

## VIRTUAL CHILD PORNOGRAPHY

by

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*Child pornography is a serious negative social phenomenon and countries are trying to fight against it effectively. Virtual child pornography constitutes a subset of child pornography. It is a new phenomenon with many unresolved questions and problems. This article firstly defines basic concepts which child pornography generally involves. Furthermore, it contains the definition of virtual child pornography from the perspective of Czech law and international law (especially from the perspective of the European Union). This article including a solution to various issues as the subject of virtual child pornography, status of virtual persons from the legal point of view, determination of their age and criminal punishment in law. Finally three case studies, reflecting current position of selected countries on the matter, are stated. These studies show how virtual child pornography is dealt with in practice. Virtual world is becoming a daily part of life and increasingly penetrating into the real world, and for this reason there is also an expanding number of society's moral values requiring protection.*

### KEYWORDS

*Child, child pornography, pure virtual child pornography, pornographic work.*

### 1. INTRODUCTION

Child pornography in general is a negative social phenomenon. It is one of the most serious forms of criminal activity which is directed against the members of society who are vulnerable with regard to their age and intellectual and moral development. The children don't have sufficient experiences and possibilities to make appropriate decisions about their lives. All these reasons can lead to abuse of children. A very important fact for the

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understanding of child pornography represents moral values of society. Each state recognizes different ones which are reflected in their legal system and then we can say in the understanding and regulation of child pornography.

Child pornography can be divided into two groups:

- a) real child pornography – the object is a real child from flesh and blood
- b) the virtual child pornography – here we can speak about two concepts:
  - 1) a broader concept (larger sense) – a situation where child pornography is committed in cyberspace, the object can be a real or unreal child. This category will take in distribution of real child pornography within information technologies.
  - 2) a narrower concept (narrow sense) – a situation where child pornography is directly linked to cyberspace, and it can only be committed within it. This kind of child pornography is called pure virtual child pornography (for example pornographic works depicting unrealistic children, animation).

This article is focused on pure virtual child pornography, mainly on the animations. There are basic concepts that are common to any kind of child pornography:

1. pornographic work,
2. child,
3. child pornography in a general sense.

### **1.1. PORNOGRAPHIC WORK**

Not every pornographic work may be an object of crime, for example: historical objects, works intended for teaching, scientific purposes or works of art in the meaning of copyright law (works covered by copyright protection can't be subject to criminal penalties / sanctions). It is important that the work has a pornographic nature in terms of criminal law, it means the public nature. It has to be a work with no serious artistic, political or scientific value.

There is no a legal definition In Czech law, the definition of pornographic work were left to the theory and practice. The highest courts of the Czech Republic consider pornographic work as work which affects and stimulates

sexual instinct in especially intensive and insistent way, while at the same time it exceeds the accepted moral standards of the society, and this pornographic work evokes the feelings of deep shame for most of members of particular society<sup>1</sup>. For the purposes of criminal law The Czech Constitutional Court declares that pornographic work is everything, what is difficult to accept in the sense of sexual propriety<sup>2</sup>. It must be a work that grossly violates moral values of the society and this work taken as a whole is susceptible to offend, repulse or abash an average person.

Conclusion about a pornographic nature of the work must be inferred from the content of the work, rather than just from certain parts taken out of context (from a passage, chapter, individual photographs pulled out of a collection of consequential photos). Conclusion about pornographic nature of the work can't be inferred only from the fact that this work is presented in order to satisfy a person suffering from sexual deviation (a person who fantasizes or engages in sexual activity with prepubertal children). For example: It is not possible to evaluate pornographic materials as pornography only for reason that this material includes children and it was presented on the server for pedophiles.

## 1.2. CHILD

The concept of child is regulated by domestic sources of law in the first place. These definitions are based on international regulation. European countries commonly define as a child a person less than 18 years. The best known source is the Convention on the Rights of the Child, which defines a child as any human being under the age of eighteen, unless the relevant law recognize an earlier age of majority. Different matter presents the reaching of majority. For example, the Czech law allows to reach majority in the age of 16 if a person meets the statutory requirements. From the point of view of criminal law such reaching of majority doesn't have any influence and person will continue to be considered a child until he/she reaches the age of 18 years by the passage of time.

European Law defines a child as a person younger than 18 (Article 1 of Council Framework Decision 2004/68/JHA of 22 December 2003 on combat-

<sup>1</sup> Resolution of The Czech Constitutional Court no. IV, ÚS 606/03 (Usnesení Ústavního soudu České republiky ze dne 19. 4. 2004, sp. zn. IV. ÚS 606/03, ASPI). Source available at: <<http://nalus.usoud.cz/Search/Search.aspx>>

<sup>2</sup> Resolution of The Supreme Court of the Czech Republic no. 7 Tdo 1077/2004-I (Usnesení Nejvyššího soudu České republiky ze dne 28. 12. 2004 sp. zn. 7 Tdo 1077/2004-I, ASPI). Source available at: <<http://www.nsoud.cz>>

ing the sexual exploitation of children and child pornography). Another important document is the Convention on cybercrime (Article 9). The Convention doesn't use the term child, but 'minor'. A minor includes any person less than 18 years old, but each Party may reserve the right to set a lower age limit but not less than 16 years. This reservation corresponds with the situation in particular states where majority is acquired before reaching the age of 18.

Individual states also govern the age limit from which a person may start sexual life with immunity from prosecution. It's possible that a person under 18 years may choose to be involved in sexual life, but this person can not choose to be object of pornographic work, that is child pornography. Example: a person under 18 years can consent to sexual activity recorded on camera, this agreement will be completely meaningless (irrelevant) and a person who presses the camera recording may be criminally liable.

### 1.3. CHILD PORNOGRAPHY IN A GENERAL SENSE

As child pornography are considered such a pornographic works that depict or otherwise exploit a child. This may include any depiction of any child by any means in actual or simulated sexual activities or any representation of the sexual organs of a child for primarily sexual purposes. For example, pictures of naked children in provocative positions demonstrating the genitals for sexual gratification, pictures of children depicting the positions of actual or simulated sexual intercourse and other sexually irritant pictures of children. It isn't possible to label pictures as child pornography, which show partially or fully naked children and may sexually stimulate sexually deviants, unless these pictures meet the criteria of pornographic nature<sup>3</sup>.

Child pornography is also defined by international documents. Framework Decision on combating the sexual exploitation of children and child pornography defines child pornography as a pornographic material which visually depicts a real child, a real person with look of child or realistic representation of non-existent child involved or engaged in sexually explicit

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<sup>3</sup> Resolution of The Supreme Court of the Czech Republic no. 7 Tdo 1077/2004-I (Usnesení Nejvyššího soudu České republiky ze dne 28. 12. 2004 sp. zn. 7 Tdo 1077/2004-I, ASPI). Source available at: <<http://www.nsoud.cz>>

conduct including lascivious exhibition of the genitals or pubic area of a child<sup>4</sup>.

Convention on cyber crime defines child pornography as pornographic material that visually depicts a minor or a person appearing to be minor realistic images representing a minor engaged in sexually explicit conduct<sup>5</sup>.

### 1.3.1. PURE VIRTUAL CHILD PORNOGRAPHY

The principle of virtual child pornography is that there is no abuse or other exploitation of a real child. As the original reason for the child pornography regulation was to protect real children from being abused and sexually exploited, an important question arises whether virtual pornographic works, or more precisely their creators, may be prosecuted. The answer is affirmative under two conditions:

- a) the work has a pornographic nature in the sense of criminal law
- b) the work must include sexual abuse or exploitation of a non-existent child. Therefore animations depicting sexual behaviour of adult animated characters (i.e. older than 18 years of age) will not be punishable.

The object of pure virtual child pornography is not a real child, but a nonexistent or unrealistic child. The possibility for the object of child pornography to be a non-existent child is conceded by the Council Framework Decision on combating the sexual exploitation of children and child pornography and the Convention on Cybercrime. Both of these documents describe child pornography as a pornographic material which visually depicts a realistic representation of a nonexistent child involved or engaged in sexually explicit conduct including lascivious exhibition of the genitals or pubic area of a child. From the international and European perspective, it's accepted for the subject of child pornography that can be virtual pornographic works (even those created outside of cyberspace). But there is one necessary condition – it must be a realistic representation of a child, i.e. the case where the pornographic work looks like a real depiction of child sexual abuse in the view of the average observer. The degree of lifelikeness of virtual pornographic work is also important. It will become increasingly difficult to discern between a real child and an unreal one with regard to ongoing technic-

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<sup>4</sup> Article 1 of Council framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography.

<sup>5</sup> Article 9 of Convention on cybercrime.

al development (this consideration will not apply to animation, because in such case we always know that there isn't an actual child concerned). Consumers of such work could as a matter of fact argue that it is not a real child.

The object of child pornography regulation is the interest of society in the protection of moral development of children and their protection from sexual abuse. But within the scope of virtual child pornography the latter interest cannot be directly interfered with, because the object is not a specific real individual. Therefore the primary object is protection of moral development of children, especially the child's attitude towards sexual life. Let us imagine a child watching a sexual animation portraying Lisa Simpson, a character with positive human characteristics in the series "The Simpsons", conceived as a "good person" in the eyes of the child. We can assume that children are not intellectually and sexually mature enough to be fully aware of what they see. Such animation can thus be perceived as a model – if Lisa does "it", there is nothing wrong with that and I can do "it" too.

It could be stated that individual object is the protection of society from a potentially dangerous behaviour which may lead to actual abuse of a child. The counter argument in this case is that virtual child pornography represents an alternative for paedophiles to satisfy their needs on the level of masturbatory fantasies<sup>6</sup>. It is possible for the animation to reduce the risk of real abuse, however this assumption remains unconfirmed.

Similar questions arised in the context of violence presented in movies and video games. Some argue that violence affects children's behavior and their perception of real life, others hold the opposite view. There is, in fact a case where violent conduct of people was influenced by a particular computer game. This case is called Columbine high school massacre<sup>7</sup> where two students killed several of their classmates and one professor. They had been planning and preparing for this crime, they even recorded a home video in which they referred to a particular computer game saying: "It's going to be like fucking Doom (...) That fucking shotgun is straight out of Doom!" This incident represents a valid argument in hands of those who argue that violence in the virtual world affects children's behavior in the real world. This case should demonstrate that virtual world is a part of everyday life even in

<sup>6</sup> Herczeg, J. 2008, Virtual child pornografy: Crime without victim? In Vanduhová, V., Gřivna, T.: Pocta Otovi Novotnému k 80. narozeninám, no. 43.

<sup>7</sup> Story of Columbine High School Massacre. Source available at: <[http://en.wikipedia.org/wiki/Columbine\\_High\\_School\\_massacre](http://en.wikipedia.org/wiki/Columbine_High_School_massacre)>

the area of virtual child pornography. The virtual world can interfere with reality and it can influence the behavior and perceptions of people.

The object of virtual child pornography is a virtual child. The fundamental question is – does a virtual child (a person) have an age? It's not possible to speak of age as in the passage of time in this context, but we can use a term "apparent age" – it's an age which can be attributed to virtual person based on the observable physical characteristics. The age of a virtual child can be deduced from its appearance. There are two situations:

- a) There is no doubt that the child is under 18 years of age (for example, an animated toddler),
- b) it is not certain that the animated person is a child. This will pose challenge in practice, where specific circumstances and features of animated characters have to be taken into account (i.e., visual features, presence and behaviour of animated characters, their clothes, etc.). These features have to be interpreted in relation to one another, rather than individually.

Another way to determine the age is to derive it from the nature of a particular animation, respectively from the context of story lines. There may be a situation where in the plot it will be clearly stated that a virtual person is of a young age. Such determination of age must be indisputable. It is possible to demand expert opinion. In case the age is not established unconditionally, the "in dubio pro reo" principle should prevail.

An another important question represents a status of virtual child (cartoon character) from a legal point of view. There are two opinions:

- 1) A cartoon character can't be a person protected under the law, because this would lead to extending criminal liability to situations where the legislator didn't intend to prosecute.
- 2) A cartoon character can be a person. The term person from a legal point of view can be considered a historical term which is commonly understood as natural and legal persons. A natural person is constructed as an individual of flesh and blood, i.e. a real person. Legal persons are the work of fiction and are not real. A similar construction could be used for the understanding of virtual characters as persons<sup>8</sup>. Law should not be rigid, on the contrary it should flexibly respond to the circumstances and environment in a given time

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<sup>8</sup> See McEWEN v. SIMMONS & ANOR (2008), NSWSC 1292.

and space. Also it should reflect the apprehension and standards of society. It is therefore possible to reflect on cartoon characters as legal entities. However there has to be set up certain limits because such approach would not apply to every crime (for example animated person or child cannot be protected from procuring and soliciting prostitution).

## 2. CASE LAW

### 2.1. THE SIMPSONS

One of the interesting judgments concerning virtual child pornography is a decision of the New South Wales Supreme Court in early 2009. *McEwen v. Simmons & Anor*<sup>9</sup>. The plaintiff was convicted of the offences of possessing child pornography (under state law – State legislation) and using his computer to access child pornography material (under Community law – Commonwealth legislation). This pornographic material comprised a series of cartoons depicting figures modeled on members of the television animated series “The Simpsons”. Sexual acts were depicted as being performed by the children of the family, who had genitalia which were evidently human.

The Supreme Court at first dealt with the issue of examination of age of children’s cartoon characters (Bart and Lisa). The Court noted that the supposed age of those figures can be derived directly from the TV series and there is no doubt that these figures are less than 18 years old (Commonwealth legislation considers a child any person under 18 years), and it is probable that the characters was younger than 16 years (State legislation uses the concept of a child as a person under (or apparently under) the age of 16 years).

The main question in this case was whether the animated cartoon character is a “person” within the meaning of the statutory offences or, to be more precise, is a depiction or representation of such a “person”. The characters were not or did not represent any actual or fictional human beings. In particular, the hands bore only four digits and the faces had eyes, a nose and mouth markedly and deliberately different to those of any possible human being. The Supreme Court saw a fundamental difference in kind

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<sup>9</sup> *McEWEN v. SIMMONS & ANOR* (2008), NSWSC 1292. Source available at: <<http://lawlink.nsw.gov.au/scjudgments/2008nswsc.nsf/2008ns>>



between a depiction of an actual human being and the depiction of an imaginary person. The distinction was made clearer by considering the various depictions in video games and comics of imaginary persons involved in terrible violence, involving the infliction of torture and death. If the persons were real, such depictions could never be permitted and their creation would constitute crimes. Such depictions are permitted only because they are merely imaginary constructions. Real people can be fictional, in the sense that they adopt or play the role of others than themselves or fictional characters, but they are still real people.

From the view of Commonwealth legislation „the drawings and other pictorial representations may be of fictional or imaginary characters. Although the primary purpose of the legislation is to combat the direct sexual exploitation and abuse of children, it also calculated to deter production of other material that can fuel demand for material that does involve the abuse of children. With regard to this conclusion the Court noted that there is no reason to limit the meaning of person to an actual person and the depictions and representation of persons to which the definition of Commonwealth legislation refers include a drawing of a fictional character, hence a cartoon. The Supreme Court pointed to the fact that the cartoon figure departed from the form of a recognisable human being it may become less like a person and not depict or represent a person at all. Merely giving some human traits to say, a rabbit or a duck, cannot be automatically seen as a representation of a person, even though a rabbit or duck has character traits that are distinctly human. On the other hand, many cartoon characters, though by no means all, are drawn to closely resemble real human beings. It's necessary to assess whether the departure is such that a person is no longer represented and also whether the cartoon figure is capable of grounding the offence. The Supreme Court acknowledged that a cartoon character, departing from the representation of a human being might be a representation of persons within the meaning of the offence. There must be at least some semblance of human form, a mere symbol wouldn't be a representation.

State legislation modifies the definition of child pornography and uses the verbs "depicts or describes". When the State legislation was introduced, the legislator referred to the fact that a depiction or description of the child in a sexual context is a broad category that would cover situations where a child is depicted in an indecent pose or watching another person engaged in sexual activity. The requirement that the material must in all circum-

stances, be offensive to reasonable person ensures that innocent family photographs of naked children won't be considered as child pornography. The Supreme Court accepted the premise that the word gains its meaning from its context, the context of the State legislation is the protection of children from sexual exploitation and abuse. On this basis it was stated that the concept of a person in this context is capable of denoting real as well as fictional persons. Therefore a cartoon character might well constitute the depiction of such a person. The drawing must be that of a human being and recognisable as such but no particular human being needs to be depicted and even a substantial departure from realism won't necessarily mean that the depiction is not that of a person in this sense. Because the depiction of a person is an essential element of the offence, it must be proved beyond reasonable doubt.

The Supreme Court concluded that the word "person" (in respect of both offenses) included fictional or imaginary characters, and the mere fact that the figure depicted departed from a realistic representation in some respects of a human being did not mean such a figure wasn't a person. Figures in the relevant material were indeed depictions of persons within the meaning of the definitions.

It is further worth noting that in this decision the Supreme Court mentioned the case *Holland v. the Queen*, in which the difference was established between the depiction of a person in a written work and the depiction of a person in an image. In written work it will make no difference if the writer is attempting to describe a real person or not, because this process does not require the presence or even the existence of any real person. There is no person displayed, they are described in words. The written description never presents to the eye of the observer the real-life person; it can only present a description. On the other hand, the depiction of a person in an image can be that of an actual person, a non-person or an imaginary person. The importance of distinguishing between real and imaginary person makes no sense in respect of a written work, but is an essential element in respect of an image. The available evidence suggests that explicit sexual materials can be harmful, whether or not they depict actual children. Moreover with the quality of temporary technology, it can be very difficult to distinguish a real child from a computer creation or composite.

## 2.2. SEX LESSONS FOR YOUNG GIRLS

Another example is a case from Holland dating from 2008 concerning a one-minute video entitled "Sex lessons for Young Girls"<sup>10</sup>. This video showed a virtual young girl giving oral sex to a virtual adult. The animation was aiming at young girls and it was supposed to serve as instructions. When the man achieved orgasm, the virtual young girl was smiling into the camera, there was an avalanche of balloons and the man started clapping hands. This atmosphere sought to demonstrate that it is a fun activity for the young girls to do. In this case the court resolved as a main question, whether it is a realistic representation of the non-existent child.

Dutch Penal Code allows prosecution of virtual child pornography and uses the concept of an apparent party. The Court dealt with the issue of age of virtual characters. It was noted that the evidence concerning the age of the virtual person isn't admissible because such virtual person has no a real age. The estimation of age of the depicted person must be made with regard to all physical characteristics (including sexual characteristics), which are the only way to indicate a virtual person's age. The fact that the virtual person appears to be a real child is enough to determine apparent participation in virtual pornography. On the other hand, obviously modified non-realistic depictions or intellectual creations should be excluded.

In this case, the age of the virtual girl was estimated according to physical characteristics, particularly undeveloped breasts, pubic hair and small stature. On this basis, the court held that the animation portrays a virtual teenage girl, who has not yet reached the age of 18.

In Netherlands the reason for criminal prosecution is not only the protection of depicted minors, but also the protection against conduct that may encourage or misguide children to participate in sexual conduct or conduct addressed to a subculture promoting sexual abuse of children. In the concerned case the Court held that an adult is indeed able to discern between the behaviour of the depicted person and a real persons, but an average child cannot do so.

## 2.3. SECOND LIFE

Another discussed issue is the availability of child pornography in Second Life. Second Life is a three-dimensional virtual world accessible over the In-

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<sup>10</sup> BC3225, Rechtbank 's-Hertogenbosch , 01/845400-07. Source available at: <<http://www.rechtspraak.nl/ljn.asp?ljn=BC3225>>

ternet. Second Life is divided into two virtual worlds, the first one called MainGrid – which is accessible to users above 18, and the second one called TeenGrid which is designed for the age group ranging from 13 to 18. Age is determined at registration, by filling in the box “age”; the actual age is not verified. It is therefore possible that in MainGrid there are people younger than 18 and in TeenGrid there are people over 18. The users create their own virtual identity which can be changed, for example a person over 18 can choose the look of a toddler, if they're interested.

In 2007, the German channel ARD broadcast a report about the availability of child pornography in Second Life<sup>11</sup>. Child pornography was available in the form of traditional video recording and directly as an online game, in which the avatar (user) was a major player and anyone could to join in as a spectator. In some cases it was necessary to pay the entrance fee.

The report revealed a group dealing with child pornography and the investigation was also aimed at users who pay for virtual sex. The reason why German authorities and the Prosecutor investigated this situation was the fact that the possession of virtual child pornography is an offence under the German law. Linden Lab, the company which created Second Life, assisted the German authorities in establishing the identity of users who paid for virtual sex and those who provided child pornography. At the same time Linden Lab undertook steps to modify the game in order to prevent virtual children (i.e. users younger than 18 and users who have a virtual identity as a child) from engaging in sexual relationships and also promised to focus on identity verification.

### **3. CONCLUSION**

In the matter of virtual child pornography it is important that the countries include protection against this issue as a part of moral standards and understanding of society. There is no doubt that the virtual world takes up an increasingly bigger role and is becoming a part of everyday life. As such it cannot be ignored. Some countries aware of the importance of this issue already try to regulate it. This completely new phenomenon may raise various issues and problems in the future. That is why prevention and preparedness are essential.

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<sup>11</sup> TV report about child pornography in Second Life. Source available at: <<http://www.youtube.com/watch?v=Wk8uNWF77gg>>

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