

# Have 'Generation Tagged' Lost Their Privacy?

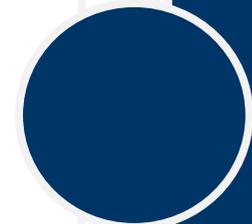
*A report on the consultation workshop to discuss the legislative, regulatory and ethical framework surrounding the depiction of young children on digital, online and broadcast media*

Run by the Centre for Information Rights, University of Winchester on behalf of the British and Irish Law, Education and Technology Association and supported by the Institute of Advanced Legal Studies

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# Introduction and Acknowledgements

This report summarises the discussions that took place in a BILETA consultation run by The Centre of Information Rights, University of Winchester. The consultation took place on the 7<sup>th</sup> June 2017 and concerned the impact of broadcast and social media on the privacy and best interests of young children.

Many participants from a variety of areas of expertise were involved in the session (listed on page 29). We would welcome any further input and wider public engagement surrounding the issues discussed.

We are very grateful to all the participants who took part in the event, ensuring full and open discussion and a variety of opinions on the matters at hand. We would also like to give a special thank you to the Institute of Advanced Legal Studies for providing the venue. In addition, we wish to thank BILETA for their support. No comments are attributed to individuals in this report. **The Recommendations are those of the report authors and do not necessarily reflect the views of the workshop participants.**



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# Background

The balance to be struck between Article 8 (the right to respect for a private and family life) and Article 10 (the right to freedom of expression) of the European Convention on Human Rights is a heavily debated issue when it comes to the law around children's privacy. This workshop and the research that inspired it<sup>1</sup> centred on this debate, concerning young children and the protection that should be afforded to maintaining their privacy. (By young children, we mean those who are not yet competent to make decisions for themselves).

The youngest members of our society are often very adept at using technology. They may, however, have little awareness of the long-term impact of the Internet. They can appear on social media because of the actions of others, such as parents posting photographs on a Facebook or Instagram page,<sup>2</sup> opening a Twitter account for their baby, or even posting a photograph of their daughter dying of cancer<sup>3</sup> (such postings may breach

*"It is all too easy for professionals and parents to regard children...as having no independent interests of their own: as objects rather than subjects"*

- Lady Hale, R (on the application of S) (2002)

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<sup>1</sup> Marion Oswald, Helen James and Emma Nottingham, 'The not so secret life of five year olds: Legal and Ethical issues relating to disclosure of information and the depiction of children on broadcast and social media' (2016) 8(2) Journal of Media Law 198 <http://www.tandfonline.com/doi/full/10.1080/17577632.2016.1239942>

<sup>2</sup> Paula Coccozza, "I was so embarrassed I cried": do parents share too much online?" *The Guardian* (5 November 2016) <https://www.theguardian.com/lifeandstyle/2016/nov/05/parents-posting-about-kids-share-too-much-online-facebook-paula-coccozza>

<sup>3</sup> Ellie Flynn, "True face of cancer' Dad defends why he shared heartbreaking picture of dying four-year-old daughter writhing in agony' *The Sun* (5 November 2016) <https://www.thesun.co.uk/news/2122384/dad-defends-why-he-shared-heartbreaking-picture-of-dying-four-year-old-daughter-writhing-in-agony/>

terms and conditions in some circumstances). Where young children feature on broadcast media, they risk becoming the target of comment on social media, outside of their immediate friends and family. This content is discoverable long after the original broadcast. They are 'Generation Tagged'.<sup>4</sup>

Many questions remain regarding young children's privacy. How, for instance, should the 'reasonable expectation of privacy' test be applied when parental consent may diverge from the child's best interests? How should children's privacy be treated when there is a public interest publication at hand?<sup>5</sup> How far should the legal, regulatory and ethical framework protect the child's 'digital person' in light of technological developments? These were just a few of the issues we hoped to elaborate upon within the workshop.

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<sup>4</sup> Marion Oswald, Helen James and Emma Nottingham, 'The not so secret life of five year olds: Legal and Ethical issues relating to disclosure of information and the depiction of children on broadcast and social media' (2016) 8(2) *Journal of Media Law* 198

<http://www.tandfonline.com/doi/full/10.1080/17577632.2016.1239942>

<sup>5</sup> BBC, 'Facebook U-turn over 'Napalm girl' photograph' (BBC Technology, 9 September 2016) <http://www.bbc.co.uk/news/technology-37318040>

# Executive Summary

The workshop debate was wide-ranging covering a number of circumstances in which young children may be depicted on broadcast and social media: in what has become known as ‘sharenting’; in the reporting of the news and current affairs; in documentaries produced by mainstream media; by non-mainstream digital media and on social media, for instance in user-generated comment. The following recommendations are intended to challenge the status quo and to contribute to the ongoing debate around law and regulation in the area of children’s privacy. (The recommendations are those of the report authors and do not necessarily reflect the views of the workshop participants):

1. Young children should have a **privacy right independent from their parents’ privacy expectations**. Such a right could be trumped by other rights or interests, for instance public interest exceptions relating to news and current affairs reporting, journalism and the arts, and the parents’ right to freedom of expression. There should however be a clearer requirement and process for the **child’s interests** (which would include the likelihood of immediate or longer term harm, the child’s welfare and whether the publication is beneficial or neutral for the child) to be considered alongside the potential benefits of the publication.
2. More open discussion is needed around the **digital social norm that accepts the objectification of young children, the posting of negative comments and images where it might reasonably be expected that the child would not agree**, yet requires a best interests test to be applied in offline settings such as health and education. The rights and protections afforded to a young child in relation to digital or broadcast media should not be subject to adult standards of proof i.e. they shouldn’t have to show ‘defamation’ or an offensive communication or evidence of direct threat. **We should consider how we want our young children to be treated in the offline world and hold the digital world to the same standards.**

3. The media should continue to reflect the lives of children and it is in no-one's interests to have a media where children simply do not appear for fear of the risk of potential harm. Programmes made by highly regulated broadcasters, ensuring wellbeing of children is of paramount importance, can help to set the high ethical watermark in this area for other forms of media to follow. We should continue to monitor the inclusion of young children in 'Science Entertainment' broadcasts, however, and the parallel impact of social media. Those involved in some of the first of these fly-on-the wall documentaries, such as Supernanny, which first aired in July 2004 are only now reaching an age at which they will be able to discuss their experiences in a reflective and meaningful way. To date it has been difficult to discuss the experiences directly with these young participants. **More research into the impact of broadcast media exposure of young children is needed to understand what effect it has on them, both positive and negative. Once these effects are more fully understood, actions can be taken to reduce any potential harm.** Concerns regarding the power-balance between participants and the broadcasters also need to continue to be addressed.
4. There is a **need for more consistency in terms of compliance and regulation between regulated broadcasters and non-mainstream digital media/social media.** This could enhance protection to children in 'YouTube families' and other instances where there are no or limited checks on what is being put into the public domain. The introduction of a **Children's Digital Ombudsman** could provide a way for children's interests to be better represented in relation to all forms of digital publications.
5. It is no longer satisfactory that online intermediaries continue to benefit from unqualified 'mere conduit' and 'hosting' protections in EU and UK law<sup>6</sup> when it comes to activities on those platforms that may be harmful to young children's privacy and best interests. **'Controller hosts' (such as Facebook, YouTube and**

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<sup>6</sup> Directive 2000/31/EC Arts 12-15

Twitter) and ‘independent intermediaries’<sup>7</sup> (such as Google) should have a duty of care to consider young children’s privacy and best interests in their operations.

6. As part of the above-mentioned duty of care, the settings on social media services (e.g. Facebook and Twitter) should be **privacy respecting as default when images or information about young children are concerned**. Potentially, it should be possible to require that warnings be shown where social media systems detect that a person intends to post images of young children without these privacy settings enabled. This suggestion may not be met with hearty enthusiasm by social media companies, however, given that such a requirement may compete negatively with business interests; ‘YouTube’ Families provides us with an example of a situation where such conflict might exist. **The duty of care, however, should increase in line with the extent to which the social media service promotes, controls and profits from the publication of images of young children.**
7. There should be a **limitation on the extent to which information and images relating to a young child can be copied, re-contextualised and re-shown in a different context to the original post or publication**. This includes copying or sharing posts and images from social media or clips of televised programmes being shared on the internet, subsequent to its broadcast. There are new developments, such as **image-matching, tracking and content moderation technologies**, which could be beneficial to protect a young child’s privacy and could be deployed by online services to prevent the re-contextualising of images and information (as has already been done in relation to sexual abuse images and terrorist related content).

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<sup>7</sup> Defined by David Erdos in Erdos, David, ‘Delimiting the Ambit of Responsibility of Intermediary Publishers for Third Party Rights in European Data Protection: Towards a Synthetic Interpretation of the EU *acquis*’ (June 27, 2017). Available at SSRN: <https://ssrn.com/abstract=2993154>

**Further research should be done to consider the potential of these technologies, and how they could assist an older child to identify and control images and data which had been posted about them in the past.<sup>8</sup>**

8. There should be more **education for both children and parents about the impact of ‘sharenting’** and the level of personal information they are potentially exposing by doing this. Clarity is required as to which body should have overall responsibility for such educational programmes.

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<sup>8</sup> See for instance Zampoglou, Markos, Symeon Papadopoulos, and Yiannis Kompatsiaris. "Detecting image splicing in the wild (web)." *Multimedia & Expo Workshops (ICMEW), 2015 IEEE International Conference on*. IEEE, 2015; Saez-Trumper, Diego. "Fake tweet buster: a webtool to identify users promoting fake news on twitter." *Proceedings of the 25th ACM conference on Hypertext and social media*. ACM, 2014.

# Children's rights in the digital world, the privacy law landscape and the child's reasonable expectation of privacy

## *Opening Talk*

The first session looked at a child's reasonable expectation of privacy, and the way the law has evolved within the area. The test for this dates back to *Campbell v Mirror Group Newspapers Ltd.*<sup>9</sup> It is made up of two stages, the first asking whether the claimant has a reasonable expectation of privacy. If they do, the second stage asks how their reasonable expectation of privacy is weighed against the defendant's rights.

For children, the leading case is *Murray v Express Newspapers*,<sup>10</sup> which clarified that children have privacy rights distinct from their parents.<sup>11</sup> Subsequent cases have discussed considerations to be taken into account

<sup>9</sup> *Campbell v Mirror Group Newspapers Ltd.* [2005] UKHL 61; [2005] 1 WLR 3394

<sup>10</sup> *Murray v Express Newspapers* [2008] EWCA Civ 446; [2009] Ch. 481

<sup>11</sup> *Murray v Express Newspapers* [2008] EWCA Civ 446; [2009] Ch. 481, 497 (Lord Clarke MR)



when deciding a child's right to privacy. Among these is *Weller v Associated Newspapers Ltd.*<sup>12</sup> in which it was said that the fact that a claimant was a child did not mean that he/she necessarily had a reasonable expectation of privacy.

The reasonable expectation of privacy test has been open to criticism and during this session was labelled, "highly artificial and strained" when concerning children. Children do not have subjective expectations so the courts ascribe the parents' expectations onto the children. Consequently, a child's case may be weakened if a parent does not have a reasonable expectation of privacy, for example, due to courting publicity.<sup>13</sup> It appears controversial that a child's privacy expectation can be affected by their parents' conduct.<sup>14</sup> Later in life a child may object to such exposure through publications, and would need their own distinct privacy rights to challenge these.<sup>15</sup> Consequently, it was submitted that young children should have an absolute right to privacy, independent from their parents. Nevertheless, other considerations could still override this right. The speaker concluded by asserting that the



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<sup>12</sup> *Weller v Associated Newspapers Ltd.* [2015] EWCA Civ 1176; [2016] 1 WLR 1541

<sup>13</sup> *AAA v Associated Newspapers Ltd.* [2012] EWHC 2103 (QB); [2013] E.M.L.R. 2

<sup>14</sup> Recent Ofcom research indicates a split in parental attitudes towards the posting of images of their children: 56% of parents said that they do not use social media to share, post or blog photos or videos of their children: Ofcom, Communications Market Report (United Kingdom) 3 August 2017, page 35 <https://www.ofcom.org.uk/research-and-data/multi-sector-research/cmr/cmr-2017/uk>

<sup>15</sup> Joint Committee on Privacy and Injunctions, *Privacy and Injunctions* (2010-12, HL 273, HC 1443) Paras 80-81

reasonable expectation of privacy test was incoherent and difficult to apply.

### *Discussion*

The discussion started by considering the lack of distinction between parents' and children's reasonable expectation of privacy. Whilst the courts have not explicitly made such a distinction, they may have done so implicitly in *Murray*. The court there held that there was a strong expectation of privacy for the claimant who had never been subject to public exposure previously as his parents had always protected him from it.<sup>16</sup>

Building from this, the use of social media was discussed. If parents with highly followed accounts frequently share images of their children for publicity, they may themselves be interfering with their child's privacy. It was asked whether parents should have a new legal responsibility to protect their children's privacy. A 'best interest' test could be a possible basis for such a new legal duty.

It was suggested in furtherance of this that when a child is deemed 'Gillick competent', under such a new right, they could then take action against their parents.<sup>17</sup> There was some conflict whilst discussing this,

### Recommendation:

**A privacy right for young children independent from their parents (subject to exceptions)**

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<sup>16</sup> A recent example of such conflict can be found in the news story: 'Stella McCartney 'furious' after David Beckham shares picture of her daughter at Harper's Buckingham Palace birthday bash on social media' The Mirror, 14 July 2017 <http://www.mirror.co.uk/3am/celebrity-news/stella-mccartney-furious-after-david-10788118>

<sup>17</sup> *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] A.C. 112

regarding whether it would be right for parents to be defendants. There was some support for the view however that it is immoral for parents to be able to share images of their child if the child does not want them shared.<sup>18</sup>

It was raised at this point that the most damaging part of sharing images of children online may not be the image itself but rather the meta-data behind it. Meta-data includes the location in which the photograph was taken or the date. Sharing this meta-data was believed by some to be more of an infringement of a child's right to privacy than the image itself.

The concern was raised that if we are too protective of children and give them an independent right to privacy, then what would the practical consequences be? Where would the age boundaries be set? Would such protection result in the use of children's images being prevented in every context? Would there be no children's clothing catalogues, for example? However, other contributors clarified that whilst they did think a child should have strong Article 8 rights, these rights could be trumped by Article 10 in some circumstances.<sup>19</sup> This decision should be made on a case-by-case basis. For example, if a

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<sup>18</sup> David Chazan, 'French parents 'could be jailed' for posting children's photos online' *The Telegraph* (Paris, 1 March 2016)

<http://www.telegraph.co.uk/news/worldnews/europe/france/12179584/French-parents-could-be-jailed-for-posting-childrens-photos-online.html>

<sup>19</sup> European Convention on Human Rights 1950, Article 8, 10

photograph was taken in a crowded place where the child was not singled out, would it have a different outcome to a picture of a child in isolation? Furthermore, it was suggested that any public interest defence would need to be broad so as to include arts, as there is a general interest in finding out how children behave. It was however suggested that children's images can be taken out of context.<sup>20</sup>

It was also suggested that it is technically possible to implement access control, tracking, notification, and personal data-store solutions, based on meta-data. It is very difficult to use access control technologies on the internet. Lots of things can be copied and shared onto different platforms, through different terms and conditions, across different jurisdictions. They can then be pulled together to create a much fuller picture about ourselves than we would have expected.<sup>21</sup> This creates a risk that children could be re-identified, with various bits of information being used to create a 'jigsaw identification'.

When it comes to the sharing of images of children online, it was discussed how there is a lack of clarity as to what might be the

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<sup>20</sup> Katherine Chatfield, 'Are you sure you want to post that?' (News.com, 22 May 2016) <http://www.news.com.au/lifestyle/sunday-style/culture/are-you-sure-you-want-to-post-that/news-story/d9b753e96fed2dc765c95fac0cda5a99>

<sup>21</sup> Margherita Ceraolo, 'Ethics and the alleged misuse of social media data' (Data Impact Blog, UK Data Service 2017) <http://blog.ukdataservice.ac.uk/ethics-and-the-alleged-misuse-of-social-media-data/>

### Recommendation:

**A limit to the re-contextualising of images and information about young children, enforced by new technology**

infringement, if any. The debate was whether first use (i.e. initially posting the image), or the second use (i.e. sharing it again) would be the infringement. There was general agreement that it would come down to all the circumstances of the case, including the type of activity, the context, the nature of any consents and so on.<sup>22</sup>

In *Murray*, Sir Anthony Clarke explained that the justifications for sharing the images were important. The nature and purpose for sharing the image and whether there was a good reason for sharing it again in that context should be considered. Where there is no justification, or the image has been re-contextualised, it infringes on the child's rights.<sup>23</sup>

To conclude, this session discussed how having parents in charge of a child's right to privacy can be problematic. Furthermore, there are other ways that children's data can be used which relate to the misuse of one's digital person<sup>24</sup>. Questions also arose around the potential for infringement of a child's privacy rights when it came to sharing their image. There was some support for the view that (following *Murray*) this infringement occurs when the nature and purpose of sharing the image differed to the first use of the image.

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<sup>22</sup> Leo Kelion, 'Facebook concern over fake cancer babies U-turns' (BBC, 22 February 2017) <http://www.bbc.co.uk/news/technology-39051972>

<sup>23</sup> *Murray v Express Newspapers* [2008] EWCA Civ 446; [2009] Ch. 481, [36]

<sup>24</sup> Marion Oswald. 'Jordan's Dilemma: Can large parties still be intimate? Refining public, private and the misuse of the digital person' *Journal of Information Communications and Technology Law*. <http://www.tandfonline.com/toc/cict20/26/1>



# The child law perspective: consent, autonomy and best interests

## *Opening Talk*

The second session discussed children's consent, autonomy and best interests. Reference was made to an article by Stacey B. Steinberg, which indicated that parents are not always protectors.<sup>25</sup> In sharing details of their children, in the form of pictures or personal information, parents become 'gatekeepers' of their children's story, which can later lead to conflict. Therefore, there is a need for a 'child centered perspective on parents' rights'.<sup>26</sup> The 'French solution' was referred to, whereby parents could be prosecuted for publishing intimate details of their child and breaching their privacy.<sup>27</sup> The United Nations Convention on the Rights of the Child (UNCRC) was also considered, as it is essential to children's rights. The treaty

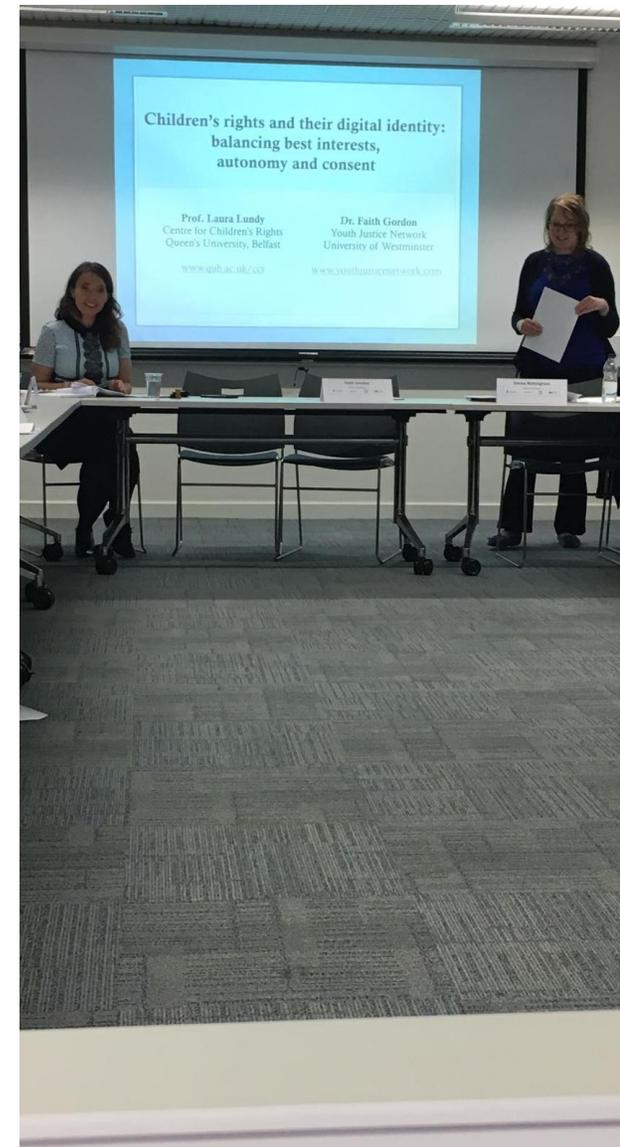
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<sup>25</sup> Stacey B. Steinberg, 'Sharenting: Children's Privacy in the Age of Social Media', (2017) 66 Emory LJ 839

<sup>26</sup> Barbara Bennett Woodhouse, '*Hatching the Egg: A Child-Centered Perspective on Parent's Rights*', (1993) 14 Cardozo L. Rev., 1747

<sup>27</sup> Jess Staufenberg, 'French parents 'could face prison' for posting photos of their children on Facebook' *The Independent* (2 March 2016)

<http://www.independent.co.uk/news/world/europe/french-parents-told-their-children-might-sue-them-for-pictures-put-on-facebook-a6906671.html>



recognises children as both being, and becoming, rights holders. Consequently, it justifies why parents can exercise the child's reasonable expectation of privacy on their behalf when young children are yet to gain capacity. It is unclear what should happen when both parents of a child have conflicting views, however.<sup>28</sup> The speaker believed that further research should consider children's and adults' perceptions of the conflict between their rights.

There is little clarity over who should be allowed to use a child's digital image. Parents, children or 3<sup>rd</sup> parties may all have an arguable reason to use a child's digital image, subject to different restrictions. Who determines a child's best interests in different contexts is another question which is yet unanswered. A third dilemma surrounds how and when a child can withdraw consent. With the concept of 'Sharenting', a child may wish to remove previously published digital information about them. To do this, they may need to apply the right (to be set out in the UK's Data Protection Bill) to ask social media companies to erase information that they posted as a child.<sup>29</sup> How this right would apply to information posted by others has yet to be determined however.

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<sup>28</sup> Hannah Mellin, 'Peter Andre's dig at Katie Price for allowing their kids on social media: 'I'm very strict about things like that'' *The Mirror* (24 January 2017)

<http://www.mirror.co.uk/3am/celebrity-news/peter-andres-dig-katie-price-9682400>

<sup>29</sup> <https://www.gov.uk/government/consultations/general-data-protection-regulation-call-for-views>

### Recommendation:

**There should be more education for children and parents about sharing data in the public domain**

This area was identified as being riven with problems. The conflicting issues that arise conflict sharply with the overriding duty of society to protect vulnerable citizens of which young people are a not insubstantial part.

## Discussion

In the second session, it was suggested that the default settings on social networks such as Facebook should be privacy respecting, in order to protect children. Digital education for children and parents was mentioned and it was asked who should take responsibility for this. It was suggested that teachers and parents/carers should have an element of responsibility. The concern was raised that if there were too many bodies involved, then the message would be diluted and there would not be a specified body with responsibility for complaints.

The introduction of a Children's Digital Ombudsman was also discussed. The idea was initially suggested by the Children's Commissioner, to create a way to mediate between under 18s and Social Media Companies.<sup>30</sup> This would provide an independent individual for children to gain advice from, as well as having someone to advocate for them if necessary. This would also provide someone to advise them on next steps in instances where social media has rejected a take-down request. General principles should be established to allow

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<sup>30</sup> Children's Commissioner 'Growing Up Digital' (4 January 2017)  
<http://www.childrenscommissioner.gov.uk/publications/growing-digital>

### Recommendation:

**The settings on social media should be privacy respecting as default when images or information about young children are concerned**

### Recommendation:

**Online intermediaries should have a duty of care to consider young children's privacy and best interests in their operations**

complaints to be made on children's behalf and detail the circumstances in which posts should be removed. An ombudsman would also make such advice more accessible and visible for young people, so that they know how best to protect their privacy and what action they can take to do this. The ombudsman would be funded by the social media companies themselves, operating in a similar way to the UK Financial Ombudsman Service.

There was much discussion throughout the workshop on the introduction of a 'best interest' approach. In this session, it was asked who should decide the best interests of a child when information about a child is published (such as their image). It was suggested that having a third party in each situation would be an unrealistic approach as it would be impossible in practical terms. The complexity of such a test was also mentioned as the 'best interests' of children and their exposure could be constantly changing. Best interests are both context and time sensitive. For example, if a child is missing and later found, they may subsequently wish to have photographs or information about them removed. It was suggested that this could be remedied by taking a similar best interest approach as used by the Mental Capacity Act 2005. Such a test would look at issues on a case-by-case basis, similar to cases where an individual's capacity is questioned.

In addition, it was suggested that there is a difference between something not being harmful, and something not being in a child's best interests. Therefore, the appropriate threshold must be decided: Can a

### Recommendation:

The introduction of a **Children's Digital Ombudsman** could provide a way for children's interests to be better represented in relation to all forms of digital publications

child appear in the public eye if it is not harmful to them, or does it have to be in their best interests to do so? It was felt that it should not be the case that children's images are not shown at all, but there was some support for the view that there should be a threshold set for the use of children's images to protect their privacy. Reference was made to 2015 research from Ofcom which stated that 'both adults and children value and enjoy under-eighteens being represented in programming. Children form strong views and feelings from a very early age and these deserve to be seen and heard in programmes.'

# Freedom of Expression, the public interest and the use of children in the media

## *Opening Talk*

The third session considered freedom of expression. Children feature in the media in different ways: in the news, children's television programmes, science documentaries and reality television shows, for example. UK public broadcasters must reflect and portray all people, including children, by law.<sup>31</sup> It was argued that there is a 'quadruple' lock on public broadcasters when children are involved. There needs to be parental and child consent, and, in practice, there will be expert input as appropriate from health and other professionals as well as specialist editorial and legal staff when broadcasts involve children. Irrespective of consent given by adults on their behalf, due care must be taken over the physical and emotional welfare and dignity of those under 18.<sup>32</sup> Although public service broadcasters are regulated media

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<sup>31</sup> Ofcom, 'The Ofcom Broadcasting Code' (Ofcom 2017) <https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code>

<sup>32</sup> Ofcom, 'The Ofcom Broadcasting Code' (Ofcom 2017) <https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code>, Rule 1.28

(and all Ofcom licensed services are regulated by Ofcom), not all media has such thresholds to face. BuzzFeed and YouTube are examples of new media which is subject to less regulation, meaning uploaded content is largely unmonitored and not subject to prior vetting. This creates a larger risk that a child's right to privacy can be breached. Nonetheless, questions remain whether these media appearances are inherently bad. Children also have their own Article 10 rights,<sup>33</sup> as well as their privacy rights. It can consequently be considered whether appearing in the media may actually be in the children's best interests. The speaker leading the session argued that some criticism of broadcast media appeared to make a presumption of harm, and questioned if this was correct.<sup>34</sup>

## Discussion

The discussion began by examining the consent procedure for children's participation in 'The Secret Life' series. It was described as 'ongoing consent', meaning there are many tiers to the process before the child can be involved in the programme. The way in which programme makers educate contributors with regard to social media

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<sup>33</sup> European Convention on Human Rights 1950, Article 10

<sup>34</sup> Marion Oswald, Helen James, Emma Nottingham, 'The not-so-secret life of five-year-olds: legal and ethical issues relating to disclosure of information and the depiction of children on broadcast and social media' (2016) 8(2) *Journal of Media Law* 198

*"Ethics drives visual research with children and young people"*

- Workshop Contributor

was explained; this also forms a key part of the existing consent process, a process that involves input from an independent child psychologist. There was discussion around the programme itself; it was asserted that the programme was not science, as such. However, it was also pointed out that the programme used scientists, involved tests on, and exercises with, children and was marketed as ‘science entertainment’. It was noted that, in some cases, the involvement of these experts in these exercises had not been subject to their primary employer’s ethical approval process, although it was questioned whether such ethical processes were relevant as it was argued that no experimentation was involved, rather illustrations.

It was stated that there had been no reports of negative impacts on the children involved; rather, some parents had reported positive impacts. These included the children making new friends and being more outgoing. A letter from the parents of a child who had received negative attention on Twitter was read out, outlining what an instructive and helpful experience taking part in the programme had been for him.

However, it was questioned whether such experiences were unique to the show and could not be experienced in any other setting, such as standard playgroups which do not expose children to the public eye. The issue was raised that, from a social science perspective, ethics should drive visual research. It was argued that, in research situations, researchers have considerable power; broadcasters have similar power

when it comes to science entertainment programmes. Parents (and potentially children) may be flattered to be involved in the programmes, but this could lead to children being disempowered. It was argued that consideration needs to be given to how the information and images will be interpreted by others and how this could affect the child. It was pointed out that, as part of the process when deciding upon the appropriateness of any potential programme participant for a particular project, bespoke systems are put in place to enable the thorough and careful assessment of the potential impact on them, especially if they are a child or vulnerable.

It was argued by some that criticism of children's media exposure is always looked at from a 'presumption of harm' perspective. Other participants defended this perspective on the basis that a cautious approach needs to be taken where there is any possibility of harm to children.<sup>35</sup> It was suggested by a participant that if a parent read a negative tweet about their parenting, it may affect their relationship with their child. Despite these possible detrimental effects, it was submitted that being invasive is part of the point of documentary style television shows. The invasiveness in showing the honest representation of young people, however, may be what actually causes the harm. Reference was made to Sarah Thane's report in which she noted: 'Hard evidence on harm is problematic to source in this field –

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<sup>35</sup> BBC News 'Dr Money and the boy with no penis' (BBC Science and Nature: TV and Radio Follow-Up, 17 September 2014)

[http://www.bbc.co.uk/sn/tvradio/programmes/horizon/dr\\_money\\_prog\\_summary.shtml](http://www.bbc.co.uk/sn/tvradio/programmes/horizon/dr_money_prog_summary.shtml)

### Recommendation:

**More research into the impact of broadcast media exposure of young children is needed**

### Recommendation:

**More discussion is needed around the digital social norm that accepts the objectification of young children**

though anecdotal evidence is plentiful. It is important to distinguish between distaste for certain types of production and expert assessment that children – or certain children – may be adversely affected in the short, medium or longer-term’. She continued: ‘There are also concerns about putting children in “unnatural” situations which expose them to aggressive behaviour/bullying, offensive language, excessive pressure ... or make capital out of their vulnerability. However, simply because these concerns and risks exist, should we assume these experiences are necessarily harmful? There is a considerable body of expert opinion that taking risks and responding to them is an important part of a child’s development and can build resistance.’<sup>36</sup>

There was much discussion around Twitter and comments made by the general public about children who feature either in television programmes or on social media. There was a debate around the advantages and disadvantages of including a hashtag in television shows for people to live tweet collectively. Those who support the use of a hashtag explained it would make it easier to monitor any comments and review them in one place. Those opposing felt it could be a double edged sword. It would simultaneously make it easier for participants in the future to find the tweets about themselves which, where negative, could be harmful. The introduction of general principles was discussed (which are expanded upon in the recommendations) and questions were raised, asking at what point do we become responsible for the

### Recommendation:

**There is a need for consistency in terms of compliance and regulation between regulated broadcasters and non-mainstream digital media/social media**

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<sup>36</sup> ‘Exploratory review of the system of regulating child performances’ Report by Sarah Thane, CBE (March 2010)

actions of others? The causal link was queried and it was asked where self-regulation fits in.

It was mentioned how, with the rise of social media, there is a lot of unvetted information being released about children. Whilst their involvement in television is regulated with guidelines to follow, non-mainstream digital media such as social networks do not face such hurdles (although are subject to national and international laws), despite sharing a lot of information about children. The rise of 'YouTube families' was discussed in relation to this as many parents on YouTube are 'vlogging' their children and documenting every day of their lives. Since "the children of YouTube are not currently subject to any psychological guidelines or legal protection", young people may grow up in a world which already knows a lot about them that they have not chosen to share, which could be hugely harmful.<sup>37</sup> One participant at the workshop raised an instance where the child (aged 9) personally asked her father not to upload a clip of her to his YouTube channel (later viewed by 4,071,596 people).<sup>38</sup> Some participants felt it was wrong that this footage was able to have been published with the child clearly not consenting. The ability for parents to upload any footage of their children without complying with any guidelines has already had negative consequences. The rise in popularity of these

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<sup>37</sup> Amelia Tait 'Is it safe to turn your children into YouTube stars?' *The Guardian* (16 September 2016) <https://www.theguardian.com/technology/2015/sep/16/youtube-stars-vlogging-child-safety-sacconejolys-katie-and-baby>

<sup>38</sup> Shaytards, 'DAD! CUT THAT PART OUT!' (YouTube, 3 April 2014)

*"It is important to distinguish between distaste for certain types of production and expert assessment that children – or certain children – may be adversely affected in the short, medium or longer-term"*

- Sarah Thane  
(2010)

families is very recent, however, so it remains to be seen what the long-term effect on these children will be.<sup>39</sup>

Despite the discussion of these issues, it was argued that Twitter and other social media platforms should not stop responsible programmes being made. But there was some support for the view that there needs to be additional controls on the posting of negative or harmful comments about young children on public social media accounts. This is expanded upon in the recommendations, as was the need for consistency in relation to compliance between regulated and non-mainstream digital media.

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<sup>39</sup> Andrew Griffin, , 'YouTube star Daddyofive loses custody of two children featured in 'prank' video, mother says' *The Independent* (2 May 2017)

<http://www.independent.co.uk/life-style/gadgets-and-tech/news/youtube-daddyofive-cody-videos-watch-children-custody-latest-prank-parents-a7713376.html#gallery>

*“We have, as visual sociologists, a broader ethical obligation to consider how the outputs of our research may become part of the wider visual culture. This includes how images, taken out of context, may contribute to, and become part of, a negative culture.”*

- Janet Fink & Helen Lomax, 'Sharing Images, Spoiling Meanings? Class, Gender and Ethics in Visual Research with Girls' (2016)

# Recommendations Arising from the Workshop

The Recommendations are those of the report authors and do not necessarily reflect the views of the workshop participants:

1. Young children should have a **privacy right independent from their parents' privacy expectations**. Such a right could be trumped by other rights or interests, for instance public interest exceptions relating to news and current affairs reporting, journalism and the arts, and the parents' right to freedom of expression. There should however be a clearer requirement and process for the **child's interests** (which would include the likelihood of immediate or longer term harm, the child's welfare and whether the publication is beneficial or neutral for the child) to be considered alongside the potential benefits of the publication.
2. More open discussion is needed around the **digital social norm that accepts the objectification of young children, the posting of negative comments and images where it might reasonably be expected that the child would not agree**, yet requires a best interests test to be applied in offline settings such as health and education. The rights and protections afforded to a young child in relation to digital or broadcast media should not be subject to adult standards of proof i.e. they shouldn't have to show 'defamation' or an offensive communication or evidence of direct threat. **We should consider how we want our young children to be treated in the offline world and hold the digital world to the same standards.**
3. The media should continue to reflect the lives of children and it is in no-one's interests to have a media where children simply do not appear for fear of the risk of potential harm. Programmes made by highly regulated broadcasters, ensuring wellbeing of children is of paramount importance, can help to set the high ethical watermark in this area for other forms of media to follow. We should continue to monitor the

inclusion of young children in ‘Science Entertainment’ broadcasts, however, and the parallel impact of social media. Those involved in some of the first of these fly-on-the wall documentaries, such as Supernanny, which first aired in July 2004 are only now reaching an age at which they will be able to discuss their experiences in a reflective and meaningful way. To date it has been difficult to discuss the experiences directly with these young participants. **More research into the impact of broadcast media exposure of young children is needed to understand what effect it has on them, both positive and negative. Once these effects are more fully understood, actions can be taken to reduce any potential harm.** Concerns regarding the power-balance between participants and the broadcasters also need to continue to be addressed.

4. There is a **need for more consistency in terms of compliance and regulation between regulated broadcasters and non-mainstream digital media/social media.** This could enhance protection to children in ‘YouTube families’ and other instances where there are no or limited checks on what is being put into the public domain. The introduction of a **Children’s Digital Ombudsman** could provide a way for children’s interests to be better represented in relation to all forms of digital publications.
5. It is no longer satisfactory that online intermediaries continue to benefit from unqualified ‘mere conduit’ and ‘hosting’ protections in EU and UK law<sup>40</sup> when it comes to activities on those platforms that may be harmful to young children’s privacy and best interests. **‘Controller hosts’ (such as Facebook, YouTube and**

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<sup>40</sup> Directive 2000/31/EC Arts 12-15

Twitter) and ‘independent intermediaries’<sup>41</sup> (such as Google) should have a duty of care to consider young children’s privacy and best interests in their operations.

6. As part of the above-mentioned duty of care, the settings on social media services (e.g. Facebook and Twitter) should be **privacy respecting as default when images or information about young children are concerned**. Potentially, it should be possible to require that warnings be shown where social media systems detect that a person intends to post images of young children without these privacy settings enabled. This suggestion may not be met with hearty enthusiasm by social media companies, however, given that such a requirement may compete negatively with business interests; ‘YouTube’ Families provides us with an example of a situation where such conflict might exist. **The duty of care, however, should increase in line with the extent to which the social media service promotes, controls and profits from the publication of images of young children.**
7. There should be a **limitation on the extent to which information and images relating to a young child can be copied, re-contextualised and re-shown in a different context to the original post or publication**. This includes copying or sharing posts and images from social media or clips of televised programmes being shared on the internet, subsequent to its broadcast. There are new developments, such as **image-matching, tracking and content moderation technologies**, which could be beneficial to protect a young child’s privacy and could be deployed by online services to prevent the re-contextualising of images and information (as has already been done in relation to sexual abuse images and terrorist related content).

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<sup>41</sup> Defined by David Erdos in Erdos, David, ‘Delimiting the Ambit of Responsibility of Intermediary Publishers for Third Party Rights in European Data Protection: Towards a Synthetic Interpretation of the EU *acquis*’ (June 27, 2017). Available at SSRN: <https://ssrn.com/abstract=2993154>

**Further research should be done to consider the potential of these technologies, and how they could assist an older child to identify and control images and data which had been posted about them in the past.<sup>42</sup>**

8. There should be more **education for both children and parents about the impact of ‘sharenting’** and the level of personal information they are potentially exposing by doing this. Clarity is required as to which body should have overall responsibility for such educational programmes.

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<sup>42</sup> See for instance Zampoglou, Markos, Symeon Papadopoulos, and Yiannis Kompatsiaris. "Detecting image splicing in the wild (web)." *Multimedia & Expo Workshops (ICMEW), 2015 IEEE International Conference on*. IEEE, 2015; Saez-Trumper, Diego. "Fake tweet buster: a webtool to identify users promoting fake news on twitter." *Proceedings of the 25th ACM conference on Hypertext and social media*. ACM, 2014.

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