Chapter 4: PORNOGRAPHY AND INTERNET

"Where the wheel is an extension of the foot, and the television an extension of the eye, the [Internet] becomes [an] extension of the self."[1]

1. INTRODUCTION

The Internet is a vast matrix of computers that are interconnected with each other and which facilitates the individual to communicate and to collect information in very short time, and at cheaper cost. Its impact and influence on our daily lives is immeasurable. It has changed the way individual communicate with another person, anywhere in the world, and provides information on any topic - imaginable. Irrespective of caste, race, economic background, gender, and age, Internet provides everyone, a platform through which they can advance their ideas, without facing the bias or prejudice of others. The way people do online trading, is just one simple example of why the Internet will continue to shape the way we communicate and transact businesses worldwide. The world has truly become a lot smaller.

Unfortunately, the Internet is not all flowers and sunshine. There are elements within it that have grown to become sources of concern within our society. Among them is the persistent availability of Pornography or more commonly known Cyberporn. Cyberporn has become the most controversial topic arising from the use of Internet in recent years. Its availability on the Internet has caused fear and a 'moral panic' among the government, law enforcement bodies. There is no settled definition of pornography in a multi-national environment such as the Internet. Cultural, moral and legal variations all around the world make it difficult to define 'pornographic content' in a global society. It is because of above reason that has caused many citizens world wide to put pressure on their law enforcement mechanism to monitor the Internet. Many nations have framed legislations that would strictly regulate the Internet,

and still others are trying to legislate. Individuals who choose to view Cyberporn have challenged these legislations.

Pornography has been an issue of great controversy around the world for years. It has its history, in continental Europe since1660's. During those days pornography was associated with various and wide ranging ideas, spanning from political messages to obscenity. When pornography was first labeled as such in France in the early eighteenth century it was primarily used in political cartoons to help organize resistance against the French aristocracy. This type of pornography, referred to as "political pornography", was strikingly different from the pornography that we know today [2]. The monarchy was often the subject of much of the pornography written between 1500 and 1800. The king's body and the body of the nation were frequently used by cartoonists to dramatize the political concerns of the citizenry. In addition, pornography was also used to criticize the excess of the Catholic Church. The Church was repeatedly referred to as the "Whore of Rome" by pornographic pamphlets printed during this time, and pornographic writers would use a rich and obscene woman to depict the ceremonies associated with Roman Church [3].

Towards the end of the period between 1500 and 1800, pornography lost its political role and instead, began to be produced only for individual sexual gratification. An industry was created that produced mass quantities of publications that were not intended to be political or cultural critiques. Once political pornography evolved (or devolved) to this phase, it ceased being political and began to be profit making. The political history of pornography has shaped the postmodern definition that we understand today. This change is what leads to the development of the type of pornography that we are most familiar with today. To understand today's pornography, it is necessary to understand and incorporate the political history that pornography has and the influence that its history contributed to our understanding of pornography in this post-modern period.

It was not until the early 1800's when pornography became associated with the humanist and material movements that it was considered obscene and regulated by the State. Both of these movements were linked to the spread of democracy and corresponding rejection of the monarchy and the hierarchy of the Catholic Church in Europe. The emphasis that both humanism and materialism be placed on the individual was threatening the political order of the period. This resulted in the creation of pornography as a category of publications, allowing the State to regulate and control the publication of pornographic works [4]. Since that time, various developments in technology have changed the way pornography is disseminated. However, it was not until the advancement in Internet technology that access to pornography was virtually unlimited. Before the Internet, one wishing to purchase or view pornographic material had to go to a place which provides such material. This allowed the government to regulate children's access to pornography. It also provided the government with an enforceable method of ensuring that illegal pornographic material was not sold. By reviewing the material sold in the establishments selling pornography, and by requiring publishers of the pornographic materials to provide proof of the age of the subjects in the photographs, illegal pornographic materials such as child pornography and bestiality could be monitored.

Now, with the development of the Internet, the regulation of pornographic material has become much more difficult. Children can access pornographic materials from their homes or even from public libraries, and illegal materials can easily be disseminated. Anyone with a scanner and a modem can post obscene photographs, which are available to millions of people. Indeed, each day additional sites dedicated to pornography are created. The Internet was originally designed by the United States Department of Defense as a means of providing decentralized computer controls. The theory was that if part of the country were destroyed by a nuclear attack, the computer systems containing war planning would still be functional. Soon the opportunities of the Internet became clear to the private sector. Universities and businesses created connections to what has been termed "the information superhighway" and eventually led to what is today known as the World Wide Web.

Technology serves to facilitate commercial activity and pornographers have never lagged behind from it. Huge amount of pornographic material can be reproduced more quickly and cheaply on the new media like hard disks, floppy disks and CD-ROMs. The new technology is not merely an extension of the existing forms like text, photographs and images. Apart form still pictures and images; full motion video clips with sound are also available. In fact, the latest trend seems to be towards interactive 'live sex' where people perform on and according to requests by subscribers to the services. The end user can view all of this on his/her monitor, save and can transmit it. In past, when technology was not so advanced government was able to keep some check. But, then there is the nature of the medium also that plays the vital role. Any search engine can be used to generate a list of a vast number of sites with pornographic content [5]. Many of these are free or have free trial offers and this defeats the very rationale of having an age limit under which pornography may not be sold to minors. This shows the serious need for regulation of pornographic materials, or at least regulation of where pornographic materials can be viewed.

2. DEFINITON OF THE TERM PORNOGRAPHY AND ITS NATURE

In any country where freedom of expression is regarded as important, whether or not it is constitutionally guaranteed, it is expected that some balance must be struck between the right to free expression and the right of government to restrict and prohibit it publication or distribution. Therefore, in the context of obscenity (and after internet, particularly child pornography), and immorality, the govt. of a country has been consistently putting 'reasonable' restriction through various enactments. [6]

It is important to note that, Indian law nowhere defines the term 'Pornography'. Even the term is not statutorily defined in the United States of America. It is also felt that as there is no uniform standard of moral culture and ethics there cannot be any fixed/uniform definition of this term. Pornography is often described as hard to define but easy to recognise.

Difference Between obscenity and pornography

At this juncture it is important that the term pornography and obscenity may be understood in their widest meaning.

The literal meaning of the term 'pornography' is describing or showing sexual acts in order to cause sexual excitement through books, films etc

The Little Oxford Dictionary defines pornography as – "an explicit presentation of sexual activity in literature, films, etc".

The Concise Oxford Dictionary defines Pornography as – "the explicit description or exhibition of sexual activity in literature, films etc. intended to stimulate erotic rather then aesthetic feelings."

Concise Oxford Dictionary defines obscenity – " offensively or repulsively indecent, esp. by offending accepted sexual morality."

Often the term 'pornography' is understood in context of 'obscenity'. However, it is submitted that obscenity is a broader concept, which includes in itself all those acts that are offensive to modesty or decency. Thus, in the light of the above definition it is found that the crux of the matter is not 'Pornography' but 'Obscenity'. It is unfortunate that, majority of us carry a false impression that pornography should be regulated, but on the contrary it is submitted that what is obscene or harmful to public decency should be checked and not pornography.

Further, discussions about pornography regulation often give meaning to pornography on three different aspects:

first is the legal definition used to define the term.

secondly, what the porno material says and how others are influenced by the use of it.

finally, what is the effect upon those who view that material.

Thus the above makes clear that pornography by itself does not constitute offence but pornography, which is obscene, and detrimental to public welfare, is an offence. At this point, the term obscene must be understood. The literal meaning of the term obscene is - words, thoughts, books, pictures, etc. indecent esp. sexually, disgusting and offensive, likely to corrupt those whose

minds are open to such immoral influences. Thus in the light of above discussion it is submitted that every obscene material is pornography but every pornography material is not obscene.

Section 292 of the Indian Penal Code also defines obscenity, which corresponds in the English case of R v. Hicklin (1868) 3 QB 360. It was in this case where the court laid down the test for Obscenity. But, later the Supreme Court of America abrogated the Hicklins test and developed the 3-prong test in Miller v. California (1973) 413 US 15.

Different countries have evolved different laws to curb pornography, but the current architecture of the Internet makes it difficult to regulate such unwanted contents at global level. Internet provides a platform through which one can express his ideas, thoughts, expressions, customs and traditions. This information will flow from one corner of the globe to another corner just at the click of mouse. It is here where we can see the clash between the spiritual east and the materialistic west. Today live sex and child pornography are rampant on the Internet. Cyber Pornography has become a difficult to regulate because there is a difference of opinion as to acceptable standards and limits of morality in different countries. Some of the attributes of cyber pornography are different from other cyber crimes like hacking, implementing viruses etc. Unlike the latter cyber crimes, which threaten the very creditability of the Internet, cyber pornography promotes the use of the Internet. Should cyber pornography be prohibited, or restricted? How much of cyber pornography should be legal? What are the powers of the state to prohibit or regulate cyber pornography? These are difficult issues to resolve. There are two reasons as to why cyber pornography has became difficult to regulate is:
firstly, it is easily, freely, and convenienently available.
secondly, its global accessibility.

The above two reasons is playing very important role in this multi billion dollar industry. The power of Internet and pornography industry is providing energy to each other. Pornography involving children is another global problem, because

it involves the direct abuse of children. Since there is a universal consensus against this menace it can be fought effectively by extremely deterrent laws.

3. LEGAL PROVISIONS RELATING TO OBSCENITY IN INDIA

Before analyzing the provision laid down in Indian Penal Code 1860 and Information Technology Act 2000, let us take a look to what Article 19 (1) (a) of Indian Constitution says. Clause (2) of A.19 of the Constitution of India imposes certain restriction on the right enjoyed under sub-clause (a) of clause (1) of the same article. The provision reads as follows:
(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the state from making any law, in so far as such law imposes reasonable restriction on the exercise of the right conferred by the sub-clause in the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign state, public order, decency and morality, or in relation to contempt of court, defamation or incitement to an offence.

Therefore, as the clause clearly says, a restriction can be imposed on the individuals right to freedom of speech on the grounds of pubic interest morality and decency. Pornography can be covered under this provision of the constitution.

At the outset it is worth mentioning here that the term, 'Pornography' is not used in S.292 of IPC or S.67 of the IT Act. However, The IT Act 2000 does not depart for the definition of "obscenity" in the Indian Penal Code 1860.
Section 292 of Indian Penal Code 1860
Section 292 of IPC deals with Sale, etc of obscene books, etc:
Its says – ".for the purpose of sub-section 2, book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object shall be deemed to be obscene, if it is lascivious or appeals to the prurient interest or if its effect are 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.

Section 67 of Information Technology Act 2000

Section 67 of the IT Act 2000 deals with 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 convection with imprisonment of wither 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."

After going through both the definitions, we can see, that the concept of obscenity is same in section 292 of the IPC and section 67 of the IT Act. The only difference is that it is discussed under different enactments. Section 292 of IPC speaks of any "book, pamphlet, paper, writing, drawing, painting...or any other object", whereas section 67 of the IT Act covers- "electronic form" only. Moreover the punishment prescribed u/s67 is more severe then u/s 292 of IPC.

Recent case law

Recent Indian incidents revolving around cyber pornography include the Air Force Balbharati School case. A student of the Air Force Balbharati School, Delhi, was teased by all his classmates for having a pockmarked face. Tired of the cruel jokes, he decided to get back at his tormentors. He scanned photographs of his classmates and teachers, morphed them with nude photographs and put them up on a website that he uploaded on to a free web hosting service. However, he was granted bail by a juvenile court. Judges Sanjay Agarwal and Ila Rawat said that bail is a matter of right and not an exception. The court went on to say that according to Section 12 of The Juvenile Justice Act 2000, "When a juvenile is brought to a court, he should be released on bail, if there is no chance of him/her absconding." The Court further remarked that students in the age group of the accused had a tendency to

scribble graffiti in bathrooms, blackboards etcetera. Court said that in the cyber era that we live in, the present case was an example of 'tech graffiti', adding that it should not be taken seriously. The purpose of the law would be served not by detaining the boy but by rehabilitating him. Showing grave concern for the boy's future, the judges remarked that keeping in view the purpose of the Juvenile Justice Act and United Nations rules for the care and protection of children, 'we should not let this childish activity spoil the boy's career'. Noting that he was in class XII, which is an important milestone in a person's career, they said the school should not push him into the backwaters. (WWW.REDIFF.COM APRIL 30 2001)

In another incident, in Mumbai a Swiss couple would gather slum children and then would force them to appear for obscene photographs. They would then upload these photographs to websites specially designed for pedophiles. The Mumbai police arrested the couple for pornography. (See - www.cybercrime.planetindia.net/intor.htm - Introduction to cyber crime)

S.292 of IPC, which deals with Indian law against obscenity, has been inherited from British, and the same has been borrowed for the IT Act 2000. The line of our present law go back to the decision of the Queens Bench in the R v. Hicklin (1868) 3 QB 360 in which the following test was evolved by the court;

"I think the test of obscenity is whether the tendency of the matter charged as 'obscene' is sufficient to deprave and corrupt those whose minds are open to such immoral influences, and into whose hand a publication of this sort may fall".

This test has been applied by courts in India also. Supreme Court of India in case of *Ranjit D Udeshi v. State of Maharashtra AIRA 1965 SC 881* approved the test and said that this test should not be discarded as it helps the courts in distinguishing between that which is artistic and that which is obscene. (Indian Penal Code- by Ratanlal and Dhirajlal)

In *Chandrakant Kalyandas v. The State of Maharashtra 1969 (2)SCC 687*, the Supreme Court held that the concept of obscenity would differ from country to country and from society to society on the standard of morals. Again it was recognised that the standards of contemporary society in India were also fast

changing and if a reference to sex by itself were considered obscene, no books would be sold except those, which are religious. The court went on the say, what one has to see is whether a class, not an isolated case into whose hands the book, article or story falls, suffer in their moral outlook or become deprave by reading it or might have impure thoughts aroused in their minds. Again, in case of *Samaresh Basu v. Amal Mitra (1985) 4 SCC 289*, the court said that the concept of obscenity is moulded to a great extent by the social outlook of the people who are generally expected to read the book. The court further admitted that even the outlook of a judge might differ from other judge on the question of obscenity. The court held that in order to constitute an offence u/s 292 of the IPC, the matter complained of as obscene must be so gross and its obscenity so pronounced that it is likely to deprave and corrupt those whose minds are open to influence of this sort. The court went on to say that even the attitude of the judge hearing the matter is likely to influence, his mind and his decision on the question (at times even unconsciously). In judging the question of obscenity, the judge should try to place himself in the position of the author from whose view point the judge should try to understand as to what it is that the author seeks to convey. The judge should thereafter place himself in the position of reader of every age group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have in the minds of readers. It was however held that though a court may consider the views of reputed authors, the ultimate duty to make proper assessment regarding obscenity rests with the court.

The Supreme Court in the famous Bandit Queen case i.e *Bobby Art International v. Om Pal Singh Hoon (1996) 4 SCC 1*, held that the film was a serious and sad story of a village-born female child becoming a dreaded dacoit. The court in this case emphasized on the message that the film intended to convey. The scenes in question relating to her being humiliated, stripped naked, paraded, made to draw water from the well, within the circle of a hundred men, were not found to arouse prurient or lascivious thoughts but revulsion against the perpetrators and pity for the victim. The SC held that the film shows the consequences of a social evil necessary must show that evil. In case of *Shanker v. St. of Tamil Nadu (1994) 4 SCC 478*, the Supreme Court come down heavily

on popular Hindi cinema. The court said that the Censor Board must see that the movies convey the values of life. Scenes of violence, rape, sex etc would frustrate the avowed objects. The court went on to say that films should be of educative value and only then can they play an important role in sub serving the interests of the society.

The test of obscenity since Hicklin case has been variously stated with shifting emphasis, in the UK and the US. Broadly, it has been recognised that obscenity has to be judged in the context of contemporary standards and prevailing attitudes towards sex [7]. However, Hicklins test was objected on certain grounds by Justice Brennan in the famous American case, Roth v. US (1957) 35 US 476. The three grounds identified by J.Brennan were:

- it permitted books to be judged obscene on the basis of isolated pages read out of context;
- it allowed the obscenity of a work to be determined by its likely effects on unusually susceptible persons;
- it posited fixed standards of propriety regardless of time, place and circumstances.

In this case it was held that a book could be judged obscene only if the dominant theme of the material taken as a whole considered and its likely effect on the average person is taken into account [8]. This came to be popularly known as Roth's three-pronged test. The test was considered to be more effective than earlier Hicklin's test.

Another important code that attempts to regulate obscenity is Indecent Representation of Women's (Prohibition) Act 1986. The title of the Act makes it amply clear that the legislature is to prohibit "indecent representation". Pornography, which amounts to indecent representation, is also an offence under this act. The issue to be determined is what may amount to indecent representation. To this section 2(c) of the Act defines indecent representation as – " the depection in any manner of the figure of a women, her form or body or any part thereof in such a way as to have the effect of being indecent, or

derogatory to, or denigrating, women, or is likely to deprave, corrupt, or injure the public morality or morals".

4. POSITION IN THE USA

Pornography is abundantly available on the Internet. Moreover, because the current architecture of the Internet cannot distinguish between adults and children, children can easily access pornographic Internet sites. Children's ready access to pornography online has not escaped the notice of parents or the U.S. Congress, but to date, attempts to regulate it through law have failed.

In the United States, pornography is difficult to regulate because most forms of pornography, with the exception of child pornography, are considered legally "indecent" rather than "obscene." Because Americans have a First Amendment right to access indecent but not obscene material, they have a qualified right to pornography. Notwithstanding this right, in *Ginsberg v. New York*, the Supreme Court held that the U.S. Constitution permits children to be prevented from accessing any material deemed "harmful to minors." Thus, material that is considered indecent for adults may be legally obscene for children. However, it was held that attempts to regulate children's access should be such that it is limited only to restrain minors from accessing such harmful material. Any measures developed to regulate pornography are thus subject to many qualifications, depending partly on the nature of the content and partly on the supposed viewer. Furthermore, *Ginsberg* also places the burden on the distributors of pornographic content by forcing them to make reasonable attempts to determine their customers' ages.

It must be noted that, obscenity is sexual words and images, which are not protected by First amendment of the US Constitution. To be legally obscene, a work must appeal to the prurient interests, depict sex in a patently offensive way, and lack serious literary, artistic, political or scientific value. Pornography on the other hand is material designed to arouse and has no legal or consistent definition. Each person's definition depends on his upbringing, sexual

preference and viewing context. One women's "trash" may be another's treasure.

In 1973, the U.S. Supreme Court did clarify the definition of pornography/obscenity. In *Miller v. California, 413 U.S. 15 (1973),* the court defined it by setting up the following three-part test: (see-www.caselaw.lp.findlaw.com/scripts/getcase)

1. Would the average person, applying contemporary community standards find that the material:
- when taken as a whole,
- appeals to a prurient interest in sex (i.e., an erotic, lascivious, unhealthy, morbid interest)?
2. Would the average person find the material depicts or describes:
sexual conduct (i.e., ultimate sex acts, normal or perverted, actual or simulated, lewd exhibition of the genitals, excretory functions, sadism, and masochism)
in a patently offensive way? AND
3. Would a reasonable person find the material:
- as a whole,
- lacks serious literary, artistic, political or scientific value?

Pornography is sexual material that leaves nothing to the imagination. The material is gripped with sex and includes close-up shots of the actual or simulated sex acts. In *Roth* the court said prurient means going "substantially beyond customary limits of openness in description or representation of such matters." If all three parts of the above test are answered with a "yes" then the material is pornographic and illegal for distribution.

In anticipation of people claiming there was no clear definition of pornography, the *Miller* court said:

Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these

specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. (See-www.caselaw.lp.findlaw.com/scripts/getcase)

The Supreme Court in Stanley v. Georgia, *394 U.S. 557 (1969)*, held that in a person's home "the mere private possession of obscene matter cannot constitutionally be made a crime." The Court went on to say, "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books 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." But the government does have the right to prohibit possession of certain items, such as child pornography. They also have the right to prohibit the distribution of certain items, such as child pornography, and material harmful to minors.

- You have the right to possess hard-core pornography/obscenity for your own use in your home.
- You do not have the right to sell or show hard-core pornography to others.
- You do not have the right to possess child pornography.
- You do not have the right to show or give material to a minor that is harmful for a minor (see-www.attorneygeneral.utha.gov/pornography/protectchild.htm)

Attempt to control, restrict and regulate cyber pornography have completely failed. In the year 1996, the Communications Decency Act [9] was legislated in the United State of America for the purpose for regulating the pornographic content on the Internet to protect minors, which was met by severe criticism, inter-alia on the arguments of free speech and violation of the rights of adults.

Constitutional right to view pornography - The U.S. Position

It is important to note that the U.S. government did not propose to limit everyone's access to pornography, which would clearly be unconstitutional. While the Government has a legitimate interest in protecting children from exposure to indecent material, the method must be such that it meets that object. The First Amendment of the U.S. constitution protects sexual

expression, which is indecent but not obscene, and the sale of such materials to adults could not be criminalized solely because they are indecent.

Before we discuss the First Amendment constitutional right to view pornography, it may be understood that for the purposes of this writing pornography is not obscene but sexually explicit and indecent expression. It must be noted that obscenity is not protected by the First Amendment and the standard to judge whether something is obscene or not, is 'whether to the average person, applying contemporary community standards, the dominant them of the material taken as a whole appeals to prurient interest." Material appealing to prurient interest is defined as "a shameful or morbid interest in nudity, sex, or excretion" [10]. In the same way, the U.S. Supreme Court in case of New York v. Ferber, 458 U.S. 747 (1982) held, that pictorial representations of children in a variety of sexual activities or exposure of the genitals is not protected by the First Amendment [11]. The policy behind the Court's decision was that the "governmental interest in protecting the physical and psychological well-being of children whose participation in the production of these materials would subject them to exploitation and harm" [12].

Where an expression is clearly obscene or clearly a case of child pornography, the government has the ability to suppress that speech, regardless of the medium, without concerns of whether First Amendment protection exist or not. However, where the problem is with respect to the expression that is offensive to some but not within the constitutional standards of unprotected obscenity, such speech will be termed as pornography. The government is allowed to regulate pornography as long as the legislation is appropriately narrow enough. The Court will generally look at the government's interest in the regulation and its view of the importance of the regulation itself [13].

The federal governments first, and thus far, only attempt to regulate pornography over the Internet occurred when the US Congress enacted the Communications Decency Act 1996 (CDA). The CDA made it a criminal offense to "by means of a telecommunications device to knowingly:

make, create, or solicit...
initiate a transmission of any comment, request, suggestion, proposal, image, or other communication, which is obscene or indecent, knowing that the recipient of the communication is under the age of 18 [14].

In Reno v. ACLU, 521 U.S. 844 (1997), the Supreme Court struck down the online censorship provision of the CDA. The after effects of this decision in regards to the regulation of online pornography are still being felt today. One of the first issues the Supreme Court had to tackle in Reno was whether the time, manner, and place restrictions that the Court had placed upon print media and broadcast media such as television would also apply to the Internet. The Supreme Court basically decided that expression over the Internet required a higher degree of first amendment protection than that afforded to TV, radio, or print, because, "the Internet can hardly be considered a "scarce" expressive commodity. It provides relatively unlimited low-cost capacity for communications of all kinds." The Court agreed with the district court's statements that the Internet is not as "invasive" as radio or television and that user of the Internet seldom encounter content by accident. The Court, after deciding that a higher degree of first amendment protection would apply to the Internet, next looked at the portion of the CDA at issue and ruled it unconstitutional. The Court stated –

"In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another"[15].

The Court basically said that the portion of the CDA applying to Internet communication was overly broad and that "the burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the state was enacted to serve".

One of the primary arguments against the CDA that the Court accepted was that, under the statute, it would have been a crime for a child of 17 years of age or younger to receive pornographic materials from libraries, educational

institutions, and not to mention, commercial pornographers [16]. The statute did not differentiate between, whether the pornographic materials where being used to educational or scientific use. The Court concluded "Congress had determined that nothing less than a total ban would be effective in preventing minors from gaining access to indecent communications [17].

Lastly, the Court frowned upon the fact that the CDA placed the burden upon the sender to screen whether or not once an indecent communication is sent across the Internet that is not received by a minor. The Court decided that this was very difficult, and no viable technology currently existed that could meet this burden [18]. The Court found it more realistic that parents could control the content of what there children receive, and that technology currently existed to accomplish this. To conclude, the Supreme Court made it clear in Reno v. ACLU that, First Amendment expression over the Internet, which includes pornography, would be afforded the highest level of protection [19]. Only the most narrowly enacted laws where the government's interest in censoring pornographic expression far exceeding any First Amendment concerns, will be upheld under a Reno v. ACLU analysis. Similarly, the court also held that state laws to regulate sexual material circulating over the Internet have also failed to satisfy the provisions of the First Amendment under Reno [20].

In spite of widespread criticism, CDA was passed by the legislature in the US without difficulty. The constitutionality of CDA was challenged on the grounds of violation of freedom of expression, vagueness and being over-board. Ultimately the act was held constitutionally invalid, and was struck down.

The next statute Congress enacted in an attempt to protect children online was entitled the **Child Online Protection Act** 1998 (COPA) [21]. COPA only applied to commercial web site operators and required them to block minors form accessing material determined to be "harmful to minors" or be faced with criminal prosecution [22]. COPA is sometimes known as "son of CDA". It was signed into law by President Clinton in 1998. COPA limits commercial web sites from distributing material that is "harmful to minors." It is a criminal act with penalties of up to a $50,000 fine and six months in jail.

According to COPA, material that is "harmful to minors" would meet the following three-prong test:
(1) the average person, applying contemporary community standards, would find, when looking at the material as a whole and with respect to minors, that it is designed to appeal to or pander to the prurient interest;
(2) the material depicts or describes, in a manner patently offensive with respect to minors, actual or simulated sex, perverted sex acts or lewd exhibitions of genitals or post-pubescent female breast; and
(3) when taken as a whole, material lacks literary, artistic, political or scientific value with respect to minors [23].

The Act also included a provision establishing the Commission on Online Child Protection to study ways to reduce access by minors to material defined as harmful to minors. The Commission looked at the effectiveness and accessibility of various child-protective methods, including "filtering and blocking services; labeling and rating systems; age verification efforts; Internet monitoring and methods; and options for increased prosecution against illegal online material."
The ACLU, along with sixteen other plaintiffs, once again challenged this legislation of child protection on the Internet. They sought an injunction, that would prevent the enforcement of COPA [24]. The U.S. District Court granted the injunction after determining that there was a "substantial likelihood" that COPA violated the First Amendment and the Third Circuit affirmed the District Court's granting of a preliminary injunction [25]. The ACLU, in response to the court's decision, said, "Clearly, the court is not satisfied with Congress's efforts in this area. We now call on Congress and the Clinton Administration to close the book on this early chapter of Internet history and embrace free speech online as we have embraced it in every other significant communications medium."[26]. However, contrary to the ACLU's hopes for Congress's "efforts in this area". Congress did not give up on its attempts to regulate the Internet with respect to minors.

In November 2001, the Supreme Court heard oral arguments regarding the federal constitutionality of COPA. The Court's questions focused on exactly what Congress intended with its "community standards" test and whether

Congress meant a community standard in the context of the Internet as a national standard. Senator John McCain (R- Ariz.) and retired Representative Thomas Bliley (R-Va.) submitted a brief to the Court in which they stated:

What is harmful to minors isn't decided by a geographical community. Instead it is based on the views of the American adult community as a whole. The law was to be adapted to the World Wide Web by using a new standard of what the American adult-age community as a whole would find prurient and offensive to minors. (Scott Ritter- Court Weighs Shielding Children's from Web Smut - see Wall Street Journal 26/Nov/2001)

Congress's next attempt was with the Children's Online Privacy Protection Act 2000 (COPPA) [27]. COPPA laid down that it is against the law for web site operators or online services directed at children, or any operator that has actual knowledge that it is collecting or maintaining personal information on a child, to collect that information in the following ways: -

- without providing notice that the information is being collected and how it is being used;
- without obtaining verifiable parental consent prior to collecting the information;
- without providing a reasonable means for a parent to review the information that is collected and refuse to permit its use;
- by conditioning a child's participation in a game, offering a prize, or another activity, on the child disclosing more personal information than is reasonably necessary to participation in the activity; and
- without establishing and maintaining reasonable procedures to protect the confidentiality, security, and integrity of the children's collected personal information [28].

COPPA has not been challenged. However, it is clearly different than the previous statutes mentioned. COPPA does not attempt to regulate the content of sites; it regulates how sites that deal with children handle the child's personal information. COPPA is a privacy statute directed at keeping a child's personal

information secure, while the CDA and COPA were directed at the sites themselves and the availability of their content to children.

The newest Congressional Legislation directed at protecting children online is called the Children's Internet Protection Act 2000 (CHIPA) [29]. The Children's Internet Protection Act was enacted in December 2000 and took effect in April 2001. Unlike the other two Acts, CIPA is not a criminal act. CIPA restricts federal funding for schools and libraries that do not put into place and enforce blocking or filtering technology that would protect against "Internet access to visual depictions that are obscene, child pornography, or harmful to minors." CHIPA required libraries that receive federal funds to install "filtering" software that is designed to block access to adult web sites [30]. The Act requires both public schools and libraries to submit "certification" that they are taking the required steps in order to prevent minors from accessing certain adult material [31]. As in the case of COPA and the CDA, this Act is also being challenged. The American Library Association, one of the plaintiffs challenging this statute, alleges that the statute isn't about protection, but is about censorship [32]. Since filtering was required in public schools and libraries by CHIPA, those most impacted would be those who did not have computers in their homes. Congress, obviously, is not giving up on legislating the protection of children on the Internet without a fight. Although statutes have been defeated on First Amendment grounds and the latest statute, CHIPA, could also fall on these grounds, it is doubtful that Congress will heed the advice of the ACLU and accept that free speech outweighs protecting the children of America. However, surpassing Constitutional scrutiny will definitely require very artistic statutory drafting.

The fact that the US Congress has tried three times to enact legislation that would protect minors from sexually explicit material on the Internet proves that it is a compelling government interest. All three attempts have run into the same problem—any regulation that protects children from sexually explicit material on the Internet must be carefully tailored so it does not infringe on the First Amendment rights of adults. Thus, the fact that all three attempts of Congress have collided with the First Amendment proves that the government

cannot remedy the problem alone. As the Child Online Protection Commission recommended, in order to protect our children from sexually explicit material online, joint efforts by the government, consumers, parents, law enforcement, the technology industry, and the adult Internet industry will be required. This may seem like a discouraging task, but with the fast pace of computer technology development, it is not an unreasonable goal. Many technologies that individuals can place on their computers to restrict access to pornographic materials already exist. These technologies are becoming more refined everyday; the time may come when their flaws are few. In the meantime, both the government and industry can educate parents about available methods of protection, and the government can fund programs to investigate and prosecute federal and state obscenity laws. The government can also provide money to address international Internet crime, including obscenity and child pornography. Libraries with public Internet access could offer a section of computers with filtering software dedicated to use by children and a section of unfiltered computers for adults.

Even if CIPA ultimately fails constitutional scrutiny, strike three is not the last chance for Congress to protect minors from sexually explicit material on the Internet. As the Third Circuit Court of Appeals stated, some day technology may be developed that produces reliable geographic and age-verification information on the Internet and, at such time, laws like COPA may become "constitutionally practicable."

5. POSITION IN CANADA

Canada's child pornography law is considered to have some of the harshest penalties in the world. Under the Criminal Code 1993 offenders who possess images of children under the age of 18 engaging in sexual activity may now be sentenced up to five years in prison.

Following are the various provisions in the Criminal Code of Canada to curb the crime of Pornography:

Section 163 of Canadian Criminal Code (Offences Tending to Corrupt Morals)

163. (1) Every one commits an offence who

(*a*) makes, prints, publishes, distributes, circulates, or has possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatever; or

(*b*) makes, prints, publishes, distributes, sells or has in his possession for the purpose of publication, distribution or circulation a crime comic.

(2) Every one commits an offence who knowingly, without lawful justification or excuse,

(*a*) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model,phonograph record or other thing whatever;

(*b*) publicly exhibits a disgusting object or an indecent show;

(*c*) offers to sell, advertises or publishes an advertisement of, or

has for sale or disposal, any means, instructions, medicine, drug or article intended or represented as a method of causing abortionor

miscarriage; or

(*d*) advertises or publishes an advertisement of any means,

instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.

Defence of public good -

(3) No person shall be convicted of an offence under this section if the public good was served by the acts that are alleged to constitute the offence and if the acts alleged did not extend beyond what served the public good.

Question of law and question of fact -

(4) For the purposes of this section, it is a question of law whether an act served the public good and whether there is evidence that the act alleged

went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.

Motives irrelevant -

(5) For the purposes of this section, the motives of an accused are irrelevant.

(6) [Repealed, 1993, c. 46, s. 1]

Obscene publication-

(8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

Section 163.1 - Definition of "child pornography"

163.1 (1) In this section, "child pornography" means

(*a*) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,

(i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or

(ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years; or

(*b*) any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act.

Making child pornography -

(2) Every person who makes, prints, publishes or possesses for the purpose of publication any child pornography is guilty of

(*a*) an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(*b*) an offence punishable on summary conviction.

Distribution, etc. of child pornography-

(3) Every person who transmits, makes available, distributes, sells, imports, exports or possesses for the purpose of transmission, making available, distribution, sale or exportation any child pornography is guilty of

(*a*) an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(*b*) an offence punishable on summary conviction.

Possession of child pornography-

(4) Every person who possesses any child pornography is guilty of

(*a*) an indictable offence and liable to imprisonment for a term not exceeding five years; or

(*b*) an offence punishable on summary conviction.

Accessing child pornography-

(4.1) Every person who accesses any child pornography is guilty of

(*a*) an indictable offence and liable to imprisonment for a term not exceeding five years; or

(*b*) an offence punishable on summary conviction.

Further, it is not a defence to a charge under subsection (2) in respect of visual representation that the accused believed that a person shown in the representation that is alleged to constitute child pornography was or was depicted as being eighteen years of age or more unless the accused took all reasonable steps to ascertain the age of that person and took all reasonable steps to ensure that, where the person was eighteen years of age or more, the representation did not depict that person as being under the age of eighteen years.

Section 168. (1) Every one commits an offence who makes use of the mails for the purpose of transmitting or delivering anything that is obscene, indecent, immoral or scurrilous.

Punishment

169. Every one who commits an offence under section 163, 165, 167 or 168 is guilty of

(*a*) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(*b*) an offence punishable on summary conviction.

The case of John Robin Sharpe highlights how Canada's child pornography laws can be interpreted.

In 1995 John Robin Sharpe was arrested and charged with two counts of possession of child pornography and two counts of distributing child pornography. He had pictures of boys under the age of 14 engaged in sex and a collection of his own stories titled 'Kiddie Kink Classics." He fought the charges claiming that the stories and images had 'artistic merit'. The Supreme Court of Canada heard the case in January 2000. Three of the judges were in favour of retaining the 1993 law and four appeared to be a favour of striking down some or all of the legislation. After a lengthy debate most of the law was upheld and the case was sent back to British Columbia courts for retrial.

In March 2002, the B.C. court found Sharpe not guilty of possessing written child pornography. He was found guilty on two counts of possessing pornographic pictures of children and later sentenced to four months of house arrest. Justice Duncan Shaw found Sharpe's stories did not advocate committing a sexual crime and had artistic merit, "irrespective of whether the work is considered pornographic." [36]

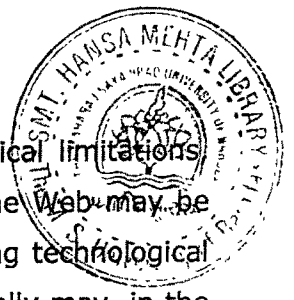
In the three years that the Toronto Child Exploitation unit has been tracking child pornography they've made 27 arrests and seized 84 computers with millions of images [37]. But the police have been frustrated in their attempts to put them behind the bars. Most get conditional sentences or house arrest. The police frequently spend more time investigating the cases than offenders will spend in jail. Police say stricter laws with better enforcement would make their job easier. They want sentences for child pornography to have a minimum mandatory jail time. They would also like to collect DNA for a national databank of child sex offenders and raise the age of sexual consent from 14 to 16.

It is submitted that in India also there is a need to have some special provision relating to child pornography in IPC in line of Section 163.1 of Canadian Criminal Code. It is unfortunate that in India we don't have any specific provisions relating to child pornography even though we have Information technology Act that deals with many aspects of cyber crimes. In absence of the definition of child pornography provisions of s.67 of IT Act 2000 and s. 292 of the IPC will be applicable.

6. WHY IS CYBER PORNOGRAPHY DIFFICULT TO REGULATE? SOME SUGGESTIONS FOR REGULATION

To understand the Supreme Court's concern with the statutes that the US Congress has passed in an attempt to protect children, it is important to understand the unique nature of the Internet and why it is so difficult to regulate. The Internet functions as a global network connecting millions of computers around the world. No one single organization or entity controls this network; instead it is a decentralized, self-maintained networking system that transmits communications by linking computers and computer networks around the world. Within the Internet is the World Wide Web, which is a publishing forum consisting of individual formatted documents or 'websites' that contain text, images or sounds provided by that site's creator. Web pages are made available to other users by connecting the publisher's computer to the Internet. Once this happens, an end user can move freely from one Web page to another by clicking on a link. Each site is connected to the Internet and becomes accessible to everyone on the Web anywhere in the world. The fact that there is no centralized point currently makes it impossible for websites or services to block the content of their pages from locations around the world. In fact, a Web publisher has no way of knowing the geographic location of visitors to its site.

The Supreme Court has been very clear that it is the technological aspects of the Internet that have made many of the regulations passed by the US Congress unconstitutional. As the Court stated:



We are forced to recognize that, at present, due to technological limitations, there may be no other means by which harmful material on the Web may be constitutionally restricted, although, in light of rapidly developing technological advances, what may now be impossible to regulate constitutionally may, in the not-too-distant future, become feasible (ACLU v. RENO, 929 F Supp. 824 1996)

The Court seems to believe that if technology ultimately allows the publishers to control access to their sites, Congress will be able to regulate them.

Some believe the movement toward a new national standard instead of community standards would solve many of the concerns over what type of material can be published. However, this approach ignores the global nature of the Internet. Web publishers fearful of prosecution for Web content access in the United States could easily move their sites to foreign servers.

One question left open by Reno v. ACLU is how the government can properly regulate pornography on the Internet, if indeed there is a way to do so without violating the First Amendment. The government certainly has a right to enact the legislations. However, until the technological blocking concerns can be addressed, the answer might be found in personal responsibility and general market principles. The Court criticized many of the alternatives available at the time, and seemed to believe that in the near future technology would provide better methods of protecting children. The government would have to devise a scheme that would restrict children's access to pornographic materials without overly burdening consenting adults, and those posting the pornographic material.

Many opponents of CDA, COPA, and CIPA argue that, instead of government regulation, parental monitoring of a child's Internet access and the use of filtering software to block access to certain sites will protect children. While these are valid solutions, they do not necessarily work. A recent study indicated that about half of parents do not supervise their children's Internet usage. Never mind the fact that most kids understand the Internet better than their parents. (See- Mike Sinder, Study -Kids Lacking Net Supervision USA Today May 27,1999)

Filtering software itself has run into constitutional challenges. In Loudon County, Virginia, the Federal District Court for the Eastern District of Virginia found mandatory filtering devices on library computers to be unconstitutional. (Mainstrean v. County Library 24 Fsupp 552 1998). The Supreme Court has not ruled on the issue of mandatory filtering devices although the passage of CIPA might expedite a decision. Additionally, most filtering devices are textually based and screen out sites based on keywords and addresses. The result is an over- and under-inclusive filtering device that often misses harmful material in the form of graphics and blocks valuable artistic, political or medical information because of the use of keywords.

We may now look to different ways to regulate the Pornography on Internet:

(a). Adult oriented top-level Domain names

One solution that may really work is the creation of adult-oriented top-level domains (TLDs). In its most simple way, the TLD is the identifier that comes after the 'dot' in all Internet addresses. For instance, in the Internet address 'yahoo.com', the 'yahoo' is the second-level domain and 'com' is the top-level domain. Initially, when Internet was designed, it was used by military, and very few computers were connected to the network. Each computer was identified by its own unique numeric address called an Internet protocol address (IP). As the number of computers and users grew, the system became burdensome. A new system was designed to respond to this growth using a hierarchical database structure, which allowed for top and second-level domain names. This new system facilitate the use of easily identified names that are then converted to numeric IP addresses, so a particular item of information within the Web can be located. Seven top-level domains such as ".gov," ".edu," ".com" etc. were created. Second-level names were then registered under the top-level domains. It is within the top-level domain name system that a possible solution may exist.

Although the top-level domains are voluntary, Internet Service Providers (ISPs) may opt to force their registrants to operate under the new domain so they can market themselves as family friendly. From the perspective concerning children, the new top-level domains such as ". xxx" or ". sex" would make it much easier for filtering devices to block pornographic materials. Instead of the keyword, the filtering device could focus on the site's top-level domain. If nothing else, it would make it easier and therefore maybe more likely for parents to identify and monitor the sites their children visit on the Web. They would know when their children had entered the 'red light district' of the Internet. (Andy Patrizo-New Net Defines Domain Names. See www.wirednews.com/news/business.html)

Originally, Network Solutions, Inc., was given authority to register second-level domains. However, once the world recognized the commercial value of the Web, the number of users increased like anything. It became apparent that as the system continued to grow, there would need to be some sort of governing body to oversee the expansion of the Internet. The Department of Commerce called for the creation of a not-for-profit corporation to administer the domain system. As a result, the Internet Corporation for Assigned Names and Numbers (ICANN) was created to administer address names. (ICCAN Fact Sheet - www.iccan.org/general/factsheet.html). One of the first tasks of ICANN was to respond to the enormous demand for new top-level domains. In November 2000, ICANN approved seven new top-level domains even though they had received a request for more than forty. (Andy Patrizo-New Net Defines Domain Names. See www.wirednews.com/news/business.html). However, new entities had began to bypass the ICANN's authority with regard to issuance of new top-level domains.

One such company, New.net, began offering twenty new top-level domains, none of which were approved by ICANN. Realizing the advantage of adult-oriented top-level domains, New.net created a new domain called ".xxx." The creation of a TLD outside of ICANN does pose some technical problems with regard to routing. Because the New.net domains are outside of the ICANN system, customers are limited to two possible ways of accessing the sites with the new TLDs. Only customers of ISPs who have partnered with New.net can

access the sites. However, if a service provider has not partnered with New.net, individuals have the option of downloading a plug-in program so their browsers can access the new sites. Earthlink, Excite and NetZero have agreed to partner with New.net, which means New.net can reach close to forty-two million users. New.net is not the only company interested in adult domains. Domain Name Systems, another company who has worked closely with the porn industry, has also begun offering .xxx names. Additionally, ICM Registry is a company that actually submitted a .xxx domain proposal to ICANN and, although it was not initially approved, is still lobbying to get the domain approved by ICANN.

The result of multiple companies registering second-level domains under the same top-level domain names creates both technical and legal problems.. In the past, the second-level domain names that were registered were easily managed since the companies registering the second-level domains had control of the top-level domain. But now, one company could register 'girls.xxx' with one company and someone else could register 'girls.xxx' with a different company. When a user types 'girls.xxx', to whose site will the user be routed and who has a legal claim to that site's name?

In 1999, ICANN adopted the Uniform Domain Name Dispute Resolution Process to deal with disputes regarding conflicting claims over identical or similarly named sites. Anyone who is approved by ICANN must agree to have any disputes handled through this resolution process. But if the new top-level domains are created outside the authority of ICANN, then the companies registering under these new domains are not bound by any of ICANN's policies. And since ICANN's authority stems from consensus, they have no real power to stop these companies from creating these domains. So, what happens if multiple companies register duplicate names with companies offering the TLDs outside of ICANN? In such cases, the users could end up at different sites depending on their browser or their ISP. For instance, Earthlink is currently partnered with New.net, so if the user typed in 'girls.xxx', the user would end up at the site registered with New.net. However, if the user accessed the site from a different computer with a different ISP, and there is a duplicate site

registered with another company like Domain Name Systems, the user would end up at that alternative site

Under current trademark guidelines, companies or individuals applying for trademark protection for top-level domains are denied. (see-www.uspto.gov.web/offoces.html) One of the key components of obtaining a trademark or service mark for a domain name is that it indicates the source to a website customer. This is why the courts and the trademark office have traditionally focused on the second-level domain name as opposed to the beginning of the address such as "http://www" or the top-level domain such as ".com".

Unfortunately, the legal confusion surrounding the new top-level domains and the concern over who will ultimately hold the rights to a particular name or site could prevent providers of pornography from taking advantage of the new adult-oriented top-level domains. However, if ICANN were to approve an adult-oriented top-level domain and companies like New.net were willing to fall under the authority of ICANN, then the chances of the adult-oriented sites being successful would be much stronger.

(b). Credit Card Verification

One another suggestion, which can be analyzed, is the use of credit card verification. Using this method, those who operate the web sites, would require a credit card number before allowing access to pornographic materials. The credit card would not be charged, but rather the age of the viewer would be verified by use of an electronic database. This method seems good apparently but it may cause an undue burden to non-commercial web hosts. Thus it is submitted that this method may unduly restrict individuals' expression.

(c). Parental Control

Another option, which can be tried is, parental control of what a minor could access. This method involved the use of software that restricts access to web sites containing certain words [37]. "Companies like America Online and Walt

Disney have released tools that help parents screen out what can be seen on their computers while on the Internet."

Others are also calling for self- regulation, Seth Warshavksy, the owner of the Internet Entertainment Group (IEG), which runs over 30 pornographic sites. He suggested during a Senate Committee meeting on Internet pornography that adult sites should only be viewed by adults. He proposed his method of ensuring that only adults were able to access adult material; what he termed as a "adult only" Internet area. It would be labeled ".adult", instead of the domain names we are so familiar with-".com, .org and .edu." In this manner, one would know when adult material was going to be accessed, thereby avoiding the problem of accidental exposure. However, at the time of the decision in Reno, and still today, there is no software that analyzes the picture content of web sites. In other words, many sites that may have pornographic images but no words associated with pornography may escape detection, while other sites, which are useful but not pornographic, may be blocked [38].

(d). Tagging

Yet another option to regulate the porno content is, Tagging of certain sites that are distributing harmful contents. With this method of regulation, the government would require that certain images, words or other data be marked or tagged with certain codes that the browser software would recognize. The browser software would then be able to restrict an individual's access to this material. The trouble with this system is that it requires a determination of exactly what is obscene and what is not. If a web site, which explains proper breast-feeding methods to mothers obscene if it contains photographs of women breastfeeding? The point is, at some level of the analysis some materials, which should be screened out, are going to make it through the system, while other material which may be suitable for general audiences will be erroneously excluded. Another problem with this method is enforcement. Specifically, there is virtually no way that the government can ensure that everyone complies with the tagging requirements. With literally millions of new web sites added yearly, it is a monumental task to attempt to document what each site contains, much less to determine whether a violation of the tagging

requirements exists. This sort of enforcement would require a huge expenditure by the government and the results are not guaranteed. Simply put, the tagging method would place demands on law enforcement much like the "war on drugs", where the arrest of one perpetrator simply creates room in the market for one more entrepreneur.

(e). Issuing Digital Certificate

One another important method, which could be the use of digital certificates to prevent access to adult material. Digital certificates reside in the Internet user's hard drive and provide information about the user, including his age. When the user enters a website, the site automatically checks the certified information and permits only those over a certain age to enter the site. It is submitted that, "digital certificate zoning is a better alternative to filtering in that it is more accurate than stand alone blocking software" and avoids the problems of "blocking software used in conjunction with content ratings."

At global level the efforts have already started to curb the menace of Cyberporn. Yet much has to be done at various national levels. We can take a look at following cases where by we can see that govt. has successfully stared its efforts to combat the cyber porn.

China closes down 16,000 Internet cafes in three months (AFP)

China has closed 16,000 Internet cafes in the past three months, as a campaign to protect its 367 million children and adolescents from corrosive influences picks up steam, state media said. The number of cafes forced to cease operations was reported by the Xinhua news agency and suggests a much more comprehensive drive to control a once-thriving industry than previously believed. China has long seemed divided on how to deal with the Internet, since on the one hand it holds huge potential for the economy, while on the other it poses a risk to the communist regime by making information more freely available. In recent months, the Chinese leadership appears to have decided to err on the side of caution, partly as a result of a new push to raise the ethical standards of the young." (See-www.uknewsyahoo.com/040602/323/evlci.html)

CN - Nanny knows best (Guardian)

Beijing is cracking down on access to the Internet in the name of public health and safety. Considerate to a fault, the Chinese authorities have closed down more than 8,600 unlicensed Internet cafes in the past three months to ensure the 'healthy development' of the nation's impressionable young minds. The government-controlled domestic media have described the move in benign terms, as the nanny state tightening safety standards at businesses that take up an increasing amount of teenage time and money. But for some reason this has not convinced cynics, who see the crackdown as an alarming new Big Brother-style restriction on the population's freedom of expression and access to information. (See-www.gurdain.co.uk/online/news/012597.htm)

UK - Gallery closed over naked pictures of girl (Guardian)

Police were called to a fashionable art gallery when concerns were raised over an exhibition featuring photos of an artist's naked daughter. Scotland Yard was alerted after visitors to the exhibition at the Spitz gallery in London complained they considered the images, showing the girl as a baby, a toddler, and a five-year-old, to be pornographic. (See- www.guardian.co.uk/arts/news/stories.html)

Looking to the nature of the Internet it is submitted that legislations alone are not going to help us more to combat the cyber crimes. The nature of the Internet plays very vital role here. Due to its global accessibility, disregard of geographical boundaries and its decentralised nature nothing much can be done. We know that traditional law enforcement mechanism rests on the pillar of jurisdiction, which respects the geographical boundaries. But in case of Internet it is fully reverse. Again difference of moral values plays its own role. The right example would be failure of the US Congress to implement its all the three enactments. Of course this does not mean the government cannot enact laws. But looking to the nature of the Internet it is submitted that we has to rely more on the technology rather than laws. The only way out to protect us and to prevent/combat the cyber pornography is the strong technological backbone.

We still may adapt following methods-

- Liability of the Internet Service Providers should be more precisely laid down.
- They must introduce more advance filtering devices that can filter the objectionable content.
- The cyber cafe owners will need to buy a license to set up shop. They must be legally required to install software filters to screen out pornography and unsuitable content.
- They must insist upon the potential surfers to fill out lengthy forms listing addresses, telephone numbers and other details.

All of these would legally have to be made available to the police, if required. Cyber cafe customers would need to display photo identity cards. Only then could they go online.

7. CONCLUSION

Because of the global access of the Internet along with diverse legal treatment to pornography in different parts of the world, it has become difficult to regulate it. There are places were pornography is liberally permissible while in other countries there are prohibitions, or restrictions. There are countries where prostitution is not only legal but also a source of earning foreign income by attracting tourists and thus it is promoted as an industry. On the other hand, there are countries like India, where prostitution is prohibited under different enactments. We in India follow the principle of dualism, which is likely to continue for cyber pornography also. The same contradiction shall apply to cyber pornography in India. Rather due to the three-click access to cyber pornography from anywhere and its invisibility, the lawmakers and the law enforcement agencies have no choice but to continue the existing dualism and contradiction for cyber pornography also.

What could be done actually to curb the menace of pornography is an attempt by the state to attain social maturity through education and then it should be left to individual choice as to what and how much of cyber pornography the individual want to see. The problem around the globe is how to restrict the children's from the cyber pornography and at the same time uphold the rights

of adults to reach to such material. It is submitted that since legislation such as CDA have been struck down as unconstitutional, Governments all over the world can do very little to resolve this dilemma. Lastly, it is submitted that strong reliance on the technology will definitely help to curb this menace.

In the present circumstances, the best solution to this problem is education and the role of parents who must assume responsibility of acting as teachers, friends and policeman to minor and adolescents.

Footnotes

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7. Freedom of Speech & Pornography - by Ankita Lal-Central India Law Quarterly. Vol.XVI 2003
8. Freedom of Speech and Pornography - by Ankita Lal - Central India Law Quarterly. Vol.XVI 2003
9. Two provisions of the Communication Decency Act 1996 (hereafter CDA) sought to protect minors from harmful material on the Internet. One of the provisions sought to criminalize the "knowing" transmission of "obscene or indecent" messages to any recipient less than 18 years of age (Sec.223 (a)(1)(B)(ii) of CDA). The other provision prohibited the "knowing", sending or displaying to a person under 18 years of age any message "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs" (Sec.233 (d) of CDA). The Supreme Court held that the aforesaid provisions were violative of the freedom of speech, which was protected by the First Amendment. The court also held that CDA failed to provide any definition of "indecent". The court

found the aforesaid provisions as vague, uncertain and amounting to suppression of the valuable rights of adults.

10. See: Invention of Privacy www.casealaw.lp.findlaw.com/data/constitution/amendment01/19.html
11. See: Invention of Privacy at www.caselaw.lp.findlaw.com/data/constitution/amendment01/19.html
12. Roth v. U.S., 354 U.S. 476 (1957) America passed CDA 1996, whose main purpose was to regulate all the medium of communication. But this Act was held to be unconstitutional by the Federal Supreme Court in landmark case of Reno v. ACLU 1997 Lexis 407 June, 26,1997
13. First Amendment of the US constitution protects the right of freedom of speech and expression on very wide footing,
14. See: Invention of Privacy - www.casealaw.lp.findlaw.com/data/constitution/amendment01/19.html
15. See. Invention of Privacy - www.casealaw.lp.findlaw.com/data/constitution/amendment01/19.html
16. See "Invasion of Privacy" www. caselaw.lp.findlaw.com/data/constitution/amendment01/19.html
17. Reno v. ACLU, 521 U.S. 844, 874 (1997).
18. See Morris, Stan Regulating 'Decency' Online: Analyzing the Past and Predicting the Future http://www.gigalaw.com/articles/morris-2000-05-p4.html
19. See Morris, Stan Regulating 'Decency' Online: Analyzing the Past and Predicting the Future http://www.gigalaw.com/articles/morris-2000-05-p4.html
20. Reno v. ACLU, 521 U.S. 844, 877 (1997)
21. Ibid 18
22. See Edmund Burke The First Amendment, Interstate Commerce and the Internet http://www.gigalaw.com/articles/2001/burke-2001-12.html
23. See Child Online Protection Act of 1998 (COPA), 47 U.S.C. section 231 (1998).
24. See Child Online Protection Act of 1998 (COPA), 47 U.S.C. section 231 (a)(1).
25. See Child Online Protection Act of 1998 (COPA), 47 U.S.C. section 231 (a)(6).
26. See ACLU v. Reno (Reno II), 31 F.Supp.2d 473 (E.D.Pa. 1999).(www.findlaw.com)
27. Reno II, 31 F.Supp.2d 473 (E.D.Pa. 1999).(www.gsulaw.gsu.edu/lawand/paper/fa01/davis/#FN11)
28. "ACLU v. Reno II Victory! Appeals Court Rejects Congress' Second Attempt at Cyber-Censorship," American Civil Liberties Union Freedom Network , 22 June 2000. www.gsulaw.gsu.edu/lawand/paper/fa01/davis/#FN12)
29. See Children's Online Privacy Protection Act of 1998(COPPA), 15 U.S.C. sections 6501-6506 (1998) (www.findlaw.com)
30. See Federal Trade Commission's Enforcement Rules of COPPA at 16 C.F.R. sections 312.3(a)-(e) (2000). -See www.gsulaw.gsu.edu/lawand/paper/fa01/davis)

31. See Children's Internet Protection Act of 2000 (CHIPA), 47 U.S.C. sections 254 (h) and (l) (2000). See - www.gsulaw.gsu.edu/lawand/paper/fa01/davis
32. CHIPA, 47 U.S.C. sections 254 (h) and (l) (2000). www.gsulaw.gsu.edu/lawand/paper/fa01/davis
33. 47 U.S.C. sections 254 (h) and (l).
34. Shannon P. Duffy, "Libraries, ACLU Challenge New Law. It's The Third Suit Against Laws Meant to Protect Children From Internet Pornography," The Legal Intellingencer 224, (March 2001): 55 www.gsulaw.gsu.edu/lawand/paper/fa01/davis
35. Criminal Code of Canada, Section 163.1 (1)
36. See- www.cba.ca/fifth/landslide/laws - Pornography laws of Canada
37. Ibid 36
38. Ibid 37
39. See www.we-blocker.com; www.netnanny.com; www.cyberpatrol.com; www.surfwatch.com; www.x-stop.com
40. For example, sites containing safe sex information have been blocked. A Web-MD site containing information about breast self-exams for cancer screening was blocked by net. nanny, while a site containing with only Japanese writing but containing nude, sexually explicit photographs was not detected by net nanny or cyber patrol.