



Legal Implications of "Sharenting"

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ABSTRACT

Sharing child's visual materials online for purely personal purposes by parents, family members or close relatives is a widespread practice, especially, where the availability of internet services is provided, which therefore, poses challenges to privacy protection of the child. Children, as one of the most vulnerable members of society, need special attention with regard of protection of fundamental rights, where privacy a crucial one. This article reviews the implications of child's privacy on social media with the emphasis on sharing minor's visual materials.

KEYWORDS: Child, Privacy, Social media

INTRODUCTION

We live in the age of tech and experiencing constant development of the internet all over the world and Georgia is no exception. While technological advancement is intended to bring benefits for us, it certainly can cause challenges and undesirable consequences. Having publicized visual materials online via various social platforms and sharing engines may not always provide positive outcomes, especially if it depicts child.

As far as we can imagine a true value of privacy and the threats rising from technological advancement, we can also be clearly aware of the importance of protecting child's privacy. Considering that, children are one of the most vulnerable persons of the society, we can be pretty sure how adverse the consequences may be if the right to privacy of a child is violated, especially when an online platform is engaged. Without any doubt, there are myriad possibilities of a violation of other rights that can cause even more harm, starting from the quality of living, education and even the basic right to life. Supposedly, while more severe challenges are yet to be addressed, it is no surprise that child's privacy

rights are overlooked, tending to be ignored in most of the cases.

Having said that, the article reviews a so-called concept of 'sharenting',¹ that describes the process of sharing child's photograph by a parent, in some cases along with brief description about his or her behavior. While sharenting is widespread in Georgia, it should not be overlooked, based on the simple fact that, as an individual, child has the right to enjoy privacy, preventing a parent from forming child's digital identity.

At the end of 2011, Georgian Parliament adopted the Law On Personal Data Protection, which now covers almost all circumstances of data processing, however, there was no reference on child's privacy in Georgian legislation until 2019, when Code on the Rights of the Child was adopted. From now on, we can be certain, that the state has taken positive steps for strengthening child's rights in general. However, for the context of sharenting a little is done.

Certainly, the state has its positive and negative obligations towards individuals, including children. These obligations are considered as mandatory in

1 The term 'sharenting' is coined from the combination of two words – 'share' and 'parent.'

modern state governance. Having said that, under the negative obligation it is required to retreat from any unnecessary restriction of rights and the positive obligation requires having sound legislative basis in order to ensure protection. On the other hand, regulating relations between family members may seem odd from the state's general viewpoint, but, at the same time, positive obligation requires securing each and every individual with the basic right.

The issue of sharenting is not widely discussed in Georgia among legal scholars and researchers. Therefore, defining the scope of parental and child relations in this regard is beneficial. In order to do so, this article starts with defining the problem of sharenting. The second part refers to the legal regulation of this issue, whereas third part reviews the absence of state regulatory mechanism. In the conclusion, closing remarks on this problem and possible solutions are given to the reader, summing up the discussion.

PROBLEM OF SHARENTING

The debate over privacy issues dates back to the year of 1890, when technological development was not the same as it is today, even in the slightest manner. However, two acknowledged lawyers from the U.S., Samuel Warren and Louis Brandeis urged society to be aware of the then existing privacy challenges, which were mainly stemming from the advancement in photography and newspaper articles.² From this period, a notion of privacy has become one of the major fundamental values for individual, as a consequence, the right to privacy is acknowledged and valuable human right.

Nowadays, the evolution of online communications is at the peak of its development and this process does not seem to be stopped in future. As a consequence, social media became very popular among the Georgian society. Technology has shifted the notion of communication to a whole new level which has its impact on interpersonal relations as well. For example, one does not have to visit relatives in order to hear news from them, nor to see his/her friend to lend a book, etc. Examples on the benefits of social relations affected by internet is versatile and we can imagine how useful the technology is for us.

On the other hand, technological development may not only provide positive outcomes, it can be

equally damaging and adverse as well. As mentioned earlier, the point where I intend to draw attention is the process of sharing a visual material (mainly photo or video file) of the child on the social media with or without description or a story about child's behavior.

There are a lot of social platforms by which this practice can be performed, but due to the fact that the most used platform in Georgia is Facebook, it is primary point of attention in this article for the challenge described here. For instance, statistical data shows that by the January 2019, there were 2.7 million internet and active social media users, most of them preferring Facebook as a primary social media platform.³ It is obvious that this is a large number of users if we consider the overall population of Georgia.

The fact, that Facebook does not prohibit a child to be registered, makes the platform available to minors as well. Generally, Facebook does not allow a person under 13 to be registered, nevertheless, there are accounts created by individuals below 13. In 2019, Ofcom – the UK's communications regulator published its annual report, inter alia, analyzing the online behavior of children on social media. According to the report,⁴ 1% of children between the ages 3-4 (online users) had their own social media account, the percentage is rising between the group of 5 to 7-year-old and equals to 4, the growing tendency was continued between the ages of 8-11 with the percentage of 21 and the highest point is between users at the age of 12-15 with the percentage of 71.⁵ In addition, adults often share a photo or video displaying a child. To set aside the ethical aspect of this matter, not because it is less important, but because I mainly point on legal issues, it can easily infringe child's right to privacy and data protection.

The infringement of privacy via social media platforms is widespread all over the world. For example, in 2018 a survey on this trend in India has indicated that 4 out of 10 parents post photos or videos of their child at least once a day via their social media accounts and 67% of parents admit that they have no concern about sharing their child's photo in school uniform, at the same time being aware that this might give stalkers the details of child's where-

2 Warren, S., Brandeis, L. (1890). A Right to Privacy. Harvard Law Review.

3 Datareportal. (2019). Digital 2019: Georgia [<https://papaya-avocado-9tgy.squarespace.com/reports/digital-2019-georgia?rq=Georgia>].

4 Ofcom. (2019). Children and Parents: Media Use and Attitudes Report 2019 [https://www.ofcom.org.uk/_data/assets/pdf_file/0023/190616/children-media-use-attitudes-2019-report.pdf].

5 *Ibid*, p. 5.

abouts.⁶ Despite not having a statistical data on this trend in Georgia, it is well known that this practice is similarly accepted and favored. The sad truth is that, sharenting may trigger certain risks, for example child's identity theft, causing from the fact that child's full name and personally identifiable information (PII), such as the age or school is publicly available.⁷

The dangers of sharing child's visual material on social media sometimes seem to lack clear understanding, however, the risks and potential harm are alarming indeed. It is obvious that, sharenting too much may hinder the development of the self in child⁸ and the reasons not to accept this practice may seem endless, however, we can briefly articulate 5 common reasons why one should avoid sharing child's photo or video:

1. Posting about a child can infringe minor's right to privacy – while not be able to understand what a parent shares about him/her, it is highly possible that, for example, lately child will feel embarrassed and develop a sense that he/she does not have ownership over his/her own body or values;
2. Posts might be used for bullying;
3. After sharing the control of data flow becomes almost impossible – public photos or videos or even shared between the group of people makes it possible to easily download or re-share them, which leaves a child's privacy exposed to vulnerable activities;
4. Potential for attracting dangerous people with potential of storing a photo on illegal websites and forums, inter alia, using them for child pornography;
5. The risk of digital kidnapping – a type of identity theft, with the result of appropriating one's own image or likeness.⁹

6 The Economic Times. Alarming trend of parents posting child's pictures online: survey [https://economictimes.indiatimes.com/tech/internet/alarming-trend-of-parents-posting-child-pictures-online-survey/articleshow/65651214.cms?from=mdr].

7 Stange Law Firm. The very real risks of 'Sharenting' [https://www.stangelawfirm.com/articles/the-very-real-risks-of-sharenting/#:~:text=Sharenting%20and%20Identity%20Theft&text=Unfortunately%2C%20sharenting%20can%20put%20children,the%20child's%20age%20or%20school.].

8 *Ibid.*

9 Jellies. Reasons not to post about your child on social media [https://jelliesapp.com/blog/5-reasons-not-to-post-about-your-child-on-social-media].

LEGAL REGULATION

Intrusions into the right to privacy are versatile and there are myriad of ways to do so. Some invasions may not seem as clear as others and here I point out intrusions into the privacy by sharing a visual material (photo or video) of a minor, without consent and in some cases without having the ability to realize the process due to early age.

As this article is mainly focused on the ways to prevent such kind of action from being completed, main attention is drawn on the legal regulation. Privacy is an acknowledged basic right of the individual. Enjoying this right creates possibility for self-development and serves as a prerequisite to enjoy other basic rights such as freedom of speech, as the former also includes a right to form ideas and opinions without interference of others and to decide whether it should be expressed publicly or within the limited number of persons.

Scholars argue that this right has no exhaustive explanation, this view is also accepted by the European Court of Human Rights as many court decisions point out the impossibility to fully determine the notion of privacy.¹⁰ In general, this right may seem (and at some extent it really is) vague, nevertheless each individual is entitled to benefit from it.

To provide argument in a coherent way, I will discuss guarantees of child's privacy protection by reviewing the most influential legal acts on privacy and personal data protection.

Speaking of a basic right, the very first legal document where it should be enshrined is the constitution. Even though, in general, negative rights declared in legal documents are mainly directed against the state intervention, therefore it is worth to review constitutional prescription of the right to privacy.

In the Constitution of Georgia, the right to privacy is declared under the Article 15, titled as "*Right to Personal and Family Privacy, Personal Space and Privacy of Communication.*" The first paragraph states that "*Personal and family life shall be inviolable. This right may be restricted only in accordance with law for ensuring national security or public safety, or for protecting the rights of others, insofar as is necessary in a democratic society.*" However, as mentioned earlier, this is applicable mostly on state interference cases, however it gives a clear indication that all shall enjoy this right in general. To provide more consistent arguments towards protection of child's privacy, we shall

10 ECtHR, Niemietz v. Germany. (16.12.1992) App. No. 13710/88. para. 29.

also mention Article 12, where the Constitution declares the general right of personal free development as follows: *“Everyone has the right to the free development of their personality.”* Considering the comprehensive nature of this provision, it can be clearly said that this right not only imposes limits towards the state, but also ensures that every individual is entitled to have a possibility to freely develop his or her personality. To translate this concept for the purposes of this article, and to read it in a combination with the Article 15, the result will be that free development of child requires to maintain an environment where minor enjoys free choice over certain actions in life, inter alia, over matters which may violate the right to privacy. In other words, starting from the birth, a parent or any other person must refrain from actions which may compromise child’s privacy.

Legislation on the right to privacy also entails acts on personal data protection and Georgia is no exception. Provisions on privacy protection can be found in the Constitution of Georgia and in other acts, such as, Civil Code of Georgia, Criminal Code of Georgia, General Administrative Code of Georgia, etc.

However, reality shows that regarding personal data protection these provisions are not sufficient and more specific regulation is needed. In 2011, the first and still valid act on personal data protection has been adopted by the Parliament of Georgia. It was considered as a serious move towards strengthening one specific yet one of the most important side of the right to privacy – personal data protection. Based on the EU Directive 95/46/EC,¹¹ the Act offers internationally accepted general concept of data protection. The first and foremost is the general principles of data processing which can be shortly described as fairness, lawfulness, protection of one’s dignity, purpose limitation and proportionality, accuracy and timely deletion of data. Other provisions include responsibilities of data controller and processor as well as data subject’s rights and terms on international data flow.

At a glance, the Act may be seen as a tool for safeguarding child’s privacy by protecting personal data, however, provisions are mostly irrelevant to apply them on parent-to-child relations regarding the

sharenting. The Act is applicable on relations where data is processed in a context of professional activities, where data processing is one’s duty or the data is used for commercial purposes.¹² The Act simply excludes its applicability on data processing where it is performed solely for personal (household) purposes.¹³ Accordingly, it has no effect on a parent-to-child relations regarding sharenting, because it is considered as a solely personal activity.

Having concluded that, we have to move towards finding a legal tool to address this challenge. Another legal basis, which may be useful, is mentioned in the Civil Code of Georgia, where it prescribes the possibility to protect one’s privacy in civil matters. Article 18 establishes rules for dealing with personal non-property rights, by declaring that *“a person may protect in court, according to the procedures laid down by law, his/her honor, dignity, privacy, personal inviolability or business reputation from defamation.”*¹⁴ In addition, it ensures that *“The values referred to in this article shall be protected regardless of the culpability of the wrongdoer. [...] In the case of culpable violation, the injured person may also claim compensation for non-property (moral) damages.”*¹⁵ Also *“when his/her image (photograph, film, video, etc.) has been disseminated without his/her consent. The consent of the person shall not be required when photo-taking (video recording, etc.) is connected with his/her public recognition, the office he/she holds, the requirements of justice or law enforcement, scientific, educational or cultural purposes, or when the photo-taking (video recording etc.) has occurred in public circumstances, or when the person has received compensation for posing.”*¹⁶ It is obvious that a person is has a right to express consent on publication of a picture of his/her own and being publicized means to make it available for specific group of people as well as for unlimited viewers, which may take place via social media.¹⁷ The Code also creates possibility for a child to apply to a court for the violation of privacy if it is compromised, but frankly speaking it cannot serve as a powerful tool for ensuring protection of child’s privacy, at least for these two reasons: firstly, in Georgia it is less likely that a child will apply to court against his/her parent for violating privacy rights by shearing a photo or video online; secondly, when having a legal

11 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. It is worth mentioning that this Directive is repealed by the 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.

12 Art. 3.

13 *Ibid.*, Art. 3(3)(a).

14 Para. 1.

15 Para. 6.

16 Para. 5.

17 Chanturia, L. (ed.). (2017). *Commentary on Civil Code of Georgia*, Book I, p. 131.

ability to apply to a court, a child may lose interest in arguing about privacy rights, particularly visual materials shared online. In addition, it should also be noted that, even if those two reasons won't exist, claiming damages may be a hard task to accomplish and therefore it may hinder a child having his/her claims reviewed at court. Of course, these reasons for not applying are not exhaustive and there may be other ones depending on a specific context of the matter, however, the point here is that law creates possibility for child to address a court.

Practices of applying to a court over unconsented photo usage is not rare internationally. For example, in 2017, 16-year-old minor applied to a court against his mother for posting photos of him on social media without a prior consent. The same year a court passed a judgement where it mandated the mother to delete all references of a minor on social media made by her until a specified date, otherwise it could cause a fine for 10000 Euros.¹⁸ In 2016, a teenager applied against her parents for posting embarrassing photos of her on Facebook. This case involved more than 500 hundred pictures that were uploaded within a period of seven years, which were shared without a consent of data subject (child).¹⁹

Speaking of child's privacy guarantees we should not avoid mentioning the Code on the Rights of the Child, which entered into force on September 1, 2020. Generally, the idea behind this Code is to ensure protection of children as one of the most vulnerable members of society. Primarily, Code addresses governmental and public bodies as the major stakeholders in ensuring protection of children.

Code establishes a notion of the 'best interests of the child,' which is explained as *"the welfare, safety, health, educational, developmental, social, moral and other interests of the child, which are determined by the parents of the child, [...] and based on the individual needs of the child, with the participation of the child, and giving due account to the opinion of the child."*²⁰ This explanation gives us a clear indication and paves way to a reasonable assumption that 'best interests,' inter alia, entail respecting child's privacy and acting diligently. In ad-

dition, emphasis is drawn on taking into account the opinions of a child.

As noted earlier, Code addresses public bodies, however, interesting prescription can be found in the Article 5(3), where the following is provided: *"It shall be a binding obligation for the legislative and executive authorities, the judiciary, and the public institutions and natural and legal persons of Georgia, to give priority to the best interests of the child when making decisions and/or taking any action in relation to the child."* Under 'natural person' we can assume any person which is responsible towards a minor for acting in favor of his/her best interests. This assumption primarily implies a parent or legal guardian. Therefore, it is their responsibility to act in accordance with child's needs and refrain from any action that will violate minor's rights, inter alia, privacy and data protection.

A concept of acting in accordance with child's best interests is also enshrined in the Convention on the Rights of the Child. It states that *"No child shall be subjected to arbitrary or unlawful interference with his or her privacy, [...]"*²¹ This provision is strengthened by declaring responsibilities of parents and legal guardians and stating that *"[...] Parents or, as the case may be, legal guardians, have primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."*²²

ABSENCE OF DIRECT STATE SUPERVISION

In Georgia, the violation of privacy and data protection rights by public or private bodies are supervised by the State Inspector Service. This public organization is responsible for controlling the fulfillment of data protection rules²³ by the data controllers and processors, and in case of violation – has the power to impose administrative fines²⁴ within a specified amounts and depending on the violated rule.

On the other hand, sharing child's photo or video material mostly is conducted within a purely personal purposes and as mentioned earlier Law on Personal Data Protection states that this Law is not applicable to *"data processing by a natural person clearly for personal purposes when the data processing is not related to his/her entrepreneurial or professional activity."*²⁵ Accordingly, unconsented sharing of child's visual

18 Odditycentral. 16-year-old Takes Mother to Court for Posting Photos of Him on Facebook [<https://www.odditycentral.com/news/16-year-old-takes-mother-to-court-for-posting-photos-of-him-on-facebook.html>].

19 Independent. Austrian Teenager Sues Parents for Posting Embarrassing Childhood Pictures on Facebook [<https://www.independent.co.uk/news/world/europe/teenager-sues-parents-over-embarrassing-childhood-pictures-facebook-austria-a7307561.html>].

20 Art. 3(h).

21 Art. 16(1).

22 Art. 18(1).

23 Law of Georgia on State Inspector Service, Art. 13.

24 *Ibid.*, Art. 16(1)(f).

25 Art. 3(3)(a).

material is beyond the scope of regulation by this Law. Does this also mean that State Inspector Service has no powers to investigate such violations? To answer this question we shall go back to the Law on State Inspector Service, where it stipulates powers of the Service, in particular „*The State Inspector Service is authorized, on his/her own initiative and upon application of an interested person, conduct an inspection of any data processor and/or authorized person.[...]*”²⁶ The terms “data processor” and “authorized person” is defined in the Law on Personal Data Protection.²⁷ However, as noted above acting within the margin of purely personal or household purposes, excludes having data controllers or data processors either. Therefore, mandatory powers cannot apply to the mentioned relations.

Nevertheless, the only public body supervising the protection of privacy and data protection rights is State Inspector Service. Formerly, known as Personal Data Protection Office, it has published several important recommendations on various data protection topics as well as has important campaigns for public and private bodies on raising awareness, which eventually shifted the culture of data protection among the citizens.

On the other hand, for almost 7 years, since the mid of 2013 the Service (formerly – Office) has not published any recommendation on child’s privacy rights, in particular on sharing visual materials online. Considering the significance of this issue and challenging nature of technological advancements, any guidance

from the supervisory authority is important and will be regarded as a positive step towards strengthening minor’s privacy rights in domestic relations.

CONCLUSION

As this article demonstrated, sharing a minor’s personal visual materials on social media platforms within purely personal purposes is a widespread practice. The legal side of this issue shows that there are mechanisms for privacy protection in this regard. Not only domestic legal acts are enabling to seek legal remedy before a court, but it is internationally acknowledged that child’s rights, inter alia, privacy protection is of paramount importance. The key factor here is to follow the rule of the best interests of child and act upon this standard. In addition, it is also enshrined in domestic law, therefore it is a reminder for everyone to respect the essence of child’s rights overall.

It is certain that state has no powers regarding the supervision of privacy rights protection between interpersonal (purely personal) relations and there is not much expected from the state when the case implies regulation of such relations. However, a general endorsement of minor’s privacy rights is needed. The necessity of such advice is also obvious considering the ever growing use of internet services and social media.

In order to shift the level of child’s privacy protection online in the context of personal relations and for the minimization of risks, implementation of permanent raising awareness campaigns as well as provision of relevant advertisements via television channels and social media is needed. This measures should be oriented on parents with the emphasis on the risks of child’s personal data usage in the social media. In addition, adoption of relevant recommendation on this issues by the State Inspector Service also would be beneficial for addressing this challenge.

26 Art. 15(1).

27 Art. 2(i), (j). Note, that in the English version of these Laws there are misalignment of terms, in particular, the Law on Personal Data Protection provides the term of “data controller”, which is referred as “data processor” in the Law on State Inspector Service. Similarly, the term of “data processor” is referred as “authorized person” in the Law on State Inspector Service. While the latter is adopted after the enactment of the Law on Personal Data Protection, specific correction is needed to synchronize legal terms in the English version of the Law.

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