

The Notion of Profit in Child Pornography

by Georgia Kiosi

translated by Nanci Rapti

With the introduction of law 3064/2002 and Section 348A of the Greek Penal Code (GPC), the legislator attempted to solve the problem of the more and more increasing child pornography, because through the current technological means and especially internet the development of this phenomenon can be facilitated within the limits of crime in cyberspace or electronic crime previously.¹ However, one could not characterise the effort of the Greek legislator as particularly effective, since there were problems shortly after the enactment of the provision because of its wording.

One of the problems derived was the use of the term 'profit' in the first paragraph of the above Section. But what does 'profit' mean and what is the role of the term in this case? As far as the meaning of this term is concerned, both jurisprudence² and legal theory³ concur that when a crime is committed for profit, then the offender intends to obtain illicitly gains, which are mainly translated as money, not necessarily continuously, but also occasionally. The following may be principally considered as ways for gaining profit: in cases where internet is not related, the gain is succeeded through the sell for money, while in the internet cases, either through access for money or commercial utilisation of the flow of websites' visitors with similar content (traffic trading).⁴

However, there have been expressed various views on the above Section regarding the role of profit. Thus, there are legal theorists who endorse that the crime of pornography is a crime of tendency⁵ or will and consequently is placed among crimes of ulterior intent.⁶ Conversely, for others, profit in general does not belong to the crime's *mens rea*, i.e., it does not constitute an extension of 'fault' or an existential element of it, but it belongs to 'guilt', namely the final disapproval of the offender's will.⁷ Consequently, it becomes evident that the incorporation of profit into Section 348 A⁸ GPC led to a conditional protection of juveniles, because the offender

is not punished if he does not aim at gaining profit through child pornography; in other words, he is not punished because he violated a legal interest but because he speculates.

Recently Greece decided to comply with the international duties as they derive from the legal texts within the frames both of EU and UN.⁹ Thus, on 22/11/2007 a draft law was brought before Parliament (which was later adopted as law 3625/2007) for the amendment of certain articles of GPC, including article 348A. After the above amendment, the element of profit is not included anymore in Section 348A. Thus, in this way, the legal interest of juvenility is probably better protected and the relative discussion on the confluence of other offenses with the crime of 348 A GPC is possibly facilitated.

Endnotes

¹ Regarding terminology used see M. Kaifa-Gbandi M., *Criminal Law and Informatics Abuse (Ποινικό Δίκαιο και καταχρήσεις της Πληροφορικής)*, Armen 2007, p. 1061 et seq. and D. Κιουρι, *Electronic Economic Crimes (Ηλεκτρονικά Οικονομικά Εγκλήματα)*, in N. Kourakis, 'The Economic Crimes II Special Part' («Τα Οικονομικά Εγκλήματα II Ειδικό Μέρος»), Ad. N. Sakkoula Pub., pp. 405 et seq.

² See Greek Supreme Court 942/2005, (2006) *Poinika Chronika*, p. 52; Council of Justices to the Misdemeanours Penal Court of Athens 2826/2004, (2005) *Poiniki Dikaiosyni*, p. 960, Greek Supreme Court 1320/1988 *Poinika Chronika* 29, p. 245, Greek Supreme Court 950/1984 *Poinika Chronika* XXXIX, p. 145.

³ See G.-A. Magakis, 'Crimes about sexual and family life; dogmatic research according to our penal code', («Τα εγκλήματα περί την γενετήσιον και οικογενειακήν ζωήν: δογματική έρευνα κατά τον ημέτερον ποινικόν κώδικα») Sakkoula Pub., Athens, 1967, pp. 107-109, K. Gardikas, 'Crimes against morals' («Εγκλήματα κατά των ηθών»), *Poinika Chronika* II, p. 211; Ag. Bouropoulos, 'Interpretation of Penal Code' («Ερμηνεία του Ποινικού Κώδικος»), Athens, 1993, p. 606, Char. Moraitis, "Reflections and Problems on provision of article 347 of Penal Code" («Σκέψεις και Προβληματισμοί σχετικά με τη διάταξη του άρθρου 348Α ΠΚ»), *Poinika Chronika*, p. 489 et seq.

⁴ G. Nouskalis 'Child Pornography: Critical Issues of article 348A GPC' («Πορνογραφία ανηλίκων: Τα κρίσιμα ζητήματα του άρθρου 348^Α ΠΚ»), (2006) 7 *Poiniki Dikaiosyni*, pp. 908 et seq.

⁵ See G. Karanikolas, ‘Child pornography on the internet; reflections on the new provision of article 348 A GPC’ («Παιδική πορνογραφία στο διαδίκτυο: προβληματισμοί γύρω από τη νέα ρύθμιση του άρθρου 348^A ΠΚ»), (2005) *Poiniki Dikaiosyni*, p. 968.

⁶ See G. Nouskalis, *op. cit.* For the notion of superflus subjective nature see E. Sumeonidou-Kastanidou & revised by M.Kaifa- Gbandi, I. MANOLEDAKIS; CRIMINAL LAW, NUTSHELL OF GENERAL PART, Thessaloniki; Sakkoula), (2005).

⁷ See I. Manoledakis, ‘Criminal Law, General Theory’ («Ποινικό Δίκαιο, Γενική Θεωρία»), Sakkoula Publications, Athens, pp. 325 et seq.

⁸ Decision-Framework 2004/68/JHA of EU of 22nd December 2003 of Council of Europe on combating sexual abuse of children and child pornography.

⁹ Convention on the Rights of the Child (20th November 1989), Optional Protocol to the Convention on the Rights of the Child of 25th of May 2003.