

CHILD PORNOGRAPHY ON THE INTERNET: CRIMINOLOGICAL ASPECT AND COMPARATIVE REGULATION

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In order to contextualize the problem of child pornography, the author first strives to analyze the terms “pornography” and “child” in the context of the criminal law norm since it is imperative from a legal point of view to define what constitutes child pornography. Already at that step, many difficulties were pointed out, which are further implied on the adequate legal fight against child pornography. In the fight against child pornography. The influence of online technologies and Internet on the changed nature and phenomenology of child pornography was especially considered. We especially pointed out that although the Internet makes it easier for criminals to engage in activities that fall under child pornography, child pornography would not have become so visible without the Internet. Although the constitution of incrimination of child pornography is deeply determined by the cultural and social basis in general, it is necessary to establish harmonization in terms of the legal fight against child pornography in order for it to be effective. In this context, we have analyzed several legal definitions of child pornography in both universal and regional legal acts.

KEY WORDS: child / pornography / sexual abuse / internet / organised crime

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1. INTRODUCTION

Modern society is largely determined by the use of technology that permeates human life in all fields. With the development of digital technologies, the broadcasting of various content, first on rare large cinema screens, and then on TV screens that were slowly “occupying” households, has become relatively easily accessible to a large number of people.

The abuse of various forms of social progress, such as technology, is a commonplace in the history of social community, and it has been particularly present in recent decades when it comes to the use of the Internet. Under the influence of the technological factor, the phenomenology of crime has been changed, so with the greater presence of high technology in everyday life, there has been a transformation of criminal opportunities and behavior. Criminal activities have become global, distributive and informationalized (Wall, 2015: 86). Crimes can be committed efficiently “remotely”, and the automation of technology contributes to the fact that an increasing number of potential perpetrators may abuse the opportunities it provides, with an increased chance of remaining undetected.

According to some sources, the presentation of pornographic content was first recorded a little over 600 years ago (Uljanov, Ivanović, 2009: 171). Due to its nature, erotic content is highly attractive to people, and despite the various restrictions that have been prescribed through different political and cultural phases of society, erotic content has spread easily, bringing on the one hand easy and quick earnings to the one who distribute it, and on the other hand easy pleasure for consumers.

Treating children as sexual objects is as old as humanity, and the history of creating erotic literature and drawings that include children is long. However, only recently, the dissemination of sexual materials on children depends on the technologies available for their creation and further distribution. The availability of cameras from the middle of the 19th century enabled the emergence of child pornography as we know it today (Mančević, 2016: 14). With the processes of digitalization and with the daily use of the Internet child pornography materials dissemination has become a relatively good criminal opportunity in terms of lucrativeness and difficulties in detecting crime. The advent of complex, and advanced technology offered internet users unparalleled anonymity and efficiency, giving offenders the means to share and sell child pornography materials through such networks while creating newer challenges of enforcement and policy response.²

² See: <https://www.cyberpeace.org/CyberPeace/Repository/End-to-end-Encrypted-CSAM-2.pdf>, date of access 7.5.2022.

However, until the mid-1990s, child pornography was not perceived as a particularly significant element in the array of activities related to sexual abuse. On the contrary, the dominant attitude was that it was a specific sexual deviation of a smaller scale compared to the pornographic content in which adults are portrayed (Taylor, Quayle, 2003: 1). However, after the mid-1990s, the problem gained in importance in both the professional and lay minds and is slowly becoming a topic of penal policy in many countries. According to some research, it is a multi-billion dollar industry nowadays.³ This state of affairs has caused increased normative activity, and from a time distance of several decades, we can already discuss about the quality of normative solutions that are current in different countries in terms of systemic fight against child pornography. Nevertheless, child pornography on the internet take place within a subculture that operates beyond the boundaries of any particular state or legal jurisdiction and represents a new pattern of globalized deviance (Jenkins, 2001: 5) and in an effort to gain insight into the etiology and phenomenology of the phenomenon, it is necessary to analyze it from a multidisciplinary point of view.

2. DEFINING NOTIONS ACCORDING TO CRIMINAL LAW RELEVANCE

The occurrence of sexual acts involving children is certainly not a new phenomenon and has existed in various forms throughout history. Child pornography is a form of child sexual exploitation in terms of visual depiction of sexually explicit conduct involving a minor. This is a serious sociological, criminological and victimological problem, the misuse and exploitation of computers and computer networks, most often the Internet, for the production, sale, exchange, possession and viewing of pornographic material in which the main actors are minors, in order to satisfy perverted sexual urges or gain material benefits (Mančević, 2016: 14).

In order to conceptualize the phenomenon of child pornography within the normative system of criminal law, definition difficulties must be overcome. First of all, when it comes to the legislation (criminal) where the concept of pornography is not precisely defined, it is necessary to determine it not only because of the understanding of the material content of the concept of pornography, but also because of procedural guarantees of criminal procedure, ie important criminal principles such as - *nulla poena sine lege stricta*. In light of such efforts it should be noted that pornography is a protean term determined by numerous cultural and

³ See: <https://globalinitiative.net/analysis/stolen-innocence-the-online-exploitation-of-children/>, date of access 5.5.2022.

social influences in general. Sometimes it is even very difficult to distinguish pornographic content from artistic expression. perhaps the best description of confusion and dependence on subjective experiences when it comes to defining pornography is summarized in quoted line from Supreme Court Justice Potter Stewart in 1964: “. . . I know it when I see it.” However, legal definitions tend to emphasize obscene or sexual content as an essential quality, but of course such definitions may vary depending on the legislature within a given country.

It seems that the definition according to which pornography is visual or written matter designed to cause sexual arousal⁴ is the most employed today. Consequently, useful definition has three components: content, the intention of the producer, and contextual judgement (Ashton et al. 2018: 150). Child pornography is for that reason defined in three stages: production, distribution and downloading of abusive material.

The ways that we define what it is to be a child are socially and temporally situated. Consistent with the UN Convention on the Rights of the Child, there is global trend towards an embracing view that childhood ends at 18 and persons under the age of 18 are commonly called juveniles. Most criminal justice systems distinguish between children under the age of 14 and those who have reached the age of 14 but not 18. In that sense, stricter sanctions are usually prescribed for criminal acts when the victims are children under 14 years.

Although in several domestic legal frameworks, the age of sexual consent is less than the minority age criteria, what is considered to be important for strengthening individual personality capacities, there is no relevance of consent when it comes to the child pornography. However, when viewing a picture consisting of pornographic content, attempting to determine an age may become a matter of complex judgement. Whilst decisions about whether a person photographed is a child are not problematic when the individual is very young, moving into adolescent years such decisions, when based on visual evidence, are much more difficult to make (Taylor, Quayle, 2003: 1). Simply put, an individual could enter a criminal zone by accident, while on the other hand he could escape if it turns out that the picture shows a person older than 18. Such a difficulty could be avoided with adequate norming. For instance, in the case when child pornography in terms of content is, among other things, defined as pornographic material that visually depicts a person appearing to be a minor.

At the international and regional level, there are various legal instruments/definitions that deal with child pornography. When it comes to the legalistic defini-

⁴ See: <https://www.merriam-webster.com/dictionary/pornography#note-1>, date of access 5.5.2022.

tions, the European Union's Framework Decision on combating the sexual exploitation of children and child pornography,⁵ which entered into force in January 2004, defines child pornography in article 1(b) as pornographic material that visually depicts or represents: (i) a real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or the pubic area of a child; or (ii) a real person appearing to be a child involved or engaged in the conduct mentioned in (i); or (iii) realistic images of a non-existent child involved or engaged in the conduct mentioned in (i).

The Council of Europe's Cybercrime Convention 2001,⁶ which came into force on 1 July 2004, defines child pornography, under article 9(2), as pornographic material that visually depicts: (a) a minor engaged in sexually explicit conduct; (b) a person appearing to be a minor engaged in sexually explicit conduct; (c) realistic images representing a minor engaged in sexually explicit conduct.

As for the U.S. legislation, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography,⁷ which came into force on 18 January 2002, defines child pornography in article 2(c) 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.

3. CHILD PORNOGRAPHY AND INTERNET

Almost 54 percent of the world's population (4.1 billion people) uses the internet. It's our source of instant information, entertainment, news, and social interactions.⁸ As it is stated previously, child pornography has emerged as a global threat under the the rapid technological advancement facilitating easy and cheaper internet access, a massive increase in number of smart phones users, a boom of

⁵ Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004F0068>, date of access 5.5.2022.

⁶ Convention on Cybercrime, ETS No. 185, <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=185>, date of access 5.5.2022.

⁷ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, <https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-sale-children-child>, date of access 5.5.2022.

⁸ See: <https://globalfreedomofexpression.columbia.edu/publications/?f-search=censorship>, date of access 5.5.2022.

social media, end to end encryption and cloud based services (report). All these circumstances have opened some questions regarding the content of the incrimination in question. For example, technology is now allowing the creation of lifelike child pornography without the use of children at all (Healy, 1997). The question therefore arises about whether production, distribution or use of pseudo-photographs or computer generated images, drawings, cartoons and paintings is incriminated. Many national legislations leave this question open, but it seems that the answer has been given at the universal and regional level, according to which the enumerated online imaginations of children in the sexual context enter the zone of incrimination. The Explanatory Memorandum of the Council of Europe's Cyber-crime Convention 2001 states that 'it is widely believed that such material and online practices, such as the exchange of ideas, fantasies and advice among paedophiles, play a role in supporting, encouraging or facilitating sexual offences against children.' (Akdeniz, 2016: 11).

Although criminal jurisdiction is conceived according to the borders of the state, it has long been clear that online crime exceeds that limit, what poses major problems for law enforcement agencies in the application of both material and procedural norms. Real enforcement action must require co-operation amongst agencies in multiple jurisdictions which becomes difficult and complicated when a local agency undertakes an investigation. Despite that, it seems that the problem of child pornography would not have become so visible without the Internet. The problem became more prominent in the 1990s, however, with the widespread use of the Internet (Akdeniz, 2016: 6). In the past, obtaining child pornography was difficult since it required a measure of physical exposure of the person involved to being identified, in that a visit to a specialised sex shop was required, or a name and address had to be given to a mail order organisation. The private exchange of pictures between individuals also took place, but again the danger of identification remained (Taylor, Quayle, 2003: 1). Nowadays, in many cases, law enforcement agencies have located perpetrators of child pornography online using sophisticated online knowledge. For instance, global platform ICSE used by Interpol enables specialist officers to use sophisticated database comparison software in order to make connections between victims, abuser and locations.⁹

Child pornography material proliferation on the Internet is found under three heads based on the search-ability of content by standard web search engines, namely (i) Surface Web or Public Internet which is readily available to the general public. ; (ii) Deep web, which is not indexed by standard search engines and requires

⁹ See: <https://www.interpol.int/News-and-Events/News/2017/INTERPOL-network-identifies-10-000-child-sexual-abuse-victims>, date of access 5.5.2022.

knowledge of direct URLs, IP addresses, credentials etc. to access, (iii) Dark web. While the dark web is still an evolving space on the internet, it is largely understood as the space which requires specialised software in order to be accessed.¹⁰

Table 1 below shows the most popular and widely used communication services:

Service	Global user base	E2EE in personal chats	E2EE in group/channel	Group/ channel invites through link
Facebook Messenger	1.3 billion	Optional, needs to be enabled for specific chats	No	No
WhatsApp	2 billion	Yes	Yes	Yes
Viber	1.17 billion	Yes	Yes	Yes
iMessage	Statistics not available publicly	Yes	Yes	No
Telegram	400 million	Yes, only in secret chats	No	Yes

Source: Report, *End (-to-end encrypted) Child Sexual Abuse Material*, 2020 Cyber Peace Foundation¹¹

It could be safely concluded that the biggest problem in detecting child pornography arises when it takes place within the Dark Web. On the other hand, although the business on the Internet is still insufficiently precisely regulated, technical possibilities provide various solutions for the fight against child pornography, which are recognized and applied by certain legal systems. Of course, this is possible when certain measure needs to be taken against legal entities that are registered in accordance with the law, such as *Facebook*, *TikTok*, etc. For instance, the Italian Data Protection Supervisory Authority issued two interim measures restricting the ability of social media platform, *TikTok*, from processing the data of users residing in Italy whose age could not be determined by certainty. It was stated that, although *TikTok* had a policy of denying access to its platform for children who are younger than 13 years old, this could be easily circumvented as the age verification procedure relied on the user’s self-declaration.¹²

¹⁰ See: <https://www.cyberpeace.org/CyberPeace/Repository/End-to-end-Encrypted-CSAM-2.pdf>, date of access 7.5.2022.

¹¹ *Ibidem*

¹² See: <https://globalfreedomofexpression.columbia.edu/cases/italian-data-protection-authority-v-tiktok/>, date of access 7.5.2022.

Attempts to control child pornography on the Internet have brought into focus critical issues related to the nature of the Internet as a medium of information transmission, and the social context in which that information is transmitted. A central issue for policy makers is the problem of reconciling *freedom of speech* and limitations on censorship of the Internet with the very evident child-protection problems presented by the production, distribution and viewing of child pornography (Taylor, Quayle, 2003: 1).

In one case from U.S. case law (U.S., *State v. Packingham*, 777 S.E.2d 738 (N.C. 2015) the court found a violation of the plaintiff's rights due to the fact that the law that regulated access to Internet content for registered sex offenders did so in an overly broad and not narrowly tailored way. Namely, the Supreme Court of the United States found a law in North Carolina to be in violation of the First Amendment because it made it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." The case was taken by a registered sex offender who had been convicted under the law after publishing a *Facebook* post in 2010. The Supreme Court of the United States reached its decision because the law was overly broad and not narrowly tailored to further the government's legitimate interest in preventing child abuse. They went on to state that cyberspace had become the most important place for the exchange of views and in light of the constantly developing nature of the Internet, the Court concluded that it "must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks."¹³

It is generally accepted attitude that whilst it is important to create an environment in which children are not abused, it is also necessary to recognize the limits that protection can take (Taylor, Quayle, 2003: 8).

4. PHENOMENOLOGICAL CHARACTERISTICS OF CHILD PORNOGRAPHY

It seems that the Internet has greatly contributed to the change in the phenomenology of many crimes, which is also the case when it comes to child pornography. According to Global Initiative Against Transnational Organised Crime two trends have emerged in online child sexual exploitation in recent years.

¹³ See: <https://globalfreedomofexpression.columbia.edu/cases/packingham-v-state-north-carolina/>, date of access 7.5.2022.

Firstly, the increasing prevalence of home-produced abusive material as well as live video streaming of children being forced to perform sexual acts in front of a webcam. This rapidly growing new form of child pornography allows the user to direct and make online requests for particular sexual activities to be carried out on the victim in real time. Secondly, predators are taking sophisticated security measures to share files directly between users instead of downloading them from a website. P2P is most frequently used for sharing images of very young children or of images portraying violence against children.¹⁴

In general, the incrimination of child pornography is not easy to classify and typify, since its predominant characteristics include the basic elements of different criminological classifications. Furthermore, the range of people involved in child pornography offences seems to cross boundaries of class, income and profession. Doctors, technicians, businessmen, teachers, media personalities, policemen: these are just a few of the kinds of people who have been found guilty in recent criminal proceedings of possession of child pornography (Taylor, Quayle, 2003: 7).

Activities that fall under child pornography can be performed as profit or non-profit motivated. Child Protection Act of 1984, made significant changes in comparative legislation, by removing the requirement that the transmission or receipt of child pornography be done for profit, thereby targeting the growing non-commercial cottage industry (Adler, 2001: 39). Today, it is generally accepted attitude that activities that fall under child pornography can be performed as profit or non-profit motivated.

In the context of profit driven child pornography, it is important to point out that it is the subject of activities of many organized criminal groups that operate transnationally. Organized crime operates in areas where there is money and opportunities for easy and large profits. As Serious and Organised Crime Agency UK (SOCA) warned more than 15 years ago, organised criminals are massively moving into child pornography business.¹⁵ Carrying out criminal activity on the Internet enables easy creation of a criminal network and its establishment without a lot of invested resources. Also, the Internet provides the possibility for criminal groups to be present in any market with only 'one click. For these reasons, even more extensive activities related to child pornography by organized criminal groups can be expected.

¹⁴ See: <https://globalinitiative.net/analysis/stolen-innocence-the-online-exploitation-of-children/>, date of access 5.5.2022.

¹⁵ See: <https://www.theguardian.com/uk/2006/jul/31/immigration.ukcrime>, date of access 5.5.2022.

Two important criminological phenomena are related to child pornography. Firstly, when it comes to child pornography, as a rule, there has been growing panic in recent decades. In this regard, the consequence is often an uncritical view of the problem while indulging in criminal populism, which often results in inadequate and inapplicable legal responses.

Secondly, as we discussed earlier, the Internet is a platform on which activities that fall under child pornography are most often performed is still an unregulated zone. This further means that there is a large dark figure of crime when it comes to child pornography which is important to take into account when researching this problem and designing legal and non-legal mechanisms to combat child pornography.

5. CONCLUSION

Until recently, child pornography was rarely identified as a factor in child sexual abuse, not necessarily because taking sexual photographs of children did not occur, but because, in the main, social welfare intervention with survivors of child sexual abuse has not seen it as a particularly relevant factor in treatment or counselling. However, accelerated digitization and development of the Internet has drawn our attention to the existence of child pornography in a very dramatic way. Things became even more complex when organized crime became massively involved in the business of child pornography on the Internet. However, regardless of the fact that the Internet makes it easier for criminals to engage in activities that fall under child pornography, it should be noted that child pornography would not have become so visible without the Internet.

From the aspect of protection of human rights, especially freedom of speech, there are certain problems regarding censorship and free access to information on the web, but however The laws on Child Pornography is the least controversial area of jurisprudence of the First Amendment, and the same could be said when it comes to the cases of the European Court of Human Rights.

Child pornography law is a remarkably recent invention and there is still a lot of space to improve legal response to the child pornography in terms of international harmonization which is necessary precondition for fight against child pornography since Internet profligation transcending the boundaries of national jurisdictions. In light of this, a good starting point for harmonizing national jurisdictions could be European Union's Framework Decision on combating the sexual exploitation of children and child pornography, The Council of Eu-

ropé's Cybercrime Convention 2001 or Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography in U.S since The listed legal acts recognize all contemporary difficulties in defining and combating child pornography, which are most often the result of cultural and technological circumstances, and with their adequate nomotechnics offer legal mechanisms for overcoming these difficulties.

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DEČIJA PORNOGRAFIJA NA INTERNETU: KRIMINOLOŠKI ASPEKT I UPOREDNOPRAVNA ANALIZA¹⁶

U cilju kontekstualizacije problema dečije pornografije, autor je najpre nastojao da analizira pojmove “pornografije” i “deteta” u kontekstu krivičnopravnih instituta i zakonodavstva uopšte. Već na tom prvom koraku, ukazano je na brojne poteškoće koje se dalje efektuju na odgovarajuću pravnu borbu protiv dječije pornografije, a koje su u osnovi posledica kulturoloških okvira, ali i procesa digitalizacije i “internetizacije” sadržaja u modernom društvu. Posebno je razmatran uticaj online tehnologija i interneta na izmenjenu prirodu i fenomenologiju aktivnosti koje potpadaju pod krivičnopravni pojam dečije pornografije. U radu je naglašena činjenica da iako internet olakšava bavljenje aktivnostima koje spadaju u dečiju pornografiju, ona sa druge strane ne bi postala vidljiva oku javnosti i ne bi bila percipirana kao krupan izazov za kaznenu rekaciju bez uticaja interneta. Iako je konstituisanje inkriminacije dečje pornografije duboko determinisano kulturološkim i društvenim osnovama uopšte, neophodno je uspostaviti harmonizaciju u pogledu pravne borbe kako bi ona bila delotvorna. U tom kontekstu, analizirali smo nekoliko zakonskih definicija predmetnog pojma kako u univerzalnim tako i u regionalnim pravnim dokumentima.

KLJUČNE REČI: deca, pornografija, seksualna zloupotreba, internet, organizovani kriminal

¹⁶ Ovaj rad nastao je kao rezultat istraživačkog angažovanja prema Planu i programu rada Instituta za kriminološka i sociološka istraživanja za 2022. godinu (na osnovu Ugovora broj 451-03-68/2022-14 od 17. 01. 2022 god.)