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## RIGHT TO PRIVACY OF A CHILD IN SOCIAL MEDIA

Viktoriia SHYMANOVSKA,

Master of Law of Taras Shevchenko National University of Kyiv,  
Junior Lawyer at the “GBP Partners” Law Firm

### SUMMARY

In the article the theoretical research is devoted to the problem of vulnerability of the right to children's privacy in social media. The research on the peculiarities of the definition of social media, the legal and scientific basis of the child's right to privacy, including on the Internet and social media at the European and national levels, was conducted. Particular attention is paid to the problem of child's consent with the use of his/her personal information on social media, the lack of legal regulation of this procedure in the national legislation of Ukraine. Also, the study of peculiarities of judicial practice concerning the violation of the right to children's privacy in social media by the European Court of Human Rights and Ukrainian courts has been conducted. As a conclusion, in article shown the lack of practice of Ukrainian courts in solving such problems, which the need of introduction of appropriate legal regulation. The author offers her own notion of social media and methods for regulating the consent of the child for the processing of his/her personal data.

**Key words:** right, privacy, child, social media, European Court of Human Rights, Ukraine.

### ПРАВО НА ПРИВАТНОСТЬ РЕБЁНКА В СОЦИАЛЬНЫХ МЕДИА

Виктория ШИМАНОВСКАЯ,

магистр права

Киевского национального университета имени Тараса Шевченко,  
младший юрист Юридической фирмы «GBP Partners»

Теоретическое исследование статьи посвящено проблеме уязвимости права на приватность (неприкосновенность частной жизни) ребёнка в социальных медиа. Проведено исследование особенностей понятия социальных медиа, юридической и научной основы права ребёнка на приватность, в том числе в Интернете и в социальных медиа на европейском и национальном уровнях. Особое внимание уделяется проблеме согласия ребенка с использованием его личной информации в социальных сетях, отсутствию правового регулирования этой процедуры в национальном законодательстве Украины. Также было проведено исследование особенностей судебной практики, касающейся нарушения права на приватность детей в социальных медиа Европейским судом по правам человека и украинскими судами. В заключение, в статье продемонстрировано отсутствие практики украинских судов в решении таких проблем, что требует введения надлежащего правового регулирования. Автор предлагает своё понятие социальных медиа, а также способы регулирования согласия ребёнка на обработку персональных данных в социальных медиа.

**Ключевые слова:** право, приватность, ребенок, социальные медиа, Европейский суд по правам человека, Украина.

**Formulation of the problem.** Rights and freedoms are recognized by all people, regardless of any social features, including regardless of gender and, of course, age. Due to the lack of life experience and the lack of orientation guidance, children are one of the most vulnerable in the aspect of ensuring basic rights and freedoms, including in the part of ensuring the inviolability of their privacy.

**Relevance of the researched topic** is confirmed by the great popularity of social media nowadays (including social networks), as well as the insufficient protection of children's rights in this sphere and the lack of disclosure of this problem including with court practice at the scientific level.

**Scope of the research.** Among scientists at European and Ukrainian level, attention was given to the scientific works of such scientists as Frank Jacob, M.I. Shulga, Thomas Aichner, Peter R. Scott, J. Mike Jacka, Hanne Sinadow, Grimes Sarah, Ellen Wauters, Eva Lievens, Sonia Livingstone etc.

**The aim of the article** is to reveal the problem of the right to privacy of a child in social media with additional study of judicial practice in this matter.

**Representation of the main material.** With the technical development people's communication has become more accessible and simplified. Before, people used a telegraph and still had to wait some time to receive a message, after that the phones appeared, but the connection between two persons

also took some time, what is considered now as irrational and wrong time management.

Subsequently, there are home phones that are convenient in communication but not in use, because people were attached from the start to the device, and then to a certain distance from the device. The technical world firstly turned by the computers, and then by mobile phones, which allowed to talk anywhere with mobile operator's connection, and it so quickly expanded, covering all main cities and later towns. Then in 2004 was created the world's well-known social network – Facebook by Mark Zuckerberg, USA.

In our time there are a big amount of social media such as Instagram, Twitter, Linkedin, YouTube etc. The most important goal of all social media is to connect people, make communication easier and exchange of information as quickly as possible.

Everyone should know, that social media are therefore not limited to social networks like Facebook but include blogs, business networks, collaborative projects, enterprise social networks, forums, microblogs, photo sharing, product/services reviews, social bookmarking, social gaming, video sharing and virtual worlds.

If once you ask some people to name social media tools you would receive different kinds such as Twitter, Facebook but it would be hard to find a pair who agreed on one strict definition of social media. Everyone has only a vague idea of exactly what the concept is and what exactly we can include in it.

Among the scholars, there is no established notion of what social media is and what is included in them, and it defines them exactly as social media. As Jacka and Scott argue: «[...] there is no single recognized definition of social media».

The Oxford Dictionary defines social media as: «Websites and applications used for social networking»<sup>4</sup>. In turn, social networking is defined as: «The use of dedicated websites and applications to communicate with other users, or to find people with similar interests to one's own»<sup>5</sup>. For each person, this is more intuitive – determining what exactly applies to social media. Usually people know about it with the mass media. However, social media is becoming more and more day by day and can include tools that have never been before.

The definition usually refers to technology, users' input, and content that they distributed. Sometimes social media is characterized by characteristics of the channel where we can send messages or using specific tools like Twitter or Facebook to exemplify modes of interaction.

The existence of a diverse concept of social media has led to a lack of a unified and uniform understanding of this phenomenon. This hinders the development of a single direction of research. It should be emphasized that existing research on social media varies in terms of coherence, the limits of discipline and application.

There are quite simple definitions that are built on one of the functions of social media – the ability to send messages. For example, Kelly, Chan, Russo, and Watkins defined social media as: «[...] those that facilitate online communication, networking, and/or collaboration». Kaplan and Haenlein had similarly definition of social media adding information about technology such as: «[...] a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of User Generated Content». Lewis noted that social media simply serve as a: «[...] label for digital technologies that allow people to connect, interact, produce and share content».

Ukrainian scientist Shulga believes that "Social media" is a media designed for distribution of information through social interactivity using available techniques. Social media support the human need for interaction, using Internet services and Web 2.0 technology for transforming people from content consumers to their creators.

It is obvious that in scientific circles there is a huge number of definitions of social media. We believe that this concept should be considered in a comprehensive way and includes three parts: technological, subjective (represents actors of relationship) and informational.

So, we understand social media as usually free special channels, which can be used only with Internet access, users of which may be natural and legal persons, by prior registration and signing an agreement with the terms and conditions, that use this platform for multilateral exchange of text, audio, video information for self-development, entertainment or realization of business interests.

Interesting, that with the emergence and development of various types of social media, the issue of protecting the right to privacy of child on these platforms has become especially important. This right is formulated in Article 16 of the UN Convention on the Rights of the Child (hereinafter – "UNCRC") which provides that: «The child shall not be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honor and reputation. Also, the child has the right to protection of the law against such interference or attacks». Social media may have various questions about the privacy of the child: using her personal information and photographs, reviewing correspondence, violating good reputation.

A number of diverse European documents have highlighted the need for more detailed protection of the rights of children on the Internet. In 2012, the Council of Europe's Recommendation on the protection of human rights stated that the right to privacy and human dignity are endangered due to the large number of social networks. The problem arose because there is no clear legal regulation of the activities of social networks, and they in turn are platforms for possible violations of children's rights, as they may contain harmful information for the child's psyche.

According to the Guide to the Human Rights for Internet Users by Committee of the Council of Europe in 2014: «Children are due to their age has the right to special protection and guidance when using the Internet. They should be afforded special protection from interference with your physical, mental and moral welfare, in particular regarding sexual exploitation and abuse in the Internet and other forms of cybercrime».

In March 2016, the Council of Europe adopted the new Council of Europe Strategy for the Rights of the Child (2016-2021) is the third children's rights Strategy of the Council of Europe. Bearing in mind the UNCRC, the European Convention on Human Rights (hereinafter – "ECHR", and other Council of Europe legal standards, this new plan identifies five priorities for all 47 member states to guarantee the rights of the child and the fifth one is children's rights in the digital environment.

Article 8 of the new General Data Protection Regulation (hereinafter – "GDPR") on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, which will apply to the processing of personal data from May 2018 onwards, sets out that: «The processing of the personal data of a child shall be lawful where the child is at least 16 years old. Where the child is below the age of 16 years, such processing shall be lawful only if and to the extent that consent is given or authorised by the holder of parental responsibility over the child». Also, GDPR give a possibility for Member States provide by law for a lower age for those purposes provided that such lower age is not below 13 years.

Moreover, GDPR requires: «The controller shall make reasonable efforts to verify in such cases that consent is given or authorised by the holder of parental responsibility over the child, taking into consideration available technology».

Frequently the question arises about the distribution of photos by child and their subsequent use, since children like publish their photos, and social networks in their turn reserve the rights to use these photos later for commercial purposes. In fact, this relates to the right to privacy, which is precisely requires a person's personal consent for making a photo and using it later. It is known that distributing a picture of someone else can be qualified as processing of personal data, which also entails that consent must be given or that another legitimate reason must exist (Article 7 of GDPR).

There is an open question regarding the approval of the use of this photo, for example, by the Facebook network for commercial purposes. According to the article 4 (11) of GDPR: «'consent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her».

The problem is that it is harder for minor persons to understand that their photos can be used by other people after their download for personal use. Also, consent is given at the time of registration of the account, therefore further consent is not required in the future. But it is worth noting that, as a rule, minors do not read any Terms of Use at registration, although they just and click on the button "read and agree". Interesting, that in a usability test of 2011, conducted with 12-17 year olds, researchers found that more than half of the users had difficulties

in finding the ToU on Facebook: «Most users had never seen or used the links at the bottom of each page. Users also mentioned that the text was very difficult to read because of the very small font, a lot of text, no titles, no keywords, colours, etc.»

Grimes found in her study of end-user license agreements of highly popular virtual worlds developed and directed specifically to under-13-year-olds that the agreements of all 16 virtual worlds contained many if not all of the same terms and specialised language found in contracts written for adults. So, *de jure* minors are informed, *de facto* – they have not provided of information and do not have an idea of the possible legal consequences of their actions.

It should be emphasized that contracts to which minors may join must meet a number of requirements, such as visibility (words have to be clearly visible) and clarity (use of the corresponding vocabulary that the child understands in corresponding years). Indeed, in practice, it turns out that it really serves the problem. In a usability test of 2011, conducted with 12-17 year olds, researchers found that more than half of the users had difficulties in finding the Terms of Service on Facebook. Most users had never seen or used the links at the bottom of each page.

Regarding the legal regulation of the consent procedure for minors in social media in Ukraine, it is important to highlight that it is practically absent and those legal acts that are in existence require further development, since the existing legal acts are not in a position to regulate this sphere. Ukraine is only approaching the EU standards on guarantees of human rights and freedoms and standards of the social media's regulation.

Ukraine has only two legal acts: the Law of Ukraine «On information», the Law of Ukraine «On Protection of Personal Data» and both of them have no word concerning child's consent or even child. This shows to us a necessity to introduce a special articles in the Law of Ukraine «On Protection of Personal Data» that will regulate child's consent on processing his or her personal data.

On our opinion, there are three ways are possible. The first one – it is possible to limit the right to register in social networks for persons under 16 years of age. For example, in accordance with Terms of Service of social network Facebook: «You will not use Facebook if you are under 13».

This can be explained by the fact that most social network sites are established in the United States of America (hereinafter – «USA») where the Children Online Privacy Protection Act (hereinafter – «COPPA») stipulates that websites that want to collect data from individuals under 13 have to obtain explicit permission from those individuals' parents. To avoid having to comply with COPPA and obtaining consent from all parents of members who are not yet 13, US-based Social Networks Sites (hereinafter – «SNS») include this age limitation in their Terms of Service.

This is not just about the fact that minor's photos can be used by other people in the future, but also that often social networks are not very successful in controlling the content that users publish to users because of its large number. An example can be shown by the, already forbidden, Russian social network VKontakte. Our generation is quite familiar with what kind of content could be found by chance on this social platform, just if you visited a page of an unknown person with an adequate profile photo.

Concerning the simple indicating of the date birth during the registration from a technical point of view it is very easy to circumvent the age limitation, since control is usually limited to an automatic check on the birth date which the new user specifies him- or herself. Four in ten children admit giving a false age when setting up a profile.

As to how it can be implemented – it is possible to legally oblige parents to apply these special parental control programs

on computers and mobile phones that block web sites that are selected by parents and also block social networks in their code. Maybe it is better for program to include the function of entering the date of birth of the child so that the program knew on what day it can unlock these web sites.

On the one hand, it can be pointed out that it is the restriction of the child's right to information, but we must note that the child is not limited to use the Internet and has a free access to search engines. In this case, simply access to social networks whose users are potential violators of the rights of the child are limited, and the child being in an immature mind can not prevent the risks.

The second option is to force the social network to permanently alert a minor, for example, when the child trying to upload a personal photo, in a short and understandable form explain the risks to which it is subject by publishing a personal photo. Also, the system should conduct a short test of confidence that the child really read this warning and understood it.

The third option is to oblige social networks to regulate the flow of content according to the age of the user. This will not protect the minor from the illegal actions of others, but the information he receives will be filtered on the subject of negative events, photographs, information of a sexual nature etc.

Concerning the problem of the right to privacy in social media of the child by using his photographs and personal information by other is known in case *K.U. v Finland* where in 1999, an unknown person posted a sexual advertisement on an online dating site on behalf of the applicant who was twelve years old without his knowledge. It contained all personal information concerning the applicant's date of birth, age and physical characteristics, and also stated that he was looking for intimate relationships with a man. The advertisement also contained a link to his web page where everyone could find his photo and phone number.

The applicant has gotten to know the announcement when he received an email from the man who invited him to meet. A complaint to the police was filed, but the service provider declined to identify the person who placed the advertisement because he considered himself bound by the privacy policy. Subsequently, the district court refused to comply with the request of the police in accordance with the Criminal Investigation Act to issue an order that would oblige the service provider to disclose the identity of the person who placed it, deciding that there were no clear legal defenses in cases of less serious crimes provisions that could be used to force a service provider to disregard professional secrecy and to disclose such information. The Court of Appeals upheld this decision, and the Supreme Court refused to grant an appeal.

According to national law, the applicant's case was treated as defamatory, the Court decided to emphasize the implications for the applicant's private life in view of the potential threat to his physical and mental well-being and his vulnerable age. The placement of an internet advertisement about the applicant was a criminal act, which led to the fact that the minor became the object of attention of pedophiles.

Such actions required a response to criminal law and it was necessary to provide effective deterrence through adequate investigation and prosecution. Children and other vulnerable persons have the right to protection by the state from such a serious interference with their private life. The possibility of obtaining a refund from a third party, in this case from a service provider, was not a sufficient means of legal protection.

All they had to do was the availability of means that would allow the identification of the actual offender – in this case, the person who placed the advertisement – and bring it to justice, after that the victim could receive financial compensation from him. The government could not claim that it was not able to create a system to protect children from attacks by



pedophiles through the Internet, since the widespread problem of sexual abuse of children and the threat of the use of the Internet for criminal purposes were well-known at the time of the incident.

Although freedom of expression and the confidentiality of communications were important aspects, and users of telecommunications and social media had to have a guarantee that their own right to privacy and freedom of expression would be respected, such a guarantee could not be absolute and should sometimes give a way to other lawful requirements, such as preventing disturbances or crimes or protecting the rights and freedoms of others.

Therefore, the legislature was supposed to create a legislative basis for the harmonization of such competing interests. Although such a basis was subsequently created in the form of a Law on the exercise of freedom of expression in the media, it did not exist in the period of time referred to in the case. Accordingly, the state failed to protect the applicant's right to respect for his private life, giving preference to the requirements of confidentiality over his physical and mental well-being.

Based on the analysis of this case, we can see how the Court is taking the first steps in protecting children in social media, namely from the illegal use of their private information, especially for criminal purposes rather than for entertainment purposes. It is important to follow the idea of the positive obligations of the state and to emphasize the fact that the Court does not require the actions of the state that arose not so long ago. The court places a positive obligation on the states to constantly improve their legislation based on the current needs of technology and society. It merely demonstrates how the Court plays an active role in the law-making of States-parties to the Convention through the preventive character of its judgments.

As for the practice of Ukraine, it should be noted that after the analysis of the database of the Single State Register of Court Decisions, no case was found that would be related to violations of the right to privacy of a minor in social media. Perhaps this situation is due to the fact that minors, firstly, may not always know that their right has been violated, even if there is some kind of email alert, then in the majority of cases such persons do not check it. Secondly, it is possible that minors do not like to share such situations, because in their opinion it can humiliate them in the eyes of other people and try to solve it themselves.

**Conclusions.** So, there is no single concept of social media in academia. The author understands social media as usually free special channels, which can be used only with Internet access, users of which may be natural and legal persons, by prior registration and signing an agreement with the terms and conditions, that use this platform for multilateral exchange of text, audio, video information for self-development, entertainment or realization of business interests.

Also, we can see that there are even more problems with regard to minors in the area of the right to privacy in social media, because of their young age and lack of knowledge. There are a lot of questions to social media about securing the privacy of minors, such as signing by minors the Terms of Services, pointing out false age within registration process, publishing personal photos without understanding of possible consequences etc.

It should be noted that European Court of Human Rights has a broader judicial practice on protection of the child's rights in social media, than Ukrainian courts, which only confirms the relevance of this problem. Moreover, it is important to emphasize that all aspects of aforementioned problem require detailed regulation at the state level as well as counter-aid by social networks, which should also be interested in providing enhanced protection of the rights of minors.

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#### INFORMATION ABOUT AUTHOR:

**Shymanovska Viktoriia Oleksandrivna** – Master of Law of Taras Shevchenko National University of Kyiv, Junior Lawyer at the “GBP Partners” Law Firm

#### ИНФОРМАЦИЯ ОБ АВТОРЕ:

**Шимановская Виктория Александровна** – магистр права Киевского национального университета имени Тараса Шевченко, младший юрист Юридической фирмы «GBP Partners»

*v.shymanovska@gmail.com*