

THE STUDENT SCHOLARSHIP BLOG

‘Fantasy v Reality: A Legal Review of Simulated Child Erotica in Manga and Electronic Games in Hong Kong’

Hilary Ko

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CENTRE FOR COMPARATIVE AND PUBLIC LAW
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Introduction

Child pornography is a subject that evokes raw emotion. It is a serious form of sexual exploitation of children, who are unable to make informed and consented decisions. It leaves irreparable harm to those involved in its production and distorts their value towards love, sex and marriage. The worse still, it is often used to normalise pedophilic desires and lure children into believing that such sexual acts are commonplace.

The United Nations Convention on the Rights of the Child (UNCRC) extended to Hong Kong in 1994. According to Article 34 of the UNCRC, children should be protected from all forms of sexual exploitation and abuse. It is under this context that the Prevention of Child Pornography Ordinance (“PCPO”) was promulgated to prohibit the production, possession and publication of child pornography in Hong Kong.¹ In PCPO, pornographic depiction means a visual depiction that either depicts a person as being engaged in explicit sexual conduct, or depicts the genitals or anal region of a person or the breast of a female person in a sexual manner or context.² The PCPO is often discussed together with the Control of Obscene and Indecent Articles Ordinance (COIAO).³ The COIAO has a broader coverage than PCPO. It regulates any article that are capable of being considered as ‘obscene’ or ‘indecent’ as long as it is on public display.⁴ Child erotica, which depicts implicit sexual conducts, is loosely regulated by COIAO.

I will argue that the existing definition of child pornography under the PCPO should be amended to expressly cover implicit child erotica. This amendment is proposed because some businessmen are exploiting this legal loophole to generate a lucrative business by depicting simulated child erotica in manga, animations and electronic games. In this essay, I studied both the legality and practicality of tightening the obscenity laws in Hong Kong with regard to simulated child erotica. I will divide this essay into two parts. First, I will critically evaluate PCPO and COIAO in light of overseas and local precedents. This will be by the examination of different legal treatments of ‘child pornography’, ‘child erotica’ and ‘simulated child erotica’. In the second part, I will propose legal reforms to close the legal gap and deter the sexualisation of children. This paper argues for a pre-sale censorship and classification system for electronic games to pre-empt the technological developments, as seen from

¹ See Prevention of Child Pornography Ordinance (Cap. 579) enacted on 19 December 2003.

² See section 2(1) of the PCPO

³ See Control of Obscene and Indecent Articles Ordinance (Cap. 390) enacted on 1 September 1987. See also Legislative Council, *Prevention of Child Pornography Bill* (SBCR 2/3231/200) para 4

⁴ The COIAO, however, does not regulate such article if it is in private possession.

the popularity of smart phones and the introduction of the virtual reality technological. Additionally, I propose for a modification in the Obscene Articles Tribunal (OAT), including the introduction of a jury system and operation in form of open trials.

Background

Since the 1980s, Japanese comics, also known as manga have been highly influential to Hong Kong culture. Manga has been merchandised into animations and electronic games and sold throughout Asia.⁵ Hong Kong is a major hub for these sales. In 2014 alone, there were more than 750,000 visits to the Animation-Comic-Game Festival.⁶ Examples of manga characters include Dragonball, Super Mario Brothers and Digimon, all of which are household names to many locals. However, some manga characters that arouse controversy because of their depiction of fantasy sex and violence involving child-like characters.⁷

PCPO has a wide coverage and outlaws all photograph, film or computer-generated image or visual representation.⁸ Logically this includes all managa, animations and games. However, the Hong Kong Bar Association commented that the PCPO gives an ‘extremely wide terms’ to child pornography compared to a different legal position in the United States of America. The Association quotes *Ashcroft, Attorney General et al v Free Speech Coalition* a decision of the US Supreme Court that the wide coverage of PCPO may be in conflict with the Human Rights provision of the Basic Law.⁹

⁵ Ng Wai-ming, ‘*The Impact of Japanese Comics and Animation in Asia*’ (2002) *Journal of Japanese Trade & Industry* July/ August, 1

⁶ ‘Endless commercial opportunities for manga and electronic games’ *Hong Kong Trade Development Council* (Hong Kong, 7 August 2014) <<http://bit.ly/298SkIA>> accessed 28 June 2016. The Animation-Comic-Game Festival is held annually at the Hong Kong Convention and Exhibition Center, where fans purchase comics, character goods and dress up as their favourite characters. There are also dancing and gaming competitions.

⁷ Mark McLelland, ‘*Thought Policing or Protection of Youth? Debate in Japan over the “Non-Existent Youth Bill”*’ (2011) *International Journal of Comic Art*, 13(1), 348.

⁸ See ‘child pornography’ in section 2(2) PCPO. The definition is also elaborated below.

⁹ Although the Bar Association did not stipulate which human rights may be at stake, inferring from *Ashcroft*, it is most likely that the Association was having the Article 27 of the Basic Law and Article 16 of the Bill of Rights Ordinance (Cap.383) in mind, which guarantee the freedom of opinion and expression. Hong Kong Bar Association ‘The Bar Association’s Submission on the Prevention of Child Pornography Bill’ (The Legislative Council’s Bills Committee Meeting, Hong Kong, May 2002). See *Ashcroft, Attorney General et al v Free Speech Coalition* 35 U.S. 234 (2002) (SC).

In fact, it has long been argued that simulated characters in manga, animation and electronic games should warrant a different treatment. When the Tokyo Metropolitan Government proposed to extend the law to cover virtual child pornography in 2010, 1421 manga artists and 10 publishers publicly protested against the bill, arguing that artists should enjoy the freedom of creation and not be punished for some ‘non-existent youth’.¹⁰ Mark McLelland, an Associate Professor of the University of Wollongong, categorises child pornography into real, pseudo and virtual images.¹¹ Real images is a record of crime, pseudo images involve digitally enhanced images; and virtual images are largely about fictional representations, exactly what is merchandised in manga, animations and games.¹² McLelland also expresses his worry that this may amount to a ‘thought crime’, which allows the government to police the social morality.¹³ In face of the strong opposition, the scope of the legislation was reduced. Manga, animation and computer games were singled out for further discussions.¹⁴

While art should be allowed to fulfil self-expression, the society should be wary against its use as a facade for child abuse materials. Hong Kong’s legal position is similar to those of Australia and Canada.¹⁵ The similarities is that the publication, trading and possession of child pornography is criminalised, and the definition of which includes drawings and simulated images.¹⁶ In spite of the stringent control, local businessmen who sell manga art that has sexualised images of children often bypass the law by covering images with minors’ private parts with boxes or plastic bubble wraps. These products fall short of child pornography and thus fall outside the scope of PCPO.

Simulated child erotica is a real and pressing problem. In Japan, there is a subgenre of manga called ‘lolicon’ which centralises around pre-pubescent girls in a highly sexualised context. They are often dressed in racy costumes that expose much of their limbs and breasts. The genitals are often hidden or effaced. They were originally targeted at hardcore fans, but slowly established themselves in the major market. An example is *Magical Princess Minky Momo* (1982-1983), a story of a little girl

¹⁰ McLelland (n 9)

¹¹ Mark McLelland, *The World of Yaoi: The Internet, Censorship and the Global “Boys’Love” Fandom* (2005) Australian Feminist Law Journal, 63

¹² Ibid.

¹³ Ibid

¹⁴ Ibid

¹⁵ See further discussion at n47-51 below.

¹⁶ See n 12 above and n47-51 below

transforming into a sexy adult in fetish costumes.¹⁷ A similar story line can be found in the online game *Princess Maker* (1991). The player, defaulted to be a male, can raise his daughter with the option of marrying her.¹⁸ Females are often depicted with an innocent, youthful face and a voluptuous figure, longing for sex and comforts from the male characters or the player himself. Another subgenre, ‘shotacon’, features pre-pubescent boys. It may or may not come with homosexual contents, but similarly depicts children as a possible sexual partner.

Sadly, child erotica is an enormous business in Japan. The Special Rapporteur of United Nations, Maud de Boer-Buquicchio, openly condemned this exploitation of children in her recent visit.¹⁹ Simulated child erotica in manga, animations and electronic games are often overlooked as it is deemed to be nothing more than a fantasy. But the uncomfortable thought that characters shall be infantilised to fuel paedophilic appetite suggests that there is an attitudinal harm in commercialising and promoting such materials.

Theoretically speaking, anyone selling these erotic manga and games in Hong Kong should seal them in a wrapper and display a warning notice occupying at least 20% of the cover in case they are likely to be classified as being ‘indecent’ under the COIAO.²⁰ They should also refrain from selling them to persons under 18 years of age.²¹ It is not mandatory for producers, publishers or sellers to send their articles for classification though. In reality, vendors in Sin Tat Plaza in Mongkok or Golden Computer Arcade in Sham Shui Po often take the risk and find ways to evade from the inspections by the authority.²² There was only one conviction from 2010 to September 2013 with a fine of mere \$2,000.²³ Above all, in the age of internet, such manga, animations and electronic

¹⁷ Galbraith (n 5)

¹⁸ Patrick Galbraith *‘Bishojo Games: “Techno-intimacy” and the Virtually Human in Japan’* (2011) *The International Journal of Computer Game Research* Volume 11 Issue 2

¹⁹ Maud de Boer-Buquicchio *‘End of Mission Statement of the United Nations Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography on her visit to Japan’* (26 October 2015) <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16656&LangID=E>> accessed on 5 December 2015

²⁰ See section 24 of the COIAO

²¹ See section 22 of the COIAO

²² According to section 34(1) of COIAO, a magistrate may issue a warrant authorizing any police officer or member of the Customs and Excise Service to enter premises and search for, seize, remove and detain any such article or thing so long as there is a reasonable ground for suspicion.

²³ Legislative Council *‘Official Record of Proceedings: Regulation of Electronic Game Products by Dr Elizabeth Quat’* (13 November 2013)

games can be downloaded any time. It is a tantamount task to curb the circulation of such materials. There is a need to review the relevant legislations in Hong Kong, be it PCPO or COIAO.

Hong Kong laws regarding possession of child pornography

The then Chief Executive, Mr Tung Chee-hwa, ordered the introduction of the Prevention of Child Pornography Bill 1999 (the Bill) after a sensitive list of child pornography subscribers was obtained from the Interpol and published in the Sunday Morning Post.²⁴ It allegedly named a few Hong Kong people including a lawyer and some policemen.²⁵ According to the First Legislative Council Brief, the Bill aimed to set up specific offences for the printing, making, producing, reproducing, importing, copying, distribution, publication, advertising and possession of child pornography.²⁶ The procurement and employment of children for making pornography were separately addressed in the Crimes (Amendment) Bill 1999.

Section 2 of the PCPO defines ‘child pornography’ as any photograph, film, computer-generated image or visual representation of a ‘child’ that is of ‘pornographic depiction’.²⁷ The same section defines a child to be a person under the age of 16.²⁸ It also defines pornographic depiction to be a visual depiction that shows explicit sexual conduct, the genital or anal region of a person or breast of a female in a sexual context.²⁹ The coverage is rather wide as real, pseudo and virtual depictions are all captured.

While the Bill was hailed to be a major step towards child protection, it did not come without controversy. In its submission, the Law Society of Hong Kong raised concerns towards the criminalization of ‘simple possession’ of child pornography.³⁰ The Society referred to the basic premise of criminal law and maintained that a person should not be convicted for his or her

²⁴ See Legislative Council, *Prevention of Child Pornography Bill* (SBCR 21/3231/71) para 1, See also, the Prevention of Child Pornography Bill 1999 | Legislative Council | (99-00). For the sensitive list published, see, Nick Gentle, ‘Three men jailed under new child pornography law’ *South China Morning Post* (Hong Kong, 29 February 2004) <<http://www.scmp.com/article/446339/three-men-jailed-under-newchild-pornography-law>> accessed on 28 June 2016.

²⁵ *ibid*

²⁶ See above, n27, para 9. See section 3 of PCPO on the criminal punishments relating to child pornography.

²⁷ See section 2 of PCPO on the full definition of child pornography

²⁸ Section 2 of PCPO

²⁹ *ibid*

³⁰ The Law Society of Hong Kong ‘Prevention of Child Pornography Bill’ (LC Paper No. CB(2)1978/02-03(01), 5 May 2003)

thoughts, even if they might not adhere to the moral standard of society.³¹ The Society further described it to be a ‘short step from banning possession of, for instance, political material’.³² Although the Hong Kong Bar Association did not employ such strong words, it brought up a similar concern in its submission.³³ There is a possible infringement of the freedom of speech as guaranteed in Article 27 of the Basic Law and Article 16 of the Bill of Rights Ordinance (Cap. 383). This is especially so when the offence comes with a heavy punishment. In *Secretary for Justice v Man Kwong Choi*, Chief Justice Ma ruled that the possession of child pornography alone gave rise to an immediate custodial sentence.³⁴ Under section 3(3), any person convicted on indictment is liable to an imprisonment of five years.³⁵ The gravity of the offence is reflected in the level of punishment.

Aside from the constitutional concern, the case law on child pornography and simulated child pornography lacks consistency. There seems to be more judicial sympathy towards simulated child pornography as no actual children are involved. In a case where a homeless man was charged with possessing four children pornographic manga, Magistrate So regarded simulated child pornography a lesser sin and mentioned that there was no sentencing guideline on it.³⁶ In the end the defendant was sentenced to a two-month imprisonment and granted a two-year suspended imprisonment.³⁷

The situation is more complicated when the simulated depictions fall short of pornography but are nevertheless erotic. There is no statutory definition of ‘child erotica’ or ‘implicit child pornography’. The most helpful case is perhaps *Man Kwong Choi*.³⁸ Citing *R v Mark David Oliver and others*, Chief Justice Ma decided that depictions in question could be divided into 5 levels of classification.³⁹ These levels are: (1) images depicting erotic posing with no sexual activity; (2) sexual activity between children, or solo masturbation by a child; (3) non-penetrative sexual activity between adults and children; (4) penetrative sexual activity between children and adults; and (5) sadism. Simulated child erotica is most likely to fall into the description of Level 1, yet it is not

³¹ *ibid*

³² *ibid*

³³ (n 14)

³⁴ [2008] 5 HKLRD 519 (CA) [16] per Ma CJ

³⁵ (n 32)

³⁶ Keung Wai Hong ‘Wanderer in Airport fine \$5,000 for leering at a young lady and granted suspended sentence for possessing child pornographic manga’ Apple Daily <<http://hk.apple.nextmedia.com/news/art/20080521/11134489>> accessed on 28 June 2015

³⁷ *ibid*

³⁸ (n 40)

³⁹ [2003] 2 Cr App R 64r (CA)

clear whether the description includes children who are nude, partially or fully clothed. Nudity is a paramount concern as any depiction of genital, anal region, or breast of a female leads to a charge under section 3(3) of the PCPO unless the possessor fulfills any of the statutory defences.⁴⁰ Depictions that are absent of nudity will at best be caught by the COIAO when they are advertised or sold for commercial use, a point that shall be addressed later. It is easy to escape from the PCPO if a person possesses child erotica rather than child pornography albeit their similar nature.

Australian, Canadian and American laws on the possession of child pornography

The legal position of Hong Kong shall be compared against those in other jurisdictions. I will focus on the laws in Australia, Canada and the United States in this essay and briefly mention that of Japan.

Australia and Canada take a more conservative approach. The relevant can be found in sections 64 to 66 *Criminal Act 1900* for Canada and section 163.1 of *Criminal Code 1985* for Australia.⁴¹ Both jurisdictions come with a heavier sentencing for the possession of child pornography. Possessing child pornography in Australia leads to a minimum imprisonment of six months and a maximum of 7 years.⁴² Possessing child pornography in Canada can give rise to a maximum imprisonment of 10 years.⁴³ It should also be noted that the child pornography laws in both jurisdictions cover more than visual depictions. They extend to include writings and audio recordings⁴⁴.

In *R v Sharpe*, the Supreme Court of Canada upheld the constitutionality of the prohibition on possession of child pornography, with minor exceptions.⁴⁵ The Court adopted the harm test in *R v Butler*.⁴⁶ The Court ruled that the infringement of the freedom of speech was justified if the image

⁴⁰ See section 4 of PCPO for the list of defences

⁴¹ See *Criminal Act 1900* (ACTO) sections 64 to 66 for Canada, and *Criminal Code (Cth) 1985*, section 163.1 for Australia.

⁴² See *Criminal Code 1985* section 163.1(4) on punishment regarding possession of child pornography

⁴³ See *Criminal Act 1900* (ACTO) section 65 on punishment regarding possession of child pornography

⁴⁴ See definition of 'child pornography' in *Criminal Act 1900* (ACTO section 64(5) and *Criminal Code 1985* section 163.1(1) respectively.

⁴⁵ *R v Sharpe* [2001] 1 S.C.R. 45 (SC) While the principle of child protection is acknowledged, the majority read into the law the two exceptions to s163(1) Criminal Code: (1) any written material or visual representation created by the accused alone, and held by the accused alone, exclusively for his or her own personal use; and (2) any visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use. These exceptions are to guarantee the sexual autonomy of teenagers of consenting age. Such a defence was proposed by the Drafting Committee in Hong Kong but did not survive the bill amendments to PCPO.

⁴⁶ (1992) 89 D.L.R. (SC)

is: (1) promoting cognitive distortions [of children]; (2) fuelling fantasies that incite offenders to offend; (3) being used for grooming and seducing victims; and (4) children are abused in the production of child pornography involving real children.⁴⁷ It should be noted that *R v Sharpe* was quoted and relied on when the Hong Kong government was drafting the Bill.⁴⁸

What *R v Sharpe* did not discuss, however, was the constitutionality of banning simulated child pornography. Critics may argue that possessing simulated child pornography is a ‘victimless crime’ and people shall not be punished for their fantasies. This issue was discussed in *Ashcroft v Free Speech Coalition*.⁴⁹ In *Ashcroft*, the Supreme Court of the United States struck down two provisions of the Child Pornography Act 1996. The majority ruled a vital distinction must be drawn ‘between words and deeds, between ideas and conducts’.⁵⁰ It also ruled that the government should not legislate on ‘private thoughts’.⁵¹ Following the same reasoning, Japan, which recently criminalised the possession of child pornography on a national level, purposefully made anime and manga an exception.⁵² The approach in the United States and Japan shows that some jurisdictions are more open-minded than others. It is of no surprise that the Hong Kong government hesitates to go a step further and criminalise simulated child erotica, especially when the problem is not considered as being rampant right now.

HK laws regarding the production and publication of child pornography

I now turn to the Hong Kong laws on publishing manga that is child pornographic in nature. The trite law is section 3(1), (2) and (4) of PCPO, which prescribes a maximum fine of two million and imprisonment of eight years upon conviction.

⁴⁷ *Sharpe* (n 52) [13], [22], [61], [85], [96], [164] [165] [167]. The Court banned child pornography even where it was a ‘product of imagination’, The reason was that it could still create ‘a heightened risk of attitudinal harm’ to the society at large.

⁴⁸ Legislative Council, *Prevention of Child Pornography Bill* (SBCR 2/3231/2001), para 5

⁴⁹ 535 U.S. 234 (2002) (SC)

⁵⁰ *Ashcroft* (n 19) [20], [21] per Justice Kennedy

⁵¹ *ibid* [18], [19] per Justice Kennedy

⁵² Will Ripley. Hilary Whiteman and Edmund Henry ‘*Sexually Explicit Japan manga Evades New Laws on Child Pornography*’ *CNN* (18 June 2014) <<http://edition.cnn.com/2014/06/18/world/asia/japan-manga-anime-pornography/index.html>> accessed 26 November 2015

Implicit child pornography is governed through the COIAO, which was enacted in 1987.⁵³ It also established the OAT to regulate articles containing obscene or indecent contents by classifying a submitted article before it is to be published. OAT also has the power to decide on civil cases upon referral by the judiciary on cases on COIAO.⁵⁴ The OAT consists of a presiding magistrate, and two or more members drawn from a panel of 500 adjudicators appointed by the Chief Justice.⁵⁵ It discharges two functions: to either give a classification on a submitted article (administrative classification function) or upon referral by the court or magistrate in civil or criminal proceedings (judicial determination function).⁵⁶ The OAT has the power to classify any articles within the definition of s2 COIAO with regard to the community standard, the overall effect of an article, the attributes of the likely audience and the location where it is displayed and the purpose of it. ‘Articles’ include anything consisting of or containing material to be read and / or looked at, any sound-recording, and any film, videotape, disc or other record of a picture or pictures. Manga, animations and electronic games fall into its scope of regulations.

There are three levels of classification made by the OAT. Class I article (neither obscene nor indecent), such that it may be published or sold without restriction; Class II article (indecent) that must not be published or sold to persons under 18 and, when published or sold, must carry a statutory warning notice and be sealed in a wrapper; or Class III article (obscene), which is prohibited from publication at all.⁵⁷ It is not a must for a producer, publisher or retailer to send its work to the OAT for classification. However, once the articles are sent to the OAT and decided to be ‘indecent’ or ‘obscene’, the relevant personnels must bear the legal consequences.

The differences between indecency, obscenity and pornography

Currently, the Hong Kong legislations does not consider images that has an implicit sexual depiction of a child to be child pornography, hence publisher and possessor of such images are not

⁵³ Implicit child pornography refers to depictions that show children in sexually suggestive positions but fall short of nudity or sexually explicit acts. Also known as child erotica.

⁵⁴ See section 29(2) of COIAO for the jurisdiction of OAT

⁵⁵ Legislative Council ‘*Updated background brief on the review of the Control of Obscene and Indecent Articles Ordinance*’ (9 March 2015) CB(4)590/14-15(05) [2]. See further Section 5 of COIAO.

⁵⁶ Legislative Council (n 27) [4]

⁵⁷ Under s21 COIAO, the maximum penalty for the illegitimate publication of a Class II article is a fine of eighty thousand and an imprisonment of twelve months, while that of a Class III article is a fine of one million and an imprisonment for three years

liable under PCPO. This can be seen from the case *HKSAR v Easy Finder Ltd. and Others*, which concerned the sexy photos taken by pop singer Lee Wan, Renee when she was fourteen years old.⁵⁸ The photos were accompanied by the title ‘Just became ripe’ and the subtext ‘How can Renee being such a young pretty girl who has just become ripe, possibly attract only the middle-aged blokes?’.⁵⁹ The police received 140 complaints after the photos were featured in Issue 752 of the magazine *Easy Finder*.⁶⁰ The case was considered in light of PCPO.⁶¹ While Judge Line admitted that ‘it could be possible to depict a female breast in a sexual manner or context even though it was not partially or wholly exposed’⁶², he did not find the photos explicit and pornographic. The appeal was dismissed. The case might stand a chance if the photos were sent to the OAT for classification - at the very least, they will be classified as being ‘indecent’, and the publishers will be fined for its sexualisation of children. The ambiguous interface of PCPO and COIAO in light of the production and publication of child pornography creates difficulties in enforcement.

The defence of ‘artistic merits’

In case the articles are deemed to be pornography and be caught by PCPO, the producer, publisher or seller of the manga, animations and electronic games can raise the defence of ‘artistic merits’ by virtue of section 4(1)(a) of PCPO.⁶³ The defence originated from the Canadian case *R v Sharpe*, which was frequently brought up in the drafting stage of PCPO as mentioned before.⁶⁴ *Sharpe* laid down a number of principles that aim to strike a balance between child protection and the freedom of speech. First of all, a jury or a separate tribunal (OAT) should not be the body to decide upon artistic merits. This should be decided objectively by a trial judge, as a judge can give consideration to a number of factors, such as the subjective intention of the creator, the form and content of the work, its connections with artistic conventions, traditions or styles and experts’ opinions.⁶⁵ The community test in *Langer* was rejected.⁶⁶ Secondly, there is no requirement that the artwork should

⁵⁸ [2008] 4 HKLRD 555: 272

⁵⁹ *ibid* [2](i)

⁶⁰ Commerce and Economic Development Bureau ‘*LCQ7: Complaints about child pornography*’ (12 July 2006)

⁶¹ *Easy Finder* (n68) [1]. See also section (2) PCPO.

⁶² *ibid* [16]

⁶³ The defence applies to all offences under PCPO. See section 4(1) of PCPO.

⁶⁴ *Sharpe* (n 52). See also, Legislative Council Brief (n 57)

⁶⁵ (n52) [64]

⁶⁶ *Ontario (A.G.) v Langer* (1995) 123 D.L.R. (SC) See also, Note 52 above, [65]

be of meritorious or professional quality.⁶⁷ The artist will be protected by law as long as the article possesses ‘the quality of art’ or ‘artistic character’.⁶⁸

The liberal approach brought the position more in line with section 2(b) of the Canadian Charter of Rights and Freedoms: that the freedom of speech shall be guaranteed as long as it does not pose significant harm to society.⁶⁹ Currently there is no case law explaining the defence of ‘artistic merits’ in Hong Kong. If the Court adopts the position in *R v Sharpe*, the artistic defence will allow a greater room for arts appreciation. On the contrary, if the Court adopts the community test, manga, animations and electronic games, as a form of subculture, may not be fully recognised. In view of the constitutional debate, I would support the Court to follow the position in *R v Sharpe* when interpreting section 4(1)(a) of PCPO. It is not easy to fulfill the statutory requirements in spite of the liberal interpretation. For instance, it is up to the defendant to adduce evidence and prove that the depiction in question has artistic value.⁷⁰ The interpretative approach gives the judge flexibility in deciding the legality of the relevant depiction while maintaining a *prima facie* protection for children.

The underlying problems of the OAT

The major criticism of all is that the OAT has the power to classify a wide array of publications but is secretive in operation. As criticised by the Hong Kong Human Rights Watch, the standards of ‘obscenity’ and ‘indecentry’ are overly broad and ambiguous.⁷¹ Section s(3) of the COIAO stipulates that ‘obscenity’ and ‘indecentry’ include violence, depravity and repulsiveness, but never goes on to explain what contents or situations are covered.

Although there is an implied duty to give reasons by common law and by the implication of section 7(3) of the COIAO, such reasoning is not openly accessible to the public.⁷² Anyone who would like to refer to previous classifications as case precedents must also pay a lofty fee of \$420 per article⁷³.

⁶⁷ June Ross ‘*R v Sharpe and the Defence to Artistic Merit*’ 12 Const. F. 23 2001-2003, 24

⁶⁸ Note 52 above, [62] - [64]

⁶⁹ Ross (n19)

⁷⁰ Section 4(1) of the PCPO reads, “It is a defence to a charge under section 3 for the defendant to establish that - (a) the depiction that is alleged to constitute child pornography has artistic merit...”

⁷¹ Hong Kong Human Rights Watch ‘*Submission on the review of the Control of Obscene and Indecent Articles Ordinance*’ (15 July 2012) (Chinese version only)

⁷² *Eastern Express Publisher Ltd v Obscene Articles Tribunal* [1995] 2 HKLR 290, p294 per Findlay J

⁷³ ‘The Obscene Articles Tribunal (The Judiciary 19 January 2015)

<http://www.judiciary.gov.hk/en/crt_services/pphlt/html/oat.htm> accessed 5 December 2015

It is my concern that the COIAO may be used to censor publications, further impeding the freedom of speech.

The OAT also adopts a different test from the PCPO. In *Easy Finder*, the Court affirmed that an objective test must be adopted when assessing whether an article amounts to child pornography following the position in *Sharpe*.⁷⁴ The assessment shall be evaluated in light of the actual or potential harm to society (the harm test). However, the guiding provision in s10 COIAO stipulates that the standards of community shall be taken into consideration in assessing whether an article is obscene or indecent (the community test). In a borderline situation such as where a child erotica is questioned of its legality, very different results may arise upon the application of PCPO or COIAO.

The complication may boil down to the intrinsic problem with the statutory powers given to the OAT. It is not clear when the Court is obliged to refer cases of controversy to the OAT and vice versa. In 2008, the Hong Kong government conducted a comprehensive review of the COIAO.⁷⁵ In the consultation, the Judiciary considered that it unsatisfactory for the OAT to perform both administrative and judicial functions. It proposed to remove the administrative function and replaced the adjudicators system with a jury system.⁷⁶ This would allow the OAT to absorb a wider spectrum of opinions and be more liberal in its decision. It would also ensure more uniform standards as the presiding judge may give guidance to the jury in light of the evidence and the legal considerations. The proposal, however, is still being discussed.⁷⁷

⁷⁴ *Easy Finder* (n 35) [11]

⁷⁵ Legislative Council Panel on Information Technology and Broadcasting, 'Review of the Control of Obscene and Indecent Articles Ordinance' 13 July 2009, LC Paper No. CB 91) 2180/ 08-09(05)

⁷⁶ *ibid*, [15]

⁷⁷ Legislative Council Panel on Information Technology and Broadcasting, 'Updated background brief on the review of the Control of Obscene and Indecent Articles Ordinance', 9 March 2015, LC Paper No. CB(4)590/14-15(05)

Suggestions

After evaluating the legal gaps in the PCPO and the COIAO, this part considers the possibilities of legal reforms. I propose to introduce a pre-sale censorship and classification system for electronic games whilst upholding the original position for manga and animations. I then propose reforming the OAT, and to call for establishing an online database for the public.

i. Introducing pre-sale censorship and a classification system for electronic games

Currently, there is no requirement for producers, publishers and retailers to send the articles for review under OAT. It is only when an article is found to be obscene or indecent that the relevant persons may be punished for its public display and transaction. The position is relatively liberal, and I argue that it should remain so for manga and animations.

Nevertheless, I argue that electronic games are of a different position. They should be subject to a greater degree of scrutiny because of its sensational contents and quick circulation. It is very common to see role-playing or dating games featuring scantily dressed girls. They pose a much greater harm than animations or manga as they are highly interactive and come with multi-sensory experience, allowing players to inhabit in the scenes and exercise control over the female characters.

LovePlus (2009) is a game originally developed on the platform on Nintendo DS. The player can interact with one of the three female characters until she agrees to be his girlfriend. All of them are high school students. The player then enters into 'love mode' and can engaged in 'touch events', where the girlfriend asks for skinship or other forms of physical intimacy.⁷⁸ The success of the interaction depends on knowing the speed, pressure and pattern of touching preferred by the virtual girl.⁷⁹ Proved to be a commercial success, the game is recently extended to iOS platform using the technology of 'augmented reality'.⁸⁰

Technically speaking, LovePlus is not a pornographic game. It has an erotic undertone, but it mainly sells through its romantic appeal and the reconstruction of youthful time. It is less

⁷⁸ (n 19)

⁷⁹ *ibid*

⁸⁰ The game developer, Konami, hosted a Christmas concert in Tokyo in 2010 where the female characters performed on stage using hologram projection. The tickets were sold out. Danielle Demetriou, 'Love Plus Captures Hearts in Japan', *The Telegraph* (London, 11 December 2011) <<http://www.telegraph.co.uk/women/sex/8940765/She-Feels-as-Real-as-My-Real-Girlfriend-Love-Plus-captures-hearts-in-Japan.html>> accessed on 28 June 2016

controversial than other child erotic games as the virtual girls are arguably near to the age of consent. What it shows is that electronic games are breaking free from the traditional platforms of computers, PlayStations and Nintendo game consoles and finding their way into smartphones and tablets. With the popularity of Apple Store and Google Play Store, such games can be easily downloaded at a price as low as US \$0.99 or even for free. With a valid credit card, anyone with a pedophilic desire could have easily fed his appetite legally and conveniently.

It is especially worrying when businessmen have already started to employ the technology of virtual reality in pornography. It will not be too soon for erotic games to follow suits. *Summer Lesson*, a virtual reality demo for Sony's Project Morpheus Headset, actually leads players to shake their heads to control their gaze on screen and leer at a fictional school girl on screen - down at her cleavage or up at her skirt at Tokyo Game Show 2014.⁸¹ The protection offered by the COIAO is insufficient. There is a need for the law to pre-empt the technological development and protect the youth from it.

South Korea, Japan and Taiwan have already implemented systems for pre-sale censorship and classification of electronic game products.⁸² Hong Kong should also set up a Game Rating Board underneath OAT, with a four-tier classification of 'all', 'twelve or above', 'fifteen or above' and 'eighteen or above'. Only selling a game targeted for 'eighteen or above' to a minor will attract a penalty. In the process of classification, the Game Rating Board may also filter out controversial games for review under the OAT or direct prosecution. This will ensure a much more efficient enforcement of the law than regular inspections by the OFNAA, the police and the customs.

ii. Reform of the OAT

a. Jury system and open trial

Since the COIAO incorporates a community test, the paper proposes that the revamped OAT to adopt a jury system, similar to that adopted in the High Court and the Coroner's Court.⁸³ The news system will be more representative and democratic. It also encourages public participation and

⁸¹ Brian Ashcarft 'Shake Your Head at a Virtual Japanese Schoolgirl' (9 January 2014) Kotaku <pre-sale censorship and classification system> accessed on 5 December 2015

⁸² Hong Kong Comics and Animation Federation 'Submission on the review of the Control of Obscene and Indecent Articles Ordinance' (19 June 2000) (Chinese version only)

⁸³ Hong Kong Bar Association 'Second Round of Consultation on the Review of the Control of Obscene and Indecent Arcticles Ordinance' (6 August 2012) [22]

transparency, and resolves some of the longstanding criticisms. Save for cases where child abuse materials are involved, there ought to be an open trial for the administrative classification of indecent or obscene articles. Reasons should be given either by the presiding magistrate or judge, or jurors under his or her instructions, fulfilling the right to fair hearing under Article 10 of BORO.⁸⁴

b. Establishment of online database

OAT should also set up an online database system available upon request and for free. A request should be granted as long as there is a reasonable ground of application, such that anyone fearing that he or she may offend the COIAO can refer to case precedents for reference. A similar arrangement has long been available in common law jurisdictions such as Australia and New Zealand.⁸⁵

Conclusion

In 2003, Hong Kong took a step forward and passed the PCPO, which prohibited the production, possession and publication of child pornography in Hong Kong. The legal position is in line with those in Australia and Canada, although it is deemed to be more conservative than that of the United States. I begin by addressing the controversy surrounding the criminalisation of simple possession of child pornography. I then move on to address the argument that simulated child pornography should not be outlawed in view of freedom of speech with reference to oppositions from the Hong Kong Bar Association, the Law Society of Hong Kong and the decision by the Supreme Court of United States in *Ashcroft*.⁸⁶ Upon a closer examination of cases, it seems like Hong Kong is more inclined to the Canadian position, i.e. prohibiting simulated child pornography but allowing the defence of ‘artistic merits’.⁸⁷ I argue that the legal position in *Sharpe* should be followed such that it is up to the judge to decide whether the disputed depiction has artistic value - rather than by the community standard. This allows room for arts appreciation while employing legal principles to evaluate the legitimacy of the said depiction.

There are good reasons to believe that Hong Kong places much emphasis on child protection and is determined to work towards a tighter control of child pornography law. Still, there are inevitable

⁸⁴ *Lam Siu Po v Commissioner of Police* [2009] HKCFA 24 (CFA)

⁸⁵ (n 65) [20]

⁸⁶ (n 17)

⁸⁷ (n 13)

practical difficulties when enforcing the PCPO. I am particularly concerned on how local businessmen bypass the laws by tuning down the pornographic contents in manga, animations and electronic games, such that they are relatively implicit and subtle. This commercial tactic is proved to be much welcomed and successful, and the platform extends from paperback to computers, video game consoles to smartphones and tablets. The high degree of interactivity and circulation render electronic games more harmful than manga or animations. As a result, I call for the introduction of pre-sale censorship and classification system of electronic games. The controversy can be balanced off by the liberalisation of the OAT, which is achieved by the introduction of a jury system, open trial and establishment of online database.

The consultation for the amendments to the COAO is still going on. It is hoped that the abridged legislations will clarify some of the confusions posed by the overlapping standards of 'pornography', 'obscenity', 'indecenty', and incorporate changes that have been long hoped for to guarantee better protection of children and youth.