PAEDOPORNOGRAPHY ON THE INTERNET - A CONSTANTLY EVOLVING JURIDICAL REGULATION –

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Pornography is a troublesome term, difficult to define. Not until long ago, a uniform definition at European level did not exist. In some cases – the United States of America, for example – there weren't even uniform definitions at national level.

The understanding of the term *child pornography* differs, due to various moral, social and religious beliefs, sometimes within the same society. Even the legal definitions of the term *child* and *pornography* had sensible differences from one system to another.

Child pornography is more and more connected to the Internet, which secretly provides new means of production and distribution of illegal materials at worldwide level. A terrific increment of the number of these images takes place every year. Also, the exhibited violence and cruelty are emphasised. The images are not only sold, but also exchanged, a fact that pushes this industry deeper underground.

The object of this material is represented by the offences regarding paedopornography, as well as the way in which the informational society, the Internet, facilitated this kind of actions. The basis of this paper was a study made by the renowned National Centre for Missing and Exploited Children[1], about the level of legislation in various states.

Before finding out details about what the study consisted of, which the evaluation criteria were and where our country does stand in this hierarchy, our intent is to clarify the object of the study and to have the audience acquainted with the term of „paedopornography".

One of the first definitions of this term is found in the Optional Protocol to the United Nations Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted on the 25th of May 2000. Then, the term was defined by the Interpol's Specialist Group on Crimes against Children, by the „End Child Prostitution and Trafficking in Children" Organisation and by other organisations.

Here are some of these definitions: (1) „Child pornography means 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"[2].

(2) „Any kind of representation or capitalisation of sexual exploitation of a child, including printed or audio materials, which have as primary subject the sexual conduct or sexual organs of a child."[3]

(3) „A visual representation of a child engaged in explicit sexual activity, real or simulated, or the indecent exhibition of a child's sexual organs, in order to produce or provide

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[1] National Center for Missing and Exploited Children, „Model Legislation and Global Review", 2006, available at http://www.icmec.com/en_X1/English__5th_Edition_.pdf (dec. 2007)

[2] The OPTIONAL PROTOCOL to the United Nations Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, signed in New York at the 6th of September 2000, published in the Oficial Gazette of Romania no. 601/September 25th 2001.

[3] INTERPOL's Specialist Group on Crimes against Children, „INTERPOL's work to fight crimes against children", available at http://www.interpol.int/Public/ICPO/FactSheets/THB03.pdf (dec. 2007)

sexual pleasure to a user; it includes the production, distribution and use of this kind of materials." [4]

(4) „It represents paedopornography any kind of pornographic material which represents in a visual way: a minor engaging in sexually explicit conduct; a person who appears to be a minor and is engaged in sexually explicit conduct; realistic images representing a minor engaged in sexually explicit conduct." [5]

The Framework Directive from December 23rd 2003, on fighting against sexual exploitation of children and paedopornography[6], harmonises the perception of this term. In order to do that, firstly it defines the institution of the minor.

Thus, to apply this framework-decision, any person under the age of eighteen is a **child**. This mention was, of course, expected as the divergent opinions of member states had profound effects. There is only one aspect on which national legislations could be different: the age of sexual majority. But this concept is used only within article 5, aggravating circumstances.

The **paedopornographic material or paedopornography** receives also a harmonised definition: **"**any kind of pornographic material which represents visually:

- (A) a real child engaged in sexually explicit conduct or who exhibits, in a lascivious manner, its genital or pubic parts, or
- (B) a real person who seams to be a child […]
- (C) realistic images of a child who doesn't exist, images which represent a sexual conduct […]

As it can be noticed, there are some differences between these definitions and the Directive only presents the definition of paedopornographic materials and not of paedopornography in the wide sense of activity.

After these clarifications and harmonisations, the framework-decision deals with incriminations. The offences regarding sexual exploitation of children are presented in the next chapter. One notices here a unitary treatment of these offences, a thing that doesn't happen at the level of internal legislation.

In the 3rd chapter, the offences connected with the pornographic materials of paedophilic kind are enumerated: the production, distribution, dissemination or transmission of child pornography, supplying or making available child pornography, acquisition or possession of such materials with or without the help of informational systems. Hence, the mere possession is punishable in the whole European Union, and as a consequence, all the member states have to take appropriate measures so that this action, done with intent, to be incriminated by the internal legislation.

The fight through legislative means continues and is still far from being won. The III World Congress Against Sexual Exploitation of Children and Adolescents, held on the 25th – 28th of November 2008, has materialised into the conception of the Rio de Janeiro Pact on preventing and stopping sexual exploitation of children and adolescents, and the report elaborated by Roberta Angelilli (UEN, Italy)[7] and debated on February the 3rd 2009, report which advises the member

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[4] „End Child Prostitution and Trafficking in Children" Organisation, „Questions & Answers about the Commercial Sexual Exploitation of Children" available at http://www.ecpat.net/EI/Publications/About_CSEC/FAQ_ENG_2008.pdf (dec 2007)

[5] Council of Europe Convention on Cybercrime 23/11/2001, published in the Oficial Gazette of Romania, part I, no. 343 on 20/04/2004, European Treaties seriea no. 185

[6] Décision-cadre 2004/68/JAI du Conseil du 22 décembre 2003 relative à la lutte contre l'exploitation sexuelle des enfants et la pédopornographie

[7] *European Parliament Recommendation of February 3rd 2009 for the Council for fighting sexual exploitation of children and child pornography* (2008/2144(INI)), available at

states „to incriminate all kind of sexual abuses against children", including the manipulation and approaching the children on the Internet, for sexual purposes („grooming").

The Romanian legislation on the matter is not compact. There are different texts of law, certain articles, which deal with these problems. Some of these are:

- The Law on preventing and fighting pornography – no. 196/2003, modified by Law no. 301/2007 – defines pornographic materials, actions with obscene character. In the 2nd chapter it focuses on „the locations where erotic programmes are being performed", on the publications having pornographic content and on sites containing pornographic material. The law only states for the last one that there is prohibited the inclusion of materials having paedophile character (and it does not define the term in this context). But it returns and clarifies in article 11 that „(1) The distribution of materials having an obscene character, which exhibit images with minors having a sexually explicit conduct, is punishable by imprisonment from 1 to 5 years" and (2)"the same punishment is applicable for possessing the materials stated at paragraph (1) if the intent of dissemination is present".
- At the same time, a law issued the same year, Law no. 161/2003 (on fighting corruption) contains also a definition of pornographic materials in article 35 paragraph1 letter i) under Title III – The Prevention and Fighting against Informatics Crime. Here, the definition includes the simulated, unreal images which represent a sexually explicit conduct.

One may notice that these laws, which have been the only regulating source of law on the matter of child pornography for a few years, excluded on the one hand the materials which were not explicit, even if they could produce sexual sensations to the viewer, and on the other hand they did not sanction the mere possession, but the possession with intent to publish on the Internet.

There are very many texts that incriminate actions connected with the offences that we hint at, in the way that they are either accessories to offences, or absorbed or in another kind of relationship with the actions taken here into consideration. For example:

- The Penal Code – in Chapter 3, *Offences regarding sexual life* Article 198, sexual intercourse with a minor, where the production of pornographic materials is only an aggravating circumstance, not an offence-in-itself, a circumstance which elevates the imprisonment penalty from 5 to 18 years and the prohibition of some rights[8].
- The Penal Code – in Chapter 3, *Offences regarding sexual life* Articles 197 and 198, rape and sexual intercourse with a minor – where it is stated „*The punishment is imprisonment from 10 to 25 years and the prohibition of some rights, if the victim is under the age of 15*" and respectively „*Sexual intercourse, of any kind, with a person of different or same sex, who is under the age of 15, is punishable with imprisonment from 3 to 10 years and the prohibition of some rights*".

In the case of rape our opinion is that we can talk about a concourse of offences if these actions were made for the purpose of producing pornographic materials with paedophile content.

- Article 201 incriminates sexual perversion, which also can come into concourse with one of the actions under discussion. As a collateral observation we notice and signal a distinction between the Romanian and the European law concerning the definition of the minor, in this context.
- Another tex of law that we consider of interest in this study is Article 202 of the Penal Code, Sexual Corruption, but only paragraph 3 „*The enticement of a person in order to have sexual intercourses with a minor of different or same sex*" as this action can come into

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http://www.europarl.europa.eu/activities/plenary/ta/calendar.do?language=RO# (Feb. 2009)

[8] One notices here an interesting evolution of the penal law: an aggravating circumstance which leads to the creation of the constitutive elements of a new offence.

concourse with the offences we hint at – but not Paragraph 1, for example, „*The actions with obscene character done with or in the presence of a minor* "

Of course there are many other laws that seem connected with the subject of our discussion, but we will stop here with their selection. Out of the already chosen ones, the only text issued ulterior to the directive is the Law of Pornography. This may be the reason why the Romanian legislation has not manage yet to integrate anywhere, clearly and compactly, a definition of paedopornography or of pornographic materials with paedophile character, as we use the term. The framework-decision of the EU Council from December 23rd 2003 should have been transposed into the internal legislation before January 20th 2006. Obviously the references at the points b and c are missing from the definition.

Concerning the incriminated actions, the directive is also more severe. Out of the enumeration „production, distribution, dissemination or transmission of pornographic materials, supplying or making available to others such materials, acquisition or possession of this kind of materials, with or without the help of informational systems" the Romanian law incriminates in Article 11, paragraph 2 only „the possession with intent of dissemination" and not the mere possession or acquisition of such materials.

Regarding the fight against child pornography and the control of pornography, in general, the regulations on the matter are also included in Law 196/2003, republished in the Official Gazette of Romania no.87 of February the 4th 2008. Thus, not only are the sites containing child pornography declared illegal, but some rules for the procedure of authorization and supervision of the activities of the others are intended to establish. Although there is no explicit reference to child pornography, the supervision of the activity of a video-chat, for example, could lead to the guarantee of the fact that „the actors" are not minors.

We have also mentioned that the law tries also to consider its application on the Internet, through article 7:

„ (1) The persons that create sites having pornographic character are under the obligation to restrain the access to them by using a password, and the access to these sites will only be permitted after a tax per minute of utilization has been paid, the quantum of which is settled by the creator of the site and declared at the fiscal organs.

(2) The persons creating or managing this kind of sites have to have a clear evidence of the number of the users accessing the site, in order to be subjected to the fiscal obligations mentioned by the law.

(3) The creation and management of sites having paedophile, zoophiles or necrophilia character is prohibited."

Unfortunately, although there was criticism from more associations, one of which is The National Association of Internet Service Providers in Romania, this formula contains some errors that render paragraph 1 of article 7 useless. Thus, the term "tax per minute of utilization of a site" has no technical correspondent. Obviously, the legislator thought the use of a site is somehow similar with the access to a telephone line.

In its initial form, the law also had a paragraph which requested the establishment of a commission to „approve" these sites. As this commission was never established, that paragraph has been dropped when the law was republished. Also there was mentioned a set of methodological rules for applying the law, which had to appear in 30 days from the moment the law was published. For obvious reasons, these methodological rules have been dropped, too.

In connection to preventing pornography on the Internet, by declaring such sites illegal, it is not mentioned that the law refers to sites hosted in Romania and/or created or managed by Romanian persons. And also there is no mention of how ANRC (The National Authority of Regulation of Communications) could compel **all** Internet Service Provides in Romania to block any of these sites.

In order to approach the end of the discussions on the legislative framework, allow us to return to the study realised by the National Centre for Missing and Exploited Children. It has

been made by taking into consideration the legislations of 184 Interpol member states. Five criteria have been taken into account:

1. Is there a law incriminating child pornography?
2. Does this law include a definition of child pornography?
3. Is the simple possession of pornographic material an offence?
4. Is the distribution of child pornography through computers and Internet incriminated?
5. Are the Internet providers compelled to signal out the material suspect of containing child pornography to the organs abilitated to start penal investigation?

Five states were rated as „very good” as they had an efficient legislation, respecting all five criteria. These states are: Belgium, France, Australia, South Africa and the USA. Twenty two[9] states, among which Romania, were rated as „good” as they were respecting only the first four criteria. O very short mention: although the National Centre for Missing and Exploited Children has established that the Romanian legislation incriminates the possession of pornographic material, actually, the Law of Pornography, in article 11 paragraph (2) incriminates „the possession of materials mentioned in paragraph (1), with the intent of dissemination”, which, in our opinion, is not the same thing.

The difference between these rates is made by the fifth criterion which considers those organizations whose services are used to proliferate child pornography and which should consequently exercise a responsibility – *a civic spirit of corporation*, a social responsibility in their basic operations.

Entering the sphere of regulation for the **prevention** of these offences, we will first analyze the realities in the informational society, realities that induce the evolution of law in order to keep the pace with technique, a process which in our opinion seems very lively.

The cybernetic space is not a void; it constitutes a real social arena in which a new kind of interaction and communication among people is being created, in which vulnerabilities of the real world are replicated and where risks and dangers, which were unknown not until long ago[10], are gradually taking shape. The multitude of these aspects, created in a more and more complex electronic perimeter, determinate juridical consequences in the physical world.

In the virtual space there are illegal phenomena, some investigated by the abilitated organs and others not yet. But their presence contaminates the Internet, and its initial purpose, that of becoming a territory of total freedom of expression, crosses in these situations the boundaries of legality. The providers of electronic communication networks and services have the possibility to block the access to certain sites considered dangerous, but this has not happened yet, due to some reasons. It's obvious that such a type of activity would transform the Internet providers into censors of information and that such an option would directly lead to the provisions stated in article 30 of the Constitution – the freedom of expression. Moreover, the responsibility and the obligations of service providers are stated in the articles 11-16 of the Law on Electronic Commerce[11], where it is settled that providers of services are not responsible for the information which is transmitted, held or to which they facilitate access, and the exceptions to the rule that the law mentions are primarily connected with the situations when the providers have an active role in directing or modifying the content of the information.

The delicacy of this matter leads to a great caution in formulating some regulations that are specially conceived for the prevention and control of crime on the Internet. We will still point

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[9] Hong Kong, New Zeeland and Tonga ; Austria, Denmark, Finland, Germany, Greece, Hungary, Iceland, Italy, Netherlands, Norway, Romania, Slovakia, Switzerland, Great Britain; Canada; Honduras, Panama and Peru; Israel.

[10] Horaţiu Dumitru, *Juridical Issues concerning Abuses against Minors on the Internet*, Pandectele Române no. 2/2006, 4/2006, 6/2006 and 1/2007

[11] Law no. 365/2002, published in the Oficial Gazette of Romania, Part I, no.483 of July 5th 2002

out some very recent orientations of jurisprudence, promoted in other states, deduced out of three cases that we would take into consideration as we can thus identify three kinds of approaches to the same issue. A first situation is the following: the well-known site youtube has not long ago been the host of some explicit and violent obscene materials: a real rape posted on this system, which had great popularity. The victim of the rape wanted to report the site to the authorities because she thought the physical suffering was exceeded by the torture of knowing that the images had been seen by more than 600 users. The same situation happens in the cases of publishing pornographic materials with children, the harm is suffered by the victim at the time the images are created and each time the visual record of the abuse is downloaded from the Internet. The site offers simple tools for uploading video materials. The rate is so high that every minute 10 hours of video recorded material is being uploaded. There is a special button so that any user can report a material as inappropriate, and as a consequence the material is immediately pulled off the site. Although there hasn't been a trial on this case, the manager of the site wanted to express the position Youtube has on the matter, on which occasion it was showed that the site does not have technical means of checking all the materials before being uploaded. Following the public's dissatisfaction, the Youtube representatives showed that they are acting according to the laws in force in the United Kingdom and that whatever other measures they would be required to take, a better control of the hosted materials is not technically possible.

A second manner of approaching the issue, which also offers a solution, done this time on the way of jurisprudence, is the one in the decision pronounced by a court in Hamburg, on the 2nd of December 2005, concerning the responsibility of managers of forums (Az. 324 O 721/05)[12]. Although the case is not about child pornography content, the arguments of the court must be taken consideration, as they operate a distinction among the different categories of negative contents. Thus, the German judges considered the electronic forums to be „very dangerous" technological systems, which facilitate the access of users to potential illegal materials. Hence, the providers of such electronic services are compelled to subject themselves to a very severe regime of juridical responsibility. The jurisprudence recorded prior to this decision had established that the provider can be held responsible only from the moment when he knew of the existence of some illegal materials within the forum, and that he was not compelled to organise an active search for such kind of contents on his forum. The decision of the court in Hamburg diverts considerably from these precedents, by considering that the provider of access to electronic forums practices a form of commercial activity[13]. Under these circumstances, the provider has to allocate material and human resources in order to keep under control his own activity on the Internet. These resources - regardless of the financial efforts imposed by such organising – must be capable of insuring a permanent supervision of the materials posted on the forum, and this way the ones having an illegal content to be operatively eliminated. Moreover, the sentence of the court underlines the necessity of assuming the obligation of active supervision as far as the following: "If the number of forums and the contributions of users to these forums is so high that the provider is incapable, due to the lack of personnel and technical means, to fulfil his obligation of preliminary supervision in order to eliminate illegal contents, the provider would either have to acquire the sufficient resources or to reduce his commercial activity to the level which allows him to fulfil this obligation". One notices that virtually the imperative of keeping the virtual environment free of illegal contents prevails over both the principle of the freedom of expression and the requirements of practicing a lucrative activity.

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[12] More information about this case can be found on the web page of Heise Printing House, Hamburger Landgericht: Forentreiber sind für Beiträge haftbar, available at www.heise.de/newsticker/meldung/print/72026

[13] There is no indication whether this classification refers only to the forums with paid access or also to those the users can access free of charges.

Our opinion is that one can observe here the way the legislation on the matter will develop and this opinion is also supported by *the European Parliament recommendation of 3 February 2009 to the Council on combating the sexual exploitation of children and child pornography* (2008/2144(INI)).

Following numerous investigations, that were concluded with important arrests, the authorities revealed the fact that paedo-pornographers use advanced levels of encryption to protect themselves, and that they are one of the most sophisticated and disciplined groups of offenders. The high and increasing number of this kind of offences[14] makes one think of the way the cocaine business, the terrorism or Mafia have developed. If they have good security methods, then it is hard for the authorities to conduct their investigations right from a procedural point of view.

Thus our conclusion is that there still is an important number of legislative reforms that are expected for a better **prevention** of these illegal activities. The informational industry must, in its turn, identify technical solutions to assist the police in its steps to identify new ways of utilising new technologies for illegal purposes. Moreover, with the development of GPRS and 3G networks, the Internet becomes mobile at a even wider scale, supported by the new types of telephones. Almost all kind of threats to children, that exist nowadays, become more complex with the use of Internet out on the streets.

If any discussion about the traffic of information on the Internet starts from article 30 of the Constitution of Romania, from the Freedom of Expression, then some relative dramatic questions arise: which is the degree of the freedom of manifesting ideas on the Internet? Is anonymity admissible beyond the real world? To what extent can virtual communities escape the control exercised by the authorities imposing the law? How can we distinguish on the Internet between the private sphere – theoretically inaccessible to the control of the state - and the public sphere, naturally subjected to a certain regulation and supervision?

No matter how difficult it is to answer to these questions, that does not mean that the civil society has to stand aside and accept as inevitable the use of modern technologies and of the Internet for malefic purposes, but it should continue to hope and to tend, through civic and familial care and through improved technical means, to an Internet that is much more safe than it is today.

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