



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2023 – ISSN 2582-7820

Editor-in-Chief – Prof. (Dr.) Rishikesh Dave; Publisher – Ayush Pandey

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Child Pornography and Computer-Generated content under Indian Laws

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Received 21 January 2023; *Accepted* 10 February 2023; *Published* 13 February 2023

This paper discusses the effect of Indian law on the animated depiction of child pornography and other virtual forms of it. The evolution of child pornography is dealt with under Indian Law. The paper discusses the liability for depicting child pornography in the virtual animated platform under the Information Technology Act and POCSO. The article also discusses the various needs of the hour issues addressed through judicial pronouncements. The article discusses the prevailing difference between pseudo-photographs and animations. Multiple legislations and conventions that identify such forms of abuse and the contrary opinion that fails to cover such issues are emphasized. The article highlights different aspects of dealing with child sexual abuse material and the liabilities of content creators. Such graphical and animated content is seen as a culture of expression, where critics support such platforms to help budding artists test and trial their amateur skills. Thus, such content is encouraged to help growing artists in a few countries. The article discusses the remedies and recommendations that might help mitigate the issue.

Keywords: *child sexual abuse, csam, graphical csam materials, virtual child pornography.*

INTRODUCTION

The rise in incidents of child pornography paints a bleak picture of child sexual abuse in India on the internet. The data analysis between Lok Sabha 2021 and NCRB 2021 shows an increase in

incidents from 738 (2020) to 969 (2021)¹. It is cited that child pornography is an eight-billion-dollar industry. Although the increased report of such offenders and happenings of such offences are an improvement in the usage of the infrastructure laid out for the prevention of child sexual abuse, the alarmingly increased number of scams is the epitome of a progressive society. Mainly owing to the fewer convictions in cases of child sexual abuse, the offenders have adopted new ways and technology under the growth of digitisation among people. Cyber child pornography, also known as Child Sexual Abuse Material, is one type of cybercrime that is facilitated, arranged, and managed within cyberspace. As a result of the Internet's pervasiveness, this crime has become more common in recent years (CSAM). Child pornographic content includes genuine and computer-generated photographs and photos of children under eighteen engaging in actual or simulated sexual conduct. It also graphically or visually represents minors.

This paper focuses explicitly on child sexual abuse material that depicts the animated and graphical version of child pornography. Since the wake of the Internet and technology, the pseudo-photographic material subject has received much attention in research worldwide. However, the use of non-photographic material, such as lolicon or shotacon hentai, manga and anime (Japanese cartoons or animation which are highly publicised culturally symbolic media depicting the sexual abuse of young girls and young boys), or the "age play" in virtual worlds like Second Life, is an emerging problem for law enforcement. Recent developments in computer graphics and modelling have led to the creation of complex online environments that some have abused to create and distribute realistic virtual representations of child sexual abuse, potentially feeding the demand for such content and the portrayal of sexualised virtual interactions.

¹ Orin Basu, 'India witnessed 17-fold rise in child pornography cases, UP & Kerala on top' (*Zee News*, 2022) <<https://zeenews.india.com/india/india-witnessed-17-fold-rise-in-child-pornography-cases-up-kerala-on-top-2512885.html>> accessed 18 January 2023

INTERNATIONAL CONVENTIONS ON CURBING CHILD PORNOGRAPHY

Many critical International Conventions² address child pornography as an offence and have set laws that make it legally binding.

- **The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2002³**

Child Pornography is defined as "any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child primarily for sexual purposes" under Article 2⁴ in the UN Optional Protocol to the Convention on the Rights of the Child in 2002. This far is a more inclusive definition mentioning any representation of a child in a sexually explicit activity, be it a representation of any sexual part of a child.

- **The Convention On Cybercrime, 2001, also known as The Budapest Convention⁵**

The Budapest Convention establishes criminal penalties for unauthorised access, tampering with data or systems, and child pornography. According to the Convention on Cybercrime Art (9.2.c)⁶, "realistic photos depicting a youngster engaging in sexually explicit behaviour" are child pornography. The Convention requires countries to take measures to protect children from sexual exploitation and abuse, including efforts to prevent the production and distribution of child pornography.

- **The Council of Europe's Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, 2007⁷**

² Vienna Conference on Combating Child Pornography on the Internet 1999

³ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography 2000 UN Doc A/54/49

⁴ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography 2002 (GA res A/RES/54/263), art 2

⁵ Convention on Cybercrime 2001, ETS No 185

⁶ Convention on Cybercrime 2001, ETS No 185, art 9.2

⁷ Lanzarote Convention, Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse 2007, CETS No 201

The Convention identified that creating non-photographic child abuse pictures isn't a concurrent record of an abuse scenario, but it's also possible that they are memories of actual events involving children who can be identified. And even in situations when the abuse scenario is entirely imaginary, the result of a person's imagination, say, exposing a kid or a young person to such information, may seriously injure them and, in certain circumstances, play a role in grooming. The criminalisation of "simulated representations or realistic pictures of a non-existent kid" is optional in the Council of Europe Convention on the Protection of Children, International Convention, 2007.⁸

INDIAN LAWS DEALING WITH THE ANIMATED DEPICTION OF CHILD PORNOGRAPHY

Information Technology Act, 2000⁹ and Prevention of Child Sexual Offences Act, 2012¹⁰ deal with Child Pornography in India. There are a few other laws under Indian Penal Code that prohibit obscenity. Also, a few other laws, such as the Indecent Representation of Women (Prohibition) Act, 1986¹¹, The Young Persons (Harmful Publications) Act of 1956¹², makes it illegal to distribute, sell, or display publications that depict young people committing any crime, including obscenity¹³.

POCSO Act, 2012: The Indian Government passed the Protection of Children from Sexual Offences Act, 2012, which criminalises child pornography in India. The Act brought about the definition of "child pornography" under sec 2 (1) (da)¹⁴. According to the Act, "Child pornography" refers to any visual representation of child sexual activity, including

⁸ Dr. Victoria Baines, *Online Child Sexual Abuse: The Law enforcement Response* (ECPAT International 2008)

⁹ Information Technology Act 2000 (India)

¹⁰ Prevention of Child Sexual Offences Act 2012

¹¹ Indecent Representation of Women (Prohibition) Act 1986

¹² Young Persons (Harmful Publications) Act 1956

¹³ Rahul Hemrajani, *Research Note on Online Child Pornography Law in India* (SSRN, 2017) 2-3

¹⁴ Prevention of Child Sexual Offences Act 2012, s 2(1)(da)

photographs, videos, and digital images, computer-generated images that are indistinguishable from real children and manufactured, adapted, or manipulated to seem like children.¹⁵

Section 11 of the POCSO Act¹⁶ defines child pornography as any visual depiction of sexually explicit conduct involving a child, including the creation, distribution, or possession of such material. Section 14 of the Act¹⁷ focuses on the subject of child pornography. It prohibits and criminalises the use of a child for pornographic purposes in any form of media, such as a) portrayal of a child's sexual organs; (b) use of a child performing actual or simulated sexual actions (with or without penetration); and (c) the indecent or obscene representation of a child.

Sections 14¹⁸ and 15¹⁹ provide for the punishment of such acts ranging from 6 years to life imprisonment, depending upon the type of offence. The Act provides for a sentence of imprisonment for a term not less than five years, which may extend to 7 years, and a fine for the first conviction, and in the event of a second or subsequent conviction, with imprisonment of a term not less than seven years, which may extend to life imprisonment and fine.

IT Act, 2000: The amendment of 2008²⁰ came about with laws that deal with child pornography, before which there was no specific law addressing the issue.

Production, publication, and distribution of child pornography are all prohibited by the IT Act. Any "text and digital photos," "abuse referring to a sexually explicit act", and "depicting children in an obscene, indecent, or sexually explicit manner" are all considered to be "**production.**" Sec 67B²¹ of the Act provides for punishment of an act for electronic publication or transmission of content showing children engaging in sexually explicit activity, etc. The Act covers not only

¹⁵ PTI, 'POCSO Act: Govt defines child pornography, brings digital or computer generated content under it' (*Financial Express*, 2019) <<https://www.financialexpress.com/india-news/govt-defines-child-pornography-brings-digital-or-computer-generated-content-under-it/1641214/>> accessed 18 January 2023

¹⁶ Prevention of Child Sexual Offences Act 2012, s 11

¹⁷ Prevention of Child Sexual Offences Act 2012, s 14

¹⁸ PTI (n 15)

¹⁹ Prevention of Child Sexual Offences Act 2012, s 15

²⁰ Information Technology Act 2008

²¹ Information Technology Act 2000, s 67B

electronic media but also text-based materials. Dissecting the provisions of 67B gives a broad spectrum of inclusivity and exceptions mentioned in the provisions.

67B (a)²², The publication or transmission of any electronic content that shows minors engaging in sexually explicit behaviour is prohibited by this law. This subsection's scope also extends to those who assist in the Act of publication or transmission. 67B (b)²³ provides that creating text or digital pictures, gathering information, searching for it, browsing it, downloading it, promoting it, exchanging it, or disseminating it in any form of electronic media that shows minors in an offensive, indecent, or sexually explicit way.

EXCEPTIONS UNDER THE PROVISION

Sec 67B (i)²⁴ and 67B (ii)²⁵ provide for the exceptions extending their scope towards sec 67²⁶, 67A²⁷, and 67B²⁸,

- If publishing of a book, pamphlet, paper, essay, drawing, painting depiction, or figure is established to be justified as being in the interest of science, literature, art, learning, or other matters of general concern;
- Which is legitimately held or utilised for religious or cultural heritage purposes.

The punishment for the first conviction is imprisonment for a term not less than five years, which may extend to 7 years, and with a fine which may extend to 10 lakh rupees and in the event of a second or subsequent conviction, with imprisonment of either description for a term not less than seven years, which may extend to imprisonment for life and also with fine which may extend to 10 lakh rupees. In the case of **P.G.Sam Infant Jones v State**²⁹, the Madras High Court maintained that, While it is lawful to view adult porn, it is not legal to view child porn since

²² Information Technology Act 2000, s 67B(a)

²³ Information Technology Act 2008, s 67B(b)

²⁴ Information Technology Act 2008, s 67B(i)

²⁵ Information Technology Act 2008, s 67B(ii)

²⁶ Information Technology Act 2008, s 67

²⁷ Information Technology Act 2008, s 67A

²⁸ Information Technology Act 2008, s 67B

²⁹ *Sam Infant Jones v State* CRL OP(MD) No 7426 of 2021

"section 67-B of the Information Technology Act, 2000 penalises any sort of activities related to child pornography."

CRITICAL ANALYSIS

THE HARM PRINCIPLE STRETCH

In the case of child sexual abuse material that is graphical/computer generated, the harm principle comes into play when critics cite that there are no actual children abused or harmed in the making of it. This popular notion has taken advantage of people who support the generation of such materials, catering to people's fantasies in a "harmless way". In countries like the UK and the US, it is illegal to use pornographic materials that use cartoons or pseudo photographs that do not involve actual children. In the US, "depictions that are drawings, cartoons, sculptures, or paintings representing children or adults" are protected by the PROTECT Act. There are criticisms that the absence of a child victim makes the offence contrary to the harm principle in that situation³⁰. The debate explains why certain nations, including Japan, do not forbid such virtual materials.

THE MISPLACED CONCERN BETWEEN FICTION AND REALITY

People have their conceptions of fantasies and realities. Thus, convictions based upon pseudo-photographs or non-photographs, such as cartoons and animations of child sexual abuse, has led to contrary opinions of how law and conventions are interrupting people's thought process and fantasies³¹. While the assertion takes its backing with freedom of expression and against policing against people's way of thought, the genres of such porn explicitly have abusive material such as rape and incest.

³⁰ Martin Kwan, 'The crime of possessing or viewing child pornography: Cannot always agree on who is harmed?' (*Criminal Law Blog, NLU Jodhpur*, 2022) <<https://criminallawstudiesnluj.wordpress.com/2022/01/14/the-crime-of-possessing-or-viewing-child-pornography-cannot-always-agree-on-who-is-harmed?EF%BF%BC/#:~:text=The%20harm%20principle%20justifies%20criminalization,effect%20seeks%20to%20protect%20foreigners>> accessed 18 January 2023

³¹ Hariom Tiwari, 'Hentai, Child Porn, and India' (*Cyber Blog India*, 2021) <<https://cyberblogindia.in/hentai-child-porn-and-india/>> accessed 18 January 2023

NEWLY INTRODUCED TECHNOLOGY A MENACE

With the growth of petitions and criticisms against the animation and blanket ban on child sexual abuse materials, technology has already given rise to many other loopholes to work its way around the present laws. People have started using deep-fake technology that uses fabricated images using artificial intelligence. Using a child's face on an adult body makes applying current laws and censorship difficult. It becomes hard to distinguish between an adult and a child. AI-produced child abuse images can now open in the market since illustrative child abuse images are currently not under the ambit of laws that prohibits child sexual abuse materials. Such conduct errs on the side of lawlessness.

BLOCKING OF ONLINE CONTENT ON THE GROUNDS OF PORNOGRAPHY

According to a report by Software Freedom Law Centre (SFLC)³², pornography, child sexual abuse content, and obscenity was the third leading reason for blocking. Between 2015 and 2022, approximately 1,065 websites were prohibited on this basis. According to the report, MEITY blocked 857 websites after the Uttarakhand High Court ordered that any websites or online content that featured pornography, particularly child pornography, be prohibited. In addition, 238 websites were disabled in 2016 due to their content, which included porn, vulgarity, and child sex abuse.

INTERMEDIARY LIABILITIES

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021³³ ("IT Rules") emphasise the importance of intermediaries in the information technology industry. In the **Union of India v Kamlesh Vaswani**³⁴, 2013, a PIL petition was submitted calling for a ban on pornography in India. A directive to the Union Government to "treat watching of porn movies and sharing as non-bailable and cognisable offences" was also requested in the

³² SFLC, *Finding 404: A Report on Website Blocking in India* (Software Freedom Law Centre 2023)

³³ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021

³⁴ *Union of India v Kamlesh Vaswani* WP No 177/2013

appeal. The Department of Telecommunications ordered ISPs to prohibit over 800 websites reportedly hosting pornographic content throughout the hearings.

This case came about despite concerns about **privacy and freedom of speech** being raised before the Supreme Court. The Government countered that the petitioners had provided the DoT with a list of websites and that they had banned those websites without conducting any due diligence. The prohibition was lifted following a lot of backlashes. Under Section 79³⁵ of the Information Technology Act and the Information Technology (Intermediaries Guidelines) Rules of 2011³⁶, Internet Service Providers may claim safe harbour from liability for content they host if they meet specific due diligence criteria.

The primary need is to abide by court orders to remove content, as the Supreme Court explained these requirements in **Shreya Singhal v Union of India**³⁷. The Supreme Court considered a petition to make all Internet service providers (ISPs) responsible for identifying and blocking all pornographic content. The Supreme Court of India has repeatedly urged the central Government to develop standard operating procedures (SOPs) for handling complaints regarding child pornography and offensive internet content.³⁸

DOES ANIMATED CHILD PORNOGRAPHY INFLUENCE CHILD SEXUAL ABUSE?

Creators frequently note the paucity of credible data connecting child abuse in comics to increased child abuse instances in the real world. The US Supreme Court stated in 2002 that there is no evidence to support a causal relationship, but acknowledging the likelihood that abuse may arise due to such virtual representations. On the other hand, for critics, there is a plethora of anecdotal data connecting child sex abuse images to actual criminal activity. "Otaku Killer," Tsutomu Miyazaki³⁹, a serial killer in Japan who horrifyingly raped and killed four

³⁵ Information Technology Act 2000, s 79

³⁶ Information Technology (Intermediaries Guidelines) Rules 2011

³⁷ *Shreya Singhal v Union of India* AIR (2015) SC 1523

³⁸ *Ibid*

³⁹ Katie Serena, "Tsutomu Miyazaki, The Cartoon-Loving "Otaku Killer" Who Raped And Murdered Four Little Japanese Girls" (ATI, 2019) <<https://allthatsinteresting.com/tsutomu-miyazaki>> accessed 18 January 2023

young girls over a year, is one of the most well-known instances of how sexual images of minors in manga increase the risk of sex crimes.⁴⁰

Police discovered hundreds of child abuse and anime movies when they searched his house for evidence. They also found the corpse of one of his victims, a 5-year-old girl. Sociologists suggested that his fascination with these images led him to act on his fantasies at the time. Regarding pornography's function in the conduct of sexual assaults, there are varied outcomes, ranging from playing only a minor part to being the main factor when child victims are involved.

CONCLUSION

When no actual child is involved, such material forbids the harm principle or the criminal intent (*mens rea*) in the name of fantasy, thus making it difficult to prove such a crime. Though such material comes under the ambit of Indian Laws and can be tried in courts, laws aren't specific to such materials, thus, reporting, detection, and curbing such materials is still not within the ease of the system. Such materials are available all over the internet, and minors who are well-versed in technology can easily access them. The repercussions of easy access to such materials give children a false notion of sexuality, especially the alarming genres, and representation made in such content.

Law enforcement agencies around the world have taken steps to combat this growing problem, including creating specialized units to investigate and prosecute cases of online child sexual abuse, training officers to recognize and investigate these crimes, and working with international partners to identify and apprehend offenders. However, using encryption and other forms of online anonymity can make it difficult for law enforcement to identify and locate offenders. There is an ongoing debate about the appropriate balance between protecting children and protecting privacy and free speech. Freedom of expression is not held absolute and is scrutinised under reasonable restrictions, thus giving a chance to curb such materials. Promote

⁴⁰ *Ibid*

sex education in schools and universities as one way to at least lessen the impact of such pornographic materials.