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CHILD RIGHT TO PRIVACY AND SOCIAL MEDIA – PERSONAL INFORMATION OVERSHARING PARENTS

Anna-Maria Iskül

B.A. Graduate

**Tallinn University of Technology, School of Business and Governance,
Department of Law (Estonia)**

Contact information

Address: Akadeemia tee 3, Tallinn 12618, Estonia

Phone: +372 53422306

E-mail address: maria.kadastik@gmail.com

Kristi Joamets

Senior Lecturer, Ph.D.

**Tallinn University of Technology, School of Business and Governance,
Department of Law (Estonia)**

Contact information

Address: Akadeemia tee 3, Tallinn 12618, Estonia

Phone: +372 53422306

E-mail address: kristi.joamets@taltech.ee

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ABSTRACT

Many parents (over)share personal details regarding their children in social media without thinking that this can negatively affect the wellbeing of their child and put him/her at risk. Furthermore, parents forget that they are not owners of their children's data but just the legal representatives of the child with an obligation to act only for the best interests of the child. A child's right to privacy and the protection of his/her data is regulated in international,

EU and national level, however, this is not enough to avoid malpractice of the data of a child. This article analyses social media dangers and whether parental actions result in privacy and online safety violations focusing on legal regulations and their interpretations in international, EU and national level exploring child's right to privacy, consent of the child and the right to be forgotten.

KEYWORDS

Child and social media, child's rights, data protection, oversharing personal data, parental responsibility, right to be forgotten

NOTE

This article is based partly on the 1st and 2nd chapter of the graduation thesis of Maria Kadastik "The Protection of the Children on Social Media: Fine as a Possible Solution to Personal Oversharing" defended in January 2021 in Department of Law, School of Business and Governance, Tallinn University of Technology.

INTRODUCTION

The development of technologies plays an essential role in a child's life. Having special status with more protection than others, it is important to analyse how technology impacts these rights and how to protect such rights in the best possible manner. The online future of children depends among other things on the actions of the parents. Many parents (over)share personal details regarding their children without thinking about the consequences for the wellbeing of a child and put their children at risk. Private information about their children enters the digital space often even before the birth of the child. Furthermore, parents forget that they are not owners of their children's data but just the legal representatives of the child with an obligation to act only for the best interests of the child. This demands informed and conscious parental participation when uploading the pictures of their children in social media. However, it is not easy to understand the problem because it depends on too many aspects. Thus, it is essential to analyse social media dangers and parental actions with the data of their children to avoid their privacy and online safety violations.

This article explores the legal aspects of children's personal information oversharing by the parents based on the international, EU and national (Estonian) law, court cases, scientific literature and practice. This research analyses whether the existing legal framework in all aforementioned levels of law is enough to protect the privacy of children in the realm of social media in all of these levels dealing with privacy, consent of the child and the right to be forgotten.

The article begins with a short introduction about how children are connected to the internet and social media, how this can facilitate the offenses against children and how a child's right to privacy can be violated. The next chapter examines the legal issues and viewpoints concerning the protection of child's privacy in social media, consent of the child and the right to be forgotten. In the conclusion the main results are given with suggestions for what should be considered when developing the policies, drafting the law and interpreting the current law to give a child better protection in social media.

1. SHARING A CHILD'S INFORMATION IN SOCIAL MEDIA

There are many threats connected to social media. Every internet user falls under the possibility of encountering various risks, but it is highlighted that children are frequently initial targets of online criminals.¹ Research shows that popularity and

¹ INTERPOL, "Backing Safer Internet Day to promote online safety" (March 2020) //

usage of social media grows with each passing year, the numbers are huge.² That, in turn, could be the reason why crimes against children are facilitated even more. It is reported that ill-intentioned persons already gain easy access to data connected to children, but various social media platforms also provide them with the possibility to get in touch with their future victims directly.³ Consequently, when dealing with questions of social media and children, it is fundamental not to overlook all the associated dangers.⁴

The pattern of online crimes against children has always been similar. Different surveys depict similar results. For example, a study about online threats encountered by children showed that one of the occurring problems is connected to the strangers who tried to approach children.⁵ Moreover, it is stated that such crimes are rising in numbers because of the development of technology.⁶ Already in 1997, it was noted that new appliances in the form of chunky desktop computers opened new possibilities for online predators, who used new technology to contact the children.⁷ Some surveys conducted in the EU affirmed that crimes did make the jump from the physical world to the cyber world. However, that research also noted that it is not possible to grasp the real magnitude of the problem.⁸ According to the data of UNICEF: "Some 80% of children in 25 countries report feeling in danger of sexual abuse or exploitation online".⁹

Often online dangers are caused by the behaviour of the parents by stripping their children of privacy by oversharing personal information about their kids.

<https://www.interpol.int/en/News-and-Events/News/2017/INTERPOL-backing-Safer-Internet-Day-to-promote-online-safety>; Janis Wolak, David Finkelhor, Kimberly J. Mitchell, and Michele L. Ybarra, "Online 'Predators' and Their Victims. Myths, Realities, and Implications for Prevention and Treatment," *American Psychologist* (February-March 2008); Georgia M. Winters, Leah E. Kaylor, and Elizabeth L. Jeglic, "Sexual offenders contacting children online: an examination of transcripts of sexual grooming," *Journal of Sexual Aggression* 23 (2017): 62-64 // DOI: 10.1080/13552600.2016.1271146; Richard Frank, Bryce Westlake, and Martin Bouchard "The Structure and Content of Online Child Exploitation Networks," *ISI-KDD '10: ACM SIGKDD Workshop on Intelligence and Security Informatics* 3 (2010): 1 // <https://doi.org/10.1145/1938606.1938609>.

² See for example Dave Chaffey, "Global social media research summary 2019" (March 2020) // <https://www.smartinsights.com/social-media-marketing/social-media-strategy/new-global-social-media-research/>; Simon Kemp, "Digital 2020: 3.8 billion people use social media" (Jan 2020) // <https://wearesocial.com/blog/2020/01/digital-2020-3-8-billion-people-use-social-media>; Esteban Ortiz-Ospina, "The Rise of Social Media" // <https://ourworldindata.org/rise-of-social-media>.

³ "Social networks: the 5 most common dangers and which actions to take," *Digital Guide IONOS* (Jan 2021) // <https://www.ionos.com/digitalguide/online-marketing/social-media/social-networks-dangers-of-social-media/>; Georgia M. Winters, Leah E. Kaylor, and Elizabeth L. Jeglic, *supra* note 1: 62-64.

⁴ INTERPOL, "Keeping children safe online" (Dec 2020) // <https://www.interpol.int/en/Crimes/Crimes-against-children/Keeping-children-safe-online>; "Online/Internet Safety" // <https://resourcecentre.savethechildren.net/keyword/onlineinternet-safety>; UNICEF, "Protecting children online" // <https://www.unicef.org/protection/violence-against-children-online>.

⁵ Abhilash Nair, "Mobile Phones and the Internet: Legal Issues in the Protection of Children," *International Review of Law, Computers & Technology* 20 (2006).

⁶ *Ibid.*

⁷ J. Allan Cobb, "An Examination of Venue Issues concerning Online Crimes against Children: What Happens When Cyberspace is Used to Lure Children into Sexual Relations - A Look at Federal Venue Provisions [notes]," *Journal of Family Law* 35 (1996-1997).

⁸ Stefano Caneppele and Marcele F. Aebi, "Crime Drop or Police Recording Flop? On the Relationship between the Decrease of Offline Crime and the Increase of Online and Hybrid Crimes. - Policing," *A Journal of Policy & Practice* 13 (2019).

⁹ UNICEF, *supra* note 4.

Facebook has been considered a new “Baby Book” and as Kumar and Schoenebeck state: “Through sharing photos of their babies, mothers portrayed their identities as good mothers, conveying attractive children, embracing humor, and showing evidence of milestones—all indicators of a healthy and happy family.”¹⁰ However, this pushes them to face the same dangers as everyone else on social media does.¹¹ Grace *et al.* state that sharing of a child's personal information on social media offers easy access to not only photos of the minors, but also allows the searcher to obtain detailed and personal information about the kid. That, in turn, makes them face the harmful side of social media more easily.¹² Minkus *et al.* argue that “public photo of a child with the caption ‘Happy birthday, Olivia!’ provides an observer with knowledge of the child’s face, name, and birthday. This could be exploited by criminals or predators local to the child, or by an identity thief who wishes to infer the child’s personally identifiable information.”¹³

Social media usage increases every year: billions of people utilize the internet every day.¹⁴ Therefore, it is not surprising that many parents will use it not only for themselves but also for their kids. It is normal when a couple of mothers chat about their children. Unfortunately, this simple conversation may obtain a different shape after being relocated to social media. There are studies to show that it is complicated for parents to partake in social media activities without sharing too much about their children.¹⁵

Estonian studies about “sharenting”¹⁶ have demonstrated that Estonian mothers also actively use social media accounts for posting personal data about their children; they do it quite liberally, without thinking about the privacy or dangers it may cause.¹⁷ Such surveys demonstrate that kids responded very differently on such actions. In most cases, they did not oppose it if shared information portrayed them in a positive light.¹⁸ However, it was brought out that even in situations where

¹⁰ Priya Kumar and Sarita Schoenebeck, “The Modern Day Baby Book: Enacting Good Mothering and Stewarding Privacy on Facebook,” *Systems in Support of Health & Wellness* (March 14-18, 2015): 1309.

¹¹ Stacey B. Steinberg, “Sharenting: Children's Privacy in the Age of Social Media,” *Emory Law Journal* 66 (2017).

¹² Grace Y. Choi and Jennifer Lewallen, “‘Say Instagram, Kids!’: Examining Sharenting and Children's Digital Representations on Instagram,” *Howard Journal of Communications* 29 (2018).

¹³ Tehila Minkus, *et al.*, “Children Seen But Not Heard: When Parents Compromise Children's Online Privacy,” *WWW '15: Proceedings of the 24th International Conference on World Wide WebMay* (2015): 777 // <https://doi.org/10.1145/2736277.2741124>.

¹⁴ Simon Kemp, “Digital 2020: Global Digital Overview” (Jan 2021) // <https://datareportal.com/reports/digital-2020-global-digital-overview>.

¹⁵ Jenn Bartels Supple, “Parents’ Growing Pains on Social Media: Modeling Authenticity. – Character and ...,” *Social Media* 1 (2015).

¹⁶ “Sharenting – the habitual use of social media to share news, images, etc. of one’s children” (May 2020) // <https://www.collinsdictionary.com/dictionary/english/sharenting>.

¹⁷ Merike Lipu and Andra Siibak, “Take it down!: Estonian parents’ and pre-teens’ opinions and experiences with sharenting,” *Media International Australia* 170 (2019).

¹⁸ *Ibid.*

parents realized that they should obtain their kids' approval regarding the subject, they hardly ever did so.¹⁹

The convention on the rights of the child²⁰ (UNCRC) (art 3) provides that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." This also covers the parents' behaviour in a family.²¹ The best interests of a child should be considered also when uploading the pictures of the child in social media, especially when applying the rights of the child as "privacy", "child's consent" and the "right to be forgotten".

Estonian Child Protection Act (2018) § 7 states that parents are responsible for protecting the best interest of their children. The Previous Personal Data Protection Act (2007) § 10 (1) confirmed that it is possible to publish someone's else photos only with the consent of that person. Uploading the picture of a child by a parent on social media has been also included in those requirements.²²

The authors find that on the surface it does not seem like a big problem: it is even relatively innocent and natural to be proud of being a parent of the new-born. Moreover, it is not usually frowned upon when a happy mother reveals her new-born on social media. According to Ammari *et al.* "mothers share content online and take on the responsibility of managing sharing more than fathers do" while "fathers are more restrictive about sharing to their broad networks and are concerned about sharing content that could be perceived as sexual".²³ Nevertheless, it is pointed out by the authorities that an innocent potty training photo may have a more profound impact than just a cute reaction from family and friends. In fact, there are no guarantees that the innocent photo will not end up in the hands of the online predator. Furthermore, it is emphasized that many photos end up in the hands of the wrong individuals.²⁴

Another complicated problem lies in the fact that, contrary to some parents beliefs, children do have the right to privacy. It is amazing that when parents demand from the schools and other institutions their permission before uploading the pictures of their child,²⁵ yet they see no problem in uploading pictures of their

¹⁹ *Ibid.*: 63.

²⁰ *Convention on the Rights of the Child*, UN General Assembly, 20 November 1989, United Nations, Treaty Series, vol. 1577.

²¹ Children's Bureau, Child Welfare Information Gateway, "Determining the Best Interests of the Child": 2 // https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

²² Maire Iro, "Lapsed ja andmekaitse. Milliseid muudatusi toob kaasa EL-i isikuandmete kaitse üldmäärus?" (Children and data protection. What changes brings along GDPR) (May 2020) // <http://ajakiri.lastekaitseliit.ee/2018/02/05/lapsed-ja-andmekaitse-milliseid-muudatusi-toob-kaasa-el-i-isikuandmete-kaitse-uldmaarus/>.

²³ Tawfig Ammari, *et al.*, "Managing Children's Online Identities: How Parents Decide what to Disclose about their Children Online," *CHI '15: Proceedings of the 33rd Annual ACM Conference on Human Factors in Computing Systems* (April 2015): 1903 // <http://dx.doi.org/10.1145/2702123.2702325>.

²⁴ INTERPOL, *supra* note 1.

²⁵ Stacey B. Steinberg, *supra* note 11: 843.

children by themselves. Nevertheless, children have the right to decide if they even want to have a social media account, not to mention one with the hundreds of baby photos. It does not seem like a big problem, but for example, the analysis of one of the internet security companies shows that the majority of children appear on social media right after their birth and in some cases even before because some parents create accounts and e-mails for children who are not even born yet. Absence of pictures is resolved with the help of "ultrasound pictures".²⁶ It is possible that parents forget that the internet is the vast and unapologetic place. Every shared photo and phrase will stay there forever. Consequently, such children can never be absolutely sure where, why and what images from their past will someday resurface.

There are many observations which note that there are more and more children whose social media presence is so strong and influential that they obtain status similar to that of a celebrity. There are many successful social media platforms, where parents use their kids as models; alarmingly such accounts have thousands and millions of followers. Usually, such channels are managed under the name of a child by their parents.²⁷ For example, a photo of a daughter of one reality television star in US received over eighteen million "likes" and almost two million comments.²⁸ However, it has been found that such openness attracts not only positive attention, hence is capable of having unpleasant stand towards the child.²⁹ It has been discussed that the impact on child's development in such situations could be unpredictable and affect them negatively.³⁰ Moser *et al.* argue that "it is not yet known how children will feel about having their personal lives documented online."³¹ For example, they found out that children do not want their parents to share online "embarrassing photos", "ugly pics," "baby photos", or "[p]hotos that can expose intimate life".³² On the other hand children accept sharing "cute pictures," "fun family pics," or "pictures that make me look good".³³ Archer found in her research that "some of the influencer mums seemed to imply that it was more complicated to discuss older children's stories and issues on their blog, because older children were more aware of their online presence and had a 'voice' themselves".³⁴

²⁶ Paul G. Nixon, *et al.*, eds., *Digital Media Usage Across the Life Course* (New York: Routledge, 2016), 50.

²⁷ Reena Ninan, *et al.*, "Mini Insta-Models: These Stylish Tots Are Already Famous on Instagram" (May 2020) //

<https://abcnews.go.com/Lifestyle/mini-insta-models-stylish-tots-famous-instagram/story?id=37823227>.

²⁸ Kate Hamming, "A Dangerous Inheritance: A Child's Digital Identity," *Seattle U. L. REV* 43 (2020): 1038.

²⁹ Allan J. Choi and Jennifer Lewallen, *supra* note 12: 159-160.

³⁰ Roman Globokar, "Impact of digital media on emotional, social and moral development of children," *Gulhane Medical Journal* 60 (2018).

³¹ Carol Moser, *et al.*, "Parents' and Children's Preferences about Parents Sharing about Children on Social Media," *Emerging Privacy, CHI 2017* (May 6-11, 2017) (Denver, CO, USA): 5221.

³² *Ibid.*: 5224.

³³ *Ibid.*

³⁴ Catherine Archer, "How influencer 'mumpreneur' bloggers and 'everyday' mums frame presenting their children online," *Media International Australia* 179 (2019): 53.

Every problem has several sides. It is argued that numerous parents use social media not only for enjoyment, fun, and profits, but they also need to have a connection with other moms and dads. Revealing the child's personal information happens in the process.³⁵ It does not mean that they share private information about their kids having bad intentions. In fact, many of them indeed need support or even more, do not have other choices. For example, it was analysed by Children's Hospital that many new parents, especially fathers, need and seek help through social media. As a result, they share many details about their new-borns.³⁶

An even better illustration of this is the study which explored families who are raising children with special needs. For such parents, social media was not only an excellent venting place or source for advice but also an essential place for support. There are many situations where parents need encouragement from other caregivers facing similar problems in order to deal with their difficult situations. It has been found that various parental support groups which share their experiences through social media provide needed knowledge and support.³⁷

Sharenting child's photos is parental disclosure and undoubtedly parents have no intention to harm a child but they do not see the long-term consequences of their actions, including possible psychological impact³⁸ to the child, identity theft or exposure to online predators.³⁹

The situation becomes even more complicated when considering the new family models. Even though laws use the term "parent" and it is clear that a parent as a legal representative of the child must ensure that the rights of the child are protected, in actual life children often do not live with their biological and legal fathers but are raised by the social fathers.⁴⁰ Who is responsible for what when talking about child protection? This is an additional aspect that the state should consider when working out the tools to protect children's privacy in social media.

To conclude, parents sharing personal information about their children on social media has many different sides and outcomes. It is not possible to declare that every post on social media will cause harm to the child. But, there is enough evidence to claim that, by doing so, children can lose their privacy and most importantly, the

³⁵ Stacey B. Steinberg, *supra* note 11: 841-842.

³⁶ C. S. Mott Children's Hospital, "Children's Hospital National Poll on Children's Health. Parents on social media: Likes and dislikes of sharenting" (May2020) // <https://mottpoll.org/reports-surveys/parents-social-media-likes-and-dislikes-sharenting>; Charlotte Chalklen and Heather Anderson, "Mothering on Facebook: Exploring the Privacy/Openness Paradox," *Social Media + Society* (April-June 2017): 7-8.

³⁷ Laura Cole, *et al.*, "Caregivers of School-aged Children with Autism: Social Media as a Source of Support," *Journal of Child & Family Studies* 26 (2017); Stacey B. Steinberg, *supra* note 11: 880; see also Roman's case in Kate Hamming, *supra* note 28: 1035.

³⁸ See Claire Kathryn Pescott, "'I Wish I was Wearing a Filter Right Now': An Exploration of Identity Formation and Subjectivity of 10- and 11-Year Old' Social Media Use," *Social Media + Society* (October-December 2020).

³⁹ Kate Hamming, *supra* note 28: 1037.

⁴⁰ Kristi Joamets and Tanel Kerikmäe, "European dilemmas of the biological versus social father: Estonian case," *Baltic Journal of Law and Politics* 9 (2016).

opportunity to choose whether they even want digital identity in the first place. Besides, children who are not using social media themselves should not be connected to online dangers through the actions of their parents.

2. PRIVACY, CONCENT, AND THE RIGHT TO BE FORGOTTEN AS LEGAL TOOLS PROTECTING A CHILD'S RIGHTS

Hamming states that "legislative need demands that laws expressly call out children's information as an additional subcategory of personal information that is similarly vulnerable to high risks and deserving of heightened protection."⁴¹ This calls for an analysis of the current legal tools protecting children from their data being overshared on social media. In this section, privacy, a child's consent, and the right to be forgotten are analysed and discussed.

2.1. PRIVACY

The privacy of a child is a timely topic, which is steadily brought up because of the fast development of technology and the risks it poses.⁴² A child's privacy is an actual topic in European Commission policies towards making online space safer for children.⁴³ However, policies must be embodied in a national level as well.

UNCRC⁴⁴ Article 16 does call for the protection of the privacy of the child, but at the same time, it does not touch the topic of online privacy of children. The EU General Data Protection Regulation⁴⁵ (GDPR) is an instrument which is involved with both, but it is noted that the online privacy of the children in the online realm needed and still needs modifications, new ideas and deeper analyse⁴⁶ as "technology and Internet present new issues that need non-traditional solutions".⁴⁷ Referring to Boyd,⁴⁸ Hamming brings out the following four characteristics which create new challenges: "persistence (the durability of online expressions and information), 2) visibility (information's potential audience), 3) spreadability (the ease with which

⁴¹ Kate Hamming, *supra* note 28: 1038.

⁴² Abhilash Nair, *supra* note 6: 180; Kate Hamming, *supra* note 28: 1039.

⁴³ European Commission, "Creating a Better Internet for Kids" (April 2020) // <https://ec.europa.eu/digital-single-market/en/policies/better-internet-kids> .

⁴⁴ *Convention on the Rights of the Child*, *supra* note 20.

⁴⁵ *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)*, OJ L 119, 4.5.2016, p. 1–88.

⁴⁶ Milda Macenaite, "From universal towards child-specific protection of the right to privacy online: Dilemmas in the EU General Data Protection Regulation," *New Media & Society* 19 (2017): 766; *Convention on the Rights of the Child*, *supra* note 20.

⁴⁷ Kate Hamming, *supra* note 28: 1043.

⁴⁸ Danah Boyd. "It's Complicated: The Social Lives of Networked Teens": 143; in: *Internet Law: Cases & Problems*. 9th ed. (Yale University Press, 2019).

information is shared), and 4) searchability (the ability to find information)".⁴⁹ All these characteristics prove how sharing child's information in social media violates his/her privacy.

A child's right to privacy has been recognized in several EU and international laws. Article 16(1) of the Treaty on the Functioning of the European Union⁵⁰ and Article 8(1) of the Charter of Fundamental Rights of the European Union⁵¹ brings forth the idea that their "personal data" should be protected: TFEU Article 16 (1) provides: "Everyone has the right to the protection of personal data concerning them". Charter of Fundamental Rights of the EU Article 8 (1) provides "Everyone has the right to the protection of personal data concerning him or her". European Court of Human Rights has ruled that "national law must set out appropriate measures to ensure judicial remedies against infringements of data protection rights"⁵² The abovementioned UNCRC Article 16 also states the same necessity, providing that: "No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. The child has the right to the protection of the law against such interference or attacks."

The right to privacy, even for children, will always be in opposition to other rights (such as freedom of expression and/or parental rights).⁵³ However, in the cases concerning freedom of speech and press, the best interest of the child should always prevail⁵⁴ as well as in other situations where the rights collide.

Steinberg argues that "no legal scholar has yet published an article centred at the intersection of a parent's right to share online with a child's right to privacy on the internet".⁵⁵ It is beyond dispute that there are laws which protect the interest of the children in question. However, there are no direct laws which prohibit parents from posting data which concern their children online. One can even speculate that parents upload the information about their child in internet for the interests of the child to announce his/her "existence" and "progress". Even more, Chalklen and Heather have found in their survey that "the benefits offered by Facebook and our increasingly digitally networked society cannot be discounted"⁵⁶ despite the fact that these parents in a survey cited privacy issues as the most common downsides of Facebook use, but claimed that they will continue to use Facebook and other social

⁴⁹ Kate Hamming, *supra* note 28: 1043-1044.

⁵⁰ *Treaty of European Union*, OJ C 326, 26.10.2012.

⁵¹ *Charter of Fundamental Rights of the European Union*, OJ C 202, 7.6.2016.

⁵² European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European law relating to the rights of the child* (2015), 191.

⁵³ Stacey B. Steinberg, *supra* note 11: 839.

⁵⁴ UNICEF, "Guidelines for journalists reporting on children" (March 2021) // <https://www.unicef.org/eca/media/ethical-guidelines>.

⁵⁵ Stacey B. Steinberg, *supra* note 11: 856.

⁵⁶ Charlotte Chalklen and Heather Anderson, *supra* note 36: 8.

networking technology.⁵⁷ As parents are “the gatekeeper of personal information of their children, they are the ones to decide whether and how many pictures they contribute to Social Networking Sites,”⁵⁸ such survey results are a bit frightening. On the other hand, there can be found surveys which prove that parents do consider the privacy of their children before sharing their pictures in social media⁵⁹.

The right to privacy should, in theory, protect the child not only from strangers but also from the danger which may be inflicted by parents due to oversharing personal information. At the same time, it is demonstrated that more and more photos from parent social media accounts end up on child exploitation sharing sites.⁶⁰ One can state that posting pictures of one's child will cause more harm than parents could imagine.⁶¹ Also, it is easier to agree that a violation against a child privacy occurs when a stranger embodies it and much more complicated to claim that a mother who is sharing a potty-training photo of her child in social media creates similar harm and infringement of privacy.

Even though article 16 of the UNCRC provides a clear protection to the child's privacy, the stronger protection is given by the new GDPR⁶². It is not the best tool in the cases connected to home affairs because it is not designed for that.⁶³ Even though Macenaite has stated that the new Data Protection Regulation has shifted it “from universal towards child-specific protection of the right to privacy online”⁶⁴, it is explained that at the end of the day GDPR does not offer a penalty or possibility to turn to Data Protection Inspectorate if the dispute is family oriented. For example, in Estonia such inspectorate has explained that: “Parents must protect their children and pictures about other person can be uploaded only with the consent of this person. Parents fulfil the obligations concerned a child together. If parent cannot find consensus? If at all or where publish the photos of the child, then only court can solve such dispute. Inspectorate does not intervene to the family dispute, participants can solve by themselves or in a court.”⁶⁵ The Data Protection Inspectorate has clarified on several occasions that by Article 4 of the Estonian Law Enforcement Act⁶⁶, the

⁵⁷ *Ibid.*, 9.

⁵⁸ Amina Wagner and Lisa Alina Gasche, “Sharenting: Making Decisions about Other's Privacy on Social Networking Sites,” *Multikonferenz Wirtschaftsinformatik* (March 06-09, 2018) (Lüneburg, Germany): 978.

⁵⁹ See *ibid.*; Keltie Haley, “Sharenting and the (Potential) Right to Be Forgotten,” *IND. L. J.* 95 (2020): 1008.

⁶⁰ Jess Staufenberg, “French parents 'could face prison' for posting photos of their children on Facebook” (May 2020) // <https://www.independent.co.uk/news/world/europe/french-parents-told-their-children-might-sue-them-for-pictures-put-on-facebook-a6906671.html>.

⁶¹ Lucy Battersby, “Millions of Social Media Photos Found on Child Exploitation Sharing Sites” (May 2020) // <http://www.smh.com.au/national/millions-of-socialmedia-photos-found-on-cild-exploitation-sharing-sites-20150929-gjxe55.html>.

⁶² *Regulation (EU) 2016/679*, *supra* note 45.

⁶³ European Commission, “What does the General Data Protection Regulation (GDPR) govern?” (May 2020) // https://ec.europa.eu/info/law/law-topic/data-protection/reform/what-does-general-data-protection-regulation-gdpr-govern_en.

⁶⁴ Milda Macenaite, *supra* note 46: 766.

⁶⁵ Sirje Biin, “Estonian Data Protection Inspectorate,” 04.09.2017, nr 2.1.-5/17/1725 [e-mail].

⁶⁶ *Law Enforcement Act (Estonia)*, RT I, 22.03.2011, 4.

inspectorate does not resolve issues concerning the rights and freedoms of individuals.⁶⁷

Furthermore, GDPR rules, which are designed to protect the privacy of individuals, may harm the children. According to Sculthorpe⁶⁸ officials have warned that new laws would ban the software which is capable of catching various abuse images involving the children because it will be unlawful to scan huge amount of data uploaded on different platforms. By this "new EU rules on data protection are a 'gift to paedophiles' because they undermine automatic scanning for child abuse images in the UK".⁶⁹

All this demonstrates the importance of parents' behaviour when sharing information about their children in social media. Undoubtedly there are some gaps in legislation and implementation of legal rules, as *inter alia* the Estonian case proves. Also, this analysis shows that the question of a child's privacy needs more thorough analyses to ensure that the aim of the protection of the child's privacy will happen in real life.

2.2. THE CHILD'S CONSENT

Another legal tool which should protect the child's rights, including his/her privacy, is the consent of the child. However, in the EU, parental consent in an online environment is still a novel area, and it is suggested that it needs in-depth analysis.⁷⁰ Moreover, it is noted that Article 8 of the new GDPR is one of the most important, but at the same time most disputed provision.⁷¹ It deals with the situations where the child (or the company) needs to ask the permission of the parent for using social media services if the child is below a certain age.⁷² GDPR affirms that the personal data of the children must be protected and that "they may be less aware of the risks, consequences and safeguards concerned and their rights concerning the processing of personal data".⁷³ That should include the situations where the child has his/her own social media account which was created by his/her parents. However, an issue highlighted by several studies show that GDPR is designed for conditions where

⁶⁷ *Vaideotsus avaliku teabe asjas (Appeal decision in a public information case) nr. 2.1-3/16/2*, Data Protection Inspectorate, Vaideotsused 2016 //

<https://www.aki.ee/et/inspektsioon-kontaktid/menetlusotsused/vaideotsused/vaideotsused-2016>.

⁶⁸ Tim Sculthorpe, "New EU rules on data protection are a 'gift to paedophiles', government officials warn" (May 2020) //

<https://www.dailymail.co.uk/news/article-6454521/New-EU-rules-data-protection-gift-paedophiles.html?fbclid=IwAR3QOX-HKs26izCZemyuRzoa8MSbrnGoSX7S0vbWv5MeryZOV42CPXXnIIA>.

⁶⁹ *Ibid.*

⁷⁰ Milda Macenaite and Eleni Kosta., "Consent for processing children's personal data in the EU: following in US footsteps?" *Information & Communication Technology Law* 26 (2017): 194-195.

⁷¹ Joseph Savirimuthu, "The EU, Online Child Safety and Media Literacy," *International Journal of Children's Rights* 19 (2016).

⁷² *Regulation (EU) 2016/679*, *supra* note 45.

⁷³ *Ibid.*

marketing is targeting, or services are offered directly to a child and where the parent is then the one who must give consent instead of a child.⁷⁴ The topic of consent was not evaluated deeply enough, and the EU did not consider that in many cases, parental consent does not produce any significant or desired effects. Therefore, one can conclude it is not possible to use consent as an effective legal solution. In situations where a child under a specific age limitation does not wish to have a social media account, parents may still create it, without asking the opinion of the child.⁷⁵ Still, by having the possibility to give consent instead of the child, the parent will choose the best option for the child.⁷⁶ However, it may result in the belief that the consent of a child is not necessary when the parent posts an image or any other data about their child, because the parent is the one who should make a choice.⁷⁷ This will violate the child's rights.

However, as stated above, the issues about a parent asking the consent of a child are not part of GDPR regulation. One can only assume that the parent keeps in mind the best interests of the child, but the interpretation what is in the best interests of the child can differ from the child protection officials understanding. For example, in Estonia, a representative of the Data Protection Inspectorate has clarified that GDPR and Estonian Personal Data Protection Act allow individuals to photograph and film for personal purposes, but the disclosure of such photos without the consent of all parties is prohibited.⁷⁸ *Söderman v. Sweden* case, for example, demonstrates what will happen if the law itself does not prohibit filming without consent. In this case the Swedish court decided that a man filming a naked 14-year old girl was not guilty of filming a minor without the permission because at that time Swedish law did not prohibit filming without the other persons' consent. Therefore, regarding the filming without the knowledge of the child, the man was acquitted.⁷⁹ However, later when the case reached to the European Court of Human Rights the court found that the state has positive obligations to ensure that provisions which prohibit filming without consent are in place, especially in case of minors. Moreover, importance of the consent was pointed out.⁸⁰

We argue that despite recognizing the importance of consent, there are still no laws which stop parents from posting personal information, including photos, on

⁷⁴ Milda Macenaite and Eleni Kosta, *supra* note 70: 193-195.

⁷⁵ See Rachel Buchanan, *et al.*, "Post no photos, leave no trace: Children's digital footprint management strategies," *E-learning and Digital Media* 14 (2017).

⁷⁶ Valerie Steeves, "It's Not Child's Play: The Online Invasion of Children's Privacy," *University of Ottawa Law & Technology Journal* 3 (2006).

⁷⁷ Stacey B. Steinberg, *supra* note 11: 850-851.

⁷⁸ Siiri Ottender-Paasma, "Lasteaed keelas andmekaitse seadusest tulenevalt laste pildistamise" (The kindergarten prohibited photographing children pursuant to the Data Protection Act) (May 2020) // <https://www.err.ee/887558/lasteaed-keelas-andmekaitse-seadusest-tulenevalt-laste-pildistamise>.

⁷⁹ *Söderman v. Sweden*, no. 5786/08, ECHR 2013, point 23, 38, 39.

⁸⁰ *Ibid.*, point 117.

social media, without the consent of their children. We also agree with Cheung that there are no instruments which are capable of putting an end to information oversharing by parents.⁸¹ Additionally, parents do not take into account the wishes of their children regarding the questions of posting on social media.⁸² Therefore, the existing practice and legal framework of consent are possibly not enough to protect the privacy of the children in social media.

2.3. THE RIGHT TO BE FORGOTTEN

Often it has gone unnoticed that the right to be forgotten⁸³ is applicable also for children. Children need the possibility to request the removal of their personal data because they "are different from adults in many developmental, psychosocial and behavioural respects."⁸⁴ It has been stipulated that they are most likely to post online something that they will regret later, or they allow parents to do so, without understanding the consequences. Therefore, it is crucial to have some way out of the situation which was once created by parents or childhood immaturity.⁸⁵ However, as discussed above, the obligation to ask for consent from a child before sharing information about him/her in social media, is not effective. Ly-Reilly confirms it by pointing out that infants, toddlers and small children, are not able to (fully) realise their actions.⁸⁶

Google Spain vs Google case demonstrated that it is reasonable to change "digital footprints" of the individual when information about the individual does not serve its purpose or is incorrect.⁸⁷ GDPR gives all "data subjects" the possibility to demand to correct false or to wipe off all information, which no longer serves the intended purpose.⁸⁸ The case itself was about a man who discovered upon an internet search that there are a couple of newspaper articles which showed him in an unfavourable light. Therefore, he wanted to remove those articles.⁸⁹ Such actions against Google helped to confirm that search engines do have an obligation to remove inadequate, inaccurate, irrelevant or excessive data.⁹⁰ These principles are applicable also for children's data on the internet.

⁸¹ Helier Cheung, "Can you stop your parents sharing photos of you online?" *bbc.com* (May 2020) // <https://www.bbc.com/news/world-47722427> .

⁸² Marke Lipu and Andra Siibak, *supra* note 17: 63-65.

⁸³ A right to require the removal of one's personal data from internet.

⁸⁴ Yun Li-Reilly, "Remembering, Forgetting, Reinvention and Freedom: Social Media and Children's Right to Be Forgotten," *Advocate* 75 (2017): 664.

⁸⁵ *Ibid.*: 664-665.

⁸⁶ *Ibid.*: 665.

⁸⁷ *Google Spain and Google*, Court Decision, 13.05.2014, C-131/12, EU:C:2014:317.

⁸⁸ *Regulation (EU) 2016/679*, *supra* note 45, art 17.

⁸⁹ *Google Spain and Google*, *supra* note 87, point 14-15.

⁹⁰ *Ibid.*, point 92-94.

Statistics show that, for example, from May 2014 to Jan 2021 in Estonia there were more than 27,428 URL deletions requested, in Finland 56,066, in Germany 635,221. Now this number is even greater.⁹¹ However, removal of the search result can be deleted following the European data protection laws, and that will bring us back to two things. Firstly, children will be able to request the removal of the unwanted information personally from certain age. Secondly, even if the Google will erase the unwanted material, the source (FB page of the parent etc.), will still remain.⁹² Most importantly, *CNIL v Google* case demonstrated that even for adults, this right may be quite hard to obtain outside the EU. For example, will it be possible to erase something that is posted on Russian domain? Most probably, no.⁹³ From the perspective of children's rights, again, one can notice several legal caps which need more thorough analyse and solution.

The right to be forgotten is not able to protect small children because they cannot, or they do not have enough knowledge to request the erasure of unwanted information. That is the part where they should get the needed support from adults. However, problems begin if it turns out that parents are the ones, who are making the wrong decision and overshare personal information about their children. As a result, it may be too late to use that right later in life because for that time their undesired information could wander around the internet for years and it is not so easy to eliminate all sources containing that data.

Haley argues that "the right to be forgotten framework could alleviate the tension between the parents' rights and children's privacy interests in the context of sharenting, as it balances the competing privacy interests of children and their parents' rights to disseminate information about their children on social networking sites".⁹⁴ As mentioned above, Art 17 of GDPR provides that the data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay in certain cases. This provision allows children to request the removal of personal data from the internet but still the age as the component of his/her maturity plays here an important role and gives again the power to the hands of the parents. Lievens and Maelen discuss GDPR and its application to the child right to be forgotten and the parents' right to freedom of expression and family-life contradicting the child's rights. They argue that in certain

⁹¹ Google, "Search removals under European privacy law" (Dec 2020) // https://transparencyreport.google.com/eu-privacy/overview?hl=en&requests_over_time=country:FR&lu=requests_over_time.

⁹² Adam Satariano, "Right to Be Forgotten' Privacy Rule Is Limited by Europe's Top Court" (Dec 2020) // <https://www.nytimes.com/2019/09/24/technology/europe-google-right-to-be-forgotten.html>.

⁹³ *CNIL v. Google*, Court Decision, 24.09.2019, C-507/17, EU:C:2019: 772, point 63.

⁹⁴ Keltie Haley, *supra* note 59: 1015.

situations a child can “rely on child advocacy services or other organisations representing the interest of children”⁹⁵ when there is a need to erase the information shared by his/her parents but one can hardly imagine how this will proceed in a practice.

CONCLUSION

This article shows how technology impacts child’s rights and what the role of parents in this situation is. Even more, it explores how parents’ actions in social media can put their children at risk, especially in the situations where children do not use social media personally. The article discussed legal tools applicable in preventing parents from oversharing personal data about their children focusing on the right to privacy of the child, consent of the child and the right to be forgotten.

It can be stated that there is a legal regulation in international, EU and national level to protect a child’s privacy. Also, it is evidenced that parents do not upload the pictures of their children in social media with intention to harm their child. The main problem is the knowledge of the consequences if a child’s data has been put in social media. Parents do have a responsibility to represent but also protect their child and the child’s interest always prevails. But, in practice this unfortunately does not have desired effect in child protection.

There is enough evidence to claim that by oversharing information about a child in social media, children are losing their privacy and, most importantly, the opportunity to choose whether they even want digital identity in the first place. Children who are not using social media themselves should not be connected to online dangers through the actions of their parents. The right to be forgotten is not able to protect small children because they cannot, or they do not have enough knowledge to request the erasure of unwanted information. That is the part where they should get the needed support from adults. However, problems begin if it turns out that the parents are the ones who are making the wrong decision and oversharing personal information about their children. As a result, it may be too late to use that right later in life because for that time their undesired information could wander around the internet for years and it is not so easy to eliminate all sources containing that data.

This short analysis confirms that there are many gaps in legislation and implementation of EU and international law. Based on the scientific literature used for this research one can assume that one reason for this situation is the fact that EU and international law provides the general principles but implementation in national

⁹⁵ Eva Lievens and Carl Vander Maelen, “A Child’s Right to be Forgotten: Letting Go of the Past and Embracing the Future?” *Latin American Law Review* 2 (2019): 72.

law is weak. Even though the principle that a child's rights must prevail exists, there are collisions in the principles and hence there is need for a uniform interpretation and clear guidelines for parents. States should deal with the situation more seriously and find better tools to help grant better protection to children.

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