

# SOME ASPECTS OF COMPARATIVE LAW REGARDING CHILD PSEUDOPORNOGRAPHY AND VIRTUAL CHILD PORNOGRAPHY

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## Abstract

*The present study aims to bring to the fore domestic law provisions and their interpretation in national judicial practice in four (4) countries with a long democratic tradition, namely the United States of America, France, the Netherlands and Belgium, with regard to pseudo-child pornography and virtual child pornography, in order to find answers to questions such as: Are pseudo-child pornography and virtual child pornography criminalised in the laws of these countries? What were the reasons considered for their criminalisation or non-criminalisation? What is the link between A.I. and these subspecies of child pornography and how can this technology be integrated into the fight against the phenomenon? How is pseudo-child pornography reconciled with the principle of legality of criminalisation? And more.*

*The proposed objective is to update the local doctrinal studies in the field of pseudo-child pornography and virtual child pornography from the perspective of comparative law, in order to provide arguments for and against the criminalisation of these types of child pornography, including how to reconcile the competing social values at stake.*

*New socio-technological realities also require addressing and understanding how I.A. technologies have influenced the proliferation of child sexual abuse material online, the extent of this phenomenon, and identifying effective solutions to prevent and combat the scourge.*

**Keywords:** *virtual child pornography; pseudo child pornography; comparative law; principle of legality of criminalisation; artificial intelligence technology.*

## 1. Introduction

The crime of child pornography, together with the sexual exploitation of children, is classified as a serious form of violation of fundamental human rights, in particular the freedom and integrity of the sexual personality and human dignity<sup>1</sup>.

With the development of information and communication technology, crime has taken on a predominantly digital character, and recent innovations in the field of artificial intelligence are on the verge of generating a new, alarming phenomenon of unimaginable proportions and incalculable consequences for society in general and minors in particular, in terms of child pornography.

Recently, several articles<sup>2</sup> from reputable online publications have raised an alarming phenomenon, on an upward trend, regarding the generation of illegal content online using AI, specifically the generation of pornographic material with real or non-existent minors.

A coordinated, effective, cohesive and timely response, adapted to common social values shared by democratic states, is urgently needed to counter this scourge.

The present study aims to highlight provisions of national law and their interpretation in the national judicial practice of four (4) countries with a long democratic tradition, namely the United States of America, France, the Netherlands and Belgium, with regard to child pornography and virtual child pornography, in order to find answers to questions such as: Are child pornography and virtual child pornography criminalised in the

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<sup>1</sup> In the same sense, A. Mărgineanu, *Combaterea exploatării sexuale a copiilor și a pornografiei infantile*, in *Caiete de drept penal* no. 3/2013, p. 63-89.

<sup>2</sup> See, article *US receives thousands of reports of AI-generated child abuse content in growing risk*, published on 31.01.2024 on the Reuters website, <https://www.reuters.com/world/us/us-receives-thousands-reports-ai-generated-child-abuse-content-growing-risk-2024-01-31/>, accessed on 10.04.2024; also article *Society needs to be alert! Most people are unaware AI is being used to create child abuse content*, published on 19.02.2024 on the Euronews website, <https://www.euronews.com/next/2024/02/19/society-needs-to-be-alert-most-people-are-unaware-ai-is-being-used-to-create-child-abuse-c>, accessed on 09.05.2024; also, article *AI-Generated Child Sexual Abuse Material May Overwhelm Tip Line*, published on The New York Times website on 22.04.2024, <https://www.nytimes.com/2024/04/22/technology/ai-csam-cybertipline.html>, accessed on 10.05.2024.

legislation of these countries? What were the reasons considered for their criminalisation or non-criminalisation? What is the link between AI and these subspecies of child pornography and how can this technology be integrated into the fight against the phenomenon? How is pseudo-child pornography reconciled with the principle of legality of criminalisation? And more.

At the same time, it aims to update the local doctrinal studies<sup>3</sup> in the field of child pseudopornography and virtual child pornography from a comparative law perspective.

These sub-classes of child pornography bear particular attention in the current global socio-technological context, in which AI technology has taken hold and is making its presence felt in many areas of modern life at a pace seemingly hard for states to match in terms of its regulation; its innovative nature and varied capabilities have been exploited, surprisingly or not, including by criminals for illegal purposes such as social engineering via deepfake<sup>4</sup>.

## 2. Brief considerations on the legal foundations and significance of the subject matter

All these realities were anticipated, to some extent and with some precision, by the original architects of the criminalisation of this scourge at international level; thus, on 20 November 1989, the United Nations General Assembly adopted the Convention on the Rights of the Child, which laid down in art. 34 the obligation of States Parties to protect children against all forms of sexual exploitation and sexual violence.

To this end, States shall, in particular, take all appropriate national, bilateral and multilateral measures to prevent: a) the inducement or coercion of children to engage in unlawful sexual activities; b) the exploitation of children in prostitution or other unlawful sexual practices; c) the exploitation of children in pornographic performances or materials.

Subsequently, complementary to the Convention, on 18 January 2002, the Optional Protocol on the sale of children, child prostitution and child pornography entered into force, including a legal definition of child pornography in art. 2 letter (c), according to which *child pornography* means any depiction, by whatever means, of children engaged in real or simulated explicit sexual activity or any other exposure of the sexual organs of children, primarily for sexual purposes.

At the same time, the Protocol established a series of commitments of the signatory states for the implementation of its directives, in the field of substantive and procedural law, among which we note those contained in art. 3 point 1 letter c), 2) and 3), under which it became imperative to criminalise in national law at least the following activities, whether committed domestically or internationally, individually or in an organised manner: the production, distribution, dissemination, import, export, offer, sale or possession of pornography, as defined in art. 2, for the purposes mentioned.

With regard to child pornography in electronic format, the first international legal instrument to address, among other things, this phenomenon was the Convention on Cybercrime<sup>5</sup>, adopted on 23 November 2001 in Budapest under the auspices of the Council of Europe.

To this end, the signatory parties undertook to adopt the necessary legislative or other measures to criminalise the following conduct, when committed intentionally and unlawfully, under their domestic law: (a) the production of child pornography for the purpose of distribution by means of a computer system; (b) the offering or making available of child pornography by means of a computer system; (c) the distribution or transmission of child pornography by means of a computer system; (d) the act of procuring for oneself or for another person child pornography by means of a computer system; (e) the possession of child pornography in a computer system or a computer storage medium.

The term „child pornography” was defined as any pornographic material that visually depicts: a) a minor engaging in sexually explicit conduct; b) a person of full age, depicted as a minor, engaging in sexually explicit conduct; c) realistic images depicting a minor engaging in sexually explicit conduct.

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<sup>3</sup> See: M. Angel, B. Pasamar, *Child pornography on the Internet: the basis and limits of criminal law intervention*, in *Caiete de drept penal no. 2/2008*, p. 1-43; S. Corlăţeanu, A. Cîrciumaru, S. Corlăţeanu, *Elemente de drept comparat referitoare la combaterea pornografiei infantile prin mijloace de drept penal*, in *Dreptul no. 11/2007*, p. 213-229.

<sup>4</sup> Deepfake is a fake, digitally manipulated video or audio file produced by using deep learning, an advanced type of machine learning, and typically featuring a person's likeness and voice in a situation that did not actually occur, in accordance to definition provided by <https://www.dictionary.com/>, accessed on 10.05.2024.

<sup>5</sup> Known as the „Budapest Convention”, available at CETS 185 – Convention on Cybercrime (*coe.int*), accessed on 03.05.2024.

The latter two subcategories are defined in the literature<sup>6</sup> as *pseudo-child pornography*(b) and *virtual child pornography*(c).

It should be noted that all 4 States concerned by this study are signatories<sup>7</sup> to the Budapest Convention, some of which have made reservations<sup>8</sup> under art. 9(2) of the Convention, 4 of the international normative act concerning these sub-classes of child pornography.

### 3. Regulation in the United States of America

In US law, the subject of criminalising child pornography has been debated in relation to the right to free speech, guaranteed by the First Amendment<sup>9</sup> to the US Constitution, being essentially a human form of expression; the debate has taken place at the highest level of the US judiciary, the Supreme Court, which has set certain benchmarks in the process of criminalising and interpreting the law in relation to child pornography.

One of the representative cases in this regard was *Miller v. California*<sup>10</sup>, in which the Supreme Court set the standard for assessing the obscenity of speech/form of expression at three points<sup>11</sup>, namely: (a) whether based on contemporary community standards, an ordinary person would consider the work, viewed in its entirety, to evince an obscene interest; (b) whether the work depicts or illustrates, in a patently offensive manner, sexual conduct or excretory functions as defined by state law; (c) whether the work as a whole is devoid of serious literary, artistic, political, or scientific merit.

Subsequently, in *Ferber v. New York*<sup>12</sup>, the Supreme Court clearly delineated child pornography from First Amendment protection, even though the Miller test for the type of content under consideration is not met; thus, it reasoned that the protection of children from sexual abuse is paramount, and material depicting sexual activity involving children is closely related to such abuse and has no artistic value; thus, the production, distribution or promotion of such material is exempt from First Amendment protection.

In *Osborne v. Ohio*<sup>13</sup>, the Supreme Court extended its interpretation in the above case to the mere viewing or possession of child pornography, based on the same arguments, plus the thesis that acting to decrease the demand for child pornography implicitly decreases the production of such content(supply), and that the material can be used to lure and sexualize children for the purpose of their subsequent abuse.

Some two decades after the *Ferber v. New York* decision, the Court was again called upon to rule on the constitutionality of child pornography rules, but this time contained in a federal law, the Child Pornography Prevention Act of 1996<sup>14</sup>; the case was called *Ashcroft v. Free Speech Coalition*<sup>15</sup>, in which the Court declared two provisions of that law unconstitutional because their language was too broad with respect to material that was neither obscene under the Miller test nor produced through the exploitation of real children, as in the *Ferber* case, thus violating First Amendment protections.

Only one of the two provisions is of interest for the present analysis, namely the one that covered „any visual depiction, including any photograph, film, video, image or computer-generated image” that „is or appears to be of a minor engaging in sexually explicit conduct”<sup>16</sup>; the provision aimed at criminalising different types of conduct, such as production, procurement, distribution, involving so-called pseudo-child pornography and virtual

<sup>6</sup> See, M. Angel, B. Pasamar, *op. cit.*, *loc. cit.*

<sup>7</sup> See the list of signatory states to the Budapest Convention, *Parties/Observers to the Budapest Convention and Observer Organisations to the T-CY – Cybercrime (coe.int)*, accessed on 10.05.2024.

<sup>8</sup> See the list of States that have entered reservations to various provisions of the Convention, <https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=185&codeNature=0>, accessed on 10.05.2024.

<sup>9</sup> Adopted on December 15, 1791, it was the first of ten amendments to the US Constitution, forming the so-called „Bill of Rights”; it was intended to limit the power of Congress to make laws for the establishment of any religion or prohibition of the free exercise thereof, or to abridge freedom of speech, freedom of the press, or the right of the people peaceably to assemble and to petition the government for the redress of grievances; [https://ro.wikipedia.org/wiki/Primul\\_amendament\\_la\\_Constitu%C8%9Bia\\_Stator\\_Unite\\_ale\\_Americii](https://ro.wikipedia.org/wiki/Primul_amendament_la_Constitu%C8%9Bia_Stator_Unite_ale_Americii), accessed on 06.04.2024.

<sup>10</sup> Settled by judgment of the Court of 21.06.1973, <https://supreme.justia.com/cases/federal/us/413/15/>, accessed on 06.04.2024.

<sup>11</sup> The criteria are cumulative, conventionally referred to as the „Miller Test”.

<sup>12</sup> In which the Court delivered its judgment of 02.07.1982; <https://supreme.justia.com/cases/federal/us/458/747/>, accessed on 06.04.2024.

<sup>13</sup> Settled by judgment of the Court of 18.04.1990, <https://supreme.justia.com/cases/federal/us/495/103/>, accessed on 06.04.2024.

<sup>14</sup> <https://www.congress.gov/bill/104th-congress/house-bill/4123/text>, accessed on 06.04.2024; the act aimed to criminalise child pornography online, including virtual child pornography.

<sup>15</sup> Settled by judgment of the Court of 16.04.2002, <https://supreme.justia.com/cases/federal/us/535/234/>, accessed on 06.04.2024.

<sup>16</sup> Art. 2256 para. 8 letter A of the US Code, as amended by the 1996 Act.

child pornography, where the resulting content did not involve real children in sexually explicit conduct, but either adults appearing to be minors or computer-generated images of non-existent children.

In contrast, the Court upheld the validity of the arguments in *Ferber v New York* in relation to another type<sup>17</sup> of virtual child pornography, which renders the image of a real child, but altered by means of a computer system so as to create the impression of the child's involvement in sexual activities<sup>18</sup> (for example, by superimposing the image of a child's face over the face of an adult engaged in sexual activities).

Responding to society's need to balance competing general interests (the right to free speech and the protection of children from sexual abuse and exploitation), a year later, in 2003, the US Congress passed the *Procedural Remedies and Other Tools to End Child Exploitation Today Act*<sup>19</sup>; among other things, the Act brought its provisions in line with the principled rulings of the Supreme Court in the Miller, Ferber and Ashcroft cases on virtual child pornography.

The Act changed the previous wording „appears to be a minor” to „indistinguishable from that (*n.n.*, *image*) of a minor”, thereby narrowing the scope of the rule to limit interference with freedom of expression to what is necessary to achieve the stated objective; thus, it was an offence to possess or distribute any visual depiction of sexually explicit conduct involving „a computer image, computer-generated image or digital image that represents or is virtually indistinguishable from that of an actual minor” to an ordinary observer (not an expert).

In addition, it introduced a case<sup>20</sup> which would remove criminal liability for the offence if the subject of the visual depiction was a real adult (over 18) at the time of production or was merely a virtual creation and not a real minor, but the burden of proving these elements was on the defendant; thus, to the extent that the case did not involve a real minor, the requirement in *Ferber v. New York* excluding First Amendment protection only for child pornography involving real children was also respected; the rationale for reversing the burden of proof from the prosecutor to the defendant as to the non-existence of a real child in the pornographic visual depiction, despite appearances, was that the person creating or receiving child pornography was certainly in a better position than the prosecutor in this regard, especially since no effective tools were available to identify the source of the materials.

However, this legal defence was explicitly excluded for the other form of virtual child pornography, which involved transforming<sup>21</sup> images of real children in such a way that they appeared to be engaged in sexual activity; the justification was that the rule was intended to prevent the creation of a sexually explicit image using an innocent image of a child, the possible distribution of which clearly created a real danger to the image, dignity and privacy of the child in question, despite the fact that they had not been directly involved in the sexual activity depicted.

These virtual child pornography and pseudo child pornography provisions introduced by the PROTECT Act of 2003 have stood the test of time to date, as they are also found in the current *US Code* in Title 18 - Crimes and Criminal Procedures, Part I - Crimes, Chapter 110 - Sexual Exploitation and Other Abuse of Children, *Section 2256*<sup>22</sup>.

Note the topography of the criminalisation of child pornography in the US Criminal Code, *i.e.*, within the spectrum of social relations concerning sexual exploitation and other abuse of children, and not within the social relations concerning public morality<sup>23</sup>; therefore, the legal object protected by the criminal norm is mainly concerned with the individual rights of children - their freedom and integrity of sexual personality, freedom of will, dignity and privacy.

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<sup>17</sup> In the literature it is referred to as pseudo-pornography, as distinct from virtual child pornography proper, which involves the generation of entirely computer-generated pornographic images of unreal children; see, M. Eneman, A.A. Gillespie, B. Carsten Stahl, *Criminalising fantasies: the regulation of virtual child pornography*, <https://gup.ub.gu.se/file/207727>, accessed on 10.04.2024.

<sup>18</sup> The provision was found in art. 2256 para. 8 letter C of the US Code.

<sup>19</sup> The acronym in English being the „PROTECT Act of 2003”, also known as the „Amber Alert Law”, <https://www.congress.gov/congressional-report/108th-congress/senate-report/2/1?q=%7B%22search%22%3A%22%5C%22protect+act+of+2003%5C%22%22%7D&s=5&r=29>.

<sup>20</sup> In American criminal law, this type of legal defence is known as the affirmative defence.

<sup>21</sup> The Act concerned digital transformation, known in American legal parlance as „morphed child pornography images”.

<sup>22</sup> Article defining the terms used in the criminalisation of child pornography conduct, including „minor”, „sexually explicit conduct”, „production”, „visual depiction”, „computer”, „child pornography”, „identifiable minor”, „indistinguishable from”.

<sup>23</sup> This legal object is protected by other offences found in Chapter 71 of the US Criminal Code, entitled „Obscenity”.

#### 4. Regulation in the Kingdom of the Netherlands

In the Kingdom of the Netherlands, the criminalisation of child pornography is found in the *Dutch Criminal Code*, under Title XIV - Offences against morality, in *art. 240b*, and covers both child pornography as such and virtual child pornography and pseudo-child pornography.

The offences include the production, possession and distribution of, inter alia, an image or data medium containing an image of a sexual act involving or appearing to involve a person who is visibly under the age of 18<sup>24</sup>.

The last two subcategories of child pornography in the above list became criminal offences with the entry into force of the Act of 13 July 2002 amending the Dutch Criminal Code and Criminal Procedure Code<sup>25</sup>, which raised the age threshold for the person covered by the protection of criminal law from 16 to 18 and introduced the phrase „apparently involved”.

Thus, the new legislative formula covered the following three assumptions<sup>26</sup>: (1) representation of a real child; (2) representation of a real adult person who looks like a child; (3) realistic representation of a non-existent child engaged in sexual conduct.

It should be noted that these three situations are based on the hypotheses referred to in art. 9(9). 2 of the Budapest Convention on Cybercrime concerning the definition of child pornography, an international legal instrument which inspired the Dutch legislator, among others<sup>27</sup>.

What made the image pornographic in the first place was the depiction of sexually explicit behaviour of a person apparently under the age of 18, including the exposure of genitals or pubic area in an ostentatious manner<sup>28</sup>; on the other hand, the way in which the image was created was equally eloquent in this respect, if it served to sexually stimulate the viewer (*e.g.*, by adding text/voice, overlaying some elements or removing others, resulting in a sexual character, focusing on certain anatomical parts of the person's body, especially those sexual or considered erogenous)<sup>29</sup>.

At the same time, the arguments that underpinned the criminalisation of virtual child pornography and pseudo-pornography focused on the need to prevent behaviour that would have encouraged or attracted children to adopt inappropriate sexual behaviour or that would have generated a subculture of promoting sexual abuse of children; at the same time, the aim was to ease the burden of proof on the investigating authorities in the sense that it was no longer necessary to prove the use of real children for the production of pornographic material, which was impossible to prove solely on the basis of available visual evidence<sup>30</sup>.

The phrase „is apparently involved” in art. 240b of the Dutch Criminal Code signifies the indistinguishable character of an image of a real child engaged in sexually explicit conduct, and the standard for assessing this factual aspect relates to an ordinary observer without relevant expertise in the field, as follows from the case law<sup>31</sup> of the Supreme Court of the Netherlands.

At the same time, regardless of whether the person depicted in the image is an adult, but, on the basis of his or her physical appearance, looks like a minor, under the age of 18, criminal liability is incurred for committing the offence of child pornography, with its subspecies, pseudo-child pornography; this assessment of the age of the person depicted remains a question of fact, left to the discretion of the judge, who has not raised questions of constitutionality of the incriminating text from a *lex certa* perspective to date.

<sup>24</sup> See Dutch Criminal Code, form in force at the date of access - 29.04.2024, available in the official language of the Kingdom of the Netherlands at the following address [wetten.nl](https://wetten.nl) - *Regeling - Wetboek van Strafrecht - BWBR0001854 (overheid.nl)* as well as in the Romanian version, in the form in force on 01.10.2012, available at *Codex Penal – Criminal Code of the Kingdom of the Netherlands (just.ro)*, accessed on 28.04.2024.

<sup>25</sup> Available at Staatsblad 2002, 388|Overheid.nl > Officiële bekendmakingen ([officielebekendmakingen.nl](https://officielebekendmakingen.nl)), accessed on 01.05.2024.

<sup>26</sup> See, in this respect, Memorandum of the Minister of Justice of the Kingdom of the Netherlands no. 27745-299b on the legal issues raised in the parliamentary debates on the 2002 draft law, ante-referred, published in the Dutch Official Gazette on 20.06.2002, available at [kst-20012002-27745-299b.pdf](https://kst-20012002-27745-299b.pdf) ([officielebekendmakingen.nl](https://officielebekendmakingen.nl)) accessed on 02.05.2024.

<sup>27</sup> See Explanatory Memorandum to the Act of 13 July 2002 amending the Criminal Code and the Criminal Procedure Code of the Kingdom of the Netherlands, available at Parliamentary document 27745, no. 3|Overheid.nl > Official announcements ([officielebekendmakingen.nl](https://officielebekendmakingen.nl)).

<sup>28</sup> See Supreme Court of the Kingdom of the Netherlands, judgment from 07.12.2010, Case no. 08/00787 B, <https://deepink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2010:BO6446>, accessed on 20.03.2024.

<sup>29</sup> See Instructions of the College of Prosecutors General, published in the Official Gazette no. 19415/2016, <https://zoek.officielebekendmakingen.nl/stcrt-2016-19415.html>, accessed on 04.05.2024.

<sup>30</sup> See Supreme Court of the Kingdom of the Netherlands, judgment from 12.03.2013, Case no. 11/04168, <https://deepink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2013:BY9719>, accessed on 20.03.2024.

<sup>31</sup> *Ibidem*.

Therefore, in contrast to the case law of the US Supreme Court, as set out above, the Dutch legislature has held that the criminalisation of virtual child pornography does not infringe the freedom of expression and the right to privacy of its nationals; the general interest of preventing and combating child pornography as a whole, encompassing both real and virtual child pornography, which are essentially inseparable, prevails over the competing private interests at stake.

## 5. Regulation in the Kingdom of Belgium

In the law of the Kingdom of Belgium, child pornography is found in the *Belgian Criminal Code*, Title VIII - Crimes and Offences against the Person, Chapter I - Offences against Sexual Integrity, the Right to Sexual Self-Determination and Public Decency, Section 2 - Sexual Exploitation of Minors, Subsection 3 - Images of Sexual Abuse of Minors, *art. 417/43 to 417/47*<sup>32</sup> and punishes both child pornography as such and virtual child pornography and pseudo-child pornography.

It criminalises conduct such as producing, disseminating, possessing or accessing images of sexual abuse of minors, among others.

As regards the phrase „images of sexual abuse of minors”, *art. 417/43* defines such images in accordance with the authentic interpretation of the term 'child pornography' found in *art. 2 letter c)* of Directive 2011/93/EU<sup>33</sup> of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, a legal instrument which, together with the Lanzarote Convention and the Budapest Convention, among others, has been a source of inspiration for the Belgian legislator in this area<sup>34</sup>.

Thus, the term encompassed the following three assumptions: (1) depiction of a real child; (2) depiction of a real adult person who looked like a child; (3) realistic depiction of a non-existent or apparent child engaged in real or simulated sexual conduct or exposing genitals, primarily for sexual purposes.

The Belgian legislator's vision of placing child pornography offences within the spectrum of offences protecting social relations relating mainly to the integrity of the sexual personality, human dignity and the private life of the person dates back to 2022, initially the offence was placed under the auspices of Title VII - Offences against the family and public order, Chapter VII - Offences against morality, *art. 383 bis*<sup>35</sup>.

With regard to the criminalisation of virtual child pornography and pseudo child pornography, defined in hypotheses 2 and 3 above, the *ratio legis* was aimed at complying with international obligations in this area, ensuring a high degree of predictability of the criminal law and protecting the image of the minor per se, even in the case of pseudo child pornography.

With regard to the latter, a case decision<sup>36</sup> considered the request of the defendant, convicted at first instance of possessing and accessing images of apparently underage persons engaged in sexually explicit conduct, to refer the matter to the Constitutional Court of the Kingdom of Belgium for a review of the constitutionality of the incriminating provision - at that time *art. 383bis* of the Belgian Criminal Code with the principle of legality in criminal matters; the defendant argued that the law refers to „a person who appears to be a minor engaging in sexually explicit conduct”, which is a purely subjective concept leaving room for too wide a margin of appreciation on the part of the judge.

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<sup>32</sup> See Belgian Criminal Code, in its current form, [https://www.ejustice.just.fgov.be/cgi\\_loi/loi\\_a1.pl?imgcn.x=57&imgcn.y=15&DETAIL=1867060801%2FF&caller=list&row\\_id=1&numero=3&rech=4&cn=1867060801&table\\_name=LOI&nm=1867060850&la=F&chercher=t&dt=CODE+PENAL&language=fr&fr=f&choix1=ET&choix2=ET&fromtab=loi\\_all&cc=DROIT+PENAL&sql=dt+contains+%27CODE%27%2526+%27PENAL%27+and+cc+contains+%27DROIT+PENAL%27+and+actif+%3D+%27Y%27&tri=dd+AS+RANK+&trier=promulgation#LNK0120](https://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?imgcn.x=57&imgcn.y=15&DETAIL=1867060801%2FF&caller=list&row_id=1&numero=3&rech=4&cn=1867060801&table_name=LOI&nm=1867060850&la=F&chercher=t&dt=CODE+PENAL&language=fr&fr=f&choix1=ET&choix2=ET&fromtab=loi_all&cc=DROIT+PENAL&sql=dt+contains+%27CODE%27%2526+%27PENAL%27+and+cc+contains+%27DROIT+PENAL%27+and+actif+%3D+%27Y%27&tri=dd+AS+RANK+&trier=promulgation#LNK0120), accessed on 15.04.2024.

<sup>33</sup> OJ L 335/1/17.12.2011.

<sup>34</sup> See Explanatory Memorandum to the Act of 31.05.2016 on the amendment of the Belgian Criminal Code to implement European obligations in the field of sexual exploitation of children, child pornography and trafficking in human beings, among others, published in the Official Gazette on 08.06.2016, <https://www.lachambre.be/doc/flwb/pdf/54/1701/54k1701001.pdf#search=%221701%20%2054k%20%3Cin%3E%20keywords%22>, accessed on 03.05.2024; this legislative act amended *art. 383bis* of the Belgian Criminal Code, the seat of the child pornography offence until 30.03.2022, when the article was repealed.

<sup>35</sup> See Belgian Criminal Code, as in force from 01.08.2016, <https://codexpenal.just.ro/laws/Cod-Penal-Belgia-RO.html>, accessed on 20.04.2024.

<sup>36</sup> See CA Liège, judgment from 19.01.2023, <https://juportal.be/content/ECLI:BE:CALIE:2023:ARR.20230119.1?HiLi=eNp1kUFuwjAQRer/iRddxAiRMVIGJwFJERlgewAKLjhQRK4QVYkNXvUa76jkk92qctkBEZvfvf+Hvmfwv88CkEL94Dj4DJ359NZap6V21rZd5RxyxG4JZ6wEyNuzUaPJRw9a0aACv1VpXYXD6u34gWBBaErV6y2VeLPN5kciFSDuv0e2nTwdct9QftfQlVetDo2PHzOS+q4OGNwf91CEIB+O8dtkoOpndwJeLRjUa7KB8u4RryKVVZiOwrK0It6+Sglx/CS1uHFiwzpnMjrKVEJO+phZlv5yvX0QmA9L2QyQkL2pONf+98ah/8djo6Q+lza3s>, accessed on 15.04.2024.

The court rejected the defendant's request, arguing that, by criminalising pseudo-child pornography and virtual pornography, the Belgian legislature had sought to prevent and combat all forms of child pornography, in accordance with the consensus view of the States parties to the Budapest Convention, to which Belgium had acceded, without making any reservations in that regard; at the same time, because of the general nature of the laws, their interpretation and application leave the courts with a certain margin of discretion, but the result of the interpretation must be reasonably foreseeable and consistent with the substance of the offence.

The foreseeability of the law does not preclude the person concerned from seeking expert advice in order to assess, to a reasonable extent in the circumstances of the case, the consequences which might flow from a particular act<sup>37</sup>.

The Court concluded that the criminal law does not place the judge in the position of deciding, on the basis of a purely subjective assessment, whether or not the person depicted in the pornographic material is legally a minor, but only to decide whether the material produced endangers the image of a minor by the explicit sexual conduct it depicts.

## 6. Regulation in the French Republic

In France, child pornography is regulated in the *French Criminal Code*, Book II Crimes and Offences against Persons, Title II - Offences against the Individual, Chapter VII - Offences against Minors and the Family, Section 5 - Peril to Minors, Subsection 2 - Sexual Offences against Minors, art. 227-23<sup>38</sup> and covers in principle only child pornography as such and virtual child pornography. Conduct such as fixing or recording, disseminating or possessing pornographic images or representations of a minor is criminalised.

From the perspective of virtual child pornography, it is worth mentioning the amendments made by Law no. 98-468/1998 on the prevention of sexual offences and the protection of minors<sup>39</sup> to art. 227-23 of the French Criminal Code, according to which the phrase „representation of a minor” was inserted in the precept of the incrimination, as an alternative to the phrase „image of a minor” of a pornographic nature, and a relative legal presumption of the existence of the state of minority was inserted for the person appearing in the pornographic image, when his/her appearance looks like that of a minor, and the burden of proof to the contrary is on the accused.

The representation of minors in pornographic poses covers the virtual domain, which does not exist, as it emerges from the parliamentary debates held during the formulation of amendments to the bill under discussion<sup>40</sup>.

This thesis was also confirmed by the French Court of Cassation in its case law<sup>41</sup> when it ruled on an appeal brought by the defendants accused of importing and distributing to the public a film in which the protagonist, an animated character, „undoubtedly presents the characteristics of a small child, in particular in view of his small size in relation to the adult characters around him, the absence of morphological signs suggesting that he might be an adult and his facial features which make him appear as a very small child”, a character who was having sexual relations with adult women; the court dismissed the defendants' appeal, holding that the legislature's intention was to punish the dissemination of pornographic depictions of minors and that the scope of the offence was broadened by including in the subject-matter of the offence, previously limited to the image of a minor, any visual, photographic or cinematographic depiction of a child, any depiction of a minor; the offence therefore also covered unreal images of an imaginary minor or even images resulting from the transformation of a real image.

The French legislator's intention not to criminalise child pornography is clear from the last sentence of art. 227-23 of the French Criminal Code, which states that the provisions of the offence also apply to images of a person whose physical appearance is that of a minor, unless it is proved that the person was at least 18 years old at the time the image was taken or recorded.

<sup>37</sup> Case *Cantoni v. France*, judgment from 15.11.1996, para. 35, <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-62627%22%7D>).

<sup>38</sup> See the French Criminal Code, in its current form, <https://www.legifrance.gouv.fr/codes/id/LEGIARTI000043409170/2021-04-23/>, accessed on 02.05.2024.

<sup>39</sup> Published in the French Official Journal on 18.06.1998, <https://www.legifrance.gouv.fr/loda/id/LEGIARTI000006492895/1998-06-18/>, accessed on 04.05.2024.

<sup>40</sup> <https://www.senat.fr/rap/197-265/197-265.html>, accessed on 08.05.2024.

<sup>41</sup> See French Court of Cassation, crim. s., judgment from 12.09.2007, [https://www.legifrance.gouv.fr/juri/id/JURITEXT000007640077?fonds=JURI&page=1&pageSize=10&query=%22%27aspect+physique+est+d%27un+mineur%22&searchField=ALL&searchType=ALL&tab\\_selection=all&typePagination=DEFAULT](https://www.legifrance.gouv.fr/juri/id/JURITEXT000007640077?fonds=JURI&page=1&pageSize=10&query=%22%27aspect+physique+est+d%27un+mineur%22&searchField=ALL&searchType=ALL&tab_selection=all&typePagination=DEFAULT), accessed on 07.05.2024.

However, by reversing the burden of proof from the prosecution to the accused regarding the adult status of the person whose physical appearance is similar to that of a minor, even actual cases of pseudo-child pornography can be sanctioned, to the extent that the accused fails to prove the contrary.

### **7. A look at the extent of virtual child pornography and pseudo-child pornography and the challenges posed by AI**

At the beginning of the paper I mentioned the huge amount of material on sexual abuse of minors<sup>42</sup>, which is spread in the virtual environment, but which is recently amplified by the use of AI technology to generate such content.

Among law enforcement in the United States, a country in whose jurisdiction social networks or electronic communications service providers<sup>43</sup> with a significant percentage of global users operate, the sense of helplessness in the face of the explosive number of such materials flooding the online environment has increased with Meta's announcement<sup>44</sup> of the integration of end-to-end encryption into electronic messaging services earlier this year<sup>45</sup>; added to this is the growing number of computer-generated materials from AI of such sexual abuse of real or non-existent children, which further increases the logistical and human effort to investigate the circumstances in which these materials were produced; once it is established that these are virtual child pornography materials, the investigation is not as definitive as it should be, since, under US law, this type of virtual child pornography of fictitious children is not criminalised in this situation<sup>46</sup>; these situations significantly reduce the chances for prompt intervention in cases of sexual abuse of real children, whose victimisation is disseminated online.

In addition, it is also worth noting the ease<sup>47</sup> with which criminals can use AI to modify the source code of real child sexual abuse material so that the result does not change the nature of the content, but only its logical (digital) fingerprint<sup>48</sup>, so that the material cannot be recognised by the filters used to detect and remove illegal content.

However, the same AI is able to offer solutions to overcome these obstacles in an effective way; for example, a joint project of the Centre for Artificial Intelligence and Robotics of the United Nations, Interregional Crime and Justice Research Institute (U.N.I.C.R.I.) and the Ministry of Interior of the United Arab Emirates, called „AI for Safer Kids”, was launched in 2020 and aims to effectively combat online child abuse, including sexual abuse, by providing information, best practices and tools for using AI, and facilitating the exchange of experience between law enforcement agencies from 72 countries<sup>49</sup>.

It should be noted that at this point in time, AI technology is not so reliable that the results of its processing are not duplicated by human examination, and this is even more so for child sexual abuse material; however, it does take many of the time-consuming tasks off the shoulders of those involved in preventing and combating this scourge online and offline, such as identifying duplicates of such material in an automated way, as well as facilitating the identification of new victims.

Against the current backdrop of the extent of online dissemination of child sexual abuse material, the technology industry has come up with its own solutions to the use of AI technology. In identifying, removing and reporting this type of illegal content in their own online platforms that they manage or for which they provide electronic communication services; some companies use these machine learning processes in ways that are compatible<sup>50</sup> with respect for the human right to privacy in its substance, and others in ways that have sparked

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<sup>42</sup> In English, „Child sexual abuse material”.

<sup>43</sup> Like Meta, Twitter, Snap Inc., TikTok, Google etc.

<sup>44</sup> The company was listed as the most prolific partner for law enforcement agencies in identifying and reporting the circulation of child sexual abuse material on social networks it managed.

<sup>45</sup> See *Law Enforcement Braces for Flood of A.I.-Generated Child Sex Abuse Images*, The New York Times website, published on 30.01.2024, <https://www.nytimes.com/2024/01/30/us/politics/ai-child-sex-abuse.html?searchResultPosition=1>, accessed 15.04.2024.

<sup>46</sup> The so-called „affirmative defense” set in favor of the defendant, mentioned above.

<sup>47</sup> In the same vein, *Law Enforcement Braces for Flood of A.I.-Generated Child Sex Abuse Images*, *op. cit.*, *loc. cit.*

<sup>48</sup> Known as a „hash”.

<sup>49</sup> Project available at <https://unicri.it/topic/AI-for-Safer-Children-Global-Hub>, accessed on 10.05.2024.

<sup>50</sup> For example, the Safety AI tool offered by Google to combat child sexual abuse online by detecting, removing and reporting new potentially harmful or illegal content; more information is available at <https://protectingchildren.google/#alliances-and-programs>, accessed on 10.05.2024.



controversy and legal disputes<sup>51</sup>, such as the generation of a facial recognition fingerprint<sup>52</sup> used to identify victims and offenders, based on a huge database containing billions of photos taken from the internet and social media.

Thus, there is an acute need to regulate the use of this AI technology, with potentially diametrically opposed capabilities, depending on the purpose of its use.

In Europe, more specifically within the political edifice called EU, a draft law on AI is currently being debated in the legislative forums of the European Parliament and the Council of the European Union, and has recently been provisionally agreed<sup>53</sup>; the future legislation aims to maximise the benefits of this new technology in order to strengthen democracy, respect for human rights and the environment, as well as to minimise its potential risks and impact; it could also be used to combat the proliferation of child pornography, including virtual and simulated child pornography, online.

Also in the United States, with a more specific objective, a bill<sup>54</sup> called the Commission of Experts on Child Exploitation and Artificial Intelligence Act has recently been introduced in the US Congress, aiming to establish a commission to devise a legal framework useful in the prevention, detection and prosecution of AI crimes against children.

## 8. Conclusions

We found that the field of virtual child pornography and pseudo-child pornography involves relatively different legislative solutions in the positive law of the United States, the Netherlands, Belgium and France.

Similar to the US Criminal Code, French law does not incriminate pseudo-child pornography, but places the question of whether or not this type of child pornography is punishable in practice on the evidentiary level; the option thus reconciles the competing interests at stake, on the one hand, the individual's particular interest in privacy and freedom of expression, and, on the other hand, society's overriding interest in preventing and combating the use of minors for sexual abuse or exploitation, and in protecting their dignity and privacy.

It is noted that this option of criminalisation is also consistent with the view of the legislator in the United States of America and France on placing the offence of child pornography mainly in the spectrum of social relations relating to birth and protecting minors from prohibited conduct.

In contrast, the legislation of the Kingdom of the Netherlands mainly protects social relations relating to birth and the development of collective morality in the sense of the repugnance of the conduct contained in child pornography, while the legislation of the Kingdom of Belgium had the same vision until the legislative amendment in 2022, but subsequently kept the offence in the sphere of these social relations only in a subsidiary manner.

Thus, we note that the criminalisation of virtual child pornography and pseudo-child pornography is closely related to these states' view of the social relations affected mainly by the specific conduct of child pornography.

We have also found that some regulations on virtual child pornography, as well as their interpretation and application in practice, such as the legislation of the United States of America and the Kingdom of the Netherlands, offer a high standard of predictability of the rule, such as to significantly limit the power of interpretation and discretionary application of the judiciary, in accordance with the principle of legality of incrimination *nullum crimen sine lege* and its component *lex certa*.

As art. 2256 of the US Criminal Code is worded, and as art. 240b of the Dutch Criminal Code is interpreted in case law, with regard to virtual child pornography, the standard „indistinguishable from the image of a minor“ could also be used to reformulate the precept of criminalisation of pseudo-child pornography.

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<sup>51</sup> See Report provided by the Research Service of the European Parliament, November 2020, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659360/EPRS\\_BRI\(2020\)659360\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659360/EPRS_BRI(2020)659360_EN.pdf), accessed on 10.05.2024.

<sup>52</sup> For example the Clearview AI tool, offered by a US start-up of the same name, further information is available at <https://www.clearview.ai/contact>, accessed on 10.05.2024.

<sup>53</sup> See press release posted on 09.12.2023 on the European Parliament's website, <https://www.europarl.europa.eu/news/ro/press-room/20231206IPR15699/artificial-intelligence-act-deal-on-comprehensive-rules-for-trustworthy-ai>, accessed on 10.05.2024.

<sup>54</sup> See, press release issued on 16.04.2024 by Congressman Nick Langworthy, <https://langworthy.house.gov/media/press-releases/congressman-langworthy-introduces-legislation-combat-use-artificial>, accessed on 10.05.2024.

We state this because the standard „adult person appearing to be a minor” used for child pornography has different perspectives of interpretation<sup>55</sup>; one in which criteria extrinsic to the physiognomy, somatic features and secondary sexual characteristics<sup>56</sup> of the person depicted are used, the other in which the assessment is based strictly on the latter criteria (physiognomy, somatic features, secondary sexual characteristics).

Thus, according to the first variant, accessories or style of dress or hairstyle suggesting the idea of a minor, such as a school uniform, braided pigtails, a Barbie doll/schoolbook in hand, a backpack on the back, etc., could be traced, perhaps complementing a shy or playful attitude, independently of the visibly mature physical appearance of the person depicted, in order to characterise the material as child pornography.

In contrast, the other option only includes in the classification of this type of child pornography elements related to physical appearance, such as an adolescent face, the presence of facial acne, visibly immature somatic features, lack of facial or pubic hair or the onset of such hair.

It should be pointed out that even in the latter variant, subjectivity is not excluded in assessing the appearance of minority, especially in situations where we are talking about young adults whose physical appearance is close to that of a 16-17 years old minor, bearing in mind that the transition to adulthood is natural, gradual and relatively imperceptible.

This degree of subjectivity can make the difference between a conviction and an acquittal, with all the legal consequences that entails.

Therefore, we believe that the competing interests at stake can and must be reconciled in a fair manner, the desiderata being greater predictability of the law, respect for the principle of *ultima ratio* and proportionality between the means and the end, and the degree of adequacy of the means to the objective pursued.

In our view, this reconciliation can be achieved by reformulating the provisions criminalising child pseudo-pornography by reference to the following *standard*: the image of a real adult, whether or not digitally distorted, so that it is indistinguishable by itself from that of a prepubescent or pubescent minor engaged in sexually explicit conduct by an ordinary observer without close scrutiny.

The reference to a prepubertal or pubertal minor leads to an exclusive analysis of the physiognomy, somatic features and secondary sexual characteristics of the person represented, and the degree of differentiation from a minor at the age of majority is higher, thus reducing the judge's margin of discretion.

Thus, we would remove the ambiguity as to whether or not the criterion of physiognomic image is exclusive in determining whether the minor is a minor, the subjectivity of distinguishing a minor teenager from a young adult, and we would protect the image and prevent frivolous sexualisation and the generation of a subculture of promoting sexual abuse or sexual exploitation of the most vulnerable minors, while respecting freedom of expression and the privacy of the individual; we would have a necessary compromise for the simultaneous protection of competing interests.

Logic and consistency in regulation would oblige us to limit virtual child pornography - realistic images of a non-existent minor - to the same category of minors, prepubertal or pubertal.

Of course, a note of subjectivity would still persist when the judge has to analyse and respond to a defence by the defendant that, in his opinion, the real adult or fictitious minor depicted in the picture does not appear as a pubertal minor, but as a minor on the verge of majority, say 17, thus invoking a factual error.

However, as has been crystallised in the ECtHR case-law<sup>57</sup>, because of the general nature of laws, their wording cannot be absolutely precise, and more or less imprecise formulas are necessary in order to avoid excessive rigidity; equally, the foreseeability of the law does not preclude the person concerned from seeking the advice of experts in order to assess, to a reasonable extent in the circumstances of the case, the consequences which might result from a given act.

Of course, in the context of this proposal, the adulthood or imaginary character of the person represented would fall to the defendant, as provided for in US law, since he is certainly in a better position than the prosecutor in this respect.

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<sup>55</sup> The conclusion is all the more obvious in wording such as that used in art. 374 para. (4) CP for child pseudo-pornography, according to which *pornographic material* means any material that *presents* a person of legal age as a minor engaging in sexually explicit conduct; the term „presents” *prima facie* leads us to think of a context detached from the mere physiognomy of the person represented in that material.

<sup>56</sup> In the literature, secondary sexual characteristics are understood to mean in girls – the appearance of pubic hair and mammary development, respectively the appearance and dimensions of the testicles, penis and pubic hair in boys; for details, see D. Navolan, D. Stoian, M. Craina, *Sexologia de la A la Z*, 2<sup>nd</sup> ed., Victor Babeş Publishing House, Timișoara, 2020, p. 21.

<sup>57</sup> ECtHR, Case *Cantoni v. France*, para. 31, 35, *supra*; Case *Kokkinakis v. Greece*, judgment from 25.05.1993, para. 40, <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%7B%22001-62384%22%7D%7D>, accessed 09.05.2024.

A final point should be made here, namely the need for multidisciplinary studies to prove or disprove the existence of a serious link between the creation and possession of virtual child pornography or pseudo-pornography and the sexual abuse of children, as there are relevant voices<sup>58</sup> arguing that criminalising such conduct would actually reduce the consumption of actual child pornography with real minors; the answer to such a question needs to be provided, as important competing interests are at stake, such as freedom of expression and individual privacy, and on the other side a concept, also important for the development of a modern and robust society, but volatile over time - collective sexual morality.

On the other hand, we have noted the extent of child pornography in the electronic environment, especially virtual child pornography, and the challenges posed by the use of artificial intelligence in the creation of such content.

In this respect, the direction of action is to integrate as a way of working in this kind of cases AI tools, capable of analysing, classifying and reporting, in a much shorter time and with greater accuracy, a volume of data incomparably superior to human capabilities; it would also be necessary to involve the providers of online platforms and services, which can host and propagate such illegal content, for proactive detection using AI technology.

The sheer volume of material circulating around the world makes a reactive approach to the phenomenon, by investigating after the fact cases of child pornography in digital format, ineffective and implausible; the thesis is all the more eloquent because, at present, a major shortcoming is the lack of a standardised classification<sup>59</sup> of the content of child sexual abuse material between the various parties involved in the process of preventing and combating child pornography - law enforcement agencies, non-governmental organisations, companies in the AI industry. Such a shortcoming also affects the effective cooperation between public and private partners in several countries.

Thus, a unified approach to the problem is needed from both a legislative and administrative point of view from developed countries in order to reduce as much as possible the causes of the proliferation of this scourge.

Finally, we stress the importance of following the future legal instruments at international level, especially at the EU and US level, for regulating the use of AI, mentioned above, in order to analyse and assess, to a reasonable extent, the impact and effectiveness of these regulations in combating child pornography online, but the subject will probably be reserved for a future study.

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<sup>58</sup> See: F. Morales Prats, *Los ilícitos en la red(II): pornografía infantil y ciberterrorismo*, in *El cibercrimen: nuevos retos jurídico-penales, nuevas respuestas político-criminales*, Comares, Granada, 2006, p. 294, apud M. Angel, B. Pasamar, *op. cit.*; K.S. Williams, *Child Pornography Law: Does it Protect Children?*, *Journal of Social Welfare and Family Law*, 2004, p. 245-261, apud M. Eneman, A.A. Gillespie, B.C. Stahl, *op. cit.*

<sup>59</sup> See Report provided by the European Parliament Research Service, November 2020, *supra*.

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