



## Understanding Criminal Liability for Pornography in Cyberspace Based on the Pattern of Distribution

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### **Abstract:**

*The purpose of this research is that criminal liability for the distribution of sexual intercourse videos cannot be imposed directly on the actor or perpetrator. This is because Law Number 44 of 2008 does not criminalize the act of recording and storing videos of sexual intercourse for personal use. The research method used in this research is a normative research method with a statutory approach, namely by examining all laws and regulations related to the legal issues discussed. Clarified by using a case approach, namely examining other similar cases related to the legal issues being studied. The results of this study Regarding the criminal liability of the actor of the sexual intercourse video scene must be based on proving his guilt in the series of events spreading pornography in the form of a video so that it is believed to be legally subject to punishment. Is it true that the maker wants the pornography in the form of video to be spread to the public space either between electronic media and social media or not at all.*

**Keywords:** Criminal Liability; Sexual Intercourse; Videos; Actor; Pattern.

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## Introduction

In a world with a series of changes and processes that take place continuously, humans are the main actors. Sometimes it is said that way, sometimes it is the opposite, human life is greatly influenced by these changes. This is an answer that can be understood because, in a changing world, science is increasingly developing and advancing rapidly and widely, which in turn gave birth to various new discoveries in the field of technology and information in the 20th century, especially after the Second World War. The changes supported and driven by the winning countries of the Second World War had a global impact. Countries such as America, France, England and their allies, which brought the concept of liberalism, became a state model that was followed by many countries that had just escaped the trap of colonialism, imperialism and became independent (Santoso 2023).



Openness is considered an absolute characteristic and prerequisite that must be adhered to by countries in the world to lead a progressive life in various sectors. At the same time, technological advances influence modern ways of thinking and lifestyle. Basic technology was created to improve the quality of life and encourage the effectiveness and efficiency of human activities. Apart from the positive side, technology also has a negative side. In several studies, the increase in crime is closely related to technological advances. Dependence, negligence, lack of understanding or deliberate use of information technology, if not balanced with a positive mindset and attitude, will have a negative impact.

The Internet is one of the results of advances in information technology created at the end of the 20th century. The US National Supreme Court defines the Internet as an international network of interconnected computers, or an international network of computers that are interconnected so that they can cross the territorial boundaries of a country. Technological progress has now reached all groups of society without exception. This affects the increasingly developing side of society. Likewise, modern society's perspective regarding the laws that apply in its place. The use of the internet has formed a new world society that is no longer hindered by the territorial boundaries of countries that were previously considered vital, namely cyberspace, a borderless world and virtual reality. Reality this is what is called cyberspace.

According to Howard Rheingold (Howard Rheingold), Cybespace is a fictional space or virtual space, it is man-made, and everyone uses new ways to do things that are usually done in everyday social life. As Hubermas said, cyberspace has turned into a public domain. The internet has become a public discussion medium, and can open various topics to everyone without any restrictions. The virtual world has also changed human activities that were previously carried out in real life. E-mail, web blogs, chats, the emergence of webcams to Facebook and Twitter, then e-learning, e-commerce and e-banking have become new media for real activities (Putra 2022).

These facilities are good things that exist as a result of the development of the internet world. As mentioned before, where there is a good side, there will be a bad side. The bad side or impact of the internet is what can influence people to do criminal things. According to Andi Hamzah, technological developments always have a direct negative impact and will greatly influence every attitude and psychological attitude towards members of society. Technology is two-sided, on the one hand it has brought



enormous benefits to humanity and marked the progress of society, but on the other hand it has also made things easier and even expanded the scope of crime on a global scale. From a criminological perspective, technology can be said to be a criminogenic factor, namely a factor that causes people to want to commit crime or encourage crime. Misuse of information technology or its negative impact on the development of information technology through computerized systems and internet networks is called "cybercrime".

An example of the negative impact of the development of cyberspace is the dissemination of electronic information whose contents violate the norms of decency, especially pornographic videos of action, this causes serious concern from all levels of society, from government circles, legal officials, and the general public. One of the cases that has been widely reported in various media and has also become the subject of public discussion on social media is the case of recording and saving videos of sexual relations involving one of the well-known public figures in Indonesia in the first third of November 2020. It is also known that there have been reports by several party to Polda Metro Jaya to find out the cause of the video. The reporting party also demanded that the actors in the video be charged criminally. Polda Metro Jaya once revealed that actors in videos or perpetrators in videos could be subject to the Pornography Law. In preventing and eradicating crimes, the distribution of electronic information whose contents violate moral norms, especially action pornographic videos, has been regulated in various laws and regulations with different punishment qualifications. It is necessary to study the application of this rule from both material law and formal law, and we must also pay attention to how legislators formulate prohibited actions (Ayuningtyas 2021).

Even to give the public the right to use information and communication technology, it is still necessary to formulate rules that limit the inherent use and sanctions of these rules, so that the law is strong and mandatory. Of course law enforcement and general objectives cannot be separated, namely upholding order and justice in accordance with LJ Van Apeldorn's advice, according to him the aim of law is to maintain public order.

## Method

As normative legal research with a statutory regulation approach (statute



approach), namely by examining all statutory regulations related to the legal issues being discussed. It is clarified by using a case approach, namely examining other similar cases related to the legal issue being studied. And a conceptual approach, namely drawing on legal concepts that are relevant to the legal issue being studied. The nature of the research used in this legal study is descriptive. Descriptives can be seen from the questions that will be discussed, namely regarding how legislation regulates perpetrators in action porn videos spread on various social media. The data the author uses is primary data and secondary data (Benuf and Azhar 2020).

## Discussion

### 1. Overview of Pornography

Nowadays, the use of internet networks via computers, smartphones or tablets is not only aimed at gaining personal benefit and convenience in a positive sense but also in a negative sense. Often the internet network is used as the main means to carry out an act that violates laws, rules or regulations, where the act is carried out intentionally and driven by various motives and objectives.

In its development, this kind of action is called Cybercrime. The term was used during the 10th United Nations Congress on Crime Prevention and the Treatment of Offenders, Information Technology Association of Canada (ITAC) at the International Information Industry Congress (IIIC) 2000 Millennium Congress in Quebec on September 19, 2000. Then in November 1996, the "European Committee on Crime Problems" (CDPC) used the same term as the title of a draft agreement published in April of that year, namely the Draft Convention on Cyber-crime (Gunawan, Sugiarta, and Karma 2021).

In the draft, in the chapter "Substantive Criminal Law", one type of cybercrime involving Content-related offenses is included, one of which is an offense related to erotic or pornographic material (excluding child pornography).

In May 2001, the final draft of the convention and its Explanatory Memorandum (i.e. draft No. 27.Rev) was successfully prepared which was submitted for approval to the CDPC at its 50th meeting (on 18-22 June 2001. On 23 November 2001 in Budapest, Cybercrime This convention was finally signed by 30 countries. This means that countries in the world agree that the act of disseminating content



containing pornographic material is an act that cannot be tolerated (Mutmainnah 2021).

In Indonesia, the regulation of pornographic material is subject to various laws and regulations, as an act that violates morality. The application must be contextualized with the series of events objectively. In this article, the author only focuses on the spread of videos of sexual relations, where the perpetrator is thought to be a public figure. So it's not through social media based on live streaming video. To find out who can be criminally responsible, according to the author, there are two laws that will be used by law enforcement officials. Namely Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Electronic Information and Transactions and Law of the Republic of Indonesia Number 44 of 2008 concerning Pornography.

## **2. Criminal Responsibility for the Distribution of Pornography**

Responsibility, in Dutch is called *toerekenbaarheid*, in English criminal responsibility or criminal liability. Roeslan Saleh said with the term "criminal responsibility", while Moeljatno expressed "responsibility in criminal law", more legal experts call it "criminal responsibility".

In terms of legal philosophy, Roscoe Pound explained that: I..use simple word "liability" for the situation whereby one may exact legally and another is legally subjected to the exactation. (Liability for the situation where one may legally and the other is legally subject to the exclusion). Simons said the ability to be responsible can be defined as a psychological condition that can justify the implementation of the law of probation from a human and overall point of view. He also said that a criminal offense can be charged in the following situations: First, he can know/realize that his actions are illegal. Secondly, one can determine one's will based on this awareness (Puspitorini 2020).

In contrast to Simons, Van Hamel states that the ability of responsibility is a state of normality of psychological maturity that brings three kinds of abilities, namely understanding the consequences of one's actions, understanding that society does not allow his actions and being able to determine his will to act.

Pompe provides an understanding of criminal responsibility in the following aspects, namely thinking about the ability of the perpetrator to control his own mind and



determine his own will, the perpetrator can understand the benefits and effects of his behavior, and the perpetrator is able to use his own opinion (about the meaning and consequences of behavior) to determine his will. In the field of criminal justice, if the defendant cannot prove that he had a "defense" at the time of committing the crime, he is held responsible for his criminal behavior.

Criminal responsibility regarding negative actions has been explained in the Criminal Code, especially in Article 44 and Articles 48-51. The articles that have been described previously are articles that contain exceptions from the imposition of punishment. To exclude criminal coercion here means to exclude criminal responsibility. In some cases, this may mean problem solving. Negatively establishing criminal responsibility, especially in terms of the suppressive function of criminal law. In this case, being responsible to the person in criminal law means law.

In conclusion, criminal responsibility is a necessary condition for imposing punishment on criminal offenders. At the same time, based on the idea of monism (*daad en dader strafrecht*), due process in imposing criminal law, in addition to taking into account the interests of the individual, also looks at the interests of the perpetrator. The process depends on whether the conditions of punishment and the realization of these conditions, therefore if the criminal act is punished, it is legal (Yanti, Mangku, and Kertih 2023).

The criminal law in Indonesia does not regulate in what capacity a person can be held accountable for the distribution of pornography in cyberspace. The punishment that will be given to the wrongdoer, whether criminalized or not, depends on the wrongdoing. This is because the principle that applies to criminal liability is "no punishment without fault" (*Geen straf zonder schuld; Actus non facit reum nisi mens sis rea*) which means: "the assessment of criminal responsibility is directed at the inner attitude of the perpetrator, not the assessment of his behavior." Likewise, the criminal liability of actors or perpetrators in pornography in the form of immoral videos or photos that are spread, needs to be determined with strict limits on the form of guilt so that it can be subject to punishment. Is it right to want pornography in the form of immoral videos or photos to be spread in public or in public or not at all.

### 3. Criminal Threats for Spreading Pornography in Cyberspace According to ITE Law





Responding to the pattern of criminal acts in crimes committed through social media or media connected to the internet, it has been regulated through Law Number 11 of 2008 concerning Electronic Information and Transactions (hereinafter referred to as ITE Law) which has been changed to Law Number 19 of 2016 concerning Electronic Information and Transactions which has the aim of utilizing technology so that it is better used according to laws and regulations.

As also explained earlier that one type of Cybercrime is the act of spreading content that contains pornographic material, whether in the form of images, writings or videos. The Electronic Information and Transaction Law regulates all kinds of criminal acts committed by following the development of cyberspace, meaning through the use of electronic media as a means of criminal behavior. Although there is no pornography, there is "content that violates decency" (Ayu, Pawennei, and Abbas 2024).

The crime of pornography is actually regulated in Law Number 1 of 1946 concerning Criminal Law Regulations (hereinafter referred to as the Criminal Code) in the second book of Chapter XIV Crimes Against Decency, then more specifically regulated in Law Number 44 of 2008 concerning Pornography (hereinafter referred to as the Pornography Law). However, both laws are unable to accommodate the modus operandi of spreading pornographic content through electronic media connected to the internet.

The regulation regarding the dissemination of information and documents that violate decency through electronic media is specifically regulated in Article 27 Paragraph (1), while the criminal provisions are regulated in Article 45 paragraph (1),

Which is explained again in Article 27 Paragraph (1) which states that:

- 1) What is meant by "distributing" is sending and/or distributing Electronic Information and/or Electronic Documents to many Persons or various parties through an Electronic System.
- 2) What is meant by "transmitting" is sending Electronic Information and/or Electronic Documents addressed to one other party through an Electronic System.
- 3) What is meant by "making accessible" is all other acts other than distributing and transmitting through an Electronic System that cause Electronic Information and/or Electronic Documents to become known to other parties or the public (FARIRA 2024).



Although the explanation of the article mentioned above does not explicitly mention pornographic videos in cyberspace, based on the formulation of Article 27 paragraph (1), it can be used to reach acts whose burden violates the rules. Because this behavior clearly violates the manners of using computers or other electronic media to be carried out via the internet.

What needs to be understood is that the reach of the article does not cover the time when the immoral act occurs, is committed or when it is recorded. Rather, when a person operates in the distribution and/or transmission and/or accessibility of electronic information and/or electronic documents. Therefore, criminal liability is imposed on anyone who, based on digital traces, is proven to have intentionally disseminated the video through electronic devices connected to the internet network. Whether it is done by the perpetrator himself in the video or another person who in some way obtains the video.

#### 4. Legal Threats of the Spread of Pornography in Cyberspace According to the Pornography Law

Criminal provisions in pornography law are regulated in the Criminal Code Article 29 - Article 41 which are related to the issues in this journal which are related to the issue being studied, namely the spread of immoral videos and whether the perpetrator or person in the video recorded and If you save a video of the sexual intercourse and then spread it, can you be held criminally liable or not at all? (Nggeboe and Ibrahim 2022)

This refers to a number of assumptions that the actors or perpetrators in the video are being punished under the Pornography Law. Based on Criminal Law Expert from Trisakti University, Abdul Fickar Hadjar, he revealed that if it is true that the actor or perpetrator in the video is a public figure as the public thinks, then he could be subject to Article 8 which carries a threat of 10 years in prison or Article 9 which carries a threat of 12 years in prison. The threats given to those spreading pornographic content, including via the internet, are regulated in Article 4 paragraph (1) of the Pornography Law, namely:

“Every person is prohibited from producing, creating, reproducing, duplicating, distributing, broadcasting, importing, exporting, offering, selling, renting or providing pornography that explicitly contains:



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- a) Sexual intercourse, including deviant sexual intercourse;
  - b) Sexual violence,
  - c) Masturbation or masturbation;
  - d) Nudity or impressive display
  - e) Nudity
  - f) Genitals; or
  - g) Child pornography."

Violations of article 4 paragraph (1) of the Pornography Law can be punished by punishment as regulated in Article 29 of the Pornography Law, namely:

"Every person who produces, creates, reproduces, duplicates, distributes, broadcasts, imports, exports, offers, sells, rents or provides pornography as intended in Article 4 paragraph (1) shall be punished with imprisonment for a minimum of 6 (six) months and a maximum of 12 (twelve) years and/or a fine of at least IDR 250,000,000.00 (two hundred and fifty million rupiah) and a maximum of IDR 6,000,000,000.00 (six billion rupiah)." (Cayo 2020)

The Pornography Law itself does not explain in detail how to display or misuse the internet to spread pornography, but based on the understanding of pornography in Article 1 point 1, it states that:

*"Pornography is a picture, sketch, illustration, photo, writing, voice, sound, moving image, animation, cartoon, conversation, gesture, or other form of message through various forms of communication media and/or public performances, the contents of which are obscene or sexual exploitation that violates social ethics."*

Based on the author's opinion, the internet and social media are communication tools that can be used to spread pornographic content. To determine whether or not actors or perpetrators in immoral videos can be subject to criminal sanctions, it is not only based on their truth or suitability with public figures as suspected by the public. Not just because the video was spread and had content that clearly violated decency. However, it is based on the reason or purpose of making the video. Because, this law limits itself to what is meant by pornography in video form.



There must be a distinction between the conditions at the time the video was made and at the time the video was distributed. The conditions at the time the video was made were purely the decision of one or both of the actors or perpetrators. Meanwhile, the process of spreading the video is not purely the fault of the actors or perpetrators in the video. However, other people have played a role so that it has spread into public spaces, especially on the internet and social media (Ketaren 2016).

In general, the legal politics behind the birth of the law are to maintain and maintain the orderly life of society, the values and morality of the Indonesian nation from the bad influence of pornography and the negative excesses that arise, especially towards children. In practice, Indonesia is not just a market, user or connoisseur of pornography. Rather, it anticipates and prevents the making of pornographic videos for the purpose of gaining material gain. For example, in 2018 a person named Faisal Akbar was sentenced to 7 (seven) years in prison because he was proven to be the main actor in making pornographic videos involving children for commercial purposes. The resulting video was then sold to buyers from Russian citizens. Currently, there are many international sites that dare to pay for the production of pornographic videos to be used as content for the site.

Therefore, this law limits the meaning of the word "make" as long as the aim is not for commercialization or for making a profit. In the explanation of Article 4, it is explained that interests and themselves are not included in what is meant by "making".

Systematically it must be understood that this explanation is a comprehensive indication that determines the meaning of the following articles in this law. So, if men and women agree to record their own sex videos, and these photos and videos are used only for their own benefit (except as regulated in Article 4 paragraph (1) of the Pornography Law), the creation and storage of the desired content is not included also the scope of "making" as intended in Article 4 of the Pornography Law . If a man or woman takes photos or recordings of sexual relations without the man and woman knowing or without their consent, then making the video violates Article 4 paragraph (1) of the Pornography Law. Consent is a very important part in determining whether there is a violation or not.



## 5. Patterns of the Distribution of Pornography

It is clear that the conditions at the time the sexual intercourse was made or recorded are what most determine whether a person can be found guilty or not. The problem of spreading videos of immoral sexual relations is a different matter. To find out whether the actor or perpetrator in an immoral video or photo can be criminally responsible or not, one must look at the series of events or the process by which the pornography was distributed (Sushanty 2019).

### a. Perpetrators of Dissemination Are Not Pornography Creators

From the beginning, men and women agreed to record their sexual relations to be kept for private collections or personal interests. However, the cause of its spread was not due to the intention or will of the man or woman in the video. Rather, other people are the first to discover the video in a certain way. For example, First, when the first party intentionally accesses or taps the electronic device of one of the actors, whether a smartphone, computer, or hard disk, or other electronic device. Then from this first party, the video was spread to other people until it spread to cyberspace or social media. Or it could be that one of the actors saved the video file on the memory card of a cellphone or smartphone that was lost or stolen. And then, the person who found it or the thief, without any special reason, accessed the contents of the memory and found the video file and then spread it to the public space. In essence, if one of the parties is not found to have evidence of their role and intention in the distribution of the video, then there is no crime against them.

Second, by chance the first party found the video on an electronic device belonging to one of the actors, and without permission, copied the video until it spread to public space. Situations like this are usually caused by negligence by one of the actors or perpetrators in the video. For example, one of the actors, male or female, is conscious and knows that his smartphone contains a video of his sexual relationship with his partner, but gives free access to other people to use the smartphone. Then, the person saw and deliberately copied it without permission and without the knowledge of the owner of the video so that it spread into public space. A concrete example of how this model occurs is the case of Peterpan band vocalist Muhammad Nazril Ilham. He saved the video of his sexual relations with Luna Maya and Cut Tari on an external hard disk, which he knew or at least was aware of the possibility



that he was not the only one who would use the external hard disk. Around July 2006, Muhammad Nazril Ilham gave the external hard disk to Reza Rizaldi with the intention of editing it. However, Reza Rizaldi reproduced the video without Muhammad Nazril Ilham's permission and knowledge. As a result, Muhammad Nazril Ilham was punished for negligence so that the video spread. And not because of the making or recording of his sexual relations with Luna Maya and also with Cut Tari . Although the feasibility and correctness of this decision can still be debated.

b. The Distributor is a Pornography Creator

Even though the creation, recording or taking of pornography in the form of photos or videos is mutually agreed upon from the start, both men and women, it is only for personal gain. It does not rule out the possibility that one of the actors or perpetrators will not distribute the pornography because it is motivated by the risk that follows. Pornography is spread directly by one of the parties on their own initiative and usually because of certain motives and goals that benefit themselves both from a material and non-material perspective. Some of the motives and objectives are as follows:

- a) For sale to international online sites;
- b) Proof of winning a bet with his friend;
- c) Because of hurt feelings;
- d) Due to feelings of resentment over previous disputes;

A concrete example, in March 2020, a man in Mamuju City with the initials WA, had to be held accountable for his actions because he distributed thirteen videos of his sexual intercourse with his girlfriend with the initials A. These videos were recorded and made with the agreement of both of them. It is known that WA's actions were driven by feelings of hurt and did not accept that A would leave her marriage. In this case, WA was guilty not because she had made and saved the video but because she distributed it in public spaces and social media. Even though the actors in the video are WA and her boyfriend A.

## Conclusion

The conclusion can be drawn from the explanation above, namely that the Law of the Republic of Indonesia Number 44 of 2008 concerning Pornography does not



criminalize the act of recording, taking and storing videos and photos of sexual intercourse or sexual intercourse as long as it is for personal use. The dissemination of the video or photo is a different matter. The criminalization can be based on Law No. 19 of 2016 on the Amendment to Law No. 11 of 2008 on Electronic Information and Transactions and also Law of the Republic of Indonesia No. 44 of 2008 on Pornography.

Regarding the criminal responsibility of the actor of the sexual intercourse video scene, it must be based on proving his guilt in the series of events of the spread of pornography in the form of a video so that it is legally believed that he can be subject to punishment. Is it true that the maker wants the pornography in the form of video to be spread to the public space either between electronic media and social media or not at all.

## Recommendation

Based on the conclusions drawn, it is recommended that a clearer legal framework be established to differentiate between the acts of recording, taking, and storing sexual content for personal use, and the act of disseminating such content to the public. The current laws, such as the Law of the Republic of Indonesia Number 44 of 2008 concerning Pornography and Law No. 19 of 2016 on the Amendment to Law No. 11 of 2008 on Electronic Information and Transactions, should be reviewed and possibly revised to provide more explicit guidance on these distinctions. Furthermore, the criminal responsibility of individuals involved in creating sexual content should be carefully evaluated, particularly in terms of their intent and involvement in the dissemination of such content. Legal authorities must ensure that punishment is applied only when there is clear evidence that the individual intended or was complicit in spreading the content to public platforms. This approach would help protect individual privacy while also upholding the law against the unlawful distribution of pornographic materials.

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