

Criminal law application of the aggravating circumstance of cyber-spaced child molestation offenses

Zihao Yin

School of Law, People's Public Security University of China, Beijing, China

Abstract: *Indecent assault on children in the Internet environment presents a network spacing behaviours, in the incrimination of the judicial interpretation of the level of recognition, in the application of aggravating circumstances of criminal law, there is room for interpretation. Recognized as "public places in public" need to have both "openness" and "co-temporality"; "Crowds" in cyberspace need only satisfy temporal uniformity; there is a possibility of causing harm to children by molesting children in cyberspace under the theory of indirect principal offender; network spacing type of basic can be abstracted as non-contact + production, and network spacing type of basic aggravated abstraction for contact + production to distinguish; "Aggravated indecent assault" should be distinguished from traditional child molestation, and it is not appropriate to recognize cyber-alienation as an aggravating circumstance across the board.*

Keywords: *Cybercrime, child molestation, aggravating circumstances*

1. Introduction

With the increasing popularization of the Internet, and the continuous increase in the number of young people accessing the Internet, the content of child molestation on the Internet has been increasing year by year. Since 2018, the combination of "spatial molestation" of minors through online means, and actual offline molestation after online communication, has accounted for 15.8% of all sexual violence cases against minors. At the same time, the number of minors committing crimes online is also gradually increasing. Between 2018 and 2021, the number of people prosecuted climbed from an initial 1,127 to 2,853, rising at an annual rate of 36.3 percent. [1] As of September 2022, the Public Prosecutor's Office has successfully prosecuted 1,130 suspects for online "spatial molestation" of children. [2] This is related to the fact that there has been a gradual increase in the online alienation of child molestation, as well as a gradual clarification of the incriminatory nature of the guiding cases at the judicial level.

To address the issue of online alienation of child molestation, the Supreme Court and the Supreme Prosecutor's Office (SPO) have moved from guiding cases to judicial interpretations, and in 2018, the SPO issued a series of guiding cases, represented by the Luo Mou Child Molestation Case (Prosecutor's Case No. 43), which clearly stated that "The act of requesting a child to transmit private photos through computer software across the screen constitutes the crime of child molestation", and in 2019, the Supreme Court further confirmed and supported the view of the Supreme Prosecutor by releasing the "Chengfei Jiang Child Molestation Case". After that, the Supreme Court and the Supreme Prosecutor jointly issued the "Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of Laws in Handling Criminal Cases of Rape and Indecent Assault of Minors" on May 25, 2023, in which the first paragraph of Article 9 explicitly stipulates that "coercing or enticing minors using video chatting on the Internet, or sending videos or photographs exposes private parts of the body, or engages in obscene acts". Private parts of the body or engaging in obscene behavior is in line with the provisions of Article 237 of the Criminal Law, and will be classified and punished as a crime of forced molestation or child molestation.", elevating the affirmative answer to the question of the incriminatory nature of child molestation under cyber-alienation to the level of judicial interpretation.

Immediately after that, the aggravating circumstances of the crime of indecent assault on children under the Criminal Law Amendment (XI) and the refinement of "vile means" and "serious circumstances" in the Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of Law in Handling Criminal Cases of Rape and Indecent Assault on Minors (hereinafter referred to as the "Interpretation") issued by the Supreme People's Court and the

Supreme People's Procurator ate, both of which are undoubtedly worth exploring whether and how the crime of indecent assault on children under the network alienation can be applied. This article will summarize the judicial cases, abstract the behavioral patterns of network alienation of indecent assault on children, and analyze the judicial difficulties in the application of the aggravating circumstances in the criminal law regulation after the corresponding judicial and theoretical evaluations.

2. Overview of cyber-spaced child molestation

The key to dealing with cyber child molestation is to determine the specific elements of the crime of child molestation through legal interpretation, to set the standard for punishment. This study attempts to provide theoretical support and relatively clear guidelines for combating cyber child molestation by exploring the types of cyber child molestation, and using them as a guide. With the aim of ensuring justice, and safeguarding children's rights and interests as much as possible, and then providing a behavioral model for the application of subsequent aggravating circumstances.

This new form of cyber-induced child molestation, in which an illusory environment constructed using computer technology is used to commit an act of molestation, is differentiated from the traditional physical touching of a person by a person. One point to emphasize is that the case of cyber-spaced molestation of minors does not mean the means of violating human dignity and mental health of minors must be carried out indirectly. In fact, even in the regular pattern of indecent assault, the perpetrator may use methods such as intimidating the victim to touch himself to achieve this indirect act. [3] Therefore, "non-direct contact" should not be used as a criterion for distinguishing between ordinary sexual harassment and its cyber-based variant, but rather the concept of "cyberspace", which means that the perpetrator and the victim are not physically present in the same physical area, while the indecent act is in progress because of the cyber environment. Therefore, if the perpetrator only invites the victim to meet him through the Internet and then completes the act of molestation in the actual offline space, this situation should not be categorized as a cyber-variant of child molestation. [4]

Correspondingly, due to the inclusion of the factors of "network" and "space", the network-space type of child molestation has the following characteristics:

- 1) Combining online and offline
- 2) Both covert and overt
- 3) Permanence and continuity
- 4) High prevalence of secondary transmission and identity exposure

At the same time, there are several main types of online spaced-out child molestation [5]:

Violations in the area of sexual violence against children

That is, the perpetrator's ability to influence and control through cyber transmissions leads to the possibility that the child may engage in some sexually explicit activity involving himself or others.

1) The act of engaging in intrusive sexual relations with a victimized child using a sexual organ or other instrument.

2) The act of touching the sexual parts of a victimized child.

3) The act of touching a victimized child's body with sexual parts.

4) Contact with non-sexual parts of the victimized child.

Violations in the area of child psychosexuality

Compared with cyber spatial molestation, which directly touches children's bodies, more forms of cyber molestation are currently carried out without physical contact. These acts mainly take place on the Internet, which is used to make children feel the impact of sex, thus damaging their sexual self-management ability and their ability to grow up sexually healthy. Therefore, this type of harm to the psychosexual domain of the victimized children should be dealt with as child molestation. This includes the following situations: performing sexual acts in front of children during online broadcasting or using real-time chatting software; showing adult content to child victims online; inducing them to display sexually explicit gestures by using abusive language, and possibly further requesting them to take, send or disseminate sexually explicit videos or pictures.[6]

3. Difficulties in the Application of Criminal Law to the Aggravating Circumstances of Child Molestation over the Internet and the Relief thereof

3.1. The recognition of "publicity in a public place" requires both "publicity" and "coexistence".

3.1.1. Publicity

In the legal guideline for the "Luo Mou child molestation case" proposed by the Supreme People's Procuratorate, it is clearly emphasized that "if the perpetrator, using satisfying sexual excitement, asks the child to take photos or videos of his or her nude body or sensitive parts for his or her viewing using enticement, coercion, or any other method, which seriously infringes upon the child's human dignity and mental health, this constitutes the crime of child molestation." This type of child molestation often occurs in cyberspace, and there is some controversy whether the aggravating circumstance of "in public" applies, the first step in resolving the controversy is to determine whether the Internet environment is considered a public place.

In the Opinions on Combating Crimes against Minors following the Law, issued jointly by the Supreme People's Court and other departments in 2013, the scope of "public places" is enumerated to a certain extent, but it is not exhaustive, mentioning such scenarios as schools, swimming pools, children's playgrounds, etc., and the concept of "in public" is also explained. The concept of "in public" is also explained, pointing out that "as long as there are many other people present, whether they actually see it, it belongs to the scope of the public", that is, it is not based on the actual perception of the perpetrator as a criterion, but as long as there is the possibility of perception will be recognized as belonging to the "public" situation. In the previously released Interpretation on Several Issues Concerning the Application of Law to the Handling of Criminal Cases Involving the Use of Information Networks for the Purpose of Committing Slander and Other Criminal Cases, the concept of a public place is also of guiding significance, and the second paragraph of its Article 5 stipulates that the dissemination of false information on the Internet belongs to the "disturbance in a public place" stipulated in the first paragraph of Article 293 (d) of the Criminal Law".

In the author's view, this interpretation only recognizes the possibility of some areas of cyberspace becoming public places, but does not directly define all areas of cyberspace as public places. Here we can understand with the help of some scholars who oppose regard cyberspace as a public place, that is, "space is the upper concept of place". "Physical space" is the concept corresponding to cyberspace. If it is recognized that there is a distinction between public places such as schools, swimming pools, children's playgrounds and non-public places such as private homes in physical space, then it should also be recognized that there are corresponding public and private domains in cyberspace. Furthermore, if this judicial interpretation is taken to mean that all areas of the Internet are regarded as public places, then the following absurd situation would exist: that is, in an Internet chat room where only two individuals are present, the acts of long-distance couples or adult couples engaging in video pornography, such as nude chatting, in which they engage in such acts are regarded as openly exposing their bodies and engaging in sexual activities in a public place, and this is an act of unlawfulness. At the very least, they should be punished in accordance with the Public Security Administration Punishment Law, which is clearly an unreasonable infringement and restriction on the exercise of one's sexual rights.

The so-called "public" network platform refers to a form of platform that can be accessed and viewed by any unspecified network user without restriction. Although there is a possibility that information transmitted in cyberspace may be deciphered or leaked by an unspecified third party, this possibility is minimal in software platforms such as QQ, which has matured encrypted communication technology, and does not satisfy the possibility of being perceived by others in terms of its public nature. Thus, in the case of Luo's alleged assault of a minor, the use of a one-to-one QQ dialog box to send revealing photographs did not satisfy the publicity characteristic of a "public place".

3.1.2. Co-temporality

Co-temporality: There is no difference between cyberspace and physical space in terms of the timely interactivity of words and actions, etc., and therefore the determination of "in public" should be consistent with the requirement that a majority of other people be present at the time of the act when it is determined to be "in public" in physical space. That is to say, at the time of the act of cyber indecent exposure, the majority of other people are watching the act on the same public channel in a co-temporal manner. If the perpetrator opens a live channel that is freely accessible to an unspecified number of people and carries out child molestation acts in which the child is required to expose his or her private body parts for viewing by online viewers, and at this time there are no other online viewers in the channel, or other network

users watch the video playback after the molestation act has been completed, neither of these acts meets the requirement of "consensualness". The requirement of "co-timeliness" is not met, and the aggravating circumstance of "committed in public" cannot be applied to the perpetrator's acts of child molestation.

Therefore, the establishment of a live broadcasting channel that is secretly operated, requires the permission of the owner of the premises for others to enter, and has a fixed number of viewers, is equivalent to a private place where many people congregate, and does not satisfy relative publicity; the corresponding establishment of a live broadcasting channel that is publicly operated, does not require the permission of the owner of the premises for others to enter, and has an unspecified number of viewers has a relatively public character. The establishment of a public channel, a few online viewers, a short flash format, and a number of online viewers who indicate that they have not seen the broadcast may be considered minor rather than aggravating circumstances, but if the broadcast continues for a long period of time and is seen by numerous people, it may be considered an aggravating circumstance.

In addition, considering that cyberspace needs to be dependent on the complete conditions of cyberspace, if there are other Internet users online in the channel when the indecent act is carried out, but due to reasons other than the will of the Internet, such as network failure, poor live signal, etc., and the conditions of the construction of cyberspace itself, the viewer is not able to complete the "co-temporal" viewing, the situation of "capable of being perceived by others" in the Opinion on Sexual Assault should be recognized as a case of "possibility". In the Opinion, the situation of "being able to be perceived as a possibility by others" should be recognized as one of the cases in the Sexual Assault Opinion.

At the same time, the term "co-temporal" here does not require that the perpetrator's act of cyber indecent assault be co-temporal with the victim's perception of the act. Although the act of filming or stealing children's private sexual information and disseminating it on the Internet violates their right to sexual privacy and may bring them a mental burden and negative impact, the act itself also has the subjective content of satisfying the sexual purpose of the perpetrator. However, the harm caused by these offenses is not directly caused by the aforementioned acts, but is accomplished through the creation and sharing of child sex-related products and the violation of children's privacy. If children do not realize that their sexually related information has been leaked out, then it is not considered an activity that allows them to personally experience sexual experiences or feel sexually stimulated. Therefore, such behavior is not equivalent to the manner of child molestation and the degree of harm caused, and cannot be regarded as the crime of child molestation. If the act constitutes the crime of producing, reproducing, publishing, trafficking, or disseminating obscene materials for profit, the crime of disseminating obscene materials, or the crime of infringing on citizens' personal information, the act shall be punished by conviction for the relevant crime.

3.2. "Crowds" in cyberspace need only satisfy temporal uniformity

The criteria for determining whether acts involving the molestation of children carried out in an online environment constitute "mobbing" have not been clearly defined. Due to the influence of the Internet, the traditional offline requirement of temporal and spatial consistency has been undermined, allowing the perpetrators to maintain temporal consistency across time and space, thus realizing the state of "mobbing". [7] According to the characteristics and key elements of the previously mentioned network spatial molestation and child molestation behaviors, and concerning the existing relevant provisions on "mobbing", the author believes that to commit "mobbing molestation" on the Internet, the following conditions should be met:

The first is the requirement of the number of actors in a "multitude". In the same legal system, "multitude" generally refers to three or more actors, and the "multitude" here should also be consistent in terms of the numerical requirement, i.e., there need to be at least three or more actors.

Secondly, there is a common criminal intent. Joint criminal theory for the common criminal intent requirements should also be reflected here, when evaluating the network space type of child molestation whether to meet the "crowd" this condition, we need to determine whether the perpetrator of child molestation has a direct or indirect prior common intent. Under the intervention of network factors, there may be situations where the perpetrator mistakenly enters a live channel where child molestation is being broadcast, at this time, if the perpetrator discovers that he immediately exits, the mistaken entrant as well as the person who broadcasts the molestation should not be evaluated as a "mobbing" situation, and if the perpetrator finds out that he still stays and watches, and reaches the situation where three or more people are watching, then the situation will be evaluated as a "mobbing" situation. If the perpetrator discovers the situation and still stays and watches, and three or more people are present at the same time,

then the live broadcaster should be evaluated in terms of "mobbing".

Finally, the conduct needs to produce social harm corresponding to the aggravating circumstances. For example, the greater the number of actors involved in the viewing, the greater the damage to the child's physical and mental health and human dignity; the longer the period of simultaneous viewing, the greater the damage to the child's physical and mental health and human dignity, as well as the greater the risk of the dissemination of sexually oriented images of the child, with the corresponding probability of the child's future normal schooling and life being disturbed.

3.3. Possibility of "causing injury to a child or other serious consequences" under the theory of indirect perpetration

Although some researchers have concluded after the collation of China's legislative history, the standard of "injury" is limited to the impact of minor injuries or above is only based on the prevailing conventions and conventions of jurisprudence theoretical inference and rules of time[8] ; There are also some who advocate that, "the act of causing minor injuries does not constitute the crime of intentional injury, which is only a general judicial practice, and the criminal law for the crime of intentional injury to the extent of the damage caused by the crime has not been excluded minor injury" ; However, Article 7 of the Interpretation has pointed out that "injury" must reach the minimum threshold of minor injuries. The Criminal Law does not exclude minor injuries." [9] However, article 7 of the Interpretation states that "injury" must meet the minimum threshold of minor injuries.

Article 7 of the Interpretation clearly stipulates that: Indecent assault on a child shall be recognized as "causing injury to the child or other serious consequences" as stipulated in Article 237(3)(c) of the Criminal Law if one of the following circumstances applies: (1) causing the child to sustain more than minor injuries; (2) causing the child to commit self-mutilation or suicide; (3) causing other injuries or serious consequences to the child's physical and mental health. (c) Causing other injuries or serious consequences to the child's physical or mental health

There are several possible scenarios, then, where the network extends the actor's control:

1) The perpetrator controls the victim to carry out self-injurious acts on his or her own from space. If the perpetrator directs the victim to use various types of objects to perform intrusive actions on the perpetrator's body.

2) The perpetrator controls another person across the screen to carry out an injurious act against the victim. If the perpetrator commands multiple victims in front of the screen to perform intrusive or non-intrusive injurious acts on each other.

3) The perpetrator controls the other minors to harm each other from a distance, and at the same time, this situation also allows for a variety of matching combinations of criminal liability under the conditions of combined age and form of complicity.

3.4. Network spaced basic (no contact + production) vs. network spaced aggravated (contact + production)

As the perpetrator is not in the same physical space in the cyberspace environment, it is difficult for the victim to notice the perpetrator's action across the screen, and at the same time, it is easy for the perpetrator to carry out operations such as picture interception and video recording in this cyberenvironment, and it is extremely easy for the perpetrator to generate a series of "derivatives" of video, photographs and other image materials involving the victim's private parts of the child's body in the process of carrying out the act of indecent assault against the child through the use of the Internet. In the process of using the Internet to commit "spatial" molestation of children, it is extremely easy for the perpetrator to generate a series of "derivatives" involving videos and photographs of the private parts of the victim's body. Such "derivatives" have a high risk of secondary or even multiple dissemination, and once disseminated, will cause secondary or even multiple injuries to the physical and mental health of the victimized child. If the perpetrator uploads the abovementioned "derivatives" into cyberspace to be downloaded by an unspecified majority of people, it is very easy for the identity of the victim to be exposed, and such a situation will result in the harm to the victim lasting for a long time, which is difficult to be remedied through the relevant technical means.

Based on this type of situation, which is more serious in terms of the infringement of legal interests, Article 8(3) of the Interpretation explicitly stipulates that: "Making video, photographs or other image

materials of the molestation process or the private parts of the victim's body as a means of coercing the victim into committing the molestation or causing the image materials to be disseminated to many people, exposing the victim's identity;" shall be deemed to be (a) "Indecent assault using aggravated circumstances or with other aggravating circumstances", as stipulated in article 237, paragraph 3 (d), of the Criminal Law.

We can get the formula: basic offense form of traditional child molestation + production coercion or dissemination of exposure = basic aggravation, but does cyber-spaced child molestation + production coercion or dissemination of exposure necessarily = alienated aggravation?

First, the interpretation of "production". The basic behavioral pattern of network spatial child molestation includes the process of transmitting the molestation process and the image data of the private parts of the victim's body through the network, but not all network alienated child molestation can constitute this aggravating circumstance of the crime of child molestation. Does it include indirectly committing the act of the perpetrator controlling the victim for self-production and transmission, or does it only refer to the perpetrator's production of image data of the molestation process and the victim's private parts? The author believes that the answer should be the latter. Combined with the enumeration of the preceding sequence of behavior, the control of the victim to self-filming and transmission for the perpetrator to watch the behavior, with the basic form of child molestation crime for evaluation is sufficient.[10]

Regarding the understanding of "coercion", the behavior pattern of cyber child molestation already includes the process of coercion, after completing a video data coercion type online space molestation of children, if the intention to continue the molestation is to use the previous video data again, should it be recognized as an aggravating situation of "multiple" or as an aggravating situation of "malicious means"? The author believes that it should be understood in combination with the connotation of "multiple times" and the competition of legal provisions, that is, when the perpetrator completes a video data coercion type of online sexual assault on children in the air and then uses this threat for a total of three times or less, "malicious means" can be applied for regulation. This also conforms to the original intention of the Interpretation to increase the intensity of the crackdown; When the total number of times the actor repeats the above pattern reaches three or more times, a situation of overlapping legal provisions is formed, which can be applied from a single evaluation.

3.5. Typical representation of "aggravated means" and "other aggravating circumstances"

Concerning the "bad means" and "other aggravating circumstances" stipulated in the Interpretation, we can summarize and list the following typical representative types for reference in sentencing in conjunction with the relevant elements in judicial practice.

1) Indecent assault by a person with custodial responsibility

In the case of the Beijing teacher's online/offline combination, the perpetrator used the Internet to ask the victim to send photos of her naked private body parts, and then indecently assaulted her offline with direct contact, to which the statutory penalty of an elevated grade was ultimately applied. Combined with the provisions of the Opinions on Handling Criminal Cases of Sexual Abuse of Minors regarding caregivers, and Article 236 of the Criminal Law of the People's Republic of China, we can reasonably presume that sexual offenses involving minors committed by caregivers have a greater degree of inappropriateness, and that they should be evaluated with elevated statutory penalties and included in the scope of "other aggravating circumstances". There is a rational basis for evaluating them by upgrading the statutory penalties to include "other aggravating circumstances".

2) Means of integrating with offline intrusiveness

That is to say, it is a type of intrusion that involves the use of other people or the child himself or herself with parts or objects other than the genitals. The act of intruding causes the human dignity of the subject of the intrusion to be dissolved, and at the same time causes the subject of the intrusion to passively complete the change of objectification and materialization, and also causes great harm to the mental health of the child, which is detrimental to the child's legal interest in health. Therefore, the intruding behavior should be more severely evaluated as illegal, regardless of whether the perpetrator uses his/her genital organs, or other organs other than genital organs, or other objects other than body organs.

4. Conclusions

The criminal law should provide strict paternalistic protection for children's sexual inviolability and their physical and mental health, and the principle of maximizing the interests of the child should be implemented under the principle of the legality of crime and punishment for the crime of child molestation in cyberspace, which has been emphasized in the judicial documents that have been issued, and also in the negative evaluation of the new types of child molestation that continue to rise in cyberspace environments. In the application of aggravating circumstances, the relevant provisions of the Interpretation should be understood closely, and attention should be paid to the simultaneous existence of "openness" and "co-temporality" when determining the situation of "publicity in a public place" in cyberspace; and the simultaneous existence of "publicity" and "co-temporality" in cyberspace. "The situation of "mobbing" should be harmonized with the number of persons, intentionality of accomplices and degree of harm in the same legal system; and in the case of the production and dissemination of video materials, a distinction should be made between basic and aggravated cyberspace-type situations.

Of course, we cannot emphasize once the network of child molestation should be used to combat the criminal law, should be combined with the judicial structure of the dual system in our country, under the premise of correctly distinguishing the specific charges, give full play to the "Public Security Administration Punishment Law" and other administrative law and the "Criminal Law" in the degree of harm on the level of the difference between the integrated behavior of the subject, the object. Behavioral connotation, behavioral pattern, behavioral means, subjective tendency and other aspects of the factors to be considered, otherwise, will increase the cost of justice and may result in a criminal crackdown on the surface is too wide and other issues, resulting in similar to drink-driving and help letter in the contradiction in the problem.

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