

The Substantive Criminal Aspects of the Offence of Simulated Child Pornography under Polish Law

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Abstract

The objective scope of the research problem concerns the content and sense of the elements characterising one of the types of child pornography, criminalised under Art. 202 §4b of Poland's Criminal Code, i.e. simulated child pornography. This offence is understood as producing, disseminating, presenting, storing and possessing pornographic material presenting a generated or processed image of a minor participating in sexual activity. The main goal of the article is the substantive criminal analysis of the act criminalised under Art. 202 §4b of the Code. The scope of the analysis has been elaborated with the following question: To what degree is the legal solution concerned with criminalisation and penalisation of the activities of »production, dissemination, presentation, storage or possession of pornographic material presenting a generated or processed image of a minor participating in sexual activity« usable, and realises the ratio legis intended by the legislator? The issue has been analysed using what is primarily an institutional and legal approach, involving textual, functional and doctrinal interpretations that have been supplemented by the author's own conclusions and opinions.

Keywords

pornography, child pornography, sexual offences, information restriction, cybercrime

1. Introduction

The material scope of the research problem in the text encompasses selected issues concerning the content and sense of the elements characterising one of the types of child-pornography offence criminalised under Art. 202 of the Polish Criminal Code. The object of in-depth analysis is the crime of simulated child pornography, which is understood to be material presenting a generated or processed image of a minor participating in sexual activity (Art. 202 §4b of the Criminal Code). The crime of simulated child pornography was criminalised through an amendment of the Criminal Code

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dated 24 October 2008 [1]. It is accepted that the *ratio legis* behind the criminalisation of this act is the intention to eliminate pornographic material involving an image of a minor under the age of 18. This fits with solutions arrived at in international law with a view to various types of child pornography being criminalised and penalised. The relevant (2007) Council of Europe Convention signed at Lanzarote, and concerned with the protection of children against sexual exploitation and sexual abuse, already introduced a definition of child pornography – and alongside imagery of a child participating in a real sexual act, it also makes reference to participation in simulated sexual acts [2]. Following on from that, the EU's 2011 Directive of the European Parliament and of the Council regards as child pornography “any material that visually depicts any person appearing to be a child engaged in real or simulated sexually explicit conduct or any depiction of the sexual organs of any person appearing to be a child, for primarily sexual purposes”, as well as “realistic images of a child engaged in sexually explicit conduct or realistic images of the sexual organs of a child” [3].

Against that background, this paper has as its main purpose the substantive crime-related analysis of the offence of simulated child pornography, as in turn criminalised in Poland under Art. 202 §4b of the Criminal Code; as well as evaluation of this legal solution arrived at in respect of its usefulness on the one hand, and its criminal function on the other. With a view to this research topic being further elaborated on, the research question posed was: To what degree is the legal solution concerned with criminalisation and penalisation of the activities of »production, dissemination, presentation, storage or possession of pornographic material presenting a generated or processed image of a minor participating in sexual activity« usable, and realises the *ratio legis* intended by the legislator?

The analysis referred to is primarily an overview, mainly from the institutional and legal points of view, with the aid of textual, functional and doctrinal interpretations. However, the effects have also been supplemented by the author's own conclusions and opinions as regards *de lege lata* solutions.

2. Models for the criminalisation of pornography

While the term “pornography” is derived from the two Greek words for “prostitute” (πόρνη, *porne*) and for “write” (γράφος, *graphos*), the term in the sense we use it today would not have been known to the ancients. We use it today would not have been known to the ancients. Indeed, Athenaeus of Naucratis in the 3rd century CE wrote one of the first works featuring the term πορνογράφον (Greek, *pornográfon*), which was *Deipnosophistae* (“The Dinner Sophists”). It was not then until the 19th century that our present word ‘pornography’ came into widespread usage. However, as of that time it was still literary or scientific work devoted to the phenomenon of prostitution that was being referred to [4].

Nevertheless, by the 1890s, there was already both theoretical discussion and practical work as regards legal solutions that might achieve the elimination of pornography from the public sphere. Filar recalls how issues revolving around the counteraction of immoral content were the subject of the international convention and conference done in Paris in 1908 and 1910. An international accord was thus arrived at as regards the prevention of the circulation of pornographic publications, with the first regulation in international law in this field being the Geneva Convention of 1923, whose purpose was to combat the circulation of and trade in pornographic publications [5, p. 25, 6, pp. 43-58].

However, the 1923 Convention offered no legal definition of its core subject and term, indeed emphasising that it would be up to individual State Parties to decide on how to define what was ‘pornographic’ (of obscene as the French had it). What the Convention did do was characterise pornography by reference to material carriers thereof, be these writings, pictures, drawings, paintings, prints, images, posters, emblems, photographs, films or other objects [7].

Individual countries go on regulating (criminalising or decriminalising) the phenomenon of pornography, with this arising *inter alia* out of different ways in which such criminalisation or decriminalisation of pornographic media are actually achieved. It is cultural differences as well as different legal systems in states that stand in the way of a uniform position being developed by the international community. Equally, whatever the detailed circumstances, we are left in doubt that what is involved here is an attempt at regulating private life with the aid of instruments relating to the public sphere. This leaves actions taken as seeking to give effect to a specific legal policy in the criminal sphere. Generalising from that we note how criminal policy encompasses a set of actions a state takes to combat crime as such, but also to eliminate negative phenomena in society often constituting a prelude to the perpetration of the crime(s) in question. There is then penal policy, as one element of criminal policy, that takes in actions by which: (1) penal law is laid down, (2) penal law is applied, (3) laid-down and applied law is assessed from the point of view of its effects, and (4) the effectiveness of laid-down and applied law is in turn assessed [8, pp. 229-265, 9, pp. 122-190, 10, pp. 11-43, 11, pp. 123-141].

Against that background it is then possible to point to various models of criminal policy relating to pornography, as these may be: (1) restrictive, (2) restrictive-permissive, and (3) permissive. The first model provides for complete prohibition of pornography, while taking into account different categories thereof present in different legal systems. The second model is one involving mixed strategies of criminal policy, which bring about the effect of either legal relevance or irrelevance of pornographic material. More often than not, this results from division of pornographic material into harmful and harmless content. In accordance with the third model, pornographic material is not criminalised, and so it is irrelevant to penal policy. It seems that the model applied most frequently is the restrictive-permissive one, which in certain cases does not criminalise pornographic material, while singling out particular types of pornography that are subject to strict prohibition.

A visible process in the criminal policy pursued by countries is one whereby specific types of pornographic material are criminalised, e.g. paedophilia, or the use or presentation of violence. This may in fact be exemplified by the criminalisation of simulated child pornography, which is the object of analysis here. Equally, it is reasonable to conclude that the third of the above-mentioned models of criminal policy as regards pornography is rather uncommon these days.

3. The concept and definitions of pornography

The Polish legislator has neither presented a legal definition of pornography nor used an indicium thereof, though pornographic content has been addressed. This has perforce left the interpretation of the indicium in question to the doctrine of penal law. To understand what is pornographic in nature, the literature has put forth various ways for the category to be demarcated. Thus the aforesaid Filar presents conditions needing to be met concomitantly for given material to be deemed pornographic. The author points out that material of this kind should: (1) contain sexual acts that differ substantially from accepted societal standards in this regard, (2) focus solely on the technical aspects of sex life and sexuality itself, while dehumanising sexual acts by presenting only their sexual functions, as well as the gynaecological and anatomical structure of sex organs, (3) be verified with regard to the author's motivation, e.g. willingness to show technical aspects of sexual acts or cause sexual arousal in viewers, (4) be verified as to technical and aesthetic level, where the premise is that the lower the level, the greater the likelihood that a given work will be regarded as pornography [12, pp. 39-40, 13, pp. 202-206].

It may be noted how the above-mentioned characteristics of pornographic material appear to give too much competence to the representatives of the doctrine with regard to the evaluation of material potentially constituting pornographic material. They are highly dubious, as certain material might conceivably feature pornographic

content, even as it fails to meet most of the conditions referred to. By way of illustration, while Lars von Trier's *Antichrist* is not a pornographic film, certain of its scenes may be considered pornographic. This leaves it possible to distinguish between something referred to in its entirety as a pornographic film and something that is referred to as pornographic material within the meaning of the doctrine of penal law. This results from the display of sex organs involved in sexual acts being a core characteristic of pornography. Equally, what conventionally needs to be conveyed is such an involvement of the said organs as shows them directly, rather than metaphorically, implicitly or by means of manifold hiding filters.

In addition, attention should be drawn to the thesis regarding the interpretation of the category of pornographic material that the Supreme Court of the Republic of Poland presented in its ruling of 2010. It was held that the category of pornographic material was to be regarded as a legal, rather than a medical or sexological, category. This leaves experts competent solely to assess the potential effect specific material may have on a viewer when it comes to reactions (in essence of a sexual nature). Proceeding from that, no expert (even a sexologist) can stand in for a court of law when it comes to assessing whether the indicium for pornographic material under given circumstances has or has not been fulfilled [14, 15, pp. 128-151].

It follows from the above comments on the characteristics used in demarcating the boundaries of pornographic material that it is necessary to rely on the category of sexual act. Acts of this type include both sexual relations and other sexual acts. Both types of act constitute indicia of the offence of rape criminalised under Art. 197 of the Criminal Code.

Sexual relations are understood, in the first place, as sexual intercourse (*coitus*), which involves the insertion of male genitalia into female genitalia. However, it is noteworthy that the category of sexual relations is broader than the category of a sexual intercourse. The scope of sexual relations also includes surrogates for sexual intercourses, i.e. any forms of sexual contact regarded as comparable or equivalent thereto. It is worth pointing out that the doctrine features variant interpretations as to what can be termed a "surrogate for a sexual intercourse." Filar regarded as such surrogates direct sexual contact involving body parts of one of the sexual-act participants and body parts of the other participant, which, despite not being actually sexual, are considered comparable to sex parts by the perpetrator, who uses them to satisfy his or her sexual needs. To Warylewski, surrogates for sexual intercourses are those in which the necessary element is the involvement of either the perpetrator's or the victim's sex organs. The author referred to found this element necessary, but not sufficient, considering that surrogates for sexual intercourses are confined to penetrations of natural body orifices in the circumstances of copulation being imitated. This provides for the inclusion as types of sexual intercourse of oral sex in the form of cunnilingus, axillary and interfemoral intercourse, and *coitus vestibularis*. To Rodzyniewicz, surrogates for sexual intercourses are those acts that involve direct contact between the perpetrator's body and the victim's sex organs, or other body parts of him or her, that the perpetrator finds equivalent and sexually satisfying [16, pp. 211-229, 17, 13, pp. 45-59].

The jurisprudence has come to feature various interpretations of acts as sexual relations and surrogates for them, which comprise: (1) oral sex, (2) the insertion of a hand into a female reproductive tract, (3) the insertion of a penis-shaped vibrator into a victim's vagina and anus, (3) the insertion of a bottleneck into the anus (but also other objects, e.g. a stick). From this it can be seen readily enough how the jurisprudence extends beyond the doctrinal definitions of sexual relations. For instance, when the perpetrator penetrates the victim's body with inanimate objects, that may be regarded as surrogates for male genitalia.

Another element in the category of sexual acts is another sexual act. Of course, the scope of other sexual acts does not cover sexual intercourse. Still, other sexual acts are connected with sexuality *sensu largo*. As regards the fulfilment of indicia, they denote carnal relations involving intimate parts, without sexual intercourse, but with a culturally sexual character

attributed to them, i.e. the perpetrator's sexual arousal. It is accepted that intimate parts include genital, vaginal, anal and mammary-gland areas. Examples of other sexual acts include the masturbating of a victim, as well as instances of a victim being forced to masturbate or to masturbate another person, touching genital, vaginal and mammary-gland areas [16, pp. 211-229, 18, pp. 132-194, 19, 20]

Given the singling out of the category of a surrogate for sexual acts, and the attempt at explicating its scope, the borderline between sexual intercourse and another sexual act becomes shifted in both doctrine and jurisprudence. Various stances in this respect can be exemplified by legal classifications concerning the insertion by the perpetrator of objects, which are not elements of his or her body, into the final segment of the digestive tract or of the female reproductive system. Other examples include acts of masturbation, which by some commentators would be reckoned among other sexual acts, while by others among surrogates for sexual intercourse, and hence sexual relations [18, pp. 132-194].

Alongside the category of pornographic material in the penal provisions, the Polish legislator uses the indicium of the image of a naked person (see Art. 191a of the Criminal Code - *the offence of recording and distributing the image of a naked person or a person during sexual activity*). Following the doctrine, the image of a naked person means exposed intimate parts, e.g. sex organs and mammary glands. The image of a naked person is understood, not only as a stark-naked person, but also by reference to exposed intimate parts of him or her. At the same time, it is accepted that the image of a stark-naked person who has his or her intimate parts covered, e.g. by edited blackening, does not fulfil the indicium of the image of a naked person. The status of intimate parts not related directly to a person's face remains problematic. Still, it is accepted that if another characteristic element of a person's appearance allows him or her to be identified, then an image within the meaning of Art. 191a of the Criminal Code is deemed to be involved [21, pp. 567-571, 22, pp. 1023-1026]. Material containing images of naked persons or images of persons during sexual activity, within the meaning of Art. 191a of the Criminal Code, may become pornographic within the meaning of Art. 202 of the Criminal Code, if these bear characteristics discussed above with regard to the concept of pornography.

4. The offence of simulated child pornography

Simulated child pornography was criminalised in Poland as a result of the amendment of the Criminal Code in 2008. The criminalisation was intended to implement the Council Framework Decision 2004/68/JHA of 22 December 2003, which was no longer in force, in respect of the combating of the sexual exploitation of children, and child pornography. Pursuant to the solutions contained in the Decision, the EU Member States were obliged to combat, not only pornographic material involving real children, but also material presenting individuals resembling children, or presenting realistic images of non-existing children [1, 22, pp. 1080-1086, 23].

In Art. 202 §4b, as the legislator uses the indicium of a generated or processed image of a minor, it is worth explaining here the very category of such an image. According to a dictionary definition, an image means a depiction, likeness, portrait and representation of something, also a photograph (the word 'image' has its Polish equivalent of 'wizerunek', which is derived from the German 'Visierung'). Besides, the word 'image' can be synonymised with such words as reflection, mirroring and reconstruction. Hence, in the early Polish language the actions of regarding something attentively, targeting something with your eye or measuring were referred to as 'wizerowanie' [24, p. 1233, 25, pp. 342-343, 26, p. 1172].

Doctrinally, a generated or processed image of a minor has come to be referred to as simulated child pornography. And so such adjectival indicia as "generated" and "processed"

have come to be identified with another one – simulated. According to a dictionary definition, the adjectival expression “processed” means ‘creatively transformed,’ ‘changed,’ ‘with a different shape or appearance’. According to a dictionary definition, the adjectival expression “generated” means ‘produced,’ ‘crafted,’ ‘created,’ ‘caused by something’ or ‘made.’

An image is to be understood as the likeness of a specific person, which allows him or her to be identified. The features enabling identification of a person are physical, and so they are connected with appearance. For a person’s image to be identified, it is not necessary for his or her face to be presented, as other body parts may serve that purpose. However, it is noteworthy that, in pornographic material, a person’s face is usually used in connection with other parts of the body. Still, the Polish legislator uses the indicium of the image of a minor. This means that the image of a person must be identifiable as the image of a minor. At the same time, the legislator does not indicate the criteria by which minority characteristics are to be classified – which would not be problematic in the case of “ordinary” child pornography (where the real age of a minor is a firm criterion), but it can still cause problems when it comes to indicating characteristics of a generated or processed image of a minor. A relatively clear example – one that illustrates the fulfilment of the indicium of the *ratione materiae* under Art. 202 §4b – may entail intentional generation of animation with a plot allowing for no other possible interpretation but to accept that it presents a generated image of a minor.

The above does not preclude the presentation of a quite problematic example whereby production of a pornographic film involves a major with an image (appearing or stylised in a manner) imitating the appearance of a minor, or which involves sex dolls imitating an image of a minor.

It needs to be borne in mind that a minor’s naked image alone does not suffice, as it needs to be related to sexual acts, and only then does it amount to pornographic material. Next to the previously presented doctrinal interpretations of the indicia of sexual activity (sexual intercourse and other sexual acts), it is worth mentioning solutions present in the Council Framework Decision 2004/68/JHA of 2003. The latter defines simulated child pornography as: (1) realistic images of a non-existing child participating in clearly sexual activity, or being subjected to such activity, including lewd presentation of sex organs or intimate parts, (2) images of a real person who appears to be a child, participating in clearly sexual activity, or being subjected to such activity, including lewd presentation of sex organs or intimate parts [23].

As regards the causative acts criminalised under Art. 202 §4b, the legislator includes: (1) producing, (2) disseminating, (3) presenting, (4) storing, and (5) possessing pornographic material presenting generated or processed images of minors participating in sexual activity. Interestingly enough, compared with §3, in §4 the legislator does not include such causative acts as recording and importing. Compared with the Sections in Art. 202 of the Criminal Code, which do not mention a direct intent as an action aimed at dissemination, as an indicium of the subjective side, i.e. §4 and 4a, the legislator has not included such indicia as recording and gaining access. Thus, one can point to a lack of coherence with regard to the regulations criminalising the offence of pornography, or even to a lack of logic. This results from the fact that the legislator has excluded recording, importing and gaining access from the verbal features of the indicia of simulated child pornography. Hence, the objective scope of the criminalisation of the offence of simulated child pornography does not include, by way of illustration, a situation in which an Internet user gains access, while browsing, to pornographic material bearing the indicia specified in Art. 202 §4b of the Criminal Code. At the same time, if the perpetrator has done that in connection with pornographic material involving a minor in general, the act would be punishable.

The verbal feature “produces” denotes a whole process of producing pornographic material for specific purposes, taking into account technical and organisational aspects.

The most extreme examples of the fulfilment of this indicium are acts performed by producers, directors, scriptwriters, operators and even actors. And so it follows that the indicium of production of pornographic material is fulfilled by every participant in the organisational and technical activities undertaken as necessary in the process [22, pp. 1080–1086].

Production of animated films presenting minors participating in sexual activity may be considered to fulfil the indicia specified in Art. 202 §4b of the Criminal Code. Generated by means of a variety of methods, characters in such cartoons ought to be recognised as fulfilling the indicium of the generated image of a minor. Of course, a minor engaged in sexual activity needs to be presented in a specified manner for given film material to be regarded as pornographic. Theoretically, the use of a minor's generated image may be related to a specific type of hentai films and comics, e.g. *rorikon* (material most commonly presenting pre-pubescent girls), *shotacon* (material most commonly presenting pre-pubescent boys), *ecchi* (material presenting sexual fantasies, most often involving sexually ignorant attractive women, which sometimes takes the form of a playful plot), *yuri* (material presenting lesbian relationships), *yaoi* (material presenting gay relationships with dominant and subdued roles), *kinbaku* (material showing the tying and restraining of bodies, e.g. *bondage*), *tenacle* or *shokushu-kei* (material presenting women's sexual activity involving tentacled non-human creatures), *bukkake* (material presenting sexual activity in which men ejaculate on women, and most often their faces), *gokkun* (material presenting sexual activity in which women swallow sperm), *futanari* (material presenting sexual activity involving outstanding sex organs, frequently featuring group sex and *bukkake*) [27, pp. 340–353, 28].

It is also noteworthy that, irrespective of the strict use of the category of *hentai*, in the sexual context, in the pornography industry, a category that draws freely on the convention of this type of animated or comic material has been singled out. As a result, on pornographic websites, tabs with such keywords are created, but they cover both animated material and films featuring actors in the industry.

The problem concerned with the production of pornographic material with generated or processed images of minors may grow in strength in connection with the development of deepfake technology. The availability of software offering possibilities for creating and processing personal images gives rise to twofold problems. The first problem is the greater harmfulness of this type of acts to the person who has fallen victim to, by way of illustration, dissemination of pornographic material containing his or her image. The other problem is perpetrators' lack of awareness of criminalisation of this type of conduct, or the sense of anonymity resulting from the universal availability of the Internet [29, pp. 133–140, 30, pp. 39–52]. Frequently, this phenomenon is related to some forms of stalking, insult or slander. Arguably, every use of an image of a minor, where it is pasted in a scene of some existing pornographic material involving majors, or vice versa, fulfils the indicia of generating and processing, which are mentioned in Art. 202 §4b of the Criminal Code. Incidentally, it is worth stressing the problem concerned with the scale of interference in material, and of the use of, for instance, an existing image of a minor, which is by no means specified with indicia, in fact.

The indicium of dissemination in the general sense means making generally known, available and public. This means that dissemination of pornographic material is about making it available to a larger and/or unlimited number of people. Such an action may be taken, for instance, by putting such material on the Internet (e.g. on someone's own websites, open accounts of social messaging services, accounts of pornography website users). It is therefore accepted that acts consisting in making pornographic material available to a small number of persons, or to a circle of persons defined narrowly or strictly does not fulfil the indicium of dissemination. It is to be noted that the indicium of dissemination is not equivalent to another one, that of publicising.

This means that dissemination of pornographic material does not have to be public. Still, it has been accepted in the jurisprudence that lending, copying, publicising and other forms by which material of the above type is made available to an unspecified number of persons is equivalent to dissemination [21, pp. 665– 676, 22, pp. 1080–1086]. Arguably, the putting on the Internet of pornographic content with a minor's image that has been generated or processed by: (1) pasting a minor's face to a photograph such that it replaces the face of a major participating in sexual activity, (2) creating deepfake where a face of a major participating in sexual activity is replaced with a face of a minor, (3) creating a realistic animated film showing sexual acts performed by minors – all instantiate the fulfilment of the indicia of dissemination, as referred to in Art. 202 §4b of the Criminal Code.

The indicium of presentation is understood as the showing of pornographic material subject to criminalisation. Presentation can also be effected through various forms of media, e.g. films, magazines, pictures, photographs and posters; and it can be done both publicly and non-publicly. Still, it should be noted that presentation of pornographic material by means of the Internet is often public, given the character of that medium, and hence involves the fulfilment of the indicium of dissemination. In a case like this, the active or passive attitude of the viewer of pornographic material is of no consequence. This in turn means that for the indicium of presentation to be fulfilled, it does not matter whether the viewer of criminalised material took the initiative in becoming exposed to it. However, it is accepted that, in a situation where becoming exposed to pornographic material requires the viewer's conscious involvement, there is no fulfilment of the indicium of presentation [13, p. 208, 21, pp. 665-676, 22, pp. 1080-1086, 31]. As regards pornographic material showing a generated or processed image of a minor, the fulfilment of the indicium of presentation will be the case if the perpetrator for instance uses e-mail to make available videos and photographs containing such material. The perpetrator may also present criminalised material by making it available on social media accounts (e.g. Facebook).

Storage is associated with the holding of pornographic material, which is most often done clandestinely. The legislator does not point to the timescale for storage of this type of pornographic material. However, alongside storage, the legislator has included the indicium of possession of pornographic material, which is to be understood as factual control over it (autonomous or dependent possession within the meaning of the civil law). Hence, having control over pornographic material on behalf - or for the sake - of other persons fulfils the indicium of storage, and not possession. Still, it is noteworthy that possession is the case after, for instance, a file containing pornographic material showing simulated child pornography has been downloaded and recorded on a data storage device; and when such material is stored in the so-called "Cloud", to which there may be unlimited access. This assumption follows from the fact that the scope of criminalisation does not cover the data-storage device itself, but the pornographic material [21, pp. 665-676, 22, pp. 1080-1086, 32; 33].

5. Conclusion

The object of analysis in the text is the content and sense of the indicia of the offence of so-called simulated child pornography, as criminalised under Art. 202 §4b of the Polish Criminal Code. The said analysis, which is of a substantive criminal nature, resorts to textual, functional and doctrinal interpretations, albeit with outcomes supplemented by the author's own conclusions and opinions. With a view to the material scope of the analysis being elaborated, and conclusions presented, the formulated research question was: To what degree is the legal solution concerned with criminalisation and penalisation of the activities of »production, dissemination, presentation, storage or possession of pornographic material presenting a generated or processed image of a minor participating in sexual activity« usable, and realises the ratio legis intended by the legislator?

The rationale behind the criminalisation and penalisation of simulated child pornography under Polish criminal law has been to eliminate harmful effect on the personality of a viewer. Seen from a broader perspective, an imaginary (artificially created or processed) exploitation of minors would be conducive to the culture of permissiveness with regard to sexual violence directed at this group. The issue of simulated child pornography was addressed in some degree by the Council of Europe Convention done at Lanzarote, which also included, alongside the imagery of a child participating in real sexual activity, participation in simulated sexual acts. At the same time, the Convention singled out the category of simulated presentation or realistic images of a non-existing child.

The textual analysis demonstrates the ambiguity of some of the indicia intended to characterise the category of simulated child pornography. While the terms 'generation' and 'processing' are understandable linguistically, as has to be conceded, assignment of factual creations to them may prove problematic. This reflects a lack of standards as regards generation and processing, their effects or assessment of the age of a person in generated imagery. Nor has the legislator indicated the degree of processing of a minor's image, which means that it is unclear what criterion for the realism of a minor's image should be adopted. Additionally, criminalisation of this type of pornography does not distinguish between a collage made by the perpetrator from photographs clipped manually, and video material made by the perpetrator by way of deepfake technology. Besides, legal classification of simulated child pornography is problematic, because the process could involve design in the virtual worlds of games like *Second Life*.

Another problematic aspect is the stage at which an image or creation of simulated sexual acts is made subject to processing. This can be seen clearly in the process of selection for the purposes of pornographic films such actors as have juvenile traits, or can be made to look juvenile with the aid of make-up. This reveals a problem concerned with the difference between the creation of a minor's image with animated video technology and selection of suitable actors and make-up tricks. A similar situation will be one involving sex mannequins with juvenile traits (the so-called sex dolls), as these feature in video material or pornographic material of some other type. There is no doubt that, viewed objectively, there is no difference between the creation of a minor's image with the aid of animation, and the creation of such an image in the form of a sex mannequin used for sexual activity in pornographic material.

Given technological advancement (e.g. artificial intelligence in connection with deepfake) and the potential greater harmfulness of pornographic material, it is to be assumed that criminalisation of child pornography will not solely serve to eliminate deleterious effects on viewers, as well as specific content from social circulation. Rather, with the passage of time, it may also prove useful in eliminating such other acts as stalking, and the recording and dissemination of the image of a naked person participating in sexual activity.

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