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ONLINE CHILD PORNOGRAPHY: THE ITALIAN COURT OF CASSATION CONSIDERS IT ILLEGAL WHEN IT IS ALSO SHARED ON FACEBOOK

Art. 600-ter of the Italian Penal Code concerning child pornography is also applied when pornographic material is shared on Internet profiles with limited visibility.

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The Internet allows data transfer and sharing almost immediately between people living in every part of the planet. Because of the enormous quantity of such data, not all stored and shared material can be controlled, thus leading to an increase in criminal phenomena on the web.

Online child pornography has been detrimental to the web for a long time and the acts for child protection have always been insufficient.

Art. 600-ter of the Italian Penal Code (3rd August 1998, n. 269 and later changes) deals with the crime of child pornography, inflicting the same penalty (1) on the following kinds of behaviour towards children below the age of eighteen years:

production for pornographic performances, i.e. production of pornographic material; **recruitment or inducement** to take part in pornographic performances, thus **making a profit** from them; **commercialisation** of pornographic material.

Those who **distribute, spread or promote** pornographic material through any medium, i.e. **spread news or information aimed at solicitation or sexual exploitation** of children below the age of eighteen years, are subject to a reduced penalty.

Art. 600-quater of the Italian Penal Code opens with a reservation clause and punishes the **possession of pornographic material, whose quantity, if large**, can be considered as an aggravating factor.

The law 6th February 2006 n. 38 founded the "**National Centre for the fight against child pornography on the web**" to fight against this horrible crime. The Centre is connected with the Italian Postal and Communications Police Service of the Department of Public Security and it deals with the prevention and suppression of such crimes. The Centre monitors and searches for illegal virtual spaces in which pictures and videos of abused children are offered. After monitoring and talking to other institutions, including international ones, a **blacklist** of pornographic websites is given to the Internet Service Providers in order to block their navigation through specific filtering techniques.

The same law introduced the **Observatory for the fight against paedophilia and child pornography** at the Italian Presidency of the Council of Ministers to monitor the phenomenon for the institutions interested in children issues, including judicial organs and social services.

Interpol and Europol assist police forces daily in order to identify the victims of child pornography, wherever they live.

Despite numerous attempts of legal adaptation and modernisation, the acts available to stop this horrible phenomenon always reveal to be insufficient.

To make matters worse, the number of youngsters having profiles on social networks and mobile messaging apps has increased in 2015. **75%** of minors have a **Facebook** account and almost **60%** of them have a **messaging service on their smartphones**. As a result, the solicitation of the child is made easier, since criminals can create fake accounts (thus introducing the crime of identity theft).

The Italian Court of Cassation (**sentence 16340/2015**) has recently claimed that the use of social networks may lead to the crime of online child pornography, thus confirming the conviction of a man accused of aggravated sexual violence and child pornography to the detriment of a minor.

The third penal section did not consider the defence for the accused as valid. Based on the non-existence of the crime ex art. 600-ter par. 1, the defence stated that "the accused neither intended to spread pornographic material to an undefined number of pedophiles nor did he use an organisation, not even at an early stage". The accused claimed that he shared pornographic pictures of the minor victim only to satisfy his sexual desires and not to share pornographic material with other pedophiles.

The Italian Supreme Court maintained that "the crime of child pornography is a **concrete crime of danger**". "The system prepares **penal protection for the minor's sexual freedom**, thus repressing those prodromal phases of behaviour which, even if they are non-profit, put children's personal development at risk through the commercialisation of their bodies and their introduction in the perverse world of paedophilia", as taught by the joint sessions in the sentence 31st May 2000 n.13; therefore, the crime exists when "there is a real danger of spreading pornographic material". **The judge must verify such danger** by considering different elements, among which the joint sessions include the existence of an organisation, even a rudimentary one, "which aims at satisfying pedophiles' market needs" and "the availability of technical instruments for the production and/or transmission of pornographic material to a large number of addressees". In the next law of this section, the existence of the crime is determined by a real danger of spreading pornographic material (Italian Court of Cassation, sec. 3, 21st January 2005, n. 5774; Italian Court of Cassation, sec. 3, 1st December 2009, n. 49604) to a large number of people (Italian Court of Cassation, sec. 3, 20th November 2007 - 14th January 2008, n. 1814) and a potential use of such material by third parties (Italian Court of Cassation, sec.

3, 11th March 2010, n. 17178; see also Italian Court of Cassation, sec. 3, 5th June 2007, n. 27252).

The Court confirms that the popularity of a social network like Facebook prevents the judge from verifying the real danger of transmitting pornographic material to an undefined number of users. In particular, "posting pornographic material to the wall of an account favours its spread. The immense circle of pedophiles cannot be identified among a large and mixed audience like that of Facebook, therefore such material can easily reach them".

Consequently, the Italian Court of Cassation decided that **the crime of child pornography should also be applied to cases in which pornographic material is shared on profiles with limited visibility** in order to reduce the crimes that have not been punished over the years. However, it is worth thinking about the fact that in the Italian system the legislator (and not the judicial organs) should be in charge of adapting the law to the changing reality.

(1) Art. 600-ter of the Italian Penal Code

^[1]. The following kinds of behaviour shall be punished by imprisonment from six to twelve years and by a fine from 24,000 to 240,000 euros:

- 1) use of children below the age of eighteen years to produce pornographic material;
- 2) recruitment or inducement of minors to take part in pornographic performances, i.e. make a profit from such performances ^[600-septies, 600-septies.1, 600-septies.2, 602-ter].

^[2]. Those who buy and sell pornographic material mentioned in the first paragraph are subject to the same penalty.

^[3]. Besides the cases mentioned in the first and second paragraphs, those who distribute, spread (3) or promote pornographic material through any medium, i.e. spread news or information aimed at solicitation or sexual exploitation of children below the age of eighteen years, are punished by imprisonment from two to five years and by a fine from 2,582 to 51,645 euros ^[600-septies, 600-septies.1, 600-septies.2, 602-ter].

[IV]. Besides the abovementioned cases in the first, second and third paragraphs, those who offer or give pornographic material to others, even for free, are punished by imprisonment up to three years and by a fine from 1,549 to 5,164 euros ^[600-septies, 600-septies.1, 600-septies.2, 602-ter, 609-decies, 734-bis].

[V]. If there is a large quantity of pornographic material, the penalty increases, but it does not overcome two thirds.

[VI]. Unless the crime is more serious, those who attend pornographic performances involving minors are punished by imprisonment up to three years and by a fine from 1,500 to 6,000 euros ^[600-septies, 600-septies.1, 600-septies.2].

[VII]. For the purposes of this article, child pornography can be defined as the representation, through any medium, of a minor involved in explicit, real or simulated sexual activities or any representation of a minor's sexual organs for sexual purposes.
