

## **PORNOGRAPHIC CYBERWORLD - REFLECTIONS ON ARTICLE 202 OF THE PENAL CODE<sup>2</sup>**

### **1. PORNOGRAPHY - DEFINITION AND EVOLUTION**

Already ten years ago pornographic content was widely made available via computer networks, with special websites linked to pornographic services. The spread of pornography on the Internet has crowded out traditional magazines and video cassettes<sup>3</sup>. The word "sex" ranks at the very top term in most search engines. Pornography-related crime has always sparked emotions and disputes. Controversies arise already over the very definition of "pornography". Pornography is difficult to accurately define, this stemming from to the legal origin of the term. Definition should take account not only of its subjective element, that is the author's intent to evoke sexual excitement in the recipient, but also an objective one, which refers to the content and its effects. As claimed in one of the past judgment pornography consists in the transmission of a specific idea (content), and not just a recording and registration of a specific factual event<sup>4</sup>.

The term pornographic content has been most clearly and transparently explained in Marian Filar's reasoning, which mentions several components of this concept, which must be fulfilled jointly. This stance is further reflected in subsequent judgments<sup>5</sup>. It is worth noting that an image of a nude person who does not perform any sexual activities, such as masturbation, and its sexual organs are not in their sexual function will not be considered pornography<sup>6</sup>. Under Article 9 of the Convention, the parties to the Convention are required to introduce the following offences related to child pornography into their national legislation:

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<sup>2</sup> Artykuł przetłumaczony ze środków finansowanych przez Ministerstwo Nauki i Szkolnictwa Wyższego na działalność upowszechniającą naukę (DUN), nr decyzji 810/P-DUN/2018. Article translated from funds financed by the Ministry of Science and Higher Education for the dissemination of science (DUN), Decision No. 810 / P-DUN / 2018.

<sup>3</sup> J. Gołaczyński, *Pornografia w Internecie*, Prawo Mediów Elektronicznych 1/2004, p.3

<sup>4</sup> Supreme Court ruling of 23.11.2010, IV KK 173/10, Legalis (access:5.07.2019).

<sup>5</sup> M. Filar, *Kodeks Karny. Komentarz.*, Wolters Kluwer, Warszawa 2016, pp.1255-1263,

<sup>6</sup> Ruling of the Court of Appeal in Gdańsk of 9.02.2017, II Aka 294/16, Legalis (access: 5.07.2019).

- producing child pornography for the purpose of its distribution through a computer system,
- offering or making available child pornography through a computer system,
- distributing or transmitting child pornography through a computer system,
- procuring child pornography through a computer system for oneself or for another person,
- possessing child pornography in a computer system or on a computer-data storage medium<sup>7</sup>.

The Convention also defines child pornography itself, which is stipulated in Article 2 of the Directive of the European Parliament and of the Council. Another issue is possible incrimination for the possession of pornographic material involving children, which may give rise to some doubt and controversy. The allegations against the criminalisation of possession of child pornography to a large extent track down to it being an interference in the sphere of human privacy.

## **2. PROBLEMS ASSOCIATED WITH PORNOGRAPHIC ACTIVITIES**

It is widely accepted that the provision of the current Article 202 § 2 of the Code of Criminal Procedure applies to a situation in which the manner of content distribution would make it available to a specific minor. Hence, this provision shall be inoperative where any minor Internet user could potentially be the recipient of the content. Although the proposed wording of Article 202 § 2 of the Penal Code provides for "dissemination of pornographic content in a manner enabling minors to become acquainted with it", it is difficult to conclude that this will clearly determine the limitation of the operation of all "unsecured" pornographic websites. In particular with regard to websites maintained by foreigners abroad, the requirement of double criminality will in many cases prevent the application of the provisions of the Penal Code. The prohibition on disseminating pornographic content in a manner enabling minors to become acquainted with it, however, implies the introduction of effective age verification methods for

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<sup>7</sup> Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

a minor website visitor. Allowing minors to watch films and programmes which, due to age limits, they should not watch does not have to be tantamount to presenting pornographic content within the meaning of Article 202(2) of the Code of Criminal Procedure<sup>8</sup>. Whereas persons preparing, disseminating or publicly presenting such pornography may effectively invoke the error as to Article 28 §1, reliance on external appearance poses material practical difficulties, because it is generally difficult to assess whether the person presented is for instance 17 years old or already 18 years old. Moreover, it invokes an intra-statutory inconsistency whereby it is legally irrelevant to engage in sexual conduct with a person over the age of 15 with his or her consent, while the recording of the course of such an act, for instance on video tape, is subject to severe punishment<sup>9</sup>.

The Council of Europe Convention on Cybercrime stipulates in Article 9(2)(b) that criminal law shall treat pornographic content created solely by means of a computer in the same way as traditional child pornography<sup>10</sup>. For the purposes of Article 202(1) of the Penal Code, the medium through which pornographic content is presented is irrelevant, the provision focuses only on the pornographic content itself. By the construction of Article 202 § 1 of the Penal Code one may conclude that this prohibition stems from the need to protect the individual freedom of man. No doubt, mere making pornographic content available on an Internet server is tantamount to its public presentation and dissemination. By the nature of the Internet, as a rule, a user must undertake conscious actions to access certain. Thus, the visitor to pornographic websites at least contemplates reviewing such material. At the same time, the developers of websites seek safety against allegation of criminal dissemination of pornography by introducing various types of security measures. Some sites offer paid access to their resources by requiring that the payment be made by credit card, but this does not effectively restrict the access of minors to pornographic content. Another issue is that most websites offer pornographic content free of charge, sometimes requiring only a text message to a specific number. This way the age of a user may not be verified. The inclusion of a message about the pornographic nature of the website visited, together with a request to confirm the age of majority of the user is the least convincing and the most common of these. In fact, the confirmation of the age of majority is done by choosing an appropriate option from the two variants. This shows how easy it is to become a recipient of pornographic content even by a minor. As can be seen, this problem

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<sup>8</sup> Supreme Court ruling of 9.01.2015, III KK 251/14, Legalis (access: 05.07.2019).

<sup>9</sup> M. Filar, *Op. cit.*

<sup>10</sup> Council of Europe Convention on Cybercrime (Budapest Convention) of 23.11.2001 Dz.U.-Journal of Laws of 2015, item 728), dziennikustaw.gov.pl (access:05.07.2019).

requires the intervention of the legislator. Another incentive to reach for pornography is provided by not entirely moral advertising practices in the form of windows popping-up during a visit to a website. Combatting pornographic content comes more difficult by configuring the website that it transfers its visitors directly to a pornographic site. It is also common for pornographic content to be placed on websites whose addresses may mislead users as to their content. The concept of dissemination is similar in its content to that of public presentation. It is about making available, dissemination, fixation and publication to an indefinite and anonymous group of people. Dissemination is not an act of sharing pornographic content to a small and strictly defined community<sup>11</sup>, but that the method of downloading pornographic files and making them available through an appropriate software allowed an unlimited number of entities to become acquainted with<sup>12</sup>, while the possession referred to in Article 202§4a of the Penal Code should be determined by the possessor being able to act in a way that characterizes the beneficial owner under civil law<sup>13</sup>. It is, however, excluded that the verb "disseminate" has been implemented where the perpetrator assumes in advance that the content will be made available to strictly individualized persons, with the assumption that this content will not be shared with other people. Every public presentation is a dissemination, but not every dissemination is a public presentation. Dissemination carries a wider semantic range<sup>14</sup>.

Importing the content referred to in Article 202 § 4a of the Penal Code, shall denote all forms of activity of the perpetrator aimed at obtaining this content, causing it to be at the disposal of itself or another person<sup>15</sup>. The virtual world is taking the form of ancient *aelicariae*-spelt-mill girls, complementing catering to erotic needs with the sale of cookies in the shape of female organs - for the glory of Venus and male - in honour of the god Priap.

### 3. GAMES AND CONTENTS INCLUDED

Virtual pornography creates not only moral but also legal problems, because it is problematic to check if we are a recipient of content which feature a minor. Hooked up by advertising, we can quickly hit the backstage of the pornographic world, by a direct transfer. In games, we can

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<sup>11</sup> Supreme Court Ruling, of 16.02.1987, WR 28/87, Supreme Court Ruling, of 1.09.2011r., V KK 43/11 Legalis (access:05.07.2019).

<sup>12</sup> Supreme Court Decision–Criminal Chamber, of 11.07.2018, III KK 303/18, Legalis (access: 05.07.2019).

<sup>13</sup> Supreme Court Ruling –Criminal Chamber, of 17.05.2017, III KK 478/16 Legalis (access: 05.07.2019).

<sup>14</sup> W. Wróbel, A. Zoll, *Kodeks karny. Część szczególna, Vol. II, Wolters Kluwer, Warszawa 2017*.

<sup>15</sup> Ruling of the Court of Appeal in Wrocław-II Criminal Division Karny, of 27.09.2012, II AKa Legalis (access: 5.07.2019).

watch characters taking the appearance of girls or boys who sell their avatars' bodies for lindens. Eight-year-old girls have been reported to provide sex for money, using avatars. The police suspected that the crime could be staged by criminal groups benefiting from the dissemination of paedophile materials. The appearance of avatars depends only on the will and fantasy of their owners. One can assume any form they like. For this reasons, players began to offer sex in the form of children. If the participants do not teleport in the game to a place inaccessible to other players, for example to a virtual home of one of them, the view of their avatars is widely available, hence we may deal with a violation of Article 202 § 1 of the Penal Code<sup>16</sup>. There seems to be no doubt that animated sex positions constitute "pornographic content" within the meaning of this provision. The situation is analogous here, as in the case of "ordinary" cartoon with such content or only drawings of this nature. Apparently, the criteria of presenting pornographic content to "another person" will be met. In fact, any person who wishes to participate in the game as a player, even a minor, can access this content. On a track record are teenagers who 'engaged in' cybersex with other players of the popular SimsOnline game, which proceeded as a conversation by means of illustrated pictures. Teenagers may play a persona of choice, be it an innocent girl, a mature woman, they may switch genders. There is no control over the rules of the game. That the problem of criminal law assessment of pornography in games containing pornographic content is not only virtual, can be demonstrated by the proceedings taken in 2007 by the prosecutor's office in Halle and the Dutch police on a report by one of the players, a journalist of the ReportMainz programme, station ARD74, which was offered in the game access to pornography with the participation of children, both in the form of avatars and real ones, along with participation in so-called Age Play, that is performing sexual activities with avatars with the appearance of children, also in exchange for financial gains. The German prosecutor's office had no doubt that a crime had been committed.

#### **4. SOFTWARE TO INHIBIT AND CATALYSE DISSEMINATION OF PORNOGRAPHY**

In the virtual world, avatar - child tends to be reduced to a sexual and economic object, to the rank of a substitute required to satisfy the sexual drive, which is very difficult to be eliminated and prevented. In the era of a secure Internet, access to prohibited content is difficult, but not

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<sup>16</sup> J. Kulesza, J.Kulesza, *Gra „Second Life”- wirtualny świat, realne przestępstwa?*, Prokuratura i Prawo 3, 2009, p.32.

enough. Large corporations such as Google and Facebook spare no effort to create new mechanisms responsible for blocking many types of potentially inappropriate material, but stopping the distribution of pornographic content online is as difficult as block a caller's number. Any security measure can be circumvented. This was the case with WhatsApp, which was designed to prevent chats about child pornography. Thousands of users of WhatsApp employed special end-to-end encryption to hide illegal discussion groups where child pornography videos and photos were shared. Noteworthy is worldwide Emule where users can download peer2peer content notwithstanding their location. This software allows many users to download one file, with unlimited number of downloaders, which only affects the speed of transfer. The directory where the downloaded files are stored in Emule, and when downloaded also made available to other users, is called emule/incoming directory. Emule, which allows indefinite number of other users to download files, cannot be compared to sending a single pornographic message to a specific e-mail recipient, or even to a larger number of such recipients specifically marked. This activity could not constitute dissemination as viewed in this argument, since the e-mail message is all the time intended to be addressed to specific, selected persons. On the other hand, mass and random e-mailing of pornographic content can already be regarded as distribution if it is established in factual evidence that the way in which the content is presented gives an indeterminate number of persons a change to access it<sup>17</sup>.

## 5. STATISTICS

Interesting are the statistics of one of the largest pornographic services in the world-Pornhub-surprising as they may be, the figures provide an overview of the pornographic market on the Internet. It is the major site providing pornographic content. As a result, trends in the above market emerge, who the site users would like to watch in movies and what they are really looking for in this type of services. In 2018. Pornhub recorded over 33.5 billion views, by 5 billion more than in 2017. It makes 92 million in the equivalent of the number of entries per day, as if each citizen of three countries with the population as large as in Poland entered the Pornhub every day. The residents of the United States are the most frequent viewers, while

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<sup>17</sup> J. Warylewski, *Pornografia w Internecie-wybrane zagadnienia karnoprawne*, Prokuratura i Prawo Issue 4, 2002, pp.52-61, A. Adamski, *Cyberprzestępczość- aspekty prawne i kryminologiczne. Studia Prawnicze Issue 4, 2005, p.71.*

Poland ranks fourteenth, that is one place higher than in 2017. Most users from Poland are aged 25-34<sup>18</sup>.

## 6. SUMMARY

Whereas pornography is fuelling sex crime, its elimination from the circulation constitutes a crime preventive measure. In the recipients with a low IQ or with personality not fully or defectively developed, the patterns drawn from pornographic content may consolidate the tendency to imitate the observed behaviour. For educated, cultured and socialised audiences, exposure to pornographic content contributes to tensions in sexual life. Many adult video websites contain pornographic content related to a minor or feature an adult stylized as a minor. How should a website visitor be aware of how old a person engaged in sexual activities is? After all, no one is a clairvoyant. In my opinion, the owners of such websites should screen the material they make available to avoid blurring a limit between a teenager and an adult. It is about the safety of children and the moral impact of such websites on them. People need to see clearly that the image of a minor is under a protective shield and not a business element.

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<sup>18</sup> *Co robimy w ukryciu. Portal Pornhub podsumował rok w pornografii.*, Newsweek, [www.newsweek.pl](http://www.newsweek.pl) (access: 5.07.2019).

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