

# Cyber Pornography in India- A Legal Insight

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## Abstract

Today cyber pornography has become a big industry. Due to the global accessibility, jurisdiction problem, differences in standard of morality and law in different countries, the enforcement of law has become impossible. In India though we have laws regarding cyber pornography but there are difficulties in combating them. As there is lack of uniformity in the laws and are not properly implemented and many are inadequate. This research paper examines the various provisions in different laws dealing with the cyber pornography and the inadequacies to deal with the said issue.

**Keywords:** pornography, obscenity, child pornography.

## Introduction

Today the internet which is also called the net is a global computer network system where everyone who uses computers can get the information from any other system if they are allowed. It is also called a network of network.<sup>1</sup>

It is no doubt that internet has become a major part of our lives in today's life because almost every work is being done by the internet. In fact wherever we go these days we can find people holding some gadgets and using the internet for playing games or to search something. Although internet is a useful and today we can do all work by just one click.<sup>2</sup>

It is true that today internet has acquired most important place in our lives. Life seems impossible without internet. But it is also a truth that today internet is used as a tool to commit crime also. It is so because it is accessible by almost any person regardless of age and condition. Cybercrime or computer generated crime, is crime which includes a computer and a network. Cybercrimes can be defined as: "Offences that are committed against individuals or groups of individuals with a criminal motive to intentionally harm the reputation of the victim or cause physical or mental harm, or loss, to the victim directly or indirectly, using modern telecommunication networks such as Internet (networks including but not limited to Chat rooms, emails, notice boards and groups) and mobile phones (Bluetooth SMS/MMS).

There are many kinds of cybercrime like cyber bullying, cyber defamation, cyber stalking, Cyber hacking, Cyber Theft, Identity theft, Malicious Software, and cyber pornography. Cyber Pornography simply means

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<sup>1</sup> <https://searchwindevelopment.techtarget.com/> (Visited on April 20, 2018)

<sup>2</sup> <https://www.wikipedia.org/> (Visited on April 21, 2018)

displaying of some sexual acts in order to cause sexual excitement. It also includes any pornographic websites ,magazines produces by using computer and internet and sent on mobile phones. The world is indeed , undergoing a new revolution in terms of information. It not only touches every aspect of life but also make the way to perform industrial and economic function of the society. There have been a dramatic changes in the way of living due to new communication system and digital technology.

On one side there are many advantages from storing of information in electronic form, but on the other side it has opened the door for anti social and criminal behaviour in the way that it was never possible earlier. Cyber pornography is the act of using cyberspace to create, display, distribute , import or publish pornography or obscene materials ,especially materials depicting children engaged in sexual acts with adults. Cyber pornography is a criminal offence classified as causing harm to persons. The literal meaning of the term 'Pornography' is "describing or showing sexual acts in order to cause sexual excitement through books, films, etc." The word pornography has originated from Greek word "PORNOGRAPHOS". The word porno means prostitution and graphos means writing about or description of which puts still more distance between subject and object. Cyber Pornography is defined as the act which uses cyberspace to initiate, design, expose , introduce and circulate as well as advertise indecent or pornographic contents <sup>3</sup>. Pornography is a criminal offence and had been classified as one of the reason for causing harm to persons. Pornography is available on the internet in different layout .It includes pictures and short animated movies .One of the astonishing fact about cyber pornography is that it mainly focuses on children and teenagers. Child Pornography involves pictures of children depicted in social activities . Taking a dig at historical background ,the history and evolution of cybercrime are easy to track and tally with the evolution of internet. Pornography is simply a graphic display of human sexuality which can be traced as far back as any other sign of human intelligence. It is in 20<sup>th</sup> century where pornography became able to find its way in literally every aspect of modern society. Earlier pornography were also found in salacious songs which was performed in Greece at festivals honouring the God Dionysius. During the middle ages pornography was spread over but it was held in low repute and could find its place in riddles, doggerel, common jokes and verses. The thing which led to the rebirth of ambitious pornographic written work was the invention of printing because it frequently contained humour , romance .During Victoria era pornography flourished because of the prevailing taboos on sexual topics. Pornography has remained target of moral and legal sanction on belief that it may tend to corrupt and deprave minors and adults which caused the commission of sexual crimes. It was the cave man who made first sexual drawing and it dates back to almost 1000 years back of the first written document. Though pornography was there ,it was mainly used as instructional materials, but not as a source of sexual attention.<sup>4</sup>

<sup>3</sup>[www.eajournals.org](http://www.eajournals.org).(Visited on April 20,2018).

<sup>4</sup><http://www.feedtherightwolf.org/>(Visited on April,23,2018).

The first documented porn picture were printed in oriental manuals of sex, "KAMA SUTRA" was the first manual on love written in 300AD and it contained explicit description of lovemaking and related object. The statues in famous temple of KHUJRAHO depict the lovemaking scenes in explicit details and are places of not only art and culture but of worship also.

The accessibility , affordability and anonymity of internet pornography have helped the porn industry to reach a new level. It is easily available at just one click of mouse.

Porn has been normalized to the point where most men are becoming addicted as well. As pornography proliferates because of the internet , it has taken a larger role in our lives. Many have been hurt by it. There are many side effects of cyber pornography .Due to it the marital relations gets disturbed .Prone to pornography by either partner weaken their marital status as well as dissatisfaction and distaste towards spouse.<sup>5</sup> Exposure to pornography vitiates the learning habits of children and hinders their mental growth. Images which imprinted on the mind of a child at an early age often reflect on her actions, and this negative exposure propels a child to act out sexually against other kids.<sup>6</sup> These premature activities are nothing but the result of pornographic content which they had encountered on the internet. Certain events and/or experiences, such as viewing pornography, can disturb this process of sexual development. Viewing pornography can disturb even accelerate; a child's appropriate, normal sexual development.Exposure of adult towards pornography has led the adults to move in wrong direction and corrupt their mind and they are becoming criminal and offender in sexual offences.

The speedy growth of internet shows an example of such changes. On one hand the internet has opened a world full of opportunities in e-commerce and information and on the other hand, it has its own problems and abuses which are caused by cyber criminals. The pornography culture affects people from all walks of life .Pornography have invited a great deal of controversy and interest especially to behavior related to sex offences and rape. Generally, there are three factors which mediate the impact of exposure of pornography and they are the characteristics of the viewer; their own engagement with the material; and the context and character of exposure.The main purpose of pornography is stimulation and excitement. It is lowering the portrayal of a human whether it be a male , female , child .It includes those contents that includes sex to encourage such behavior.<sup>7</sup>

Child Pornography is a kind as child sexual exploitation. Today child pornography and prostitution are two disturbing issues in the world.<sup>8</sup>. The offenders who are engaged in commission of cyber pornography are producers , distributors ,coercers and users. It is also necessary to discuss about obscenity .An **obscenity** is any utterance

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<sup>5</sup> <http://thelife.com>(Visited on April 25,2018).

<sup>6</sup> <https://www.linkedin.com> (Visited on April 25,2018).

<sup>7</sup> <http://uzspace.uzulu.ac.za> (Visited on April 22,2018).

<sup>8</sup> Richard Wortley and Stephen Smallbone, *Internet child pornography: causes Investigation and Prevention*(Graeme R.Newman,2012).

or act that strongly offends the prevalent morality of the time .The word obscenity is derived from Latin term “OBSCAENA” a cognate of the ancient Greek root skene .<sup>9</sup>

### Definition

Though there is no settled definition of pornography however there are some limited definitions-According to Oxford Dictionary pornography means the explicit description or exhibition of sexual objects or activity in literature, painting, films etc. In a manner intended to stimulate erotic rather than aesthetic feelings ; literature etc.<sup>10</sup>

According to the Webster’s Dictionary , pornography means writings ,pictures etc intended to arouse sexual desire .<sup>11</sup>

According to Britannica Pornography is representation of sexual behaviour in books, pictures, statues, motion pictures ,and other media that is intended to cause sexual excitement.<sup>12</sup>

### Legal framework of Cyber Pornography

The internet is a cheap, fast means of international communication of text, image or sound. Due to the international nature of the internet, internet pornography carries with it some special issues with regard to law. There is not a single set of law which apply to distribution, purchase or possession on Internet pornography.

### Constitution of India

Constitution of India permits legislative abridgement of the right of freedom of speech and expression in the interest of decency or morality<sup>13</sup>. The expression “indecenty” seems to be easily interchangeable with obscenity, the word commonly used in English statute. The word morality has a wider connotation than decency. Though most of the English statutes dealing with the subjects and several sections of Indian Penal Code, 1860 use the word OBSCENE, it is not easy to define what obscenity is.<sup>14</sup>

The essence of free expression is the ability to think and speak freely and to obtain information from others through publication and public discourse without fear of retribution, restriction, or repression by the government .It is through free expression, people could come together to achieve political influence, to strengthen their morality, and to help others to become moral and enlightened citizens. The concept of obscenity differs from nation to nation. It depends on the cultural values and moral standards that have shaped the history and society of the country. Typically, obscenity is usually analyzed in the backdrop of sexual conduct. Indian law on obscenity is defined under the Indian Penal code.India is known as the first country in

<sup>9</sup> <http://www.dictionary.com/browse/obscene> (Visited on April 23,2018)

<sup>10</sup> <https://en.oxforddictionaries.com/definition/pornography>(Visited on April23.2018).

<sup>11</sup> <https://www.merriam-webster.com/dictionary/pornography>(Visited on April 24,2018).

<sup>12</sup> <https://www.britannica.com/topic/pornography> (Visited on April 25,2018)

<sup>13</sup> Art 19(2) of Constitution of India..

<sup>14</sup> Joseph Minattur, *Freedom of the Press in India: Constitutional Provision and Their Application*,

the world to present a formal guide to erotica in the form of Kama sutra. However, pornography as a term has remained undefined by laws unlike obscenity for a long time.

Sex is seen as a forbidden subject in India, being linked to immorality, indecency. The Indian legal system upheld this social morality to a large extent. Pornography damages the moral fabric of the society. Taking a look at the statistics, India is the 5<sup>th</sup> highest consumer of porn in the world. There are total 18.35% porn viewer in the world. There are total 243 million porn viewer in India. There are total 48.6% children under the age of 18.

In Indian context the whole picture is tied in between film, video technology, literature. It is not the matter how law looks or how law does not look but also how it relates to the various ways of pornography in view of society. Only the various legal researches, studies, analytical or critical can transparently look into the questions related to the pornography. The law is needed to prohibit it in its clear sense or on a justifiable ground. Law can categorize pornography only by the word obscenity. But pornography contains a very vast scope. The videos, films, porn movies cannot be marked by a single word obscenity. The legal status of pornography varies widely from country to country. The distribution and production of pornography are both illegal in India however accessing pornography in private is not. Laws which are prevalent in India are following:

The Constitution of India is the basis and supreme law in India. The word “democratic”, “justice”, “Liberty” used in Preamble require balance between morality and law. In our republic and democratic India we have freedom and liberty to enjoy our life, to express ourselves but all these freedoms are not absolute and restrictions have been put which are necessary and reasonable. Pornography or Obscenity is liable to be condemned and regulated by law in any civilized society there by aiming to secure and protect freedom of speech and expression which is guaranteed by Constitution under **Article 19(1)(a)**<sup>15</sup>.

Freedom of expression is a fundamental human right, both in itself and due to the role it plays in guaranteeing other rights. One of the most controversial issues is how to balance the need to protect society against the potential harm that may flow from pornography and obscene materials, and the need to ensure respect for freedom of expression and to preserve a free flow of information and ideas. Article 19(2) of the Indian constitution provides that States have the power to impose reasonable restriction on freedom of speech and expression to maintain decency or morality.

### **Indian Penal Code, (Act No. 45 of Year 1860)**

Today pornographic magazines have become a big business. With the parallel increase in the range and boldness of the subjects covered, their popularity has also increased. There are so many bookstalls that are

<sup>15</sup>Dr.J.N. Pandey, *The Constitutional Law Of India*, (Central Law Agency, 50<sup>th</sup> Ed. 2013)

covered with the periodicals and novel offering sex crime. These days, the markets are flooded with books, magazines, periodicals, posters and other pornographic literature which depict women in most vulgar way. They include nude, semi-nude pictures of women exposing her private parts which brings shame to womanhood of the country. These magazines are spoiling the minds of the youth resulting in heinous crimes like rape and other sexual offences with women, children and girls in the country. The word obscene though not clearly defined in the **Indian Penal Code** must be taken as a meaning offensive to chastity or modesty, expressing or personating to the mind or view something that delicacy, purity and decency forbid to be expressed; anything expressing or suggesting unchaste and lustful ideas; impure; indecent; lewd. And pornography is an obscene literature, art or pornography.

The code deals with sale of obscene books. It means a book, pamphlet, paper, writing, drawing, painting, representation, figure are obscene if it is lascivious or are such that they tend to deprave and corrupt person. It says that whoever sells, hires, distributes, publicly exhibits or put into circulation in any manner or produces or possesses, or import, export any obscene object or advertises shall be punishable with imprisonment which may extend to 2 years and with fine up to Rs. 2000.<sup>16</sup>

Whereas section 293 deals with sale of obscene object to young person. Young person means any person below the age of 20 years.<sup>17</sup>

There has been a revolutionary change in the field of mass media and communication with the technological advancement and the development of electronic media. Due to this a need was felt to bring a law regulating the portrayal of women to broaden its scope.

### **Indecent Representation of Women (Prohibition) Act, 1986**

Accordingly the **Indecent Representation of Women (Prohibition) Act, 1986** was introduced which strictly prohibit the indecent representation of women through any means whether it be through publication, advertisement, paintings, figures, pamphlet. The law aimed to regulate the representation and portrayal of women in mainstream media, particularly in print media. It was brought into force to ensure that the portrayal

<sup>16</sup> Sec 292, IPC. (Act No. 45 of Year 1860)

**[(Exception)]** — This section does not extend to—

**(a)** any book, pamphlet, paper, writing, drawing, painting, representation or figure— (i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern, or (ii) which is kept or used bona fide for religious purposes;

**(b)** any representation sculptured, engraved, painted or otherwise represented on or in— (i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958), or (ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.].

<sup>17</sup>K.D. Gaur, *Indian Penal Code*, (5<sup>th</sup> Edition, Universal Law Publishing)

[293. Sale, etc., of obscene objects to young person. — Whoever 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 the last preceding section, or offers or attempts so to do, shall be punished [on first conviction with imprisonment of either 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 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].]

of women in media by means of advertisements, writings, publications and illustrations was not such that could be termed “indecent”. Given the time-period it was enacted, the 1986 Act, which continues to be in force, focused primarily on print media and advertising.<sup>18</sup>

### **Cinematograph Act,( Act No. 37 of Year 1952)**

The **Cinematograph Act,1952** is an act for making provisions for the certification and exhibition of films. This Act is a central law which establishes authorities to censor movies and prevent exhibition of those films which are against the culture of our society.<sup>19</sup>

### **The Young Person (Harmful Publication) Act (Act no.93 of 1956)**

It is an act for preventing circulation of certain publications which are harmful to young persons. Young person means persons below age of 21 years<sup>20</sup>. Any person who sells ,hire ,distribute ,or publicly exhibit any harmful publication or produces or possesses for sale shall be liable for imprisonment.<sup>21</sup>

### **Information Technology Act (Act 21 of 2000)**

From the beginning of civilization ,men have always been encouraged by those needs which make progress and better technologies. All this has resulted in the tremendous progress and development .There are many significant advances which has been made by mankind but out of all of them the most potent thing is the internet. It is also true that the rapid evolution of Internet has also raised many legal issues and questions. The Indian Parliament has passed its first Cyber law ,**The Information Technology Act ,2000**.The Act contains numerous provisions. The Act deals with punishment for sending offensive messages through communication service etc. It says that any person who sends any information which is grossly offensive or which has menacing character ,or any information which is false but send to cause annoyance , inconvenience , danger ,obstruction ,insult , injury ,enmity , hatred or ill will ,or any e-mails also to cause the same by means of computer resource or a computer device is a punishable offence.<sup>22</sup>

Section 67A of the Act Deals with punishment for publishing or transmitting of material containing sexually explicit act etc , in electronic form. It says that whoever publishes or transmits or causes to be published or

<sup>18</sup>Sodhganga.inflibnet.ac.in(Visited on April 6,2018)

<sup>19</sup>Madhavi GoradiaDivan,*Facets of Media Law,(2<sup>nd</sup> Ed,2015,Eastern Book Company)*

<sup>20</sup> Sec 2(c) of Young Person (Harmful Publication) Act,1956

<sup>21</sup> Sec 3 of Young Person (Harmful Publication) Act,1956

<sup>22</sup> Sec 66A of Information Technology Act,2000.

Explanation. -For the purpose of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message.

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 lac rupees and which may extend to seven years on subsequent conviction and with fine which may extend to ten lac rupees.

Section 67 of the Act deals with punishment for publishing or transmitting obscene material in electronic form. It says that Whoever publishes or transmits or causes to be published or transmitted 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.<sup>23</sup>

The fact that our lawmakers felt two provisions are required to deal with such material is interesting. Where the offline world is concerned ,the law only prohibits obscenity. Online, however ,the publication and transmission of sexually explicit material is further singled out ,and made punishable ,explicitly. Although much of this material would likely have fallen under the obscenity laws as well ,in that sense a new crime has been created under the law.

Section 67 B of the Act deals with punishment for transmitting or publishing of any material depicting children sexually in electronic form. Whoever publishes or transmits any material in any electronic form depicting children in sexually explicit act or conduct or creates text or digital images ,collects , seek , browses, download , advertises , promotes , ,exchanges or distributes material depicting children in indecent or sexually explicit manner in any electronic form or cultivates , entices or induces children for any online relationship with one or more children for sexually explicit act or manner which offends any adult using that computer or facilitates abusing children online or records in any electronic form own abuse or that of others pertaining to sexually explicit act with children.<sup>24</sup>

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<sup>23</sup> Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeal 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.

<sup>24</sup> Publishing of information which is obscene 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 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.



## Convention on the Rights of Child ,1989

Taking this topic on international regime there are conventions which deals with it. The **Convention on the Rights of Child ,1989** deals with it. Article 34 of the convention deals with sexual exploitation . The Convention's Optional Protocol on the sale of children, child prostitution and child pornography supplements the Convention by providing States with detailed requirements to end the sexual exploitation and abuse of children.<sup>25</sup>

Article 2 of the Optional Protocol defines child pornography that 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 for primarily sexual purposes.

The new medium which has confronted humanity does not makes difference between good and evil ,between national or international or between just and unjust. Being the regulator of human behaviour law has made an entry into the cyberspace. Every country have their own domestic cyber laws and cyber crime is not a matter in India only but it is a global problem and therefore world at large has to come forward to curb this menace.

## Conclusion and Suggestion

The laws above discussed are not adequate to deal with increasing problem of cyber pornography. As talking about IT Act, 2000 it is no offence if anyone views cyber pornography .The act which is not an offence is merely downloading and viewing such content .Publishing pornographic content online is also illegal. Whereas storing cyber pornographic is not an offence. But transmitting cyber pornography through instant messaging ,emails or by any other mode is an offence<sup>26</sup> .So it is clear that the laws are not consistent which give rise to numbers in crimes. Viewing Cyber pornography is legal in India. Merely downloading and viewing such content does not amount to an offence. Downloading or browsing internet child pornography is also an offence .It is not wrong to say that in India cyber pornography is not legalised in India and not banned either. However in 2014 SC headed by Justice Lodha joined for combined effort between department of Telecom, Broadcasting ,Information and Home Ministry to deal with issues relating to curbing child pornography.

Despite of all these effort it is impossible to ban sites as there are millions of sites to access pornography.Following the public fury and ardent criticism, the government has finally realised the deficiencies in its order thereby lifting the ban and people in the Kamasutra land can watch porn online again.

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<sup>25</sup><http://www.ohchr.org/EN/pages/home.aspx> (Visited on April 25,2018)

<sup>26</sup><http://www.blod.ipleaders.in.>(visited on April 24,2018)