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"Pornographic content related to presentation of violence" - art. 202 § 3 of the Criminal Code (Poland)

Polish Criminal Code (CC) in the article 202 § 3 states that: "Whoever, in order to distribute produces, preserves, or imports, stores or owns or distributes, or publicly presents pornographic materials involving minors or **pornography related to presentation of violence** or the use of an animal is punishable by imprisonment from 6 months to 8 years." This article concerns the so-called "hard pornography", which cannot be produced for distribution, recorded, imported, nor can it be stored, it also may not be the subject of ownership, shall not be distributed, or cannot be publicly presented. We are interested in only a special kind of "hard pornography", which in its content includes elements of pornography and violence. A problematic issue in literature is the very notion of pornography – that is how to distinguish pornographic content from erotic one?¹

Article 202 § 3 contains the term "**pornography related to presentation of violence**". Early records of the Code used the phrase "**with the use of violence**", which was used by producers of pornographic films, because the form could be classified as "hard pornography" when there was genuine violence². An extreme example of actual use of violence would be films

¹ R. Góral, *Kodeks karny. Praktyczny komentarz*, WZPP, Warszawa 1998, p. 274; L. Gardocki, *Pravo karne*, C.H. Beck, Warszawa 2002, pp. 249 – 250; J. Warylewski, *Przestępstwa przeciwko wolności seksualnej i obyczajności. Rozdział XXV Kodeksu karnego. Komentarz*, C.H. Beck, Warszawa 2001, pp. 202 – 218; G. Hawkins, F. E. Zimring, *Pornography in a Free Society*, Cambridge University Press, Cambridge 1991, pp. 20 – 29. See also the: Supreme Court Judgment of 23 November 2010 (IV KK 173/10, LEX No. 667510) and the thesis of M. Derlatka in: M. Derlatka, *Definicja pornografii a zasada nullum crimen sine lege*, "Prokuratura i Prawo" 2005, No. 11, pp. 147 – 150.

² J. Warylewski, *op. cit.*, C.H. Beck, Warszawa 2001, pp. 190 – 231, B. Kunicka-Michalska, J. Wojciechowska, *Przestępstwa przeciwko wolności seksualnej i obyczajności oraz czci i nietykalności cielesnej. Rozdziały XXIII, XXIV, XXV i*

of the "snuff" type – films presenting actual scenes of murder or rape. Other examples can be films of the "gore" type (films saturated with brutality, often horror movies with huge amount of blood and various human viscera, movies, often showing subtle sexual deviations).

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It is easily seen that with advanced technology it is difficult to state if the used form of violence is authentic, which is not necessarily understood by the recipient of "hard pornography". The development of computer technology has facilitated the usage of special effects, which in the past were possible to use only by standard film studios, for a wider group of people³. Hence the production of pornographic films may not only be based on simple and aesthetically questionable forms such as "gonzo", "POV" or films maintained on purpose or not in the style of "amateur".

Under article 202 § 3 of the CC classification of the pornographic content of BDSM type or rape scenes becomes problematic. In general, the problem of "reality" of the scenes or consent of the actor on violence against him/her should be stressed. There is no doubt that the word "use" indicated narrower interpretation and applicability of art. 202 § 3 of the CC than the word "presentation". In this case, the application by the legislative of the phrase "presentation of violence" aimed at elimination of forms which would imply a sense of tolerance for acts within the scope of "sexual violence"⁴. Moreover, the recipient of the "hard pornography" does not need to be aware about authentic or simulated violence – it is enough for the film just to look this way. Hence it should be concluded that the legislator had wider objectives for enhanced penalisation of "hard pornography", which include among others eliminating a sense of permission for acts of violence. The current wording "presentation of violence", present in art. 202 § 3 of CC, prohibits presentations of played by actors scenes of violence, which means that a vast number of available on the web videos and graphics have characteristics described in the art. 202 § 3 of CC. There should be a question asked concerning the sense of creating law, the executability of which is limited, at least due to advanced technologies or possibility for effective prosecution implemented by relevant services.

XXVII Kodeksu karnego. Komentarz, C.H. Beck, Warszawa 2001, pp. 126 – 127, M. Mozgawa in: M. Mozgawa (ed.), *Kodeks karny. Praktyczny komentarz*, Wolters Kluwer, Warszawa 2010, p. 423.

³ Thus, in the judgment of the Supreme Court of 23 November 2010 (IV KK 173/10, LEX No. 667510) it is pointed out that: "The term >>pornography connected with presenting violence<< as used in art. 202 § 3 CC covers also acted by actors scenes of violence associated with the content as referred to in the above mentioned provision, as well as scenes of this kind produced by a variety of other visualization techniques."

⁴ Doubts about the changes in art. 202 § 3 CC including in: B. Kunicka – Michalska, *Przestępstwa przeciwko wolności seksualnej i obyczajności popełniane za pośrednictwem systemu informatycznego*, Ossolineum, Wrocław 2004, pp. 100 – 101.