

**CYBER PORNOGRAPHY IN INDIAN LEGAL SCENARIO**

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**ABSTRACT**

Technological inventions have always inspired mankind. The gifts of computer and internet have affected the life of everyone in every possible way. Today, information technology is used in almost every human activity. However, such technological advancement came with its own cost in the form of cyber abuses. One of such abuses is pornographic content on the internet. There has been diversity of opinion among nations regarding legality of pornography. Cultural, moral and legal variations do not allow drawing the line between obscenity and decency, and thus, defining pornography becomes challenging task. Controlling such pornography on internet becomes more challenging task in the context of such variations. Pornography is argued to be the matter of privacy, and thus, not to be regulated. However, it fails to account for the offences which attack the very foundation of morality of society and cyber pornography is one of these offences. It acts as an incitement to sexual hatred and violence against women in the same way as racist literature acts as an incitement for racial hatred. The repercussions caused in the life of women by cyber pornography must not be totally ignored and give sufficient account as to why the menace of cyber pornography must be curbed down.

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## INTRODUCTION

*“Every technological innovation creates deviant as well as respectable possibilities...”*

- Charles Edgley<sup>2</sup>

The seeming contradictions of Indian attitudes towards sex can be explained through the context of history.<sup>3</sup> Nudity in art was considered acceptable, as shown by the paintings at Ajanta and the sculptures of that time. Some of India’s most famous ancient works of art were produced, often freely depicting nudity, romantic themes or sexual situations, for example, the depiction of *apsaras*. It is being alleged that, India became more conservative after being influenced by European ideas. Conservative views of sexuality are now the norm in the modern India and South Asia in general.<sup>4</sup> In pursuance of such tradition, pornography is seen as a major blot on the foundation of morality.

The use of computer is almost everywhere from a single room of an individual to the public hall of any organization. The new technology that has allowed for the advancement of the nation has also opened the door for many new forms of cyber crimes. One of such crimes is the cyber pornography. In India, there are very few sex workers who join pornography industry voluntarily for livelihood. Many of them are coerced physically or economically. The profit in pornography industry attracts organized crime that exploits workers in pornography industry. To ensure more profit, the criminals engaged in organized crime ignore the fact that whether consent of workers has been obtained voluntarily or forcefully. Increase in demand warrants more supply at any cost. Such an increase in supply of sex workers also encourages trafficking in women and children.<sup>5</sup> There has been an increase in cases of publication and transmission of obscene material using electronic means in just one year in 2012.<sup>6</sup>

The sexual exploitation of women working in the pornography industry works as an incitement to sexual offenders. Pornography symbolizes that such kind of behavior is acceptable and practical in

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<sup>2</sup> Charles Edgley is an American Sociologist working as head of the Department of Sociology at Oklahoma State University.

<sup>3</sup> Prof. Vimlendu Tayal, CYBER LAW CYBER CRIME INTERNET AND E-COMMERCE, 147 (2011).

<sup>4</sup> *Id.*, at 151.

<sup>5</sup> Brajesh Rajak, PORNOGRAPHY LAW : XXX MUST NOT BE TOLERATED, 5 (2011).

<sup>6</sup> Devesh K. Pandey, *Pornography Cases up 100 percent last year*, THE HINDU (Apr. 21 2018, 10.08 AM) <http://www.thehindu.com/news/national/pornography-cases-up-100-per-cent-last-year/article6288856.ece>.

society.<sup>7</sup> The magnitude of cyberspace and pornographic material transmitted through it is much higher than what it seems to be and has created challenges for India's outdated legal regime.

## DEFINING CYBER PORNOGRAPHY

The definition of pornography is important to be understood so that one can appreciate what all can be included in the pornography. Pornography is much debated subject among scholars all over the world. Some of them have refused to accept the existence of any causal link between pornography and the alleged harm caused by it. On many occasions, pornography is said to be including erotica<sup>8</sup> as well, which is not true. The supporters of pornography refer to erotica while referring to pornography. They fail to understand the difference between erotica and pornography.<sup>9</sup>

The term pornography is generic and not a legal term. It refers to broad range of sexual materials. It is derived from the Greek words *harlot* (Prostitution) and *graphos* (depiction).<sup>10</sup> Thus, originally it referred to any work of art or literature dealing with sex and sexual themes. However, there is no unanimous agreement upon definition of pornography among scholars. Pornography is seldom attempted to be defined by lawmakers as well. However, it was attempted to be defined by Mackinnon-Dworkin<sup>11</sup> while drafting an ordinance as “graphic sexually explicit subordination of women through pictures or words, including electronic or other data retrieval systems.”<sup>12</sup>

In 1986, Attorney General Commission on Pornography<sup>13</sup> defined pornography as, “*Material that is sexually explicit and intended primarily for the purpose of sexual arousal.*”<sup>14</sup> Exploitation,

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<sup>7</sup> RAJAK, *supra* note 4, at 9.

<sup>8</sup> Erotica is understood to mean portrayal of pleasure of sexuality within a positive emotional relationship. In India, it may be said to be present in the form of *Kamsutra*, paintings of *Ajanta* and *Allora*.

<sup>9</sup> RAJAK, *supra* note 4, at 3.

<sup>10</sup> *Miller v. California*, 413 US 15 (1973).

<sup>11</sup> Andrea Dworkin and Catharine MacKinnon are radical feminists who drafted Anti-Pornography Civil Rights Ordinance in 1983 in United States of America as part of feminist anti-pornography movement, but was struck down by the court in *American Booksellers v. Hudnut*, 475 US 1001 (1986), as it was found to be violating freedom of speech under first amendment to the Constitution.

<sup>12</sup> *An Excerpt From Model Anti Pornography Civil Rights Ordinance* (April 21, 2018, 10:15 AM) <http://www.nostatusquo.com/ACLU/dworkin/OrdinanceModelExcerpt.html>.

<sup>13</sup> The Commission was headed by Attorney General Edwin Meese and was appointed by the then President of United States of America Ronald Reagan to investigate the harmful effects of pornography. It published its report, which is popularly known as *Meese Report*, in 1986.

subordination, dehumanization of workers engaged in pornography and sexual explicitness of the product are some of the identifying factors of pornography. Pornography is a verbal or visual representation of sexual acts. It is portrayal of people as sexual objects for pleasure of others.<sup>15</sup> However, the serious works of art, literature, politics, or science, medical works, even though they deal with sex or include sexual references or depictions, would not be considered “pornographic” in the context of their legitimate uses.

Defining pornography is complicated mainly because the way it is used in common language or defined in dictionaries is much different from the legal definition of term. Pornography is easily recognized but is often difficult to define concisely.<sup>16</sup> Thus, the difficulty in defining pornography arises due to the variations in terms of individual’s upbringing, sexual preferences and the context in which pornographic material is watched. What is sexually arousal for one may be dirt for the other.

### **CYBER PORNOGRAPHY IN INDIAN LEGAL SYSTEM**

“*What is illegal offline is illegal online.*”<sup>17</sup> There is no particular category named as pornography in law. It is usually considered as aggravated form of obscenity.<sup>18</sup> However, obscenity includes all the materials that are filthy, indecent and offensive to modesty and decency. Pornography is subset of obscenity. Pornography is inalienable part of obscenity that focuses upon dehumanizing its actors by presenting them as mere objects engaged in gratifying sexual desires of customers of pornography.<sup>19</sup> Obscenity involves stepping over the ethical lines but pornography is much serious affair than obscenity.

Thus, the term ‘pornography’ when used in relation to an offence is not defined or used in any statute in India but the term ‘obscenity’ has been effectively used and explained in two major statutes in India. Following legislations prescribe that obscenity in certain circumstances constitutes an offence:

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<sup>14</sup> *Attorney General’s Commission on Pornography* (April 22, 2018, 7:16 PM) <http://www.jesus-is-savior.com/Evils%20in%20America/Porno/commission.htm>.

<sup>15</sup> TAYAL, *supra* note 2, at 153.

<sup>16</sup> TAYAL, *supra* note 2, at 152.

<sup>17</sup> A Travis, BOUND AND GAGGED : A SECRET HISTORY OF OBSCENITY IN BRITAIN, 293 (2000).

<sup>18</sup> RAJAK, *supra* note 4, at 3.

<sup>19</sup> RAJAK, *supra* note 4, at 2.

- Indian Penal Code, 1860 ('IPC')
- Information Technology Act, 2000 ('IT Act')

As per Cockburn CJ, the test of obscenity is “*whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.*”<sup>20</sup> The Supreme Court of India has observed that the test of obscenity laid down by Cockburn CJ should not be discarded.<sup>21</sup> Later on it endorsed the ‘Miller test’<sup>22</sup> in *Samaresh Bose v. Amal Mitra*.<sup>23</sup>

### **Position prior to Information Technology (Amendment) Act, 2008**

The pornography being the subset of obscenity is covered under the relevant offences mentioned under IPC and IT Act. Although neither IPC nor IT Act defines what obscenity is, Section 292 of IPC and Section 67 of IT Act explain the obscenity to mean anything which is lascivious or appeals to the prurient interest or if its effect is to deprave and corrupt the mind of persons.

Section 292 of IPC comprehensively covers the circumstances in which the offence of obscenity occurs. On the plain reading of the section, it is made clear that if a person is in mere possession of the obscene material for his personal use, without any intention to perform any of the purposes mentioned under the section, he or she would not be guilty of an offence.<sup>24</sup>

Prior to the amendment in the IT Act in 2008, the legislation had section 67, the only provision dealing with the obscene material in electronic form and it was deficient in dealing with such offence effectively. Moreover, the wordings of this provision were such that it did not distinguish between mainstream pornography and child pornography. The language of this provision corresponded to the

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<sup>20</sup> Regina v. Hicklin, (1868) LR 3 QB 360.

<sup>21</sup> Ranjit Udeshi v. State of Maharashtra, AIR 1965 SC 881; *See also* Chandrakant Kalyandas Kakodkar v. State of Maharashtra, AIR 1970 SC 1390.

<sup>22</sup> In Miller v. California, 413 US 15 (1973), the US Supreme Court set out a three prong test for obscenity, called the ‘Miller’ test. Firstly, whether the average person applying contemporary community standards would find the work, taken as whole, appealing to the prurient interest? Secondly, whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by state law? Thirdly, whether the work, taken as whole, lacks serious literary, artistic, political, or scientific value?

<sup>23</sup> Samaresh Bose v. Amal Mitra, (1985) 4 SCC 289; *See also* Ajay Goswami v. Union of India, (2007) 1 SCC 169.

<sup>24</sup> Jagdish Chawla v. State of Rajasthan, 1999 Cr LJ 2562 (Raj).

language of Section 292 of IPC. The absence of liability in case of mere possession of obscene material was also applicable under Section 67 of the IT Act.

### **Present Legal Framework for Cyber Pornography**

The earlier version of IT Act, 2000 was deficient in dealing with the crime of cyber pornography, mainly due to following reasons:

- It did not define what is meant by ‘obscene material’ in electronic form.
- It had only one provision which referred to and penalized obscene material in electronic form. Thus, traditional test to determine obscenity was the only way for proving the offence of cyber pornography.
- It had no provision for separate offence of child pornography and impliedly included such offence within the mainstream pornography.

The Information Technology (Amendment) Act, 2008 attempted to improve the situation by adding new provisions for sex-related offences. It sought to give more comprehensive coverage to the pornography material. The combined effect of amendment in this respect is that online obscenity has been effectively brought within the legal regime and the menace of child pornography has been criminalized separately.

#### *Section 66E<sup>25</sup>*

The provision seeks to cover the instances of installation of hidden camera inside washroom, bedroom, changing room, and the sting operation<sup>26</sup> by private person or agency. The expression ‘under the circumstances violating privacy’ means circumstances in which a person can have a reasonable expectation that his or her physique is not under public eye or general surveillance.<sup>27</sup> The explanation clause for terms ‘transmit’, ‘capture’, ‘private area’ and ‘publishes’ adds exactness to the provision for its applicability.

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<sup>25</sup> Sec. 66 E : Punishment for violation of privacy. – Whoever intentionally or knowingly capture, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished with imprisonment which may extend to three years or with fine not exceeding two lakh rupees, or with both.

<sup>26</sup> In Court on its own motion v. State, WP (CRL) No. 796 of 2007, the Division Bench of Delhi High court held that any sting operation, if it violates the bodily privacy of another person, would make the private person or agency conducting such sting operation liable for action at law.

<sup>27</sup> Explanation (e) to Sec. 66E of Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India).

It is imperative that this provision must be applied in conjunction with Section 354A (Sexual Harassment and Punishment for sexual harassment), Section 354B (Assault or use of Criminal Force to woman with intent to disrobe), Section 354C (Voyeurism), and Section 354D (stalking) of IPC.<sup>28</sup>

Such provision is very remarkable step on the part of legislature in the direction of regulating the cyber pornography as this offence often leads to the offence of cyber pornography. The offender first collects the offending images of victim and then uses them for the purposes of making pornography. Thus, the offences covered under Section 66E and cyber pornography are very much interrelated and the effective regulation of one offence will lead to reduction in the other offence.

### *Section 67<sup>29</sup>*

The amended provision lays down the law that obscenity is an offence when it is ‘published’<sup>30</sup> or ‘transmitted’<sup>31</sup> or caused to be published in any electronic form. Thus, mere possession of such material does not constitute any offence, as was the case with earlier provision as well. It should be noted that under no circumstances any offence related to ‘obscenity in electronic form’ should be tried under Section 292 of IPC as Section 81 of IT Act states that the Act will have overriding effect. Moreover, the punishment given under Section 67 is far more stringent than what is being given under Section 292, IPC.<sup>32</sup> As a thumb rule, offences related to obscenity in electronic form should be tried under the provisions of Section 67 only and any attempt to import provisions of Section 292 of IPC would tantamount to disregard of the legislative intent behind the Act.<sup>33</sup> In terms of everyday application, this section will cover websites, graphic files, text messages, audio / sound messages,

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<sup>28</sup> Vakul Sharma, INFORMATION TECHNOLOGY : LAW AND PRACTICE, 195-196 (4<sup>th</sup> ed., 2015).

<sup>29</sup> Sec. 67 : Punishment for publishing or transmitting obscene material in electronic form - 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 two three years and with fine which may extend to five lakh 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 ten lakh rupees.

<sup>30</sup> Although the term has not been defined under the Act, it generally means making information available to people. It is also explained under section 66 E of the Act as reproduction in the printed or electronic form and making it available for public.

<sup>31</sup> Although the term has not been defined under the Act, it generally means sending the material to another person. It is also explained under section 66 E of the Act as to electronically send a visual image with the intent that it be viewed by a person.

<sup>32</sup> SHARMA, *supra* note 27, at 197.

<sup>33</sup> SHARMA, *supra* note 27, at 198.

digital photographs, pseudo-photographs<sup>34</sup>, software programs etc. Moreover, in interpreting this section, the court may exercise the interests of our contemporary society and particularly the influence of obscene material in electronic form on it.<sup>35</sup>

The amended section differs from the previous section only in two respects: firstly, the word “transmitting” is inserted in the marginal heading, secondly, the quantum of punishment has been changed. However, the provision is still deficient in following ways :

- It does not define ‘obscene material in electronic form’. The language of such an important provision could be more comprehensive.
- It does not make clear the intention of legislature as to whether the knowledge of the offender is relevant for determining his liability or not? Thus, the situation where offending material is hidden in the cache memory of a system not in the knowledge of offender, what will be his liability is not made clear.

#### *Section 67A<sup>36</sup>*

This provision covers the material in electronic form containing sexually explicit act or conduct. It seems to be enlarging the area of obscenity and including within it expressly the depiction of sex activities. It is for the first time that Indian law has defined such type of offence thereby indicating indirectly that depiction of sex-related act in public is intolerable.<sup>37</sup> The expression ‘explicit’ has been used along with sexual acts or conduct, meaning thereby that any material containing act or conduct merely having sexual overtures may not get attracted for this offence. It is significant to note that publication or transmission in the electronic form includes dissemination, storage, and transmission of information or data in electronic form. In view of the ease with which obscene material can be replicated, misused, and distributed over the internet, it was felt by the lawmakers to move beyond the limits of ‘likely audience’ test under section 67 and to provide more stringent

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<sup>34</sup> It means an image, whether made by computer graphics or otherwise, which appears to be a photograph. It is capable of being resolved into an image that appears to be a photograph.

<sup>35</sup> SHARMA, *supra* note 27, at 198.

<sup>36</sup> Sec. 67A : Punishment for publishing or transmitting of material containing sexually explicit act, etc. in electronic form - Whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct 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 ten lakh rupees and in the event of 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 ten lakh rupees.

<sup>37</sup> K. Mani, LEGAL FRAMEWORK ON CYBER CRIMES, 129 (2<sup>nd</sup> ed., 2012).

mechanism to combat cyber pornography.<sup>38</sup> It should be noted that Section 67 has generic applicability and Sec. 67A has specific applicability. The former uses ‘likely audience’ test and latter discards such limitation and looks at the explicit sexual nature of act or conduct in material.

### *Section 67B*<sup>39</sup>

Majority of the nations have made formal legal commitments with each other to cooperate in curbing the menace child trafficking, by becoming party to international instruments, such as the Convention on Rights of Child<sup>40</sup>, which includes the right to protection against all forms of violence and exploitation including sexual exploitation. The convention has Optional Protocol<sup>41</sup> on the Sale of Children, Child Prostitution, and Child Pornography<sup>42</sup>, which came into existence in January 2002. Fortunately, India has ratified the convention as well as the optional protocol. Apart from this, it has also ratified other international instruments like Palermo Protocol<sup>43</sup>, and has become signatory to some international instruments like, Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia<sup>44</sup>.

In context of such international commitments, especially the Convention on Rights of Child and its Optional Protocol, Section 67B was a long awaited provision. It finally differentiated child

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<sup>38</sup> SHARMA, *supra* note 27, at 202.

<sup>39</sup> Sec. 67B : Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc. in electronic form – Whoever (a) publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct, or (b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner or (c) cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resource or (d) facilitates abusing children online or (e) records in any electronic form own abuse or that of others pertaining to sexually explicit act with children, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with a fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to ten lakh rupees.

<sup>40</sup> The General Assembly adopted the Convention and opened for signature, ratification and accession by resolution 44/25 of November 20, 1989. It entered into force on September 2, 1990.

<sup>41</sup> Optional Protocols to human rights treaties are treaties in their own right, and are open to signature, accession or ratification by countries who are party to the main treaty.

<sup>42</sup> The General Assembly adopted the Optional Protocol and opened for signature, ratification and accession by resolution A/RES/54/263 of May 25, 2000. It entered into force on January 18, 2002.

<sup>43</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (supplementing the Convention against Transnational Organized Crime). The General Assembly adopted the Protocol and opened for signature, ratification and accession by resolution 55/25 of November 15, 2000.

<sup>44</sup> The Convention was signed in January 2002 during the Eleventh Summit in Kathmandu and envisages facilitating the development of full potential of the South Asian child.

pornography from the mainstream pornography, provided more comprehensive coverage of activities, and provided more stringent punishment for it. As provided in the explanation of Section 67B, children mean a person who has not completed the age of eighteen years. The provision lists out five instances covering the range of activities which are punishable and out of them clause (a) and (e) are generic and clause (b), (c), and (d) are specific.<sup>45</sup> These clauses include the instances of attempted publishing or transmitting, online ‘grooming’ of children for sexually explicit purposes, and cultivation, enticement, or inducement of children to online relationship.

Thus, the provision is very exhaustive one and dwells well on the subject of child pornography. Similar to these provisions, Section 67B does not use the words denoting *mens rea*, such as, intentionally or knowingly, which are used under Section 66E. It can be safely assumed on the basis of background of the provision and social significance that legislature intended strict liability to be attached to the offence of child pornography. It shows that a person in possession of child pornography will be held liable under the section as he must have collected or sought it from other person or browsed for it or downloaded it from internet in order to have possession of the same.

Moreover, Section 67B has some relations with Section 293 of IPC (Sale etc., of obscene objects to young person) and the latter can be used in certain circumstances for prosecuting the offender. For example, if obscene material in electronic form is distributed to the persons under 20 years of age then the punishment can be awarded under Section 67B read with Section 293 of IPC.

The late arrival of such an important piece of law can be understood in terms of highly religious society where morality is deep-rooted and physical exploitation with the underage was hitherto unknown. Thus, formulating law on such subject was hitherto not necessitated by public demand or social need until internet made it common.<sup>46</sup>

Child pornography as different from mainstream pornography is somehow connected with social issue and must receive stringent legal treatment. The easy availability, even to children, of pornographic material in digital form including video clips, its rapid transmission across the world

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<sup>45</sup> SHARMA, *supra* note 27, at 215.

<sup>46</sup> MANI, *supra* note 36, at 130.

wide web, and the absence of effective filters to screen out objectionable material from being accessed are factors that compound the challenge.<sup>47</sup>

Looking at the magnitude of the offence of child pornography, it must be noted that it is time to take concerted action to stop all forms of child pornography. A significant step has been taken in the form of Protection of Children from Sexual Offences Act, 2012<sup>48</sup>. It is a comprehensive law to provide for the protection of children from the offences of sexual assault, sexual harassment, and pornography.

### **LEGAL APPROACH TO CYBER PORNOGRAPHY IN UNITED STATES OF AMERICA**

Aberrant activities on the internet have given opportunities to the internet gurus to make lucrative clientele online in total disregard of its baneful effect on the social and moral ethos of human society across the globe. Even country like USA, the flag-holders of freedom of thought and expression, abhors it vehemently. While other cybercrimes threaten the very credibility of the internet, cyber pornography promotes the use of internet.<sup>49</sup> Recognizing the magnitude of the problem of cyber pornography, USA has woven legal framework to regulate this menace. Insight into their legal response will help in examining the legal stand taken by India to deal with cyber pornography.

The United States is the top producer of pornographic web pages with 244,661,900, or 89 percent. Annual revenues of the pornography industry in the U.S. are \$13.3 billion. This is more than the revenues of the National Football League, the National Basketball Association and Major League Baseball combined; more than NBC, CBS and ABC combined; larger than the revenues of the top technology companies. 11,000 plus porn videos were produced in the U.S. in 2006, more than 20 times the number of mainstream Hollywood movies.<sup>50</sup> Despite such shocking facts about pornography, the obscenity is not an area of constitutionally protected speech or press in USA.

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<sup>47</sup> Avinash Bajaj v. State, (2005) 3 Comp LJ 364 Del.

<sup>48</sup> The Act was passed by *Lok Sabha* on May 22, 2012 and came into force with effect from November 14, 2012.

<sup>49</sup> MANI, *supra* note 36, at 115.

<sup>50</sup> *Facts and Figures*, STOP PORN CULTURE (April 22, 2018, 7:30 PM) <http://www.ministryoftruth.me.uk/wp-content/uploads/2014/03/Facts-and-figures.pdf>.

Implicit in the history of first amendment is the rejection of obscenity as utterly without redeeming social importance.<sup>51</sup>

With respect to meaning of pornography, it was attempted to be laid down in the Anti-pornography civil rights Ordinance<sup>52</sup>. Moreover, the Supreme Court while propounding the ‘Miller’ test<sup>53</sup>, referred to pornography as ‘sexually explicit material’ in terms of obscenity which does not enjoy the First Amendment protection under the Constitution of USA.

Attempts were made in the United States in the 1970s to close down the pornography industry by prosecuting those in the industry on prostitution charges.<sup>54</sup> The prosecution started in the courts in California in the case of *People v. Freeman*<sup>55</sup>. However, the California Supreme Court acquitted Freeman and distinguished the person who takes part in a sexual relationship for money (prostitution) from the person whose role is merely portraying a sexual relationship on screen as part of acting performance.

The mainstream pornography is regulated by Title 18 – Crimes and Criminal Procedure, Chapter 71 - Obscenity, United States Code. It prohibits the possession with intent to sell or distribute obscenity, to send, ship, or receive obscenity, to import obscenity, and to transport obscenity across borders for purposes of distribution.

Although the law does not criminalize the private possession of obscene matter, the act of receiving such matter could violate the statues prohibiting the use of mails, common carriers, or interactive computer services for the purpose of transportation. It is also illegal to aid or abet the commission of these offences, and the individual who commits such acts are also punishable under federal obscenity laws. In addition, federal law prohibits both the production of obscene matter with intent to sell or distribute, and engaging in a business of selling or transferring obscene matter using or

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<sup>51</sup> Roth v. United States, 354 US 476 (1957); *but see* Stanley v. Georgia, 394 US 557 (1969), where it was observed by the court that if the first amendment means anything, it means that a state has no business telling a man, sitting alone in his own house, what book he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.

<sup>52</sup> *Supra* note 12.

<sup>53</sup> SHARMA, *supra* note 27.

<sup>54</sup> *Pornography*, US LEGAL (April 22, 2018, 7:33 PM) <https://internetlaw.uslegal.com/pornography/>.

<sup>55</sup> *People v. Freeman*, 1988 Cal LEXIS 171.

affecting means or facility of interstate or foreign commerce, including the use of interactive computer services.<sup>56</sup>

Thus, in USA an individual can possess obscene material in the privacy of home but not allowed to make others involved in the same in any manner. It must be noted further that as part of anti-pornography initiatives, Attorney General Alberto Gonzales established an Obscenity Prosecution Task Force in 2005, which is dedicated to the investigation and prosecution of the distributors of hard-core pornography that meets the test for obscenity. For this purpose, FBI Adult Obscenity Squad was recruited in to gather evidence against "manufacturers and purveyors" of adult pornography.

### *Child Pornography*

Child pornography is not protected as form of expression under the First Amendment to the Constitution of United States of America.<sup>57</sup> With respect to child pornography, the Children's Online Privacy Protection Act, 1998<sup>58</sup> was a federal law enacted by the Congress to address concerns about access to offensive content over the internet on school and library computers.

It imposed certain types of requirements on any school or library that receives funding for internet access from the E-rate program<sup>59</sup>. In *Ashcroft v. American Civil Liberties Union*<sup>60</sup>, the Court held that the government had not shown why less-restrictive alternatives (such as software filters) could not be equally or more effective. The case was remanded to a lower court for further investigation and action.

Congress came up with Children's Online Privacy Protection Rules in 1999 to implement the Children's Online Privacy Protection Act, 1998 and which provides under Section 312.2 that child means an individual under the age of 13. It later enacted Prosecutorial Remedies and Other Tools to

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<sup>56</sup> *Citizen's Guide to U.S. Federal Child Exploitation Laws*, THE UNITED STATES DEPARTMENT OF JUSTICE (April 21, 2018, 8:07 PM) <https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-obscenity>.

<sup>57</sup> *New York v. Ferber*, 458 US 747 (1982); *Osborne v. Ohio*, 495 US 103 (1990).

<sup>58</sup> Communications Decency Act, 1996 preceded the Children Internet Protection Act, 2000. It was struck down in *Reno v. American Civil Liberties Union*, 521 US 844 (1997). Later on, Congress passed the Child Pornography Prevention Act in 1996. However, in *Ashcroft v. American Civil Liberties Union*, 535 US 234 (2002), the Court held that two key provisions of the Act were unconstitutionally overbroad (affecting both legal and illegal speech) under the First Amendment.

<sup>59</sup> It is a program under which certain communication technologies are made more affordable for eligible schools and libraries.

<sup>60</sup> *Ashcroft v. American Civil Liberties Union*, 535 US 234 (2002).

End the Exploitation of Children Today Act, 2003 under which Title V (Section 501 to Section 513) sought to regulate Child pornography.

The common theme reflected in these legislations is that they seek to amend Chapter 71 - Obscenity, Title 18 – Crimes and Criminal Procedure, United States Code. Section 2256 of the Code defines child pornography as any visual depiction of sexually explicit conduct involving a minor who is under 18 years of age. The federal law specifically prohibits obscenity involving minors, and convicted offenders generally face harsher statutory penalties than if the offense involved only adults. It prohibits the production, distribution, reception, and possession of an image of child pornography using or affecting any means or facility of interstate or foreign commerce. Notably, the legal definition of sexually explicit conduct does not require that an image depict a child engaging in sexual activity. A picture of naked child may constitute illegal child pornography if it is sufficiently sexually suggestive. Additionally, the consent for sexual activity is irrelevant. Any depiction of a minor engaging in sexually explicit conduct is illegal. Moreover, the offender can be prosecuted under child pornography laws in addition to, or instead of federal law.<sup>61</sup> The federal law also prohibits the use of misleading domain names, words, or digital images on the internet with intent to deceive a minor into viewing harmful or obscene material under Section 2252B and Section 2252C.

Thus, the standard of what is harmful to minors may differ from the standard applied to adults. Harmful materials for minors include any communication consisting of nudity, sex or excretion that (i) appeals to the prurient interest of minors, (ii) is patently offensive to prevailing standards in the adult community with respect to what is suitable material for minors, and (iii) lacks serious literary, artistic, political, or scientific value for minors.<sup>62</sup>

Following are the main provisions related to child pornography in the Code:

- Section 2251 – Sexual exploitation of children (production of child pornography)
- Section 2251A – Selling and buying of children
- Section 2252 – Certain activities relating to material involving the sexual exploitation of minors (Possession, distribution and receipt of child pornography)

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<sup>61</sup> *Supra note 55.*

<sup>62</sup> *Ibid.*

- Section 2252A – certain activities relating to material constituting or containing child pornography
- Section 2260 – Production of sexually explicit depictions of a minor for importation into United States.

## CONCLUSION

As societies change and moral values change with it, one constantly needs to re-evaluate the morality laws of a country to keep up with modern changes and to prevent the moral decay without interfering in a citizen's personal lives or privacy. The nature of internet is such that while it is giving the most ideal situation to flourish, to maintain privacy, providing free of cost and providing in abundance, it is at the same time becoming difficult to a halt to the nudity race. Ironically enough, this strange offence of cyber pornography has rather popularized the internet amongst users.<sup>63</sup>

Internet technology affords access to vast amount of valuable information and endless sources of entertainment. Such facility gives immense opportunity for widest circulation of pornography over the web. Thus, it exposes users to certain dangers and to harmful materials. Moreover, the difficulty to track such distributor gets intensified further due to the fact that there is no single entity responsible for regulating the internet.<sup>64</sup>

The biggest problem with tracking down the accused in case of cyber pornography is the problem of identification of accused. The perpetrator of crime can be anyone situated anywhere in the world. Though the identity of distributor of pornographic content can be tracked using IP address, it cannot serve any useful purpose if the server is located outside India. The applicability of IT Act extends to offences in which the computer servers involved in commission of offence is located in India.<sup>65</sup> Thus, pornographic content is easily distributed by pornographers in India by locating their servers outside India and the Indian law is helpless. The second problem is with respect to jurisdiction. The world of internet is different from the real world. It does not have any boundaries. The fact that internet is a world made of virtual networks; it becomes difficult to establish the place of residence of the defendant or cause of action of the suit which is the traditional basis for fixing the

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<sup>63</sup> TAYAL, *supra* note 2, at 114-115.

<sup>64</sup> Jonathan Fairtlough, INTRODUCTION TO CYBER CRIME INVESTIGATION, 229 (2015).

<sup>65</sup> RAJAK, *supra* note 4, at 107.

jurisdiction.<sup>66</sup> Another problem is that of absence of proper training of police officials investigating the cyber offences. The officials are not equipped with proper knowledge to appreciate the intricacies of the cyber offence like pornography. Moreover, lack of effective international cooperation amongst police forces and law enforcement agencies for tracking down the pornographers renders the enforcement of law against pornography difficult. Lastly, even if above problems are overcome, the identity of offender is tracked down, the jurisdiction has been established, and the court has delivered a judgment convicting the accused, everything becomes superfluous if the decision is not enforceable. If India does not have treaty with the country where decision has to be enforced then the decision is rendered meaningless.<sup>67</sup>

Thus, the existing legal regime for cyber Pornography is falling short of effective realization of goals, and thus, need to be scrutinized in context of increasing magnitude of cyberspace. Regulation must be given a chance and legal acumen must come forth to extend the arms of law to the jungle of lawless abode called cyberspace. The internet power has weakened the force of law and a mammoth legal response to the cybercrimes, in the first instance, may not be so promising, but it will give constructive start.<sup>68</sup> Following are some of the suggestions for dealing with the problems identified above:

- Insisting upon mechanism which ensures electronic tracing of computer signals to locate offenders is a better way to curb internet offences. Encouragement of GPS technology<sup>69</sup> and offender alert mechanism would bring enormous change in manner of investigation.<sup>70</sup>
- The police officials must be trained for collecting and apprehending the evidence. More practical step would be to establish the cyber police station, which would eliminate the need of transferring the cyber cases from police station to head quarters. Moreover, cyber labs must be created to deal with the problems that occur in collection and investigation of digital evidences.<sup>71</sup>

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<sup>66</sup> RAJAK, *supra* note 4, at 108.

<sup>67</sup> RAJAK, *supra* note 4, at 111.

<sup>68</sup> Mani, *supra* note 36, at 136.

<sup>69</sup> It is a space-based navigation system that provides location and time information in all weather conditions, anywhere on or near the Earth where there is an unobstructed line of sight to four or more GPS satellites.

<sup>70</sup> Brajesh Rajak, *supra* note 4, at 111.

<sup>71</sup> *Ibid.*

- There must be single legislation which exhaustively deals with cyber pornography. IT Act is not exhaustive to deal with problems of pornography. IPC, Indecent Representation of Women Act, 1986 are some of the legislations which deal with pornography. Thus, confusion arises in relation to their applicability. Thus, it is very much advisable to have one single law to deal with pornography exclusively. There must be special courts for handling the cyber offences. The judges would be trained in such matters to appreciate the evidence and expedite the remedy.
- The problem of cyber pornography is not going to be resolved with the efforts of one country only. The need of international organization monitoring internet activities is very much required in the present scenario. In this direction, Convention on Cyber Crime<sup>72</sup> by European Union is welcome step.

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<sup>72</sup> The Convention was adopted by the Committee of Ministers of the Council of Europe on November 8, 2001. It was opened for signature in Budapest, on November 23, 2001 and it entered into force on July 1, 2004.