



Digital Parentpreneurs: From a Children's Rights Perspective

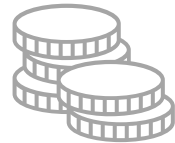
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Overview



Online world: data-driven, highly interactive and commercial environment



Monetization of posts shared by parents showing children's visual and written data



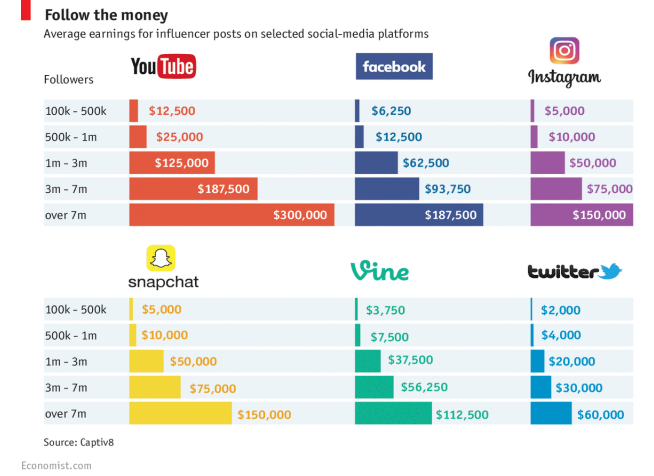
Risk-implications for children's rights



Whether governed by GDPR and national data protection laws?

Background

- Emergence of parents of young children as new digital entrepreneurs in the influencers market
- A shift in how parents consume and create on the internet
- Young children being appeared in monetized posts by parents to promote a given good or service
- Monetization through endorsement deals, sponsorships, ads, affiliate marketing
- Platforms: YouTube, Facebook, Instagram, Twitter, TikTok, etc.



Risk-Implications for Children's Rights

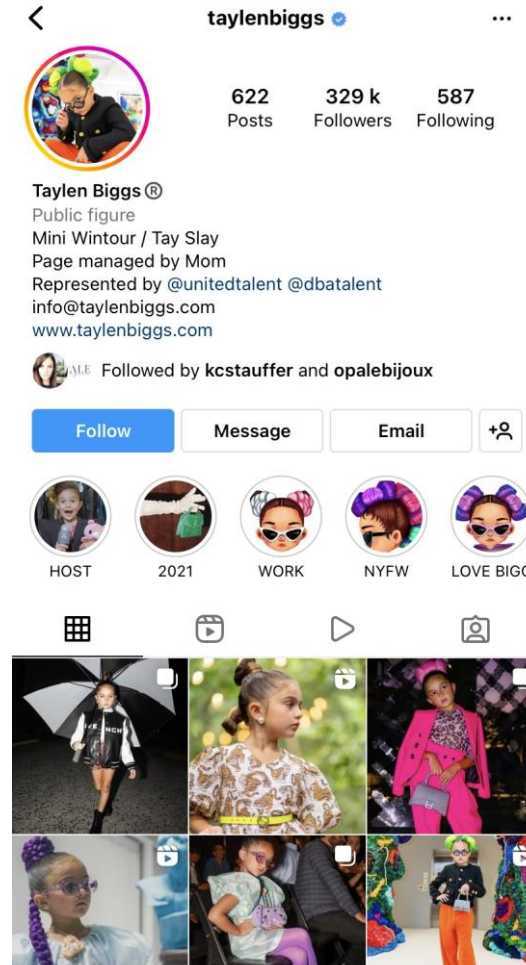
Privacy Invasion

- Collection, use and dissemination by parents of children's personal information (full name, date of birth, images)
- Scale, frequency and potential adverse consequences
 - Loss of control
 - Subsequent use in inappropriate contexts: pedophiles and child pornography, baby roleplaying and digital-kidnapping, identity theft and online fraud

- **Sidis Case (1940)**

Exploitation of Children's Identity

- Sharing/using children's images for financial gain, e.g. in monetized posts through endorsement deals, sponsorships, ads and affiliate marketing



Right-based approach: Children with an enforceable legal status

Risk-based approach: Individuals' capacity to process data for personal and household activities through access to internet => investigation of the rights from the standpoint of the impacted child based on potential adverse consequences of such personal processing activities

Art. 2(2)(c):

'2. This Regulation does not apply to the processing of personal data:

...;

(c) by a natural person in the course of a purely personal or household activity; ...'.

❖ **Recital 18 GDPR:**

'This Regulation does not apply to the processing of personal data by a natural person in the course of a purely personal or household activity and thus with no connection to a ... commercial activity. Personal or household activities could include ... social networking and online activity undertaken within the context of such activities...'.

❖ **ECJ case law: *Bodil Lindqvist case (2003)*; *Ryneš case (2014)***



- ***Bodil Lindqvist Case (2003)***

The act of loading information onto a private home page which is nonetheless accessible to anyone who knows its address be regarded as outside the scope of Directive 95/46 on the ground that it is covered by one of the exceptions in Article 3(2)?

=> **Ruling of the Court:** 'As regards the exception provided for in the second indent of Article 3(2) of Directive 95/46, the 12th recital in the preamble to that directive, ... **[t]hat exception must therefore be interpreted as relating only to activities which are carried out in the course of private or family life of individuals, which is clearly not the case with the processing of personal data consisting in publication on the internet so that those data are made accessible to an indefinite number of people.** Therefore be that processing of personal data such as that described is not covered by any of the exceptions in Article 3(2) of Directive 95/46.' (para. 47-48)

- ***Ryneš Case (2014)***

'Considering the purpose of Directive 95/46 as to ensure a high level of protection of the fundamental rights and freedoms of natural persons, in particular their right to privacy, the exemptions must be interpreted narrowly'. (para. 29) The Court further states: 'The fact that Article 3(2) of Directive 95/46 falls to be narrowly construed has its basis also in the very wording of that provision, under which the directive does not cover **the processing of data where the activity in the course of which that processing is carried out is a 'purely' personal or household activity, that is to say, not simply a personal or household activity**'. (para. 30)

=> **Ruling of the Court:** 'To the extent that video surveillance such as that at issue in the main proceedings covers, even partially, **a public space and is accordingly directed outwards from the private setting of the person processing the data in that manner, it cannot** be regarded as an activity which is 'a purely personal or household' activity for the purposes of the second indent of Article 3(2) of Directive 95/46.' (para. 33)



Whether the taking and sharing images by parents of young children on online platforms with commercial purposes out of the scope of GDPR as 'a purely personal or household activity' within the meaning of Article 2(2)(c) GDPR?

- Right to privacy for young children in a child-parent relationship
 - UNCRC
 - ✓ Children's right to privacy (Art. 16)
 - ✓ Age and evolving capacities of the child (Art. 5)
 - Rights of parents vs. rights of children
 - Parental responsibilities vs. parental rights
 - GDPR
 - ✓ Children as 'natural persons' (Art. 1)
 - ✓ Parental Consent (Art. 8)
- ❖ Right to be forgotten (Art. 17 GDPR): the case of too little too late?

Whether the taking and sharing images by parents of young children on online platforms with commercial purposes out of the scope of GDPR as ‘a purely personal or household activity’ within the meaning of Article 2(2)(c) GDPR?

- **Facts:**

- The act of publishing images and information
- To an indeterminate number of people
- By means of internet
- In the course of a commercial activity

❖ ***Rb. Gelderland - C/05/368427 (2020)***

Rb. Gelderland - C/05/368427 (2020)

- '4.5. The General Data Protection Regulation protects the fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data. However, this Regulation does not apply to the processing of personal data by a natural person in the exercise of a purely personal or household activity. Although it cannot be excluded that the placing of a photo on a personal Facebook page falls under a purely personal or household activity..., it has not been sufficiently established how [defendant] set up or protected her Facebook account or her Pinterest account. It is also unclear whether the photographs can be found through a search engine such as Google. In addition, with Facebook it cannot be ruled out that placed photos may be distributed and may end up in the hands of third parties. **In view of these circumstances, it has not appeared in the scope of these preliminary relief proceedings that there is a purely personal or domestic activity of [defendant]. This means that the provisions of the General Data Protection Act (AVG) and the General Data Protection Implementation Act (hereinafter: UAVG) apply to the present dispute.'**
- '4.6. The UAVG stipulates that the permission of their legal representative(s) is required for the posting of photographs of minors who have not yet reached the age of 16. It has been established that the minor children of [plaintiff] are under the age of 16 and that [plaintiff], as legal representative, has not given permission to [defendant] to post photographs of her children on social media. In the case of [child 1], his father did not give [defendant] permission either. In view of this the Court in preliminary relief proceedings will order [defendant] to remove the photo of [child 1] on Facebook and the photo of [plaintiff] and her children on Pinterest. In addition, [defendant] will be prohibited from posting pictures of the minor children of [plaintiff] on social media without permission (as referred to in the AVG and UAVG). The emotional importance of [defendant] to be allowed to place photographs on social media cannot lead to a different judgment in this respect.'

Thank you for listening!

In case of further interest, please find here my recent co-authorship on 'Digital Technologies and the Rights of Children in Europe':

<https://www.bloomsburycollections.com/book/human-rights-responsibilities-in-the-digital-age-states-companies-and-individuals/ch13-digital-technologies-and-the-rights-of-children-in-europe>