.iwf.org.United.Kingdom/about/R3Safety.html>>. LINX and ISPA have also established the Safety-Net Foundation. The foundation was established to take action against illegal materials found on web sites and in news groups.

¹⁹Operation Cathedral - September 1998 [Updated January 1999].

²⁰ UK - Eight in court over Internet porn, BBC News, January 7, 1999 (visited 5/10/1999) <http://news.bbc.co.UK/hi/english/UK/newsid_250000/250800.stm>. This may be the largest operation against pedophiles known to date.

over 100 people in 12 different countries, including the United Kingdom, Germany, the United States and Italy, were arrested with conspiracy to distribute child pornography.

GERMANY

"Germany has been the most active Member State pursuing censorship on the Internet and its related services."²¹ While the United States and the United Kingdom seemingly fight an endless battle with pedophiles, the Germans have decided to take matters into their own hands, by going right to the source of child pornography on the Internet, the Internet Service Providers (ISP's).

"A Munich court convicted the former head of CompuServe Germany, Felix Somm, on complicity charges for allowing the spreading of pornography over the Internet sentencing him to two years probation, as well as to pay a fine of about \$56,000 (100,000 marks)."²² The German legal system has decided to attack the source of the Internet child pornography, in conjunction with the providers of the Internet serve that allows for the exchange of this information. With the help of the recent Internet legislation, German authorities will be able to not only prosecute the offenders, but those that are allowing are essentially providing these pedophiles the service and ability to view the illegal material. On August 1, 1997 the German government released groundbreaking legislation on the Internet. "The Information and Communication Services Bill is the world's first attempt to give the Internet and other interactive information services a comprehensive legal framework."²³ One of the main points of this new act is the protection of children, and the tightening of rules regarding the collection of information and material on the Internet. It answers the question of who will be found liable for the illegal content on the Internet.

"The purpose of this Act is to establish uniform economic conditions for the various applications of electronic information and communication services." The new legislation

²¹ Patrick G. Crago, Fundamental Rights on the Infobahn: Regulating the Delivery of Internet Related Services Within the European Union, 20 Hastings Int'l & Comp. L. Rev. 467, 484

²² Wall Street Journal, German Court Convicts Former CompuServe Official In Pornography Case, Communications Media Center at New York Law School, June 1, 1998 (visited 5/7/99) <<http://cmcnlys.edu/Pubic/Bulletins/GCCFCSPC.HTM>>.

²³ Bruno Giussani, Germany, Advancing Communications Law, Seeks to Give Internet a Legal Framework, N.Y. Times (visited 5/5/99) <<http://codoh.com/newdesk/970617.HTML>>.

will require that providers be subject to German law in regards to the content they that is on their servers and that "[w]hoever makes available, on a commercial basis, electronic information and communications services which are based on transmission by means of telecommunication, shall appoint a commissioner responsible for the protection of minors " The act does point out that not all providers are the ones that are helping to distribute this illegal material stating "[p]roviders shall not be responsible for any third-party content which they make available for use, unless they have knowledge of such content and are technically able and can reasonably be expected to block the use of such content." In tandem with the new legislation, the German authorities have developed software that may aid in patrolling and protecting of the Internet, not only in Germany, but worldwide.

OBSCENITY ON THE INTERNET IN INDIA

The Indian Government has recognized the need for blocking obscene and pornographic websites. In an order dated 27th –February 2003, the central Government has laid down the procedure for blocking of pornographic websites.²⁴ The Computer Emergency Team-India (CERT- IND) has been appointed as the sole authority for issue of instructions in the context of blocking of websites.

CERT – IND, after verifying the authenticity of the complaint and after satisfying that action of blocking of the website is absolutely essential, has been empowered to instruct Department of Telecommunications (DOT) to block the website. DOT, under whose control the Internet Server Providers (ISPs) are functioning will ensure the blocking of websites and inform CERT- IND accordingly.

The IT Act represents an indirect attempt by India's government to impose restrictions on the freedom of speech and privacy on the Internet. As it reflects the prevailing political culture, the IT Act embodies the view that the Internet is something that can and must be regulated before it gets out of control. Section 67²⁵ of the IT Act is designed to deter

²⁴ The Official copy of the order can be accessed <http://cca.gov.in/documents/notificationsr181e.pdf>.

²⁵ § 67. This section, entitled "Publishing of information which is obscene in electronic form," provides, "Whoever publishes or transmits . . . in . . . electronic form, any material which is lascivious or appeals to . . . prurient interest or if [it] . . . tend[s] to deprave and corrupt persons . . . shall be punished . . . with

publication and transmission of obscene information in electronic form. Just like the U.S. COPA equivalent, this section departs from the test enunciated by the U.S. Supreme Court. Under Section 67, "any material which is lascivious or appeals to the prurient interest or . . . tend[s] to deprave and corrupt persons who are likely . . . to read, see or hear the matter . . . " is considered obscene. The section imposes dual punishment on offenders, including a fine and imprisonment up to a maximum term of ten years. Through the IT Act's passage, India's legislature ignored the "lewd, filthy and repulsive" and "preponderating social purpose" tests associated with earlier attempts at regulation. Section 67 retains only the "tendency to deprave and corrupt" test. It introduces two new standards, "lascivious" and "appealing to prurient interest," similar to COPA's introduction of new standards in the United States. These new standards even bear resemblance to COPA's provisions. In addition, Section 67 appears to be as vague as COPA yet remains unchallenged,²⁶ reflecting the emergence of a new regulatory standard for Internet speech in India.²⁷

India's courts have thus far been left out of the debate on the freedom of speech on the Internet. Consequently, India's regulators have had a seemingly free ride in their attempts to regulate the Internet. The apparent reasons for this could be summarized as follows: (1) The arbitrary blocking of websites (such as that of Shellshock and Dawn) lasted only temporarily and, therefore, eluded necessary testing by India's courts; (2) The blocking of Internet telephony sites did not constitute actionable harm for either the owners or their

imprisonment . . . and with fine . . ."

²⁶ The IT ACT, 2000 uses language similar to COPA with respect to the "prurient interest" provision.

²⁷ An online search for petitions challenging IT ACT, 2000 § 67 did not reveal any filings as of March 19, 2002. One interesting petition is the one pending in Bombay High Court, Writ Petition 2611 of 2001. See *Protecting Minors from Unsuitable Internet Material*, available at <http://www.bombaybar.com/cyberreport/cover.html> (last visited March 24, 2002). A letter from Jayesh Thakkar and Sunil Thacker to the Chief Justice of the Bombay High Court complaining about the proliferation of pornographic sites on the Internet was treated as a suo motu Writ Petition. The Division Bench of the High Court, presided over by the Chief Justice, passed an order appointing a Committee to suggest and recommend ways, measures, and means to protect/shield minors from access to pornographic and obscene material on the Internet. See *id.* The Committee comprehensively rejected the proposal for site blocking as being technically and legally unsound. The Committee's recommendations included requiring that minors be restricted to using machines in the common open space of Cyber Cafes and requiring that these machines be fitted with software filters providing for the maintenance of Internet Protocol address. See *id.* During the subsequent hearings, the Internet Users Association of India (IUAI) was permitted to intervene in the matter. On February 13, 2002, the High Court passed an order stating that the report by the Special Committee be made available to the public online for download to enable comments and suggestions. The matter stood over for further orders until April 13, 2002.

attempted users, as the majority non-Indian owners could not seek redress in India's courts, and standard VSNL user contracts explicitly prevented account users telephony and fax applications; (3) The IT Act's infancy necessarily means India's courts have not had an opportunity to scrutinize it; and (4) India's Civil liberties organizations are not well equipped to handle constitutional issues related to freedom of speech on the Internet.

INDIAN LAW REGULATING CHILD PORNOGRAPHY

As per to the Indian Information Technology Act 2000²⁸, Chapter XI Para 67, the Government of India clearly considers online pornography as a punishable offence. The Para states the following -

Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to one lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to ten years and also with fine which may extend to two lakh rupees.

The Indian Penal Code, 1860 section 293²⁹ also specifies, in clear terms, the law against Sale etc. of obscene objects to minors. As per the IPC, whosoever sells, lets to hire, distributes, exhibits or circulates to any person under the age of twenty years any such obscene object, as is referred to in IPC Section 292³⁰, or offers of attempts so to do, shall

²⁸ <http://www.mit.gov.in/itbillmain.htm>

²⁹ Sec. 293 Sale, etc., of obscene objects to young person – Whosoever sells, lets to hire, distributes, exhibits or circulates to any person under the age of twenty years any such obscene objects as is referred to in the last preceding section, or offers or attempts so to do shall be punished on first conviction with imprisonment of wither description for a term which may extend to three years, and with fine which may extend to two thousand rupees, and, in the event of second or subsequent conviction, with imprisonment of either description for a term which may extended to seven years, and also with fine which may extended to five thousand rupees.

³⁰ Sec. 292 Sale, etc., of obscene books, etc.

be punished with imprisonment for a term which may extend to three years, and which fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to seven years, and also with fine which may extend to five thousand rupees. It also states that it is a cognizable offence and the Magistrate is empowered to try any such case.

For the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it shall be punished with imprisonment, for the first instance, of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees.

INCIDENTS IN INDIA

Many of the recent incidents forced the Mallimath Committee to rethink about the law, and they have introduced an amendment to the act, which punishes the child pornography in it self. These incidents are:

Through internet chat room a man representing himself as 15 years girl before a 16 yeas old boy from 2002 to 2004 when the fact was that he was of 30 years age and a man. That boy ran away to his girl friend at Mumbai from Kolkata. Thereafter, 30 years old man (girl friend) sexually abused the victim, stole money from him and beat him up.³¹

³¹ For detail see <http://www.indian child.com>

One young Bengali model named Sonal Singh was arrested from Gujarat for distributing her pornographic images in chat-room and internet on November 2005. She was permanent resident of Srirampur, West Bengal.³²

Air force Bal Bharati School, Delhi; class(XII) student created pornographic site as revenge against his classmates (girls) and posted pornographic images of his classmates and lady teachers in internet. He was then suspended by school and arrested by Police under IPC and IT Act; though Juvenile Court allowed his bail thereafter.³³

In Delhi the CBI has arrested Director of a private Company on the charge of sending threatening and obscene e-mails to a woman and for posting her objectionable photographs on websites. He was remanded in police custody and produced before the Tis –Hazari Court on 16th March 2005 and then was remanded in judicial custody. This case was registered by Cyber Crime Investigation Cell (CCIC) of CBI under section 67 of the IT Act, 2000 and IPC on 9th March 2005.³⁴

As Indian Information technology law does specify any specific punishment in regards with these crimes. So every time this crimes predator escapes some how. So it is high time when we have to introduce some strict law in this relation.

SOLUTIONS AND SUGGESTION

APPLYING FERBER TO VIRTUAL CHILD PORNOGRAPHY³⁵

Ferber was a long-overdue step in the right direction toward the protection of children, the silent minority, who have all too often been ignored and abused throughout the world, including in the United States. The case involved a balance of the rights of the child subjects of child pornography and the free speech rights of pornographers. Because child

³² For detail see <http://www.NDTV.com>

³³ See Ananova news web page, crime, child welfare.

³⁴ CEO Bazee.com , the Concept of ISP, liability was introduced for the first time in India

³⁵ 32 Val. U. L. Rev. 207, Valparaiso University Law Review, Fall, 1997 PORN BY ANY OTHER NAME? A CONSTITUTIONAL ALTERNATIVE TO REGULATING "VICTIMLESS" COMPUTER-GENERATED CHILD PORNOGRAPHY BY Samantha L. Friel

subjects rarely have the power to look out for their own interests, the state's interest in protecting them is compelling.³⁶ A child may not be able to resist an adult pornographer who directs the child to engage in sexual conduct so that the materials can be produced. Unlike an adult, who chooses to earn a living by posing for pornographic pictures, a child very likely has little choice, and clearly no legal consent. Accordingly, in *Ferber*, child pornography was found to be without any sort of First Amendment protection. However, the category of speech that the Court created in *Ferber* is a deliberately narrow one, consisting only of "works that visually depict sexual conduct by children below a specified age." Virtual child pornography does not fall within this narrow definition, and it therefore cannot be assumed to be subject to the same regulations as child pornography³⁷. In virtual child pornography, no sexual conduct by children is occurring, as the images reflect either a completely imaginary child, or a real child, but one who has not engaged in any sexual conduct. Thus, the images are "virtual" as opposed to "real." The images only appear to represent real child pornography, but they are, in fact, different, practically and legally.³⁸

³⁶ In some circumstances, a level of governmental paternalism is necessary. Children, by the virtue of their age and inexperience, are usually not able to defend themselves from exploitation and abuse, and often their family structures offer no protection. The government therefore has a compelling interest in protecting children from sexual exploitation. *Ferber*, 458 U.S. at 764.

³⁷ Senator Orrin Hatch (R-Utah) stated: "Today, visual depictions of children engaging in any imaginable form of sexual conduct can be produced entirely by computers without even using the actual children. [T]he computer equipment and expertise required to produce such high-tech kiddie porn is readily available to any individual. All a pornographer ... needs is a personal computer with a few inexpensive and easy-to-use accessories, such as a scanner ... image editing and morphing software costing as little as \$50 to \$100, all available at virtually any computer store or through mail-order computer catalogs.

Hearing on S.1237 Child Pornography Prevention Act of 1995 Before the Senate Judiciary Comm., 104th Cong. 870 (1996) (statement of Orrin Hatch, U.S. Senator)

The ability of pornographers to splice a legal photograph of a child with a legal photograph of adult pornography (to make it appear as though the child is engaged in sexual conduct) could be a way to circumvent child pornography laws. (citing Joshua Quittner, *Computers Customize Child Porn*, *NEWSDAY*, Mar. 6, 1993, at 74). Soon, the new technology will become wide-spread: "Eventually, inexpensive software and hardware will be available which will allow one to create photo-realistic animated images in the privacy of one's own home." David B. Johnson, *Why the Possession of Computer-Generated Child Pornography Can Be Constitutionally Prohibited*, 4 *ALB. L.J. SCI. & TECH.* 311, 316 (1994).

³⁸ The "virtual" vs. "real" argument is explored in virtual reality texts. Most people are able to distinguish between reality and fantasy in their everyday lives, but when the "virtual" becomes so lifelike that it almost passes for the real, it can be easy to assume that there is "virtually" no difference between the two. Computer-manipulated images are like virtual reality in that they confuse the senses, even to the point where the viewer believes that what she is seeing is in fact a "real" representation of an event that has actually occurred. *Id.* However, it does not logically follow that, just because the senses are confused, the "virtualness" can be ignored.

CONCLUSION

It would be foolish to think the Internet can be free of all illegal materials. Part of what makes the Internet valuable is the vast amount of information that is available to us. Information that may have gone undiscovered or unnoticed without it. Technologic advancements are bringing to the world newly integrated messaging systems, more development of E-commerce, business television; high speed digital internet access, better GroupWare tools and the development of new multimedia technologies. All of these tools and advancements are in part or solely due to the Internet. With so much more to offer us, why would we want to regulate the Internet and possibly stunt its growth.

Regulation may initially stifle the Internet's growth, but it will grow and prosper with or without regulations. Besides, so many other aspects of our daily lives are regulated; money, banks, interest rates, business, schools, water, phones, electricity, land, and even airspace. Why should the Internet be any different? There is a fear that if we begin to regulate the Internet, we will be destroying it at the same time. There are arguments that the Internet is inherently chaotic and that is what makes it what it is. But as the Internet grows and it's technological wonder, so do all of the bad things that come with it.

Perverts are moving from the playground to the Internet and they are making their way into everyone's lives. While the Internet Industry provides parents with filtering systems like CyberWatch, Netnanny, and Cybernanny, the only thing these systems have accomplished is helping people avert their eyes away from the real problem. What some people view as pornography, others view as quite normal. Nevertheless, there has to be some consensus of what is child pornography, and we need to come up with a way to stop the exchange of such materials on the Internet. Germany has, to this point, taken the greatest strides in doing so. By holding the Internet providers responsible for the information, they allow their subscribers to exchange information free from illegal or illicit images. Holding ISP's liable to laws, there will be a huge decrease of the availability of child pornography on the Internet. The European Union and its member states also need a greater number of specialized police forces to deal with child

pornography. Few countries have them, the UK and Germany are the exception to the rule. Not enough is being done for these children.

We need to step carefully into the next millennium. Placing too many restrictions on the Internet could be counter-productive. There is a fine line between protecting the interests of children with the interests of the world. Too much restriction may prove fatal to the Internet commerce. A type of commerce we are becoming more dependent on day to day. We need to recognize that while the Internet is capable of providing a place for the exchange of illegal and harmful material, it is has become an essential tool in our day to day lives. A tool who's purpose is to facilitate ideas, the exchange of knowledge, and the freedom to fly across the world in the blink of an eye.