

PORNOGRAPHY IN CYBERSPACE – EUROPEAN REGULATIONS

by

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The widespread global computer networks generate also illegal content, which can reach practically an unlimited amount of recipients.

Utilizing global networks for dissemination or presenting child pornography is increasing in an avalanche-like way. Documents adopted in reaction to this phenomenon require that EU Member States, as well as countries belonging to the Council of Europe, take measures enabling prosecution of i.a. producing, making available, possessing and distributing child pornography by use of information systems.

Problematic is so-called artificially generated or simulated imagery pornography. Blocking or withdrawing of illegal content from networks remains a debatable issue. Liability is often avoided due to the variety of legal systems applied by different countries. Hence, continuous international cooperation in analyzing the situation and coordinating measures in combating child pornography and other forms of sexual abuse on the Internet is of vital importance.

Latest efforts of the European Union (e.g. the proposed new Council Framework Decision concerning combating sexual exploitation and abuse of children for sexual purposes, child pornography) strive for the adoption of harmonized regulations in combating this phenomenon in different countries.

KEYWORDS

Child pornography, simulated child pornography, pornography in cyberspace, European regulations, blocking access to websites.

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1. INTRODUCTION

The technological advancement, appearance of new solutions in many aspects of social life and the requirement of EU law harmonization as well as uniform legal regulations in different countries, make it necessary to find new legislative solutions through new laws in hitherto unregulated areas, or by amendments of laws which until recently remained sufficiently normative legislation.

Sexual exploitation of children, including child pornography, is a phenomenon known since centuries. Nonetheless, before the appearance of digital communication technology, such phenomenon was to certain degree limited. Obtaining material consisting of child pornography was difficult and time-consuming. The result was that existing material could meet the demand for a relatively long period. Global networks enable transmitting unlimited amount of information, which can reach practically an unlimited amount of recipients in a very short time – resulting in an increase of demand for new material. An unavoidable consequence of this is the exploitation of a higher number of children. The statistics is unyielding. For example, the unit fighting against child pornography of the Greater Manchester Police intercepted in 1995 twelve indecent child images. Four years later – 41 thousand of such materials, in principles all of them originating in the Internet. Currently the amount of transferred files containing child pornography counts in millions¹.

Sexual abuse of children assumes different forms in the Internet: presenting for example pornography to minors, child pornography, pornographic performance with the participation of children etc. Digital technologies, including Internet, open up new possibilities for perpetrators with the result that totally new methods emerge.

Even if presentation of pornography to minors is an undesirable phenomenon and could lead to i.a. a disordered emotional development, it does not necessarily harm the child. Child pornography is a totally different issue, particularly as a result of the abuse of a child's defencelessness, as well as its trust to persons which should take care of the child.

¹ See Carr, J., 'Internet a wykorzystywanie seksualne dzieci i pornografia dziecięca'. Source available at: <http://www.dzieckokrzywdzone.pl/UserFiles/File/kwartalnik13/13_carr.pdf>.

Adopted by a majority of European countries², the Convention on the Rights of the Child³ of 20 November 1989, imposes in art. 34 on States Parties the duty to protect children from all forms of sexual exploitation and sexual abuse, including the use of children in pornographic performance and material. According to art. 1 of the Convention – child “means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”. The aim to protect youth below the age of 18 years is also the objective of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography⁴, which imposes on States Parties the duty of penalizing “producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography” (art. 3 par. 1 c), defined as “any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes” (art. 2).

2. DOCUMENTS OF THE COUNCIL OF EUROPE

Adopted documents require that EU Member States, as well as countries belonging to the Council of Europe, take measures enabling prosecution of i.a. producing, making available, possessing and distributing child pornography by use of information systems.

Regulations of the Council of Europe concerning child pornography are primarily included in the Convention on Cybercrime⁵ and Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse⁶.

Council of Europe Convention on Cybercrime of 23 November 2001, focuses on the necessity of unifying national legislation, establishing uniform definitions of offences committed in global networks and introducing rapid and effective international cooperation in this field. Among four types of of-

² Ratification status, source available at: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en>.

³ Convention on the Rights of the Child, source available at: <<http://www2.ohchr.org/english/law/crc.htm>>.

⁴ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, source available at: <<http://www2.ohchr.org/english/law/crc-sale.htm>>.

⁵ Council of Europe Convention on Cybercrime (CETS No.: 185). Source available at: <<http://conventions.coe.int/Treaty/EN/Treaties/html/185.htm>>.

⁶ Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No.: 201). Source available at: <<http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>>.

fences committed in cyberspace defined by the Convention on Cybercrime, Title 3 (“Content-related offences”) concerns child pornography.

The Convention defines in art. 9 par. 3 a minor as every person under the age of 18 years, and allows that a Party may require a lower age-limit but this limit can not be lower than 16 years.

It is forbidden by the Convention, according to art. 9 par. 1, to produce child pornography for the purpose of its distribution through a computer system⁷, as well as offering, making available, distributing and transmitting child pornography with the use of computer system.

The definition of child pornography includes all kind of pornographic material which visually depicts a minor engaged in sexually explicit conduct (art. 9 par. 2 sub-par. a). As child pornography, the Convention recognizes also pornographic material which depicts a person appearing to be a minor engaged in sexually explicit conduct or realistic images representing a minor engaged in sexually explicit conduct. The recognizing as an offence to procure child pornography through a computer system or to possess child pornography in a computer system or on a computer-data storage medium is left by the Convention to individual Party's decision as written in art. 9 par. 4, with the right not to apply in whole or in part paragraphs 1, sub-paragraphs d. and e, and 2, sub-paragraphs b. and c of article 9 of the Convention.

The Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of 12 July 2007 also places a ban to offer, make available, distribute, transmit, procure child pornography for oneself or for another person (art. 20 par. 1 sub-paragraphs b-d), whereby child pornography means any material visually depicting a child engaged in real or simulated sexually explicit conduct or any depiction of a child's sexual organs for primarily sexual purposes (art. 20 par. 2). Criminalisation of producing and possessing child pornography may be excluded by any Party, in whole or in a part (art. 20 par. 1 'a' and 'e'), if it concerns pornographic material consisting exclusively of simulated representations or realistic images of a non-existent child, or if the presented children have reached the age of sexual consent⁸ and images of these children are produced and possessed

⁷ According to art. 1 letter “a” of the Convention, computer system “means any device or a group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of data”.

⁸ Each Party shall decide the age below which it is prohibited to engage in sexual activities with a child.

by them solely for their own private use. Criminalisation of deliberately obtaining access, through information and communication technologies, to child pornography – specified in art. 20 par. 1 sub-par. f – is left to the exclusive decision of the Convention's Parties.

3. EUROPEAN UNION LEGISLATION

3.1. EUROPEAN UNION ACTS IN FORCE

The European Council has also taken steps in order to limit the scale of exploitation of global networks for distribution of child pornography. Council Decision N. 375 of 29 May 2000 to combat child pornography on the Internet⁹ recommends the Member States to take and to intensify taken action to combat the production, processing, possession and distribution of child pornography material, as well as effective investigation and prosecution of such offences. The Decision recommends also to promote and to encourage Internet users to inform law enforcement authorities, either directly or indirectly, on suspected distribution of child pornography material on the Internet, if they come across such material.

The Council stresses also the necessity of setting-up of specialised units within law enforcement authorities, which could effectively combat child pornography in global networks as well as the necessity of establishing permanent cooperation between Member States for the purpose of information exchange, analysis of the situation and coordination of measures in combating child pornography on the Internet.

Council Framework Decision of 22 December 2003 on combating sexual exploitation of children and child pornography¹⁰, binding for all Member States, specifies that in the Framework Decision, every person below the age of 18 years is to be defined as a child (art. 1 (a)). Pornographic material, that visually depicts or represents a real child involved or engaged in sexually explicit conduct¹¹ is not allowed to be produced, distributed, disseminated, transmitted, supplying, made available, acquired and possessed (art. 3 par. 1). Child pornography also means any pornographic material that visually depicts or represents a real person appearing to be a child or realistic

⁹ Council Decision of 29 May 2000 to combat child pornography on the Internet, Official Journal. L 138, 09/06/2000 s. 0001.

¹⁰ Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, Official Journal L 13, 20/01/2004, p. 0044-0048.

¹¹ For the Framework Decision purposes sexually explicit conduct includes lascivious exhibition of the genitals or the pubic area of a child.

images of a non-existent child, in both cases involved or engaged in sexually explicit conduct (art. 1 (b)(ii) and (iii)). To describe the illegal acts mentioned in art 3 of the Decision, it is not necessary to define how the mentioned acts are being committed while using a device for automatic storing, processing and distribution of information. Nevertheless, paragraph 1 of this article singles out this kind of acts, stressing in this way the threat of distribution of pornographic material using computer systems constitutes.

Criminal liability may be excluded if a real person, appearing to be a child, in fact was 18 years of age or older at the time of the depiction (art. 3 par. 2 (a)). Criminal liability may also be excluded in case of production and possession of images of children under the age of 18 years, but who have, according to art. 3 par. 2 (b), reached the age of sexual consent and where all materials are produced and possessed with their consent and solely for their own private use. The consent, even if established, is not valid if the perpetrator achieved the consent by taking advantage of i.a. superiority in age, maturity, position, status, experience or the victim's dependency on the perpetrator. Criminal liability may also be excluded if the pornographic materials visually depicting or representing realistic images of a non-existent child are produced and possessed by the producer solely for his or her private use and no pornographic material visually depicting or representing an existent child or a real person over the age of 18 years appearing to be a child was used for the purpose of its production and the act involves no risk for the dissemination of the material (art. 3 par. 2 (c)). In the case of pornographic material that visually depicts or represents realistic images of a non-existent child, every Member State can decide not to proceed with criminal sanctions, substituting them with other non-criminal sanctions or measures (art. 5 par. 4). The Framework Decision requires that necessary measures are taken to ensure that the instigation, aiding and abetting in the commission of the described offences are punishable, as well as attempts to commit the conduct – in the scope of activity such as production, distribution, dissemination of transmission (art. 4) and describes the penalties and aggravating circumstances (art. 5). The Framework Decision requires also that necessary measures are taken to ensure that legal persons also can be held liable for offences described in the Decision, if the offence was committed for their benefit by any person, acting either individually or as part of an organ of the legal person, taking decisions on behalf of the legal person or has an authority to exercise control within the legal person, as well as for lack of su-

pervision or control by the described person – in case this fact rendered possible the commission of an offence for the benefit of that legal person by person under its authority (art. 6).

3.2. PORNOGRAPHY AND SIMULATED CHILD PORNOGRAPHY – THE ARRANGEMENTS IN DOMESTIC LAW (SELECTED EXAMPLES)

European legislation concerning prosecution of child pornography appears to be rather homogenous. Producing, possessing, making available, transmitting, distributing child pornography, as well as presenting pornography to minors and other forms of sexual abuse of minors¹² is penalized.

When it comes to so-called artificially generated or simulated imagery pornography, there are discrepancies as to range and means of penalty.

According to art. 1(b)(ii) and (iii) of Council Framework Decision of 22 December 2003 on combating sexual exploitation of children and child pornography¹³. The latter pornography covers also any pornographic material that visually depicts or represents a real person appearing to be a child or

¹² It is forbidden under German law to offer, give or make pornographic materials accessible to a person under the age of 18 years. There is also a penalty for producing, obtaining, supplying, stocking and offering such material for the purpose of dissemination, presentation, transmission or making available for persons under the age of 18 years, as well as facilitation such action to others. Art. 184 b and c penalizes i.a. dissemination, possession, production and making available child pornography (art. 184 b concerns children under the age of 14 years, while art. 184 c refers to children between the age of 14 and 18 years). French Penal Code penalizes in art. 227-23 taking, recording, transmitting, distributing, importing or exporting picture or representation of a minor, whenever the picture or the representation is of pornographic character. The penalty is increased if dissemination was made by telecommunication network open to unrestricted public. Art. 227-23 applies also to pornographic image of a person whose physical appearance is that of a minor unless it is proved that the person was over eighteen years of age on the day the picture was taken or recorded. Art. 227-24 bans manufacturing, transporting, distributing by any means content of pornographic or violent character, content seriously violating human dignity or trafficking, in cases where the message may be accessed by a minor.

In Great Britain producing and distributing child pornography is criminalised under the Protection of Children Act 1978, which consider it an offence to take, give permission to take or produce any indecent photograph or pseudo-photograph of a child, including any kind of recorded video film, as well as digital data stored on a computer disc or by other electronic means which can be processed as a photograph.

It is also banned to distribute or present such material or possess with the purpose to distribute or present.

There is forbidden under the Polish Penal Code to publicly present pornographic materials in such manner, that it is imposed upon a person who may not wish so (art. 202 § 1); to present pornographic material to a minor under the age of 15 years or make available to minors items of such a nature (art. 202 § 2); for the purpose of dissemination – to produce, record, import as well as disseminate or publicly present pornographic material with persons under the of 18 years involved or associated with the use of violence or animal (art. 202 § 3). Art. 202 § 4 and 4a increases penalties for recording, importing, storing and possessing pornographic materials, where minors under the age of 15 years are involved.

¹³ Council Framework Decision 2004/68/JHA of 22 December 2003 on combating sexual exploitation of children and child pornography, Official Journal L 13, 20/01/2004, p. 0044-0048.

realistic images of a non-existent child, in both cases involved or engaged in sexually explicit conduct¹⁴.

France is among the countries who decided to include in criminal penalization, cases where no children took part in the production of material simulating child pornography¹⁵. The British Protection of Children Act 1978 defines the notion "pseudo-photograph" as image created through computer-graphic means or otherwise and simulates a photograph¹⁶. Art. 184b and 184c of the German Penal Code penalizes child or juvenile pornography reproducing an actual or realistic activity. Since 2002, virtual child pornography, defined as pornography fabricated with the aid of computer technology, is illegal according to the Dutch Penal Code (art. 240b par. 1), even if no real child has been involved. Images of sexual acts involving a person who clearly has not reached the age of 18 years are illegal. Also penalized is digital processing of pictures of children in order to present sexual conduct¹⁷. The Swedish Penal Code, in art. 16 § 10a, criminalises child pornography and uses an expression which means picture as well as description. The legislator ipso facto penalizes all possible forms of generated pornography, providing penalties also for watching child pornography, when deliberate.

Under Polish criminal law, liability for artificial pornography is limited to generated or processed images of minors engaged in sexually explicit conduct (art. 202 § 4b), whereas in other countries depiction of intimate parts of a child can be considered as criminal artificial pornography.

3.3. SOLUTIONS FOR THE FUTURE – A PROJECT OF THE NEW DIRECTIVE

The widespread dissemination of child pornography in global networks is based i.a. on the assumption of impunity with regard to persons responsible for its production, transmission or obtaining. Leaving the implementation of certain regulations to individual countries results in a legislative heterogeneity which obviously makes prosecution of child pornography more difficult. With this in mind, the European Union has initiated work on changes

¹⁴ There is a similar definition of generated pornography in Council of Europe Convention on Cybercrime (art. 9 part. 2 sub-par. b and c).

¹⁵ Gienas, K. 2004, 'Zjawisko rozpowszechniania pornografii dziecięcej za pośrednictwem Internetu', *Palestra*, no. 3-4, p. 136.

¹⁶ Including film and any form of video recording.

¹⁷ Błachut, J. 2005, 'Pozorowana pornografia dziecięca', *Państwo i Prawo*, no. 4, pp. 80-81.

of the Framework Decision 2004/68/JHA, aiming at harmonizing criminal classification and facilitating prosecution.

A project for a European Parliament and Council Directive on combating sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA¹⁸, introduces new, increased regulations with regard to child pornography. A child is still defined as a person under the age of 18 years, but the definition of child pornography is broadened in comparison with previous regulations. Art. 2 par. b of the project defines child pornography as any material that visually depicts a child, any person appearing to be a child and realistic images of a child (even if the child does not exist) engaged in real or simulated sexually explicit conduct, as well as any depiction for primarily sexual purposes of sexual organs of a child or any person appearing to be a child, including realistic images of sexual organs of a child, regardless of the actual existence of such child. An essential change in comparison with present regulation is the absence of possibilities to exclude any part of the definition by Member States. Art. 5 of the project states that any production, acquisition, possession, distribution, dissemination, transmission, offering, supplying or making available child pornography should be penalized. Deliberate accessing to child pornography using information and communication technology is also treated as a criminal act. Organizing travel arrangements with the purpose of committing any crime connected to child pornography, as well as dissemination of material advertising the opportunity to commit such criminal act is also penalized (art. 7 of the project). According to art. 21 of the project, Member States shall use all necessary measures to block the access to webpages containing or disseminating child pornography and if possible to eliminate such sites.

Discussion on blocking of sites with illegal content is not new. Objections as to its effectiveness are of course legitimate, although it does not change the fact that blocking access to sites with child pornography is sufficiently successful to prevent access of such content to persons who will not make additional efforts to find such material. Experience in countries employing blocking of content with child pornography, by applying filter or in com-

¹⁸ Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, Official Journal L 13, 20/01/2004, p. 0044-0048. Source available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0094:FIN:EN:PDF>>.

bination with lists of illegal addresses, shows that in spite of its weaknesses, the method is worth to be used on a broad scale.

Naturally, the best solution would be to eliminate entirely sites containing child pornography, but this is only possible if the server offering such content is located in a country, whose jurisdiction enables the elimination of sites with illegal content. In all other cases blocking the access is the fastest method to make such access difficult.

Blocking webpages containing child pornography is only a part of a general problem in connection with blocking sites with illegal content. Often objections concerning blocking of internet sites is about fear of blocking sites which does not contain anything illegal but are for various reasons undesirable for authorities which decide about such action. It is therefore of great importance to maintain a balance between guarantees that rule of law is applied and guarantees for citizens rights.

4. CONCLUSIONS

The problem of pornography in cyberspace is also a problem of the widespread access to pornography in general, including hard pornography and the availability of pornography to minors. A common phenomenon is the so called cybersquatting, implying registering of popular domain names with malicious intentions. The result for example is the use of popular words or addresses in order to redirect to sites with pornographic content¹⁹. Searching in the Internet for quite „secure“ entries can therefore sometimes lead unintentionally to sites with pornographic content.

Pornographic content in computer networks is considered to be public presentation due to its access to an unlimited number of persons. If a service offering pornographic content is open only to authorized users (persons who must fulfil certain conditions, for example pay for the service or apply access code), then it is not possible to consider it publicly presented pornography. Notifying the user in advance about access to pornography and requiring confirmation of achieving of the user of certain age, as well as obtaining the user's consent to access pornographic content is sufficient to avoid accusation of presenting pornographic content to minors (which is penalized in almost all European countries), but only if the provider of por-

¹⁹ The entry „nokia“ was searched for hours in Poland in January 2003 resulting in access to i.a. advertisements for pornographic movies and sites with explicit erotic content, see Niedziela, J. 8 January 2003, 'Internet:serwisy pornograficzne zamiast firmowych', Gazeta Stołeczna.

nographic content can verify that the user has reached the age required by the law and is able to protect the service against unauthorized access. To claim that no accusations are justified for making available such content solely on the basis on the user's confirmation of fulfilling certain conditions²⁰ (for example reaching certain age) does not seem acceptable, in particular in cases when network services recognize a declaration which does not fulfil²¹ any degree of appropriate conscientiousness. Notification on websites that the content is intended only for adults does not release from responsibility either²².

Internet ensures anonymity, speed and possibility to reach an unlimited number of recipients. Research shows that child pornography available in the Internet can contribute to the awakening of paedophilic behaviour, which otherwise would remain dormant²³.

Although it is impossible to eliminate entirely child pornography in global networks, every method limiting its accessibility even for a while, is worth analyzing and applying. The European Union can play an important role in this process, mainly thanks to its ambition to harmonize the legislation in this area, as well as its possibility to achieve this. It is also important to pay attention to the necessity of creating solutions which for the moment seems impossible to realize, since it is conceivable that thanks to the technological progress, such solutions could materialize sooner than we think.

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²⁰ In particular, since pornographic material is available for marketing purposes, even before it is being made available by the service.

²¹ Confirmation can take the form of a payment card. If a card belonging to an "authorized" person has been used in an unauthorized way, it can still be stated that the service provider has taken sufficient precautions, while the owner of the card has not showed enough care. On the other hand, Andrzej Adamski refers to the position of the German administrative court which concludes that, due to the anonymity of the Internet, an identity number or a payment card cannot be treated as sufficient pass to obtain access to a server's service "for adults", Karnoprawna ochrona dziecka w sieci Internet, Prokuratura i Prawo, 2003, No 9, page 73.

²² Sowa, M. 2001, 'Ogólna charakterystyka przestępczości internetowej', Palestra, no. 5-6, p. 32.

²³ Quayle, E., 'Pornografia dziecięca w Internecie. Działania prewencyjne i terapeutyczne wobec sprawców', p.7. Source available at: <http://www.dzieckokrzywdzone.pl/UserFiles/File/kwartalnik13/13_quayle.pdf>.

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