

## *Mobile Phones and the Internet: Legal Issues in the Protection of Children*

ABHILASH NAIR

**ABSTRACT** *The issue of protecting children from the potential hazards of the Internet environment has led to various legislative attempts to regulate content on the Internet. However, the constraints it imposed on valuable free speech rendered most of them futile. While the importance of protecting children is not disputed, the problem lay in the delicate issue of finding a balance between free speech rights and the protection of children. This paper looks at the legal aspects involved in the protection of children, privacy issues, etc in the context of the growing popularity of mobile phones and other portable devices that offer Internet access. The Internet was mainly confined to PC or laptops until recently. However, over the last few years newer technology devices such as wireless, PDAs and 3G mobile phones, etc also provide Internet access, which are probably more invasive and direct than the traditional PC. These new media and delivery channels give new dimensions to the problems associated with the impact of inappropriate content on the child, especially with the widespread use of camera-phones. These forms of access for content may lead to quite different expectations regarding privacy and freedom of expression and raise new issues in the arguments for strengthening the law for protecting children from potential dangers. In the absence of a consensus on whether/how to regulate content on the Internet for the protection of children, an examination of some of the legal issues involved merits consideration. While acknowledging that technology does more good than harm, the paper argues that it is important to take adequate measures to counter its abuse and create a safer environment for children, more so in light of the growing popularity of mobile Internet.*

Correspondence: Abhilash Nair, Room 1.13, The Law School, University of Strathclyde, 173 Cathedral Street, Glasgow G4 0RQ, Scotland. E-mail: [c.m.abhilash@strath.ac.uk](mailto:c.m.abhilash@strath.ac.uk)

ISSN 1360-0869 print/ISSN 1364-6885 online/06/01–2177-9 © 2006 Taylor & Francis

DOI: 10.1080/13600860600579779

## Introduction

The Internet has been growing at an unprecedented rate ever since its invention in the last quarter of the 20th century.<sup>1</sup> As with any other new technology, there has been a lot of debate on the legal issues and new challenges posed by the Internet. However, the area that probably received most attention as well as controversy is the regulation of content on the Internet. While state action was in favour of regulation in the form of legislation, the judiciary did not seem to be very pleased, at least in the USA. What happens in the USA with respect to the Internet has great significance in Internet jurisprudence for the simple reason that a majority of Internet related litigation takes place in that country. Therefore, the world watched with utmost interest when the courts in USA ruled on the Communications Decency Act, 1996,<sup>2</sup> which was apparently the first legislative action by the US government to regulate content on the Internet. The fact that the issue being addressed here was the protection of children only made the debate more interesting and worthy of attention. The CDA sought to prevent children from being exposed to inappropriate content on the Internet and the mechanisms that the Act laid down necessarily implied restricting speech of adults which, in the physical or offline world, in many cases would have been perfectly legal. The Supreme Court upheld the decision of the trial court that the Act imposes 'impermissible burden' on the free expression rights of adults and hence, ruled it unconstitutional.<sup>3</sup>

Subsequent to the failure of the Communications Decency Act, the government drafted a new legislation, the Child Online Protection Act, 1998,<sup>4</sup> which attempted to remedy the defects of the CDA. In spite of being narrower in scope compared to the CDA, neither did COPA pass the test of constitutionality in the courts. After a protracted litigation and appeal process it was remanded back to the Circuit Court. One of the reasons the Supreme Court pointed out for doing this was the rapid changes in technology since the dispute began way back in 1996, which needs to be considered while determining the constitutionality of COPA.<sup>5</sup>

It is this constantly changing technology that throws new challenges to law. The Internet was traditionally confined to personal computers, either at home or at the office. However, the trend has now changed to that of portability, with a number of portable and handheld devices offering Internet access, which are more invasive and direct than the traditional PC. The most popular among these are mobile phones, which come at affordable prices and a wide variety of models to choose from.

## Mobile Phone Usage among Children in the UK

There has been recent research into the extent of mobile phone usage among children in the UK. According to an NOP Research Survey,<sup>6</sup> about 50% of UK children own mobile phones.<sup>7</sup> The survey reveals that 52% of girls and 44% of boys have their own mobile phones, with 14–17 year olds having the highest proportion (77% owning one). It was also found that while parents provided their children with mobile phones for use in emergency and to stay in touch with them, the phones were largely used for purposes such as keeping in touch with friends. The extent of privacy children demanded for this was also at a very high level. A 2004 research by Mobile Youth even claims that 97% of 12–16 year olds own a mobile phone in the UK.<sup>8</sup>

The mobile phone industry has also been growing rapidly over the last ten years. Mobile phones are no longer a simple device meant for making voice calls or text

messages. Convergence has elevated mobile phones into an instrument facilitating an interaction of the three major sectors of telecommunications, media and information technology. Bluetooth technology, which allows electronic devices to connect and communicate with each other in a wireless environment, is becoming increasingly popular with mobile phones. Phones that are equipped with cameras are also able to capture and send images including video images. Does this pose new challenges for law and especially for the protection of the rights of children? There are broadly two areas of concern: protecting the privacy of children, and providing a safe and annoyance free environment for children on the Internet.

### **Privacy Concerns**

A recent case in India provides an example of the problems created by camera phones with respect to privacy of children. The case involved two school children in a public school in Delhi, in which a minor boy allegedly recorded his sexual act with his girlfriend in school using his camera-equipped cell phone and later transmitted it to friends. This video clip was widely circulated and eventually found its way to a popular auctions website, called bazee.com. This case was the first of its kind in India, and the initial reaction was that of confusion. A charge sheet was framed and the prime accused turned out to be the CEO of the website that featured the advertisement for the sale of this video clipping. The other two accused were the minor schoolboy himself and another college student who allegedly put up the video clip for bidding on the website. Understandably, there were loud voices of concern and protest regarding the arrest of the CEO of the website. Bazee.com, a subsidiary of e-bay, is a trading platform that offers buyers and sellers an opportunity to transact, and unlike a retailer the website does not own or sell any goods that are listed on the site. In simple terms, what happened here was that an intermediary was indicted—which arguably is wrong.<sup>9</sup> On a different note, the Delhi administration banned mobile phones in all public funded schools pursuant to this incident. India is also in the process of amending the Information Technology Act 2000, one of the major changes proposed being making substantial changes to section 72<sup>10</sup> in order to offer stronger protection of privacy rights in the Internet and digital environment.

A recent research from Gartner<sup>11</sup> estimates that in 2003 only 9% of mobile phones sold in Western Europe had embedded cameras. This was projected to rise to 45% in 2005 and to 66% in 2006. As mentioned before, kids and teenagers are heavy users of these gadgets. The main feature of cameras fitted on mobile phones is its stealth nature. While it is easier to recognize that the user is taking a photograph with a traditional camera, this is not always the case with a camera phone. This means, it is possible to take photographs without the knowledge or consent of the subject, which sometimes can be done in an inappropriate situation. This is clearly an invasion of privacy and could cause distress for the subject of the photograph. The distribution of photographs taken this way is rather easy. As evident from the Delhi Public School case, it can be distributed easily to others and even find its way to the Internet. Once it reaches the Internet, it becomes extremely difficult to track down and permanently remove the images. Furthermore, photographs could reveal personal and location details of the subject, for instance the school name or a park where the child might be visiting on a regular basis, which if distributed inappropriately could reach the wrong hands of predators seeking contact with children. There are also concerns that confidential or examination documents could be at risk, resulting in inappropriate use of personal data or cheating.<sup>12</sup>

This threat has already been recognized in the UK, as the West Lothian in Scotland became the first local authority in the UK to introduce a ban on camera phones in all primary and secondary schools. Interestingly, this move was widely backed by teachers' associations.

## Safety Concerns

### *Online Bullying*

Bullying simply means the act of frightening or hurting a weaker person or group, according to the *Oxford English Dictionary*. Bullying in schools is nothing new and has existed long before the advent of the Internet. However, with the growing popularity of mobile phones among children, newer forms of bullying are reported and the research into this does not portray a pleasant picture.

A recent research of the charity National Children's Home (NCH) revealed a lot of interesting details on incidents of bullying through mobile phones. Twenty per cent of young people admitted that they had experienced some sort of digital bullying. Mobile bullying was the most significant of all, with 14% admitting to have received bullying or threatening text messages. It was also found that 5% were harassed in Internet chat rooms and 4% by e-mail.<sup>13</sup> The leading children's charity, Childline, announced in August 2004 a 42% rise in the total number of children counselled by the charity about bullying. Bullying is the single biggest reason for children to call Childline and now accounts for one in four calls to the free helpline.<sup>14</sup> The survey pointed out the use of new technology, such as SMS text messaging and email as vital factors in bullying.

### *Child Grooming*

There were concerns about the use of the Internet by sex offenders to groom children to meet and persuade them to have a sexual relationship. This fear has only increased since web enabled mobile phones became popular. Mobile phones have been used as a tool in child grooming process and there have been instances where the predator has sent a mobile phone to the child to ensure that the child's parents have no way of knowing about, or monitoring, the contact between the two. Mobile phones are a more powerful platform than fixed Internet for abuse and protection of children should be viewed with great importance. The PCMLP-IAPCODE Self Regulation and Codes of Conduct project undertaken in the Oxford University identified six key differentiators between fixed and mobile Internet usage:<sup>15</sup>

- (1) Pervasiveness: many secondary and even primary school students have phones with colour screens at the birth of the wireless internet;
- (2) Supervision: mobile use by its nature is unsupervised;
- (3) Filtering defaults: porn-screening defaults are opt-in, unlike opt-out Internet Explorer, AOL and Google;
- (4) Convergence: digital image capture and distribution is integrated—porn distribution is 'one click away' from digital image capturing;
- (5) P2P: messaging and filesharing drives usage amongst children and profits per bit to networks;

- (6) Liability: networks are also the ISPs, and under recent surveillance legislation (eg the U.K. RIP Act 2002) have to keep a database of all Internet pages and files accessed for up to three years.

The study underlined the importance of the networks' responsibility in protecting children and clearly demonstrates that mobile appliances are a more powerful platform for abuse than fixed ones, especially since filters do not work properly for mobile Internet.

### Global Positioning Service (GPS)

GPS technology provides assistance in tracking an individual who carries a GPS enabled device. This feature is now available in some mobile phones. GPS phones, and other tracking devices were hailed as a wonderful feature that helps parents keep a track of their children. From the child's perspective, there are two points to be considered. The first is the privacy aspect. Is a GPS enabled phone in their possession with an objective to be tracked and kept under surveillance by parents an invasion upon their privacy rights?

While children have distinct inalienable rights, it is also a fact that parents have the legal right to control their children, which includes the right to determine where the children go. Parents usually enjoy these rights, except in instances of child abuse or neglect. Thus, in the 1979 case of *Bellotti v. Baird*,<sup>16</sup> the US Supreme Court pointed out three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults:<sup>17</sup>

- (1) the peculiar vulnerability of children;
- (2) their inability to make critical decisions in an informed, mature manner; and
- (3) the importance of the guiding role of parents in the upbringing of their children.

It is very difficult to assume that the surveillance of a child's movement will interfere with their privacy rights. There are other over-riding concerns that justify restrictions on children's rights with regard to privacy, and safety should definitely receive priority over privacy considerations. As Roberts rightly pointed out, 'Rather than look to the courts for relief, teens will have to resort to old-fashioned negotiation with mom or dad to be freed of GPS tracking'.<sup>18</sup>

The second point is the safety aspect. How much safety does GPS or other devices or equipment with tracking or surveillance features offer? It does provide some—for instance, it enables parents to track the movement of the children when they go out unaccompanied. However, the benefit or convenience this feature offers should be weighed in the context of the associated security risks this might pose. Imagine the tracking feature getting into the wrong hands, for instance, those of a potential child abuser. It is even more dangerous when a potential offender finds his way into the child locate service sector. There are companies in the UK offering child locate services who track the GSM mobile phone Cell Location Data of registered phones, usually in association with their Mobile Phone Operator partners. By utilizing this service, parents can always keep an eye on their children. However, as of now there is no special requirement by law that the staff working in this business are to undergo a criminal record check. Furthermore, the entire service relies on the ability to use a website to find the location of the child, and to send 'authenticated' SMS messages. These 'trusted' SMS messages have the potential to be a perfect kidnapping tool for evil predators if this system is insecure.<sup>19</sup>

The Internet has tremendous potential as a source of information for children. Failure to ensure adequate safety and privacy standards has two effects. First is obviously the violation of their right to privacy, such as in the Delhi Public School case. Second, and probably as important is the fact that failure to provide adequate safety standards will result in a scenario where parents will shy away from letting children spend enough time on the Internet. In countries that have records of trafficking in children for the purposes of prostitution, etc, this apprehension is rightly understandable.

### Self-regulation by the Industry

The Mobile Joint Code of Practice adopted by mobile phone operators<sup>20</sup> in the UK in January 2004 was considered as a major step forward in protecting children from paedophiles and pornography on the Internet. The aim of the code is to provide a basic common framework while leaving the technical compliance, etc, to individual operators.<sup>21</sup> Among the key points of the Code are an 18 rating for adult content for which an independent classification body is appointed to provide a framework for the classification of commercial content unsuitable for those under 18; an age verification procedure before such content is distributed to a customer; an independent classification framework similar to that used in the media industry; monitoring of chat rooms; parental controls to be added to devices; and greater cooperation between mobile operators and law enforcement agencies.

### Legal Response

As mobile Internet becomes increasingly popular, children are more accessible to evil predators than ever before. If there are loopholes or shortcomings in existing law it should be amended accordingly. The potential danger of a crime committed with the aid of internet chat rooms was established with the case of Patrick Green<sup>22</sup> who was sentenced to five years imprisonment for unlawful sexual intercourse with a girl aged 13. Green first met the girl online on the Internet, which remained their means of communication until they eventually met and had sexual intercourse.

The Sexual Offences Act, 2003 was enacted with the aim of addressing challenges arising out of new technology. Prior to the SOC Act, the relevant legislations that would have applied in the case of a child grooming incident were the Criminal Law Act 1977, Protection of Children Act 1978, Criminal Attempts Act 1981, Child Abduction Act 1984 and the Sex Offenders Act 1997. However, there were various anomalies and loopholes in these laws if applied in the context of online child grooming.<sup>23</sup> In the case of a predator planning to attack or abuse a child, the threshold of a crime should be prior to the actual attack. For instance, to establish a case of 'conspiracy' under section 1 of the Criminal Law Act 1977, two or more people should agree a course of conduct that would, if implemented, be an offence. However, if the co-conspirator happens to be the victim itself, which is the likely scenario in the case of internet child grooming, this section will not apply by virtue of section 2(2) and also goes as far as to confer immunity from prosecution to the defendant.<sup>24</sup> Similarly, criminal law experts have pointed out the inadequacy in applying the requirements of 'incitement' or 'attempt' to online child grooming cases.

It was in this background that the new Sexual Offences Act 2003 was enacted. The Home Office described the Act as ‘the first major overhaul of sexual offences legislation for over a century, and designed to meet the 21st century challenges of protecting children, and applies to issues such as Internet pornography and “grooming” children for abuse’.<sup>25</sup> Section 15 of the Act created a new offence, which in fact could address the issue of online child grooming in a more practical way.<sup>26</sup> It reads,

A person aged 18 or over (A) commits an offence if—

- (a) having met or communicated with another person (B) on at least two earlier occasions, he—
  - (i) intentionally meets B, or
  - travels with the intention of meeting B in any part of the world
- (b) at the time, he intends to do anything to or in respect of B, during or after the meeting and in any part of the world, which if done will involve the commission by A of a relevant offence.
- (c) B is under 16, and
- (d) A does not reasonably believe that B is 16 or older.

The main point to be noted with this provision is that criminal liability arises, in most cases, only if a meet or travelling with the intention to meet actually takes place. This was fairly inevitable because to hold someone liable for merely talking to a child could be criticized as draconian. What exactly amounts to ‘grooming’ is a tricky question, as some sexually explicit speech could be regarded as perfectly legitimate. So again, it comes to the issue of proving intention. In order to prove intention, the perpetrator may have to be allowed to proceed to the extent of meeting the child if there is not any written evidence. This could raise concerns regarding the safety of the child and could be considered unethical in some circumstances. It cannot be ignored that most of the online grooming process takes place through conversations on the Internet, and in this respect the argument that criminalizing simple communication would be too draconian lacks weight in that otherwise the objective that the Act seeks to achieve may not be entirely successful.

In contrast, the USA was relatively quick to amend their laws to address the problem. The USA has enacted both federal and state level statutes.<sup>27</sup> The US penal code has a very simplistic, at the same time, capable definition of the offence to tackle the issue. ‘Whoever crosses a state line with intent to engage in a sexual act with a person who has not attained the age of 12 years . . . shall be fined under this title, imprisoned for any term of years or life, or both.’<sup>28</sup>

In some states within the USA, for instance Georgia, the law goes even further than this.

It shall be unlawful for any person intentionally or willfully to utilize a computer online service, Internet service, or local bulletin board service to seduce, solicit, lure or entice, or attempt to seduce, solicit, lure, or entice a child or another person believed by such a person to be a child, to commit sodomy or aggravated sodomy, child molestation or aggravated child molestation, enticing a child for indecent purposes, public indecency, or to engage in conduct that by its nature is an unlawful sexual offence against a child.<sup>29</sup>

The laws in the USA have made it possible for people to be arrested and imprisoned before the offline offence is actually committed.

Even the Canadian law of 'Internet Luring' is quite capable of tackling online child grooming offenders, which makes it an offence to 'communicate with a child for the purposes of committing a sexual offence against that child'. This offence is quite wide and was criticized by civil liberty activists as being too broad. There is no requirement of an actual meeting taking place, neither is there the need to establish an intention to meet. In spite of all criticisms, the advantage of this is that it would cover situations where the abuse actually takes place over the Internet.<sup>30</sup> It is worth considering if the UK needs to strengthen the law following the US or Canadian model, or be content with section 15 of the SOC 2003 and see how the courts interpret this.

## Conclusion

The personal nature of mobile phones has rendered it as a vital tool in the child grooming process, even before Internet enabled phones became so popular. Mobile phones were usually used during the last stages of grooming, to communicate with the child using text and voice messages. As mobile phones developed into devices offering multiple features such as embedded cameras, GPS and Internet accessibility, children are more vulnerable to predators than ever before. State legislation alone cannot tackle the menace, but effective and up-to-date laws are definitely imperative for countering the threat. Self-regulation by the industry is also equally important and their efforts so far in this direction are commendable. However it must not be ignored that the industry also may have a vested interest in adopting the Code. It could primarily be a response to the fear among the industry to avoid state regulation. Nevertheless, a multi-sector approach would be best, ie leaving the primary regulation to the industry and the state backing up with strong laws for violators. It is also important to educate parents and teachers, recognizing their roles in controlling access to the Internet for children, although it is doubtful how much control they can exercise on mobile internet as against fixed internet accessed through a home or school PC. Children need to be educated about safe Internet and mobile usage as well as be encouraged to report any abuse to those concerned.

The notion that children have no rights is no longer accepted. In fact, we have come a long way from the earlier position that children have no rights, to admitting that children have some rights although these were initially considered as something that were bestowed upon them by parents or society. Thankfully, it is now becoming increasingly accepted that children have rights of their own, independent of parents, which accrue by virtue of their very existence, which are part of their basic human rights. This position is reflected in one of the most popular human rights instrument in history, the United Nations Convention on the Rights of the Child.<sup>31</sup> However, adopting reasonable regulatory measures for the Internet with an aim to protect children is in no way an infringement of their rights, even if it means a limited restriction on speech. In fact it only reinforces their basic human rights to a life with dignity as well as the right to seek knowledge and information.

## Notes and References

- 1 According to Neilsen/Net Ratings, there was a worldwide Internet population of 580 million users, as of 2002. For a detailed report on Internet usage, see the research findings of a study conducted in Berkeley University, available online at <http://www.sims.berkeley.edu/research/projects/how-much-info-2003/internet.htm> (last accessed, 16 June 2005).

- 2 47 U.S.C. §223 (1996) (amended by 47 U.S.C. §223 (1999)).
- 3 521 U.S. 844.
- 4 47 U.S.C. §231 (2000).
- 5 See, generally, C Netterville-Heieck 'Ashcroft v. ACLU: protecting our children from harmful online material without infringing upon First Amendment Rights' *Whittier Journal of Child and Family Advocacy*, 4(1), pp 95–114, Fall 2004.
- 6 See <http://www.nop.co.uk/news/PDF/sr0133.pdf>.
- 7 See <http://news.bbc.co.uk/1/hi/uk/1142033.stm>.
- 8 See [www.mobileyouth.org](http://www.mobileyouth.org)
- 9 The case is pending trial and the accused have been released on conditional bail at the time of writing this paper. For a general discussion on the case and cyber law issues in India see [www.naavi.org](http://www.naavi.org).
- 10 Section 72(3), 'Whoever intentionally captures or broadcasts an image of a private area of an individual without his consent, and knowingly does so under circumstances violating the privacy of that individual, shall be liable to pay compensation not exceeding Rs. 25 lakhs to the person so affected, and shall also be liable for imprisonment for a term not exceeding one year or with fine not exceeding Rs 2 Lakhs, or with both on the complaint of the person so affected' (10 lakhs = 1 million).
- 11 See [www4.gartner.com](http://www4.gartner.com).
- 12 See <http://safety.ngfl.gov.uk/schools/document.php3?D=d73>.
- 13 See 'Putting U in the picture, Mobile Bullying Survey 2005', National Children's Home, available online at [www.nch.org.uk/uploads/documents/mobile-bullying-%20report.pdf](http://www.nch.org.uk/uploads/documents/mobile-bullying-%20report.pdf).
- 14 See <http://www.childline.org.uk/bullying-biggest-ever-rise-in-calls.asp>.
- 15 'Self regulation of digital media: converging on the Internet: Industry codes of conduct in sectoral analysis, 2004', Programme in Comparative Media Law and Policy, Oxford University Centre for Socio-Legal Studies, available online at <http://pcmlp.socleg.ox.ac.uk/text/IAPCO-DEfinal.pdf> (last accessed, 30 June 2005).
- 16 443 U.S. 622 (1979).
- 17 443 U.S. 622 (1979), pp 633–639.
- 18 See, generally, Stephen N Roberts 'Tracking your children with GPS: do you have the right?' [http://library.lp.findlaw.com/articles/file/01017/009618/title/Subject/topic/Family%20-Law\\_Dependent%20and%20Neglected%20Children/filename/familylaw\\_2\\_3309](http://library.lp.findlaw.com/articles/file/01017/009618/title/Subject/topic/Family%20-Law_Dependent%20and%20Neglected%20Children/filename/familylaw_2_3309).
- 19 See <http://www.spy.org.uk/cgi-bin/childlocate.pl>.
- 20 The code, the UK Code of Practice for the Self-Regulation of New Forms of Content on Mobile Phones, is available from the websites of different mobile phone operators, for example see [www.t-mobilepressoffice.co.uk/company/content-code.pdf](http://www.t-mobilepressoffice.co.uk/company/content-code.pdf).
- 21 See, R Durie, 'Code of practice—joint code of practice by mobile phone operators to regulate adult content on mobile phones' *Entertainment Law Review* Vol 15, No 5, pp N48–49, 2004.
- 22 *R. v. Green* (Patrick Steven) [2001] EWCA Crim 642.
- 23 A A Gillespie 'Children, chatrooms and the law' *Criminal Law Review* pp 435–446, June 2001.
- 24 A A Gillespie 'Tackling grooming' *Police Journal* Vol 77, p 239, 2004.
- 25 See 'Children and families: safer from sexual crime' Home office website, [http://www.homeoffice.gov.uk/docs3/children\\_families.pdf](http://www.homeoffice.gov.uk/docs3/children_families.pdf).
- 26 Sec 15, Sexual Offences Act, 2003.
- 27 See generally, <http://www.childnet-int.org/downloads/online-grooming2.pdf>.
- 28 Title 18, section 2241(c).
- 29 §16-12-100.2, Computer Pornography and Child Exploitation Prevention Act of 1999.
- 30 See *op cit*, note 27.
- 31 There are 191 countries that have ratified the Convention so far, thus making it the most popular human rights instrument in history.

Copyright of International Review of Law, Computers & Technology is the property of Routledge and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.