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Children as social network actors: A European legal perspective on challenges concerning membership, rights, conduct and liability

Ellen Wauters, Eva Lievens*, Peggy Valcke

ICRI/CIR – KU Leuven – iMinds, Leuven, Belgium

ABSTRACT

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Recent social science research shows that children from as young as 7 are avid users of Social Networking Sites (SNS) such as Facebook, Twitter, Instagram and Tumblr. The involvement of minor users on SNS platforms raises significant legal challenges, for instance regarding their capacity to enter into a membership agreement, consenting to share or be tagged in photographs and liability for certain actions. This contribution aims to identify relevant legal issues related to SNS use by (young) children and to assess the applicability of existing legal frameworks at European and national level with regard to the capacity to contract, transfer of intellectual property rights, right to image, and the liability of children and parents for certain breaches of legislative provisions or acts that cause damage. The second part contains an exploration of user empowerment mechanisms such as the use of innovative information provision tools or awareness-raising to achieve better informed decision-making by children (and parents) with regard to their SNS use.

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1. Introduction

Although social network sites (SNS) often limit the use of their services to users who are above a certain age (most often 13 years, *infra*), children from as young as 7 are present

on platforms such as Facebook, Twitter, Instagram and Tumblr. Already in 2011, the EU Kids Online study found that 38 per cent of 9–12 year olds and 77 per cent of 13–16 year olds in Europe had an SNS profile.¹ A 2013 UK survey found that 30 per cent of children aged 7–11 in the UK have their own Facebook profile.² Along the same line, recent findings

* Corresponding author. Interdisciplinary Centre for Law and ICT (ICRI)/CIR – KU Leuven – iMinds, Sint-Michielsstraat 6, B-3000 Leuven, Belgium.

E-mail address: Eva.lievens@law.kuleuven.be (E. Lievens).

¹ Livingstone, Sonia, Ólafsson, Kjartan and Staksrud, Elisabeth, 'Risky social networking practices among 'underage' users: Lessons for evidence-based policy', *Journal of Computer-Mediated Communication* 2013, 6.

² NSPCC, Younger children and social networking sites: a blind spot, November 2013, http://www.nspcc.org.uk/Inform/resourcesforprofessionals/onlinesafety/younger-children-and-social-networking-sites_wda99104.html.

show that 35% of Flemish 9–12 year olds and 89.9% of Flemish 12–18 year olds have a Facebook profile.³ A study carried out in Germany found that 44 per cent of children under 13 use SNS that are actually aimed at teenagers and adults.⁴

Aside from challenges related to (young) children's technical, cognitive and emotional competences to use SNS,⁵ legal questions are also increasingly raised. Generally, most national legal frameworks do not attribute full legal capacity to minors, e.g. the capacity to enter into a contract, which can generate legal uncertainty with regard to which actions they may validly perform.

The legal challenges that are associated with the use of SNS by minors, for instance the validity of membership, consenting to share or be tagged in photographs and liability for certain actions, have received little attention in comparison to widely publicised issues such as cyberbullying or privacy concerns. It is the aim of this article to identify relevant legal issues related to SNS use by (young) children,⁶ to assess the applicability of existing legal frameworks at national level (with references to Belgium, France, the Netherlands and Germany) and the potential consequences. First, based on a desk-research analysis of legislation, case-law, policy documents and existing Terms of Use of SNS, the article assesses the rights and obligations of minors and the challenges related to the legal impact thereof. The second part contains an evaluation of whether these challenges can be addressed by means of user empowerment mechanisms such as the use of innovative information provision tools or awareness-raising to achieve better informed decision-making by children (and parents).

2. Legal capacities of minors

2.1. Who is a minor?

In order to assess the legal capacities of minors it is important to know what is understood by the notion 'minor' and other terms often used to describe this category of individuals such as 'child', 'adolescent' or 'youth'. In many states and international policy documents these notions refer to individuals who have not yet reached the age of majority, which is most often 18 years.

³ Mediaraven and Linc, Onderzoeksrapport Apestaartjaren 5, May 2014, <http://www.apestaartjaren.be/onderzoek/apestaartjaren-5>.

⁴ Holloway, Donell, Green, Lelia and Livingstone, Sonia, Zero to Eight, Young Children and their Internet Use, August 2013, http://eprints.lse.ac.uk/52630/1/Zero_to_eight.pdf.

⁵ Vanwynsberghe, Hadewijch, *How users balance opportunity and risk: A conceptual exploration of social media literacy and measurement*, PhD thesis, 2014, University Ghent, unpublished.

⁶ The scope of this article is limited to challenges related to membership, behaviour and liability for certain actions on SNS. Specific issues which also relevant for children, such as in-game purchases on Facebook or other platforms, merit a separate analysis.

For instance, the United Nations Convention on the Rights of the Child (UNCRC) defines 'child' as "every human being below the age of eighteen years of age unless, under the law applicable to the child, majority is attained earlier". The Council of Europe Cybercrime Convention talks about 'minors', by which is also meant "all persons under 18 years of age" (unless a Party requires a lower age limit not less than 16 years of age). At national level as well, such as in Germany (Art. 2 *Bürgerliches Gesetzbuch*), Belgium (Art. 388 *Code Civil/Burgerlijk Wetboek*), France (Art. 388 *Code Civil*) and the Netherlands (Art. 1:233 *Burgerlijk Wetboek*) the age of 18 is denoted as the age of majority.

According to Hodgkin and Nowell, "setting an age for the acquisition of certain rights or for the loss of certain protections is a complex matter", which "balances the concept of the child as a subject of rights whose evolving capacities must be respected with the concept of the State's obligation to provide special protection".⁷

Within this large category of young individuals a distinction can be made between various age groups. Etzioni, for instance, clarifies the distinction between children, teenagers and minors as follows: "Children refers to those twelve and under, and teenagers refers to those between the ages of thirteen and eighteen. Minors are used to refer to both groups together."⁸ Furthermore, Lievens has argued that the term 'child' is a more general term, used in different contexts, while the term 'minor', which we use in the analysis that follows, is linked to the age of majority and thus more often used in a 'legal' context.⁹

2.2. Minors and their legal capacity

Most national legal frameworks do not attribute full legal capacity to minors. This means that they cannot undertake certain acts which may have legal consequences (e.g. enter into a (valid) contract). As Grimes observes, it is generally assumed that children have a more limited capacity to understand the nature and consequences of commercial processes and contractual agreements.¹⁰ For instance, Art. 1124 of the Belgian and French Civil Codes stipulate that minors do not have the competence to enter into an agreement; the Dutch Civil Code states that minors are not capable of entering into agreements without

⁷ Hodgkin, Rachel and Newell, Peter, *Implementation handbook for the Convention on the Rights of the Child*, UNICEF, New York, 2002, 1, as cited in Lievens, Eva, *Protecting children in the digital era: the use of alternative regulatory instruments*, Martinus Nijhoff Publishers, Leiden/Boston, 2010, 29.

⁸ Etzioni, Amitai, "On protecting children from speech", *Chicago-Kent Law Review*, 2003, Vol. 79, No. 1, 43.

⁹ Lievens, Eva, *Protecting children in the digital era: the use of alternative regulatory instruments*, Martinus Nijhoff Publishers, Leiden/Boston, 2010, 29.

¹⁰ Grimes, Sarah, "Persistent and emerging questions about the use of end-user licence agreements in children's online games and virtual worlds", *UBC Law Review* 2013, Vol. 46, No. 3, 697.

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