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The Exercise of Minors’ Rights of Personality on Social Media: An Examination of the Spanish Legal Context

Inés Sánchez-Ventura¹

I. Introduction

A. Preliminary observations

The interactive generation, the digital generation², or what is known as Generation 2.0, has almost unlimited possibilities for navigating cyberspace. The internet has become not only a way for us to interact, but also a source of information and, for minors, one of the principal ways of doing homework. Studies have shown that more than 83% of minors use the internet for their homework.³

However, apart from the important opportunities that the internet offers, we know that dangers exist and these require adequate responses from educators and public services. This paper will not only examine the dangers minors face when surfing the internet but also study the risks a minor takes once he or she has created an account on a social media site (including contact with strangers, access to false or inappropriate information, lack of knowledge about how to configure one’s profile to avoid predators, etc.).

This topic is interesting because the activities in which a minor engages on a social media site are directly related to the exercise of specific rights of personality. They are specifically related to the right to honor, family and personal privacy, the right to one’s own image and, in general, to the right of transfer of personal data. Social media is currently the venue most used by minors to share photographs and publish comments on “walls”, actions through which they reveal information about their personal and family life to a significant number of “friends”.⁴ Most often, they are not aware of the consequences that certain published information might have for

¹ Law Professor. Department of Private Law, University of Navarra.

² Term created by Marc Prensky in 2001 to refer to those who have not known a world without the internet or mobile phones; see ANA MARÍA GIL, *Redes sociales y privacidad del menor: un debate abierto*, Revista Aranzadi de Derecho y Nuevas Tecnologías, 154 (Nº 36, 2014). On line version available on: Thomson Reuters (Spanish Database) Section 2.III. 2 [downloaded on 6/25/2015].

³ MAIALEN GARMENDIA, CARMELO GARITAONANDIA, GEMMA MARTÍNEZ y MIGUEL ÁNGEL CASADO, *Riesgos y seguridad en internet: Los menores españoles en el contexto europeo. Resultados de la encuesta de EU Kids Online a menores de entre 9 y 16 años y a sus padres y madres*, EU Kids on line, London School of Economics y la Universidad del País Vasco (University of the Basque Country), (31, 2011), available on: www.ehu.es/eukidsonline [downloaded on 6/25/2015].

⁴ The study by the University of the Basque Country notes that the average minor might have about 300 “friends” with access to his or her site. MAIALEN GARMENDIA, *et al.*, *supra* note 3, at 35.

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their daily lives, as they are exposed, among other things, to comments and criticism on the part of visitors to their sites.

This paper does not aim to focus solely on the theoretical aspects of this situation and I will present statistics on the number of minors who have social media profiles, what kind of content they generate for the web, and what information they publish. This data evidences the exercise of the rights of personality mentioned above. My principal data refers to minors in Spain, though I will make references to the European situation. I will also distinguish, within the category “minors”, between the use of social media by children 13 and younger and minors ages 14 through 18. The cut-off point (the age of 13), is based on the point at which Facebook and other social media sites permit minors to create their own profiles.⁵ I should note that, in Spain, Royal Decree 1720/2007 approving the regulations relating to Constitutional Act 15/1999 on Personal Data Protection, raised the age from 13 to 14 years old.⁶

In this context, we have to take into consideration two coordinates when we speak of the exercise of those rights by minors. The first refers to the maturity needed for the exercise of rights. The second considers the legal mechanisms that aim to lessen the risks minors are exposed to before they access the social media sites and to ameliorate the consequences of irresponsible use of social media.⁷

B. Panorama of social media use among minors

In the Spanish context, where the average child began using the internet at the age of 9,⁸ it is not surprising that 56% of minors have a profile on a social media site.⁹ Of this group, about 40% are minors between the ages of 9 and 13.¹⁰ All this, despite the fact that the minimum Spanish legal age for a Facebook or Tuenti (the Spanish equivalent to Facebook) profile—to

⁵ Facebook’s “Statement of Rights and Responsibilities”, Term 4.5 provides: “You will not use Facebook if you are under 13”; available on: <https://www.facebook.com/terms> [downloaded on 7/10/2017].

⁶ Article 13.1 of Royal Decree 1720/2007 approving the regulations relating to Constitutional Act 15/1999 on Personal Data Protection (Real Decreto 1720/2007, de 21 de diciembre, por el que se aprueba el Reglamento de desarrollo de la Ley Orgánica 15/1999, de 13 de diciembre, de Protección de Datos de Carácter Personal), Boletín Oficial del Estado, núm. 17, de 19 de enero de 2008, provides that: “Data on individuals over the age of fourteen may be processed with their consent, except where the law requires that such consent may only be given where the minor is assisted by the holders of patria potestas or tutelage. Where individuals under the age of fourteen are involved, parental or tutorial consent shall be required”. Official translation available on: <http://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/documentacionpublicaciones/publicaciones/traduccion-derecho-espanol> [downloaded on 8/20/2016]. The 1999 act is: Ley Orgánica 15/1999, de 13 de diciembre, de Protección de Datos de Carácter Personal, Boletín Oficial del Estado, núm. 298, de 14 de diciembre de 1999. Official translation available on: <http://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/documentacion-publicaciones/publicaciones/traduccion-derecho-espanol> [downloaded on 20/08/2016].

⁷ Apart from legal mechanisms, we have other solutions such as educational and computer resources; e.g. training programs for parents and children or internet filter possibilities. MAIALEN GARMENDIA, *et al.*, *supra* note 3, at 26 and JUAN MARÍA MARTÍNEZ OTERO, *La protección jurídica de los menores en el entorno audiovisual: respuestas desde el Derecho a los desafíos de los nuevos medios audiovisuales y digitales*, 53-54 (Aranzadi, 2013).

⁸ MAIALEN GARMENDIA, *et al.*, *supra* note 3, at 21.

⁹ This percentage is lower than the European average, which is 59%. MAIALEN GARMENDIA, *et al.*, *supra* note 3, at 34.

¹⁰ See also XABIER BRINGUÉ y CHARO SÁDABA, *Menores y redes sociales (Foro Generaciones interactivas)* (2011), available on: <http://dadun.unav.edu/bitstream/10171/20593/1/GGII-Madrid-final.pdf> 63-70 [downloaded on 6/20/2015] (noting that a third of minors under 14 years old have a profile on a social media site).

mention the two most popular sites in Spain—is 14.¹¹ Numerous children admit to having lied about their ages in order to be able to access one of these social media sites. Specifically, 27% of minors said they wrote in a false age.¹²

The most common activities that minors engage on these sites include: “sharing photographs” (62%); “commenting on friends’ photographs” (61%); “sending private messages” (51%); “updating personal profiles” (37%); “checking out what others are doing” (29%); “information” (28%); “playing online games” (13%).¹³ In the case of 16-year-olds, 44% post photos and videos to share; however, we do not know whether these are personal documents or not. If these were personal, we would have to study up to what point the minors—particularly those between the ages of 9 and 14—are aware of the consequences of their actions. It has also been noted that the younger group tends to keep its profile public, while older ones prefer private profiles. This is due to a heightened notion of privacy among those aged 11 to 14.¹⁴

It is also interesting to consider the ways these minors access the internet, usually through a computer or other device, such as an iPad or a smartphone. This information is relevant in the context of parental vigilance and control. Access through a desktop computer in a common area in the home facilitates parental control more than if the minor uses a phone in his or her room. Minors are increasingly accessing the web through personal smartphones. Data obtained in 2014, tell us that 23% of 10 year-olds already own a mobile phone with internet access.¹⁵ However, other data disclose that “6% of Spanish minors access the internet through a mobile device as opposed to an average of 31% in the rest of Europe, and about 2% do it through another device (as opposed to the 32% European average)”.¹⁶ These data suggest that Spanish minors’ access to social media is not as high as in the rest of Europe.

At this point, it is useful to consider the dangers minors subject themselves to when they use social media. We have to examine whether they possess the maturity that will allow them to understand and weigh the fact that, although social media open up channels of communication with numerous people, serious dangers are involved. Simultaneously, evaluating a minor’s level of maturity is indispensable for determining if his or her consent is unequivocal in the terms set out by Article 6.1 of the Constitutional Act 15/1999 on Personal Data Protection: “*the processing of personal data requires the unequivocal consent of the subject, unless the law notes otherwise*”.¹⁷ The Safer Social Networking Principles for the EU, refers to four potential online risks to children and young people:

1. ‘Illegal content’, such as images of child abuse and unlawful hate speech.

¹¹ Article 13.1 of Royal Decree 1720/2007, *supra* note 6.

¹² MAIALEN GARMENDIA, *et al.*, *supra* note 3, at 37.

¹³ JUAN MARÍA MARTÍNEZ OTERO, *supra* note 7, at 56.

¹⁴ MAIALEN GARMENDIA, *et al.*, *supra* note 3, at 32-36.

¹⁵ Instituto Nacional de Estadística, *Encuesta sobre Equipamiento y Uso de Tecnologías de Información y Comunicación en los Hogares*, 3 (October 2014), available on: <http://www.ine.es/prensa/np864.pdf> [downloaded on 6/28/2015].

¹⁶ MAIALEN GARMENDIA, *et al.*, *supra* note 3, at 20.

¹⁷ Ley orgánica 15/1999, de Protección de Datos de Carácter Personal, *supra* note 6.

2. 'Age-inappropriate content', such as pornography or sexual content, violence, or other content with adult themes which may be inappropriate for young people.
3. 'Contact', which relates to inappropriate contact from adults with a sexual interest in children or by young people who solicit other young people.
4. 'Conduct', which relates to how young people behave online. This includes bullying or victimization (behaviors such as spreading rumors, excluding peers from one's social group, and withdrawing friendship or acceptance) and potentially risky behaviors (which may include for example, divulging personal information, posting sexually provocative photographs, lying about real age or arranging to meet face-to-face with people previously met only online).

From another perspective, we can classify the risks minors are subject to in the context of the specific right to personality (we will see them below):

- In relation to the right to privacy, we note the irresponsible revelation of intimate details or certain personal information, often resulting from an early fascination with the possibilities of social media.¹⁸

- In relation to the right to one's own image, we note the continuous uploading of photographs of minors without their due consent. A notable case, one which is critically underexamined, is that of parents who upload pictures of their minor children on to social network sites. In general, as their children's legal representatives, they can decide which photographs to publish online. However, this socially accepted practice might, in some cases, work against the minor's interests. Given the structure of social media sites, it is almost impossible to detect these actions. An issue to be discussed involves the fact that accepting someone as a "friend" presupposes consenting that the person may publish on one's "wall" (now Timeline)¹⁹ and may upload images that "tag" that person. It is, of course, possible to denounce the picture or remove a tag. But, in some cases, it may already be too late.

- With regard to the right to honor, social media can become a platform that people use to insult and disrespect others, leading to situations of cyberbullying.²⁰ Many minors are exposed to this form of aggression, "which involves the use and spread of injurious or defamatory information against another person (normally a minor) in electronic form through email, instant messaging, social media, text messages via mobile phones or the publication of videos and photographs in

¹⁸ JUAN MARÍA MARTÍNEZ OTERO, *supra* note 7, at 57; EDUARDO VÁZQUEZ, *Protección de datos personales, redes sociales y menores*, *Revista de Derecho y Nuevas Tecnologías*, 53 (Nº29, 2012) and XABIER BRINGUÉ y CHARO SÁDABA, *supra* note 10, at 65.

¹⁹ Techopedia explains: "Facebook Timeline is a social media feature introduced by Facebook in September 2011 and rolled out to all users in February 2012. Timeline combines a user's Facebook Wall and Profile into one page, creating a more visually holistic profile. It includes reverse-chronological details, by year, of a user's Facebook history with key life points, including birthdays, weddings and other major events. Timeline reorganizes all stored user information for display, rather than archival. In previous Facebook incarnations, it was more difficult or impossible to view outdated events, photos and comments". Information available on: <https://www.techopedia.com/definition/28406/facebook-timeline>.

²⁰ JUAN MARÍA MARTÍNEZ OTERO, *supra* note 7, at 59 and EDUARDO VÁZQUEZ, *supra* note 18, at 53.

electronic platforms”.²¹ Statistical data shows that the majority of minors have not experienced internet bullying; however, in cases where this has happened, the harassment has happened via social media or instant messaging.²²

In relation to the risks noted in first and second place (with regard to the right to privacy and to one’s own image), we should note that the companies that manage these social media sites are not able to control everything its users upload, nor do they have systems that guarantee truthfulness in its users’ identities. Everything is managed through one’s own configuration of profile privacy.

A case in point: the pre-established configuration that one finds when he or she wants to open a Facebook account²³ allows the information uploaded to be shared publicly. Anyone who uses Facebook has access to that information. One must specifically reconfigure his or her page in order to limit open access to the information uploaded or photographs shared.

Our freedom to reconfigure privacy settings, publications, and photographs has evolved. Facebook now offers more possibilities for, for example, limiting the number of people who can access information published in the past. They also ask you if you want to “Review posts friends tag you in before they appear on your timeline?” This question appears to be a way to require one’s consent before publishing information related to them. Nonetheless, the photograph appears on the uploader’s timeline even before the owner of the right has had time to give consent. A “tag” is usually the only way to know if someone has published someone else’s pictures; though one can only “tag” a “friend”. But it is always possible to publish pictures of a person without his or her knowledge. The same happens with comments.

To this we can add that a simple comment or clicking the “Like” icon on a picture leads to that information being shared with all one’s friends, thus reproducing the information and spreading it beyond its original audience.

Statistical data show that only about 55% of minors know how to change the configuration of their social media privacy settings and 61% know how to erase their surfing history, such that all their preferences and information uploaded remains stored online.²⁴ As noted earlier, data about minors below 14 affirm that these are the ones who know least about configuring privacy settings. We can conclude from this that minors below 14, particularly those between 12 and 14, are not likely to have the maturity needed to manage their online profile and presence.

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²¹ Freely translated by the author of the present article. ANTONIO CHACÓN MEDINA, *El ciberacoso sexual infantil y su respuesta desde el Derecho Penal*, available on: <http://www.icava.org/secciones/aaj/articulo3.pdf> 2 [downloaded on 6/24/2015].

²² MAIALEN GARMENDIA, *et al*, *supra* note 3, at 52.

²³ I use this example as it is currently the social media site with most users worldwide: 1,374,000,000 users based on data collected in September 2016 by the Statistic Brain Research Institute available on: <http://www.statisticbrain.com/social-networking-statistics/> [visited on 9/28/2017].

²⁴ MAIALEN GARMENDIA, *et al*, *supra* note 3, at 25.

Therefore the intervention is required of the legal representatives, who should ensure the protection of the minors, instead of exercising the minors' rights. The legal representatives would act more as a complementary agent than as a substitute. This is especially important in cases of children under 14, who do not lack experience or knowledge when using the internet (maybe they use it better than their parents) but they do lack the necessary life experience to understand the consequences that their actions will have.

II. General observations on the rights of personality and the use of social media

When someone opens an account on a social media site, it generally means that person wants to communicate with others not only through messages, but also by posting thoughts and observations, publishing pictures that show, among other things, where he or she has been, what he or she has done, and who they have been with. Indeed, according to an opinion issued by the Data Protection Working Party – a European Community advisory body²⁵ -- social network service “can broadly be defined as online communication platforms which enable individuals to join or create networks of like-minded users”²⁶.

The dynamic of social media sites presupposes the uploading of substantial amounts of personal information and constant interactions with information posted by others. This process leads to the revelation of one's location, school or place of work, tastes and preferences, hobbies, sports, ideology, religion and relationship statuses. This information is stored, first, within the site that the user is a member of (Facebook, Tuenti, etc.) and, second, within the profiles of all those who have access to one's personal site which, based on specific configurations, might be more or less restricted. Minors are thus exposed to actions by third parties that might harm their privacy, image, and honor: goods that, together with the protection of personal information, are protected by rights of personality.

At this point, and continuing with this general discussion of the rights of personality before entering into the discussion of minors' rights, I would like to establish the differences between the rights to privacy, image, honor, and the right to the protection of personal data.

A. *The right to personal and family privacy, the right to one's own image, and the right to honor*

These rights are articulated in Article 18.1 of the Spanish Constitution,²⁷ a point which serves as the basis for subsequent regulations that refer to these rights: “*The right to honour, to*

²⁵ The Data Protection Working Party was set up under Article 29 of 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. As the European Data Protection Supervisor website states, this body exercises a major role in new EU legislation through its opinions. Information available on: <https://secure.edps.europa.eu/EDPSWEB/edps/site/mySite/Art29> [downloaded on 7/10/2017].

²⁶ *Sic.* The definition quoted in the text above is from Opinion 5/2009 on Online Social Networking, adopted on 12 June 2009, available on: http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2009/wp163_en.pdf 4 [downloaded on 7/5/2015].

²⁷ Passed by the Cortes Generales in Plenary Meetings of the Congress of Deputies and the Senate held on October 31, 1978. Official translation available on: http://www.congreso.es/constitucion/ficheros/c78/cons_ingl.pdf [downloaded on 12/16/2016]. The Spanish text is available on: https://www.boe.es/diario_boe/txt.php?id=BOE-A-1978-31229 [downloaded on 7/10/2017].

personal and family privacy and to the own image is guaranteed”.²⁸ However, the constitutional basis for protection of rights regarding the internet is established in Article 18.4: “The law shall limit the use of data processing in order to guarantee the honour,²⁹ and personal and family privacy of citizens and the full exercise of their rights”.

Since the Constitution was approved these rights of personality are no longer merely subjective rights, they are proper fundamental rights.³⁰ The dignity of the human person constitutes the basis, the substance of them.³¹ As fundamental rights they are now given special protection in Article 53 of the Spanish Constitution. In particular, on one side, the exercise of those rights may be regulated only by law (art. 53.1). On the other hand, “any citizen may assert his or her claim to the protect the liberties and rights recognized in Article 14 and in Section 1 of Chapter two (articles 15 to 29) by means of a preferential and summary procedure in the ordinary courts and, when appropriate, by submitting an individual appeal for protection («recurso de amparo») to the Constitutional Court (art. 53.2). This latter procedure shall be applicable to conscientious objection as recognised in Article 30”.³²

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“to the protect” is correct.

The three rights (honor, personal, and family privacy and identity) are regulated together in Constitutional Act 1/1982 for Civil Protection of the Right to Honor, Privacy and Image.³³ Despite being listed together with the others, each right has a specific content and protects a specific aspect of the subject’s personality. Each right has its own field.³⁴

First, the right to one’s image is defined by the Spanish Constitutional Court as “a right of personality, derived from human dignity and aimed to protect each person’s moral dimension, that gives the bearer the right to determine the graphic information generated about his or her physical features that might be disseminated publicly and to prevent the unauthorized acquisition, reproduction or publication of one’s image by a third party, whatever the purpose of this might be—information, commerce, cultural, etc.”³⁵

²⁸ “[T]he own image” is a translation of “la propia imagen”. See the citation to the Spanish text in the previous footnote. Article 18 also guarantees the inviolability of homes and the secrecy of communications. This article refers to five different rights which have something in common: all of them are related to one’s private sphere. See JAVIER PARDO FALCÓ, *Los Derechos del artículo 18 de la Constitución española en la jurisprudencia del Tribunal Constitucional*, *Revista Española de Derecho Constitucional*, 142 (Nº 34, enero-abril 1992).

²⁹ In general throughout the text, I use the spelling word “honor”, which is the US version, but the official translations from Spanish to English use the English spelling, according to which the word is rendered “honour”.

³⁰ CÉSAR SEMPERE RODRÍGUEZ, *Comentarios al art. 18 CE*, en OSCAR ALZAGA VILLAAMIL (Coord.), *Comentarios a la Constitución española*, 386 (Edersa, 2006).

³¹ JAVIER PARDO FALCÓ, *supra* note 28, at 144 and CÉSAR SEMPERE RODRÍGUEZ, *supra* note 30, at 388.

³² Official translation, Spanish Constitution, *supra* note 27.

³³ Ley Orgánica 1/1982, de 5 de mayo, de protección civil del Derecho al Honor, a la Intimidad Personal y Familiar y a la Propia Imagen, Boletín Oficial del Estado, núm. 115, de 14 de mayo de 1982.

³⁴ ANA MARÍA GIL, *supra* note 2 at 150-151.

³⁵ Third paragraph of the Constitutional Court Ruling [hereinafter S.T.C.] 72/2007 (April 16, 2007), available on: <http://hj.tribunalconstitucional.es/> (freely translated by the author of the present article). The Spanish original text is the following: “En lo que aquí interesa destacar, de dicha doctrina resulta que, en su dimensión constitucional, el derecho a la propia imagen (art. 18.1 CE) se configura como un derecho de la personalidad, que atribuye a su titular la facultad de disponer de la representación de su aspecto físico que permita su identificación, lo que conlleva tanto el derecho a determinar la información gráfica generada por los rasgos físicos que le hagan reconocible que puede ser captada o tener difusión pública, como el derecho a impedir la obtención, reproducción o publicación de su propia imagen por un tercero no autorizado”. See also ASUNCIÓN HERNÁNDEZ y FRANCISCA RAMÓN FERNÁNDEZ, *El*

Second, the right to privacy has been characterized by the Constitutional Court³⁶ as “impl[ying] the existence of a private space, kept separate from the action and knowledge of others, necessary, according to the norms of our culture, in order to maintain a minimum quality of human life”.³⁷

Third, the right to honor may be defined as a right to the esteem that a person is accorded within the society in which he or she lives and develops as a human being.³⁸

Constitutional Act 1/1982 for Civil Protection of the Right to Honor, Privacy and Image³⁹ recognizes that the holder of these rights has the power to waive them; thus, one may consent to interference, for example by permitting access to data by a third party, the use of one’s voice, control over communications, and the taking and reproduction of photographs. When any of these actions is not validated by the holder’s consent, it is considered illegitimate interference. Thus, Article 7 of this statute contains a nonexclusive list of actions that are considered illegitimate.

However, a 2014 Supreme Court ruling establishes that these rights are not absolute and are therefore limited by other “fundamental rights”. The Supreme Court suggested that a judgment of proportionality was to be applied; and it also referred to circumstances in which there have occurred “specific subjective or objective singular events . . . that, based on deliberate and proportional judgment, exclude the conclusion that the interference was illicit or illegitimate”.⁴⁰ Following these criteria, for example, the broadcasting of images of public personalities would not automatically be regarded as illegitimate (Article 8.2 Constitutional Act 1/1982).

Thus, “the laws and their social use may tolerate or prohibit specific interferences. The same may happen with a person’s conduct, which may reveal his or her predisposition or obvious opposition to any or all forms of interference”.⁴¹ Social usage might establish a border,

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Derecho a la propia imagen de los menores en los medios de comunicación, Revista Aranzadi de Derecho y Nuevas Tecnologías, 25 (Nº 20, 2009).

³⁶ S.T.C. 233/2005 (September 26, 2005), fourth paragraph. Available on: <http://hj.tribunalconstitucional.es/>

³⁷ Freely translated by the author of the present article. The Spanish original text is the following: “El derecho a la intimidad personal garantizado por el art. 18.1 CE, en cuanto derivación de la dignidad de la persona reconocida en el art. 10.1 CE, implica la existencia de un ámbito propio y reservado frente a la acción y el conocimiento de los demás, necesario, según las pautas de nuestra cultura, para mantener una calidad mínima de la vida humana”.

³⁸ LUIS DÍEZ-PICAZO Y ANTONIO GULLÓN, *Sistema de Derecho Civil, Vol. I: Introducción, Derecho de la Persona, Autonomía Privada y Persona Jurídica*, 342 (Tecnos, 1997, 9th ed.).

³⁹ Ley Orgánica 1/1982, de 5 de mayo, de protección civil del derecho al honor, a la intimidad personal y familiar y a la propia imagen, *supra* note 33.

⁴⁰ Freely translated by the author of the present article. The ninth paragraph of the Supreme Court ruling refers only to the right relating to one’s image but its reasoning can also be applied to the right of personal and family privacy and the right to honor. Supreme Court Ruling (hereinafter S.T.S.) 220/2014 (May 7, 2014), available on: <http://www.poderjudicial.es/search/> The Spanish original text is the following: “el derecho a la propia imagen no es un derecho absoluto, y se encuentra sujeto a las limitaciones derivadas: de los otros derechos fundamentales –en relación con un juicio de proporcionalidad–, de las leyes-artículos 2.1 y 8 (cuyos supuestos tienen carácter enumerativo) LPDH–, los usos sociales –artículo 2.1 LPDH–, o cuando concurren singulares circunstancias, diversas y casuísticas, de variada índole subjetiva u objetiva, que, en un juicio de ponderación y proporcionalidad, excluyen la apreciación de la licitud o ilegitimidad de la intromisión”.

⁴¹ LUIS DÍEZ-PICAZO Y ANTONIO GULLÓN, *supra* note 38, at 343 (freely translated by the author of the present article).

justifying interference with the rights to honor, privacy, and one's own image. In some cases, one could justify the distribution of those photographs on social media, even without the subject's consent, that are innocuous and do not produce any harm, and those which are ancillary in character to other appropriate material and are of the sort commonly to be found on social media sites.

But, in the case of minors, the form of the permitted interference has certain specificities, as we will see below.

B. The right to the protection of personal data

The discussion of the right to the protection of personal data will look at a series of questions. It will cover what we understand by the idea of the right to protecting personal data, and examine whether it is possible to consider this separately from other rights and how it differs from the rights described above.

As a preliminary approach, we note that the right to the protection of personal data "is configured as an autonomous right which aims to control the flow of information regarding each person, whether or not in reference to the sphere of privacy, in order to preserve the possibility of full exercise of his or her rights".⁴²

Today, we can argue that a proper right to the protection of personal data exists, but that its content has progressively been defined in law and in jurisprudence thanks to the development of a regime for automatic processing of data of a personal nature, both on a national and European level. The current Spanish Constitutional Act on Personal Data Protection⁴³ is based on an earlier law from 1992⁴⁴ which regulated the automatic processing of personal information. This law was, in turn, based on the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data signed in Strasbourg in 1981.⁴⁵ A right to the protection of personal data was subsequently specified in Article 8 of the Charter of Fundamental Rights of the European Union: "1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her,

⁴² MANUEL PULIDO, *¿Numerus clausus o numerus apertus en materia de derechos fundamentales?: el derecho fundamental a la protección de datos. A propósito de las SSTC 290 (RTC 2000, 290) y 292/2000, de 30 noviembre (RTC 2000, 292)*, Repertorio Aranzadi del Tribunal Constitucional, on line version, 1717 (Nº 20, 2000) [downloaded on 6/20/2015] (freely translated by the author of the present article).

⁴³ Ley Orgánica 15/1999, de 13 de diciembre, de Protección de Datos de Carácter Personal, *supra* note 6.

⁴⁴ Ley Orgánica 5/1992, de 29 de octubre, de Regulación del Tratamiento Automatizado de los Datos de Carácter Personal, Boletín Oficial del Estado, núm. 262, de 31 de octubre de 1992. Repealed and replaced by Ley Orgánica 15/1999, de 13 de diciembre, de Protección de Datos de Carácter Personal, *supra* note 6.

⁴⁵ *Opened for signature*, Jan. 28, 1981, C.E.T.S. No. 108, available on: http://www.coe.int/fr/web/conventions/full-list/-/conventions/treaty/108?coconventions_WAR_coeconventionsportlet_languageId=en_GB [downloaded on 3/11/2016].

and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority".⁴⁶

According to the Spanish Constitutional Court, S.T.C. 292/2000 (November 30, 2000), the right to the protection of personal data has a specific content: "it consists of the right to the disposition and control of personal data that enables the subject to decide which data to give a third party, be it the State or an individual, or whoever that third party might request, and which also permits the individual to know who possesses that data, and for what purposes, allowing him to be opposed to that possession or not".⁴⁷ In its seventh paragraph, the Constitutional Court highlights how the power of disposition to which we referred earlier is articulated in a series of rights: to consent to the procurement, collection, and treatment of the data for specifically authorized objectives, the right to access the data in order to revise or cancel it, and the right to contradict it.⁴⁸

Thus, right to consent does not apply only to the transfer of data but also to the possibility of accessing and controlling that information and to the decision as to "which data will be placed at the disposal of third parties and which will not".⁴⁹ This issue is complicated in matters involving social media and the possibilities of "surfing the web", as we will discuss below.

A regards the object of the right; it is not limited to a person's private data but protects a person from every unauthorized revelation that could damage his fundamental rights; and it is not limited to infringements which invade his individual privacy as protected by Article 18.1 of the Spanish Constitution. Here is where the difference between the right to personal data and the right to privacy lies. The Constitutional Court refers to this distinction in the sixth paragraph of the ruling cited above: "The purpose of the fundamental right to privacy (Article 18.1 of the Spanish Constitution) is that of protection from any invasion that could be realized in the sphere of one's personal and family life that the person wants to exclude from a stranger's knowledge and from the interference of third parties against his will However, the fundamental right to personal data protection seeks to guarantee to a person control over his personal data, its use and destination, in order to prevent illicit and harmful traffic that would affect the dignity and rights of the person".⁵⁰

⁴⁶ Adopted December 7, 2000, 2010 O.J.C 83/02, <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF> [downloaded on 3/11/2016].

⁴⁷ Paragraph seven Spanish Constitutional Court, S.T.C. 292/2000 (November 30, 2000), available on: <http://hj.tribunalconstitucional.es/> (freely translated by the author of the present article). The Spanish original text is the following: "el contenido del derecho fundamental a la protección de datos consiste en un poder de disposición y de control sobre los datos personales que faculta a la persona para decidir cuáles de esos datos proporcionar a un tercero, sea el Estado o un particular, o cuáles puede este tercero recabar, y que también permite al individuo saber quién posee esos datos personales y para qué, pudiendo oponerse a esa posesión o uso". This judgment develops a broad understanding of this right.

⁴⁸ See also the rights which the Spanish Agency for the Protection of Data identifies on its website: https://www.agpd.es/portalwebAGPD/CanalDelCiudadano/derechos/principales_derchos/index-ides-idphp.php.

⁴⁹ EDUARDO VÁZQUEZ, *supra note* 18, at 38 (freely translated by the author of the present article).

⁵⁰ S.T.C. 292/2000 (November 30, 2000), available on: <http://hj.tribunalconstitucional.es/> (freely translated by the author of the present article). The Spanish original text is the following: "La función del derecho fundamental a la intimidad del art. 18.1 CE es la de proteger frente a cualquier invasión que pueda realizarse en aquel ámbito de la

In the case of social media, we are dealing with a very specific kind of personal data collection: one which makes use of computer technology. To discuss this, we should consider the principle of digital freedom, which is related to the right to control the use of data inserted into digital programs.⁵¹ This principle is based on Article 18.4 of the Spanish Constitution, referred to above: “*The law shall limit the use of data processing in order to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights*”.⁵²

The difference between this right and the right to personal and family privacy was noted in the Preamble of the repealed 1992 law. It stated that: “[t]he progressive development of techniques for the collection and conservation of data, as well as access to these, have presented an unprecedented threat to privacy”.⁵³ Note that the law used the word “privacy” and not “intimacy”: the former is broader than the latter, because whereas “intimacy” refers to the area wherein a person develops the more reserved facets of his or her life — the home wherein he or she lives, the ways one expresses feelings, for example — privacy includes a broader, more global, set of personal aspects that might, independently, lack intrinsic meaning, but which, together, present a portrait of the individual that he or she has the right to protect.

The description that we present suggests that, rather than seeking an absolute distinction between these rights, it would be better to affirm, as does Manuel Pulido, that the right to the protection of personal data is instrumental insofar as it serves to defend other rights, such as the right to honor, privacy, and one’s own image.⁵⁴ To the extent that a person has control over the data given to a public office or to another person, there is less danger of illegitimate interference in that person’s private sphere.

In any case, the distinction between these rights is blurry and difficulties arise when we focus on the sphere of social media. The act of publishing a photograph may infringe on the right to the protection of personal data and that of control of one’s own image, as it reveals a person’s physical appearance without consent. It can also threaten the right to privacy as it unveils information and might be viewed as interference with the person’s private life.⁵⁵ Apart from

vida personal y familiar que la persona desea excluir del conocimiento ajeno y de las intromisiones de terceros en contra de su voluntad... En cambio, el derecho fundamental a la protección de datos persigue garantizar a esa persona un poder de control sobre sus datos personales, sobre su uso y destino, con el propósito de impedir su tráfico ilícito y lesivo para la dignidad y derecho del afectado”.

⁵¹ See also S.T.C. 11/1998 (January 13, 1998), available on: <http://hj.tribunalconstitucional.es/>.

⁵² Spanish Constitution, *supra* note 27.

⁵³ Extract from the Preamble of the Ley Orgánica 5/1992, de 29 de octubre, de Regulación del Tratamiento Automatizado de los Datos de Carácter Personal, *supra* note 44 (freely translated by the author of the present article). The Spanish original text is the following: “El progresivo desarrollo de las técnicas de recolección y almacenamiento de datos y de acceso a los mismos ha expuesto a la privacidad, en efecto, a una amenaza potencial antes desconocida. Nótese que se habla de la privacidad y no de la intimidad: Aquella es más amplia que ésta, pues en tanto la intimidad protege la esfera en que se desarrollan las facetas más singularmente reservadas de la vida de la persona -el domicilio donde realiza su vida cotidiana, las comunicaciones en las que expresa sus sentimientos, por ejemplo-, la privacidad constituye un conjunto, más amplio, más global, de facetas de su personalidad que, aisladamente consideradas, pueden carecer de significación intrínseca pero que, coherentemente enlazadas entre sí, arrojan como precipitado un retrato de la personalidad del individuo que éste tiene derecho a mantener reservado”.

⁵⁴ MANUEL PULIDO, *supra* note 42, at 1717.

⁵⁵ ASUNCIÓN HERNÁNDEZ y FRANCISCA RAMÓN FERNÁNDEZ, *supra* note 35, at 34.

these situations in which one's action could damage two or more of the rights involved, each of these rights has still its own specific content and its own sphere of protection; therefore they are addressed separately.⁵⁶

One aspect that arises when we publish personal information on a social network is related to the processing of the personal information we have displayed on the "wall" or "timeline". In principle, the entity that manages the website should process the data for the ends which the user intends, which usually are, in the case of a social media site, to connect in the broadest way possible with numerous people. However, as Eduardo Vázquez observes, "it is generally known that the real business of those who run social media sites is based on commerce in the files and databases of third parties"⁵⁷. Indeed, as Ana María Gil writes, "the footprint of a person accessing the internet becomes a very valuable piece of information, which facilitates the offer of services and products adapted to that person's circumstances and which undoubtedly reveals our personal life, likes, preferences, photographs, trips, groups, conversations, ways of conceiving of and understanding one's development in ethical values, etc."⁵⁸

Regarding Facebook Terms and Policies,⁵⁹ which most of us accept with just one click without reading beforehand and without thinking about the consequences: although we own the information we hang on the wall, the company reserves the right to transmit this information to third parties. It offers services for advertisers and publishers that will use Facebook's profiles to advertise their goods and services.⁶⁰

Facebook users often find, on their pages, advertisements about products and services directly related to their preferences. This is because the site managers may have collected data about the users. The well-known cookies system⁶¹ makes such collection possible through a disproportionate collection of personal data. If the site manager does this owing to its relationships with the company that offers the products or services, it may exceed the legal limits established in Article 4.1 of the Constitutional Act 15/1999 on Personal Data Protection: "*Personal data may only be collected for processing and processed when they are suited and relevant to and not excessive for the specific, explicit and legitimate scope and purposes for which*

⁵⁶ See EDUARDO VÁZQUEZ, *supra* note 18, at 44.

⁵⁷ See EDUARDO VÁZQUEZ, *supra* note 18, at 41 (freely translated by the author of the present article).

⁵⁸ ANA MARÍA GIL, *supra* note 2, at 153 (freely translated by the author of the present article).

⁵⁹ Specifically see "Statement of Rights and Responsibilities" (January 2015), available on: <https://www.facebook.com/legal/terms> [downloaded on 9/12/2016].

⁶⁰ Facebook's Data Policy (Section III), in relation to the question "How is this information shared?" states: "We transfer information to vendors, service providers, and other partners who globally support our business, such as providing technical infrastructure services, analyzing how our Services are used, measuring the effectiveness of ads and services, providing customer service, facilitating payments, or conducting academic research and surveys. These partners must adhere to strict confidentiality obligations in a way that is consistent with this Data Policy and the agreements we enter into with them".

⁶¹ "A cookie is a small piece of data that a website asks your browser to store on your computer or mobile device. The cookie allows the website to 'remember your actions or preferences over time'. EU Internet Handbook, Information Provider's Guide, Basics, available on: http://ec.europa.eu/ipg/basics/legal/cookies/index_en.htm#section_2 [visited on 9/28/2017].

they were obtained".⁶² Thus, in certain cases, there have probably been great infractions of Article 44.⁶³ Such personal data are available also through search engines such as Google.⁶⁴

Furthermore, when we open an account on Facebook, we accept that: "[f]or content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License)".⁶⁵

Recently, the Spanish Data Protection Agency, in its decision of 11 September 2017, has imposed a penalty of 1,200,000 euros on Facebook because of three serious infringements of the Constitutional Act 15/1999 on Personal Data Protection⁶⁶. The agency gave several reasons for its decision⁶⁷:

- Facebook collects protected data without clearly informing the user about how and for what purpose it will use that data and without seeking the express consent of the user⁶⁸.
- Facebook does not provide clear information about the processing operations that will be carried out with data collected. Facebook's data policy only offers some examples. Users are not informed that the social network also collects data resulting from users' interactions on Facebook's sites and on third-party sites. Facebook compiles and makes use of user information without obtaining an unambiguous, specific and informed consent⁶⁹.
- The third main reason for this resolution refers to the cancelation of collected user data⁷⁰. "Data are not totally canceled when they are no longer useful for the purpose for which they were collected"⁷¹.

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In the quoted passage, "canceled" indeed had but one "l."

⁶² Official Translation. Ley Orgánica 15/1999, de 13 de diciembre, de Protección de Datos de Carácter Personal, *supra* note 6.

⁶³ Promoters and managers of computer applications are good examples of third parties who offer services and products. To register for some of these applications, the potential client is given the chance to enter the application site by using same user name and password as he or she does for the social media site (this happens especially on Facebook). This automatically allows the application manager to access all the personal data collected on the media site.

⁶⁴ ANA AZURMENDI, *Por un "derecho al olvido" para los europeos aportaciones jurisprudenciales de la Sentencia del TJUE del caso Google Spain y su recepción por la Sentencia de la Audiencia Nacional de 29.12.2014*, Revista de Derecho Político, 275 (Nº 92, 2015).

⁶⁵ "Statement of Rights and Responsibilities", *supra* note 59, Term 2.1.

⁶⁶ Spanish Data Protection Agency (AEPD) R/01870/2017 (August 28, 2017), available on: http://www.agpd.es/portalwebAGPD/resoluciones/procedimientos_sancionadores/ps_2017/common/pdfs/PS-00082-2017_Resolucion-de-fecha-21-08-2017_Art-ii-culo-4-5-6-7-LOPD.pdf [downloaded on 9/29/2017].

⁶⁷ An English summary of the resolution is available on: http://www.agpd.es/portalwebAGPD/revista_prensa/revista_prensa/2017/notas_prensa/news/2017_09_11-iden-idphp.php [visited on 9/28/2017].

⁶⁸ Eighth paragraph of The Spanish Data Protection Agency (AEPD) resolution R/01870/2017 (August 28, 2017), *supra* note 66.

⁶⁹ *Id.*, fifth to seventh paragraphs.

⁷⁰ *Id.*, ninth paragraph.

⁷¹ Translation available in the English summary of the resolution, *supra* note 67.

Facebook has appealed this resolution. We are at the beginning of a long process that will probably settle the principles of a safer set of procedures and standards governing the use of personal data on social networks.

Spain is not the only one in Europe that has taken measures against this social network. Following the announcement by Facebook of its new Data Policy in 2013, a contact group was created at the European level with the data protection authorities of the Netherlands, France, Hamburg, Belgium, and Spain⁷². Most of them have started investigations into Facebook's processing and collection of data. These authorities have focused on the insufficiency of the information that Facebook offers to its users and the misuse of sensitive personal data.

These are examples of the problems that could arise in relation to some of Facebook's terms included in its Data Policy. In addition, some of them may constitute unfair terms as a matter of contract law. In Europe we have the example of France, whose Court of Appeal has struck down one of Facebook's terms on the grounds that it was unfair.⁷³ The French court, in its ruling 12 February, 2016, discussed the following term: "[y]ou will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County, and you agree to submit to the personal jurisdiction of such courts for the purpose of litigating all such claims. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions".⁷⁴

The Court of Appeal decided that such a jurisdiction clause is not binding on the consumers, in this case Facebook's users, on the grounds that it created an imbalance in the parties' rights and obligations in favor of the supplier and disadvantageous to the user.⁷⁵

⁷² *Common Statement by the Contact Group of the Data Protection Authorities of The Netherlands, France, Spain, Hamburg and Belgium* (May 16, 2017), available on http://www.agpd.es/portalwebAGPD/noticias-inicio/common/pdf/2017/05_may_17/Common_Statement_16_May_2017.pdf [downloaded on 9/28/2017].

⁷³ Cour D'Appel de Paris 2016/58 (12 February), available on: <https://www.alain-bensoussan.com/wp-content/uploads/2014/05/33796589.pdf> [downloaded on 9/6/2016].

⁷⁴ "Statement of Rights and Responsibilities", *supra* note 59, Term 15.1. See also CATHERINE VAN DE HEYNING, *The boundaries of jurisdiction in cybercrime and constitutional protection: the European perspective*, in ORESTE POLLICINO Y GRAZIELLA ROMEO, *The internet and constitutional law: the protection of fundamental rights and constitutional adjudication in Europe*, 26-27 (Routledge, 2016).

⁷⁵ In this case the French court of appeal followed the criteria established by the European Court of Justice in *Océano Grupo Editorial SA v Rocio Murciano Quintero*, Case 240/98, of 27 June 2000, in relation to jurisdiction clauses. All the countries of the European Union have implemented Directive 93/13/CEE of 5 April 1993, which relates to unfair terms in consumer contracts (Official Journal L 095, 21/04/1993 at 0029 – 0034). Article 3.1 of this Directive lays down a composite test that should be applied in order to examine the unfairness of a term: "A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer". This substantive test is applied taking into account, as Article 4.1 states, "the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

California courts are inconvenient for any social network user who would not be able to afford the cost of the procedure.⁷⁶

Also in France the Directorate-General for Competition, Consumers and Fraud Prevention, in its Decision n° 2016-007 (26 January 2016), after examining the terms of Facebook's contract, concluded that most of them could be regarded as unfair, so, it recommended that Facebook review the terms in order to avoid sanctions.⁷⁷

The possibility of finding unfair terms in social network contracts may be supported by reference to recital 42 of 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," (repealing Directive 95/46/EC): "*where processing is based on the data subject's consent, the controller should be able to demonstrate that the data subject has given consent to the processing operation. In particular in the context of a written declaration on another matter, safeguards should ensure that the data subject is aware of the fact that and the extent to which consent is given. In accordance with Council Directive 93/13/EEC a declaration of consent pre-formulated by the controller should be provided in an intelligible and easily accessible form, using clear and plain language and it should not contain unfair terms. For consent to be informed, the data subject should be aware at least of the identity of the controller and the purposes of the processing for which the personal data are intended. Consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment*".⁷⁸

Some of these issues have already been addressed in Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, which we have referred to previously.⁷⁹ But these topics exceed the main subject matter of this essay: the exercise of the minors' personal rights in social networks, a virtual reality with a higher level of complexity where minors, without any prior notification, are exposed to the dangers once they share their personal information with others.

⁷⁶ The French Court stated: "que les difficultés pratiques et le coût d'accès aux juridictions californiennes sont de nature à dissuader le consommateur d'exercer toute action devant les juridictions concernant l'application du contrat et à le priver de tout recours à l'encontre de la société Facebook Inc ; qu'à l'inverse, cette dernière a une agence en France et dispose de ressources financières et humaines qui lui permettent d'assurer sans difficulté sa représentation et sa défense devant les juridictions françaises ; que dès lors, la clause attributive de compétence au profit des juridictions californiennes contenue dans le contrat a pour effet de créer, au détriment du non-professionnel ou du consommateur, un déséquilibre significatif entre les droits et obligations des parties au contrat ; qu'elle a également pour effet de créer une entrave sérieuse pour un utilisateur français à l'exercice de son action en justice". To resolve the case, the French Court applied Articles L 132 and R 132.2 of the Code de la Consommation, which implements 93/13/CEE of 5 April 1993 on unfair terms in consumer contracts, *supra* note 75.

⁷⁷ Décision n° 2016-007 du 26 janvier 2016 mettant en demeure les sociétés FACEBOOK INC. et FACEBOOK IRELAND, available on: https://www.cnil.fr/sites/default/files/atoms/files/d2016-007_med_facebook-inc-ireland.pdf [downloaded on 9/6/2016].

⁷⁸ Official Journal of the European Union, L 119, 05/04/2016, at 1-88, available on: http://ec.europa.eu/justice/data-protection/reform/files/regulation_oj_en.pdf [downloaded on 9/6/2017]. This regulation repealed the 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" (OJ 1995, L 281, at 31).

⁷⁹ See CATHERINE VAN DE HEYNING, *supra* note 74, at 27.

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III. The exercise of the minor's rights of personality

A. Minor's legal capacity to act

In theory, according to Article 12 of the Spanish Constitution⁸⁰ and Article 315.1 of the Spanish Civil Code,⁸¹ Spanish citizens reach the majority of age once they are 18 years old, but prior to 18 years old, the legal system recognizes legal capacity to perform some acts and exercise some rights with legal effects.⁸²

Until the year 2015, there was a great debate regarding the possibility of recognizing an area in which the minor could be able to exercise his rights on his own without assistance or representation. Traditionally it was understood that the minor was incapable of doing any type of act, but soon voices rose against this statement, and the opinion was expressed that the capacity to act of the minor should be limited only to the extent necessary to protect him.⁸³ The capacity to act of the minor is variable depending on the degree of development, and so, on many occasions, the minor has a natural capacity to understand some specific acts of ordinary life. Furthermore, it is assumed that from the age of 18 years onwards a person has full natural capacity to understand every act.

The recent reform introduced by Law 26/2015 of July 28th,⁸⁴ confirms this statement giving a new content to Article 1263 of the Spanish Civil Code which, in relation to consent to enter into a contract, now states:⁸⁵

"The following persons cannot give their consent:

⁸⁰ Art. 12 of the Spanish Constitution: "*Spaniards become adults at 18 years of age*". Official translation, *supra* note 27.

⁸¹ Art. 315.1 of the Spanish Civil Code: "*Legal age begins upon turning eighteen*". Official translation available on: <http://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/documentacionpublicaciones/publicaciones/traduccion-derecho-espanol> [downloaded on 12/12/2016].

⁸² For the purposes of this essay, "[l]egal capacity may hence be defined as the capacity and power to exercise rights and undertake obligations by way of one's own conduct, i.e. without assistance of representation by a third party. This concept logically presupposes the capability to be a potential holder of rights and obligations (static element), and entails the capacity to exercise these rights and to undertake these duties to create, modify or extinguish legal relationships (dynamic element)". *Background conference document prepared by the Office of the United Nations High Commissioner for Human Rights, "Legal Capacity"*, paragraph 24 (a document related to sessions of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities) Available on: <http://www.un.org/esa/socdev/enable/rights/ahc6documents.htm> [downloaded on 9/6/2017].

⁸³ SIMEÓN RIBELLÉS DURÁ, *La persona, el estado civil y el registro civil. Capacidad*, en JUAN FRANCISCO DELGADO DE MIGUEL (coord.), *Instituciones de Derecho Privado, Tomo I: Personas*, Vol. 2^o, 122-123 (Civitas, 2015).

⁸⁴ Ley 26/2015, de 28 de julio, de modificación del sistema de protección a la infancia y a la adolescencia, Boletín Oficial del Estado, núm. 180, de 29 de julio de 2015.

⁸⁵ Spanish Civil Code, *supra* note 81. Original text: "*No pueden prestar consentimiento: 1.º Los menores no emancipados, salvo en aquellos contratos que las leyes les permitan realizar por sí mismos o con asistencia de sus representantes, y los relativos a bienes y servicios de la vida corriente propios de su edad de conformidad con los usos sociales. 2.º Los que tienen su capacidad modificada judicialmente, en los términos señalados por la resolución judicial*". Before the reform this provision stated: "*The following persons cannot give their consent: 1º Non-emancipated minors. 2º Incapacitated persons*". The Official Translation of this original version is available on: <http://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/documentacionpublicaciones/publicaciones/traduccion-derecho-espanol> [downloaded on 6/07/2015].

1. *Non-emancipated minors, except in any contracts in which they are legally permitted to do so by themselves or with the assistance of their representatives, and those relating to everyday goods and services appropriate to their age, pursuant to social customs.*

2. *Incapacitated persons, under the terms indicated in the judicial resolution”.*

Considerable support for the view that a minor has the capacity to act in certain situations is afforded by Article 162 of the Spanish Civil Code, which seems to provide that the powers of parents are merely complementary in matters relating to “rights of personality”,⁸⁶ thus limiting their power to act as legal representatives.⁸⁷ However, on his or her own, the minor can only exercise those rights to the extent that he or she has the capacity to do so, because it has been established that he or she is naturally capable of the specific act. Article 162.1 states:⁸⁸

“Parents who hold parental authority shall have the legal representation of their underage non-emancipated children.

The following cases shall be excepted: 1. Acts relating to rights of personality or others which the child, pursuant to the law and to his maturity, may perform by himself.

Notwithstanding the foregoing, those with parental responsibility shall intervene in these cases by virtue of their duties of care and assistance”

Therefore, the exercise of personality rights depends, in many cases, on the subject’s natural capacity to understand and will.⁸⁹ So, two factors determine the efficacy of a minor’s intervention: 1) his or her maturity and 2) the specific legislation bearing upon the right in question.⁹⁰

Apart from this Article of the Spanish Civil Code, it is also necessary to take into account the statutes which specifically address the exercise of personality rights.⁹¹

The law as to these matters should be based on two other principles: the free development of the minor’s personality and the protection of the minor. These principles are

⁸⁶ FEDERICO DE CASTRO, *Derecho Civil de España III: el negocio jurídico y la persona jurídica*, 179 (Thomson-Civitas, 2008, Reimpresión de la edición de 1971).

⁸⁷ FRANCISCO JORDANO FRAGA, *La capacidad general del menor*, *Revista de Derecho Privado*, 893 (Nº 10, octubre, 1984).

⁸⁸ Official translation, *Código Civil Español*, *supra* note 81. The first paragraph was also modified by the Law 26/2015 of July 28th, *supra* note 84.

⁸⁹ MARÍA DEL CARMEN GARCÍA, *El ejercicio de los derechos de la personalidad del menor de edad no emancipado: (especial consideración al consentimiento a los actos médicos y a las intromisiones en el honor, la intimidad y la propia imagen)*, 78 (Thomson-Aranzadi, 2004).

⁹⁰ *Id.* at 80.

⁹¹ For example, under Spanish legislation a person 14 years old or older can make a last will or testament, according to Article 663.1 of the Spanish Civil Code; and a person 16 years old or older has the capacity to decide himself whether or not accept a medical intervention or any other health assistance measure (Article 9, Law of Patient Autonomy. Ley 41/2003 de Autonomía del Paciente, de 14 de noviembre, Boletín Oficial del Estado, núm. 274, de 15 de noviembre de 2002).

complementary and mutually limiting, so that the protectionary system is not so rigid as to stunt the minor's development nor so broad and flexible that the protection is insufficient.⁹²

In the exercise of these rights, the tension between the principle of freedom or autonomy of minors and the principle of the child's superior interest, or the interest of the minor, is most accurately expressed. The first one calls for respect, wherever possible, for the freedom of the minor and his capacity to make decisions. The principle regarding the interest of the minor calls for regulation in those situations that require, because of a minor's immaturity, the intervention of a legal representative.⁹³

However, because the maturing process of a minor is gradual, these principles do not exclude each other; both apply to persons while they are minors. If it is possible, the wishes of the minor should be taken into consideration, especially in matters which would have a great impact on the minors' personality rights. As we have already pointed out, the exercise of such rights belongs to the holder, at least if he has enough maturity to exercise them; the legal representative's interventions should be limited to actions which respond to the duty to care for and assist the minor.

B. The exercise of the minor's personality rights

We have seen, some paragraphs above, Article 162.1, which states that a minor could exercise his personality rights on his own, when justified by his level of maturity. Similarly, the Constitutional Act 1/1982 for Civil Protection of the Right to Honor, Privacy and Image⁹⁴ contains a similar provision to the one in the Civil Code. Article 3 states that:

"1. Minors and incapacitated persons should themselves give consent if they are sufficiently mature, in accordance with civil legislation. 2. In other cases, consent must be given in writing by the legal representative, who is obliged to have previously informed the Public Prosecutor of the intended consent. If the Public Prosecutor opposes this within the span of eight days, the Judge shall resolve the case".⁹⁵

So, if the minor is not sufficiently mature, consent to authorize any interference in the minor's personality rights has to be given by his legal representative, and it is compulsory to give notice of the fact to the Public Prosecutor. By providing for the Public Prosecutor's

⁹² CARLOS MARTÍNEZ DE AGUIRRE ALDIZ, *La protección jurídico-civil de la persona por razón de la menor edad (Una aproximación teleológica a las instituciones de asistencia y protección de menores en nuestro Derecho civil)*, Anuario de Derecho Civil, 1396 (Nº4, 1992).

⁹³ ANTONIO ENRIQUE PÉREZ LUÑO, *Título II: Principios de la Protección de Datos. Artículo 6*, en ANTONIO TRONCOSO REIGADA (dir.), *Comentario a la Ley Orgánica de Protección de Datos de Carácter Personal*, (Civitas, 2010). Available on: Aranzadi Instituciones (Spanish Database) 1-2 (reference BIB 2010/1631) [downloaded on 09/09/2016].

⁹⁴ Ley Orgánica 1/1982, de 5 de mayo, de protección civil del derecho al honor, a la intimidad personal y familiar y a la propia imagen, *supra* note 33. I referred to this law above when I explained the regulation of these personal rights.

⁹⁵ Freely translated by the author of the present article. The Spanish original text is the following: *"1. El consentimiento de los menores e incapaces deberá prestarse por ellos mismos si sus condiciones de madurez lo permiten, de acuerdo con la legislación civil. 2. En los restantes casos, el consentimiento habrá de otorgarse mediante escrito por su representante legal, quien estará obligado a poner en conocimiento previo del Ministerio Fiscal el consentimiento proyectado. Si en el plazo de ocho días el Ministerio Fiscal se opusiere, resolverá el juez".*

intervention, the Spanish legislator seeks to avoid any moral or material damage that might be caused by any interference or authorization related to honor, privacy, and one's image.⁹⁶

The law's approach, as described above, could be unsuitable in the context of the new technologies, where personal information is treated in a massive, simple and quick way.⁹⁷ The protection of personal data (including information about personal and family privacy, and also images of minors) "finds one of its biggest obstacles in the general, and sometimes uncontrolled, use of computing".⁹⁸

But if this is the state of the law as to the exercise of a minor's personality rights, it is also necessary to take into account the age at which a minor could give a valid consent to authorize the access and use of his personal data, the other right we are talking about. Article 13.1 of Royal Decree 1720/2007, approving regulations relating to Constitutional Act 15/1999 on Personal Data Protection, states, "[d]ata on individuals over the age of fourteen may be processed with their consent, except where the law requires that such consent may only be given where the minor is assisted by the holders of patria potestas or tutelage. Where individuals under the age of fourteen are involved, parental or tutorial consent shall be required".⁹⁹

As a result, when we are talking about the rights to honor, family and personal privacy, and one's image it is necessary to determine whether the minor has significant maturity or not. But in the case of personal data regulation, it is assumed that he has sufficient maturity if he is 14 years old. When a person opens a profile in a social network, he consents to the use of personal data relating to his preferences, images, and experiences and also authorizes the manager of the social network to use that personal data.¹⁰⁰ In the new technologies sphere, before the age of 14 years old, the consent of the legal representatives would be required, but always taking into account the degree of maturity of the minor. In my personal opinion, it is convenient to ask the minor his opinion in relation to different aspects like hanging a photo on one's wall. In this way the minor will, little by little, take part in decisions that may affect him.¹⁰¹

Also, until recently, in most of the European union countries, once the age of 14 years was reached, the minor was free to put up his personal data on a social network and, consequently, we could conclude that he had a level of maturity sufficient to manage his Facebook profile in such a way as to allow third parties to upload pictures in which the minor appeared. The minor's consent must of course be given considerable weight, but so must concern as to a wide range of

⁹⁶ JUDITH SOLÉ RESINA, *La protección de los derechos al honor, a la intimidad personal y familiar y a la propia imagen de los menores y discapacitados*, en ANTONIO FAYOS GARDÓ Y PILAR CONDE COLMENERO (coords.), *Los derechos a la intimidad y a la privacidad en el siglo XXI*, 202 (Dykinson, 2014).

⁹⁷ EDUARDO VÁZQUEZ, *supra* note 18, at 21-22.

⁹⁸ *Id.*, at 23-24 (freely translated by the author of the present article).

⁹⁹ Real Decreto 1720/2007, de 21 de diciembre, por el que se aprueba el Reglamento de desarrollo de la Ley Orgánica 15/1999, de 13 de diciembre, de Protección de Datos de Carácter Personal, *supra* note 6 (official translation).

¹⁰⁰ MARÍA ISABEL DE LA IGLESIA MONJE, *El consentimiento de ambos progenitores, la publicación de fotos en las redes sociales y el supremo interés del menor*, *Revista Crítica de Derecho Inmobiliario*, 3621 (nº 91, Nº 752, 2015).

¹⁰¹ See also, ANTONIO ENRIQUE PÉREZ LUÑO, *supra* note 93, at 1.

interference, some of it illegitimate, to which the internet exposes him. Anyone with a profile in a social network is exposed to numerous risks, especially minors.

This is the main reason why the European Union strengthened the protection of minors by raising the age of the consent to 16 years old, in a regulation which states:¹⁰²

“1. Where point (a) of Article 6(1) applies,¹⁰³ in relation to the offer of information society services directly to a child, 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.

Member States may provide by law for a lower age for those purposes provided that such lower age is not below 13 years.

2. 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.

3. Paragraph 1 shall not affect the general contract law of Member States such as the rules on the validity, formation or effect of a contract in relation to a child.”

C. Illegitimate interference in minor’s personality rights

According to what we have seen so far, on one hand, only a minor with enough maturity may give authorization and consent in relation to his personality rights (honor, privacy, and image). Apart from these cases, the intervention of the legal representative will be required. Those who act without obtaining consent which satisfies the criteria described above may present straightforward cases of illegitimate interference (consent must be given in writing by the legal representative, who is obliged to have previously informed the Public Prosecutor).

But, in relation to minors under Spanish system, even those who act *with* the requisite consent may fall afoul of Article 4.3 of the Constitutional Act 1/1996 of the Legal Protection of the Minors¹⁰⁴, which states: *“it constitutes illegitimate interference in the right to honor, personal*

¹⁰² 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 (repealing Directive 94/46/EC (General Data Protection Regulation), *supra* note 78.

¹⁰³ Article 6(1) states: *“1. Processing shall be lawful only if and to the extent that at least one of the following applies: (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes; (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; (c) processing is necessary for compliance with a legal obligation to which the controller is subject; (d) processing is necessary in order to protect the vital interests of the data subject or of another natural person; (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child. Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.*

¹⁰⁴ Ley Orgánica de Protección Jurídica del Menor, Boletín Oficial del Estado, núm. 15, 17 de enero de 1996.

and familiar privacy and minor's own image, to make any use of his image or name in the media¹⁰⁵ that could damage his honor or reputation, or that is contrary to his interests, even if the consent of the minor or his legal representatives is given".¹⁰⁶ A *sensu contrario*, we might consider that the consent, with the conditions described, will be valid only if that conduct does not involve damage to his honor or standing or is not contrary to his interests. Therefore, we can find here an objective test¹⁰⁷ which courts will apply in each case individually.

The reason for the high level of protection for the exercise of minors' personality rights is set forth in the Preamble of this statute, which refers to "*the aim of protecting the minor who could be subject to manipulation, including by his own legal representatives or [members of] the social circles in which he moves*".¹⁰⁸ Thus Article 4 reinforces the network of provisions which protects minors.¹⁰⁹

It is supposed that an illegitimate interference may cause damage in one's personality rights. As a result, according to Article 9.3 of the Constitutional Act 1/1982 for Civil Protection of the Right to Honor, Privacy and Image, a person who wrongfully publishes an image or other facts in relation to one's individual and family privacy is liable for any damage arising from his wrongful action.¹¹⁰ This Article also establishes an obligation to stop such publication.

On the other hand, in the absence of requisite consent by a legal representative, even if the publication of an image did not damage the minor's interests, the publication must be considered to have been an illegitimate interference with the minor's personal rights.

We can find an example of this situation in the Spanish Supreme Court which, in its ruling 383/2015 (June 30, 2015), considered whether the inclusion of an image of a minor (there is no reference to the age of the minor but we could say, after reading the facts that he is 12 years old or younger) in a journal with a cultural purpose (*Chiquiocio*), without his parent's consent, was lawful or not. In the image the boy appeared close to a bird of prey in the Science Museum of the Spanish city of Valladolid. The minor's uncle, who was at that time the director of that museum, took the photo. *Chiquiocio* inserted the picture beside advertisement of a children's activity related to birds of prey. The Spanish courts in the first and second instances held that the journal had not infringed the minor's personality rights, as the photo was an innocent one in a cultural publication. However the Supreme Court held that, regardless of damage to a minor's honor and reputation, and independently of the type of journal, a legal representative's consent is always

¹⁰⁵ Article 4.3 refers solely to "media", but since 1996 vastly new technologies have been developed. We should interpret the word "media" to include any publication on line (web pages, social networks, etc).

¹⁰⁶ Freely translated by the author of the present article. The Spanish text is the following: "*Se considera intromisión ilegítima en el derecho al honor, a la intimidad personal y familiar y a la propia imagen del menor, cualquier utilización de su imagen o su nombre en los medios de comunicación que pueda implicar menoscabo de su honra o reputación, o que sea contraria a sus intereses incluso si consta el consentimiento del menor o de sus representantes legales*".

¹⁰⁷ JUDITH SOLÉ RESINA, *supra* note 96, at 204.

¹⁰⁸ Preámbulo de la Ley Orgánica de Protección Jurídica del Menor, *supra* note 104. (Freely translated by the author of the present article).

¹⁰⁹ VÍCTOR MANUEL GARRIDO DE PALMA, *El concebido y el menor de edad. Su protección por el Derecho civil (el Código Civil en su 125 aniversario)*, Revista Jurídica del Notariado, 120 (Nº 84, 2012).

¹¹⁰ Ley Orgánica 1/1982, de 5 de mayo, de protección civil del derecho al honor, a la intimidad personal y familiar y a la propia imagen, *supra* note 33.

necessary. If there is no consent, the publication of a minor's photo, it held, must be considered to be an illegitimate interference with his personality rights.

The courts have also applied this reasoning to public figures and celebrities' children. There is a uniform jurisprudence that confirms that without the legal representatives' consent it is not permissible to publish a minor's images or to reveal personal or family information about the child.¹¹¹

Until recently, most of the claims of violation of the right to honor, family, and personal privacy, and one's own image, related to print publications, but now most of them are relate to on-line publications, including publications on social networks. An example is afforded by the holding of the Audiencia Provincial of Pontevedra 208/2015 (June 4, 2015) that a father is not allowed to post pictures of his son on Facebook without his ex-wife's consent.

D. Parents' duty of care in relation to their children's personality rights

So far, we have been discussing general consent for the publication of minors' images or minors' data related to their personal or family privacy. When such publication is through a social network this normally occurs because the user has published them, hanging photos and written comments on their walls. When the user is a minor 14 years old or older, he is allowed to do this on his own. It is not necessary to obtain his legal representatives' consent. But if the minor is under 14 years old, it may be assumed that their legal representatives have done it.

But when a minor gives consent to a friend to publish a photo of him, he is exercising his right to his own image (a right of personality), and the friend who publishes the photo is authorizing an interference in his personal rights. Therefore, even if the minor is 14 or older, we should not forget that parents have a duty to take care and provide assistance in the exercise of their children's personality rights under Article 162.1 of the Spanish Civil Code.¹¹²

Article 162.1 of the Spanish Civil Code was modified in 2015. Before the legal reform this article stated: "*Parents who hold parental authority shall have the legal representation of their underage non-emancipated children. The following cases shall be excepted: 1. Acts relating to rights of personality or others which the child, in accordance with the Law and to his maturity, may perform by himself*".¹¹³ Now this article includes a reference to the parent's duties of care and assistance as follows: "*Parents who hold parental authority shall have the legal representation of their underage non-emancipated children. The following cases shall be excepted: 1. Acts relating to rights of personality or others which the child, pursuant to the law and to his maturity, may perform by himself. Notwithstanding the foregoing, those with parental responsibility shall intervene in these cases by virtue of their duties of care and assistance*".¹¹⁴

¹¹¹ See also S.T.S 387/2012 (June 11, 2012) and S.T.S 2016/2013 (February 18, 2013). Available on: <http://www.poderjudicial.es/search/>

¹¹² Article 162 of the Spanish Civil Code, *supra* note 81.

¹¹³ The Official Translation of this article, as quoted above, is available on: <http://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/documentacion-publicaciones/publicaciones/traduccion-derecho-espanol> [downloaded on 6/07/2015].

¹¹⁴ Official translation, Spanish Civil Code, *supra* note 81.

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This new language, apparently, may limit the minor's autonomy which has been recognized during this past twenty years, at least from a theoretical point of view. However it is worth recalling that the minor is in the middle of a maturing process. The Law should protect, on one hand, a sphere of autonomy within which the minor can take his own decisions and, on the other hand, the interest the minor has in being informed by his legal representatives about the risks of taking specific decisions.¹¹⁵ He needs the protection of those who have a duty of providing him care, assistance and guidance, especially his parents.¹¹⁶ So it is better to recognize that the reason that justifies this new reference to parents' *duties of care and assistance* is not to reduce the minor's autonomy, but that on the contrary, it is intended to clarify parents' role in relation to the exercise of personality rights.¹¹⁷

These duties of care and assistance derive from the parental functions described in Article 154 of the Spanish Civil Code. Paragraph one of that article states that parents must *look after their children, have them in their company, feed them, educate them and provide them with a comprehensive upbringing*.¹¹⁸ Looking after children implies also a duty of supervision, care or vigilance, which, after the 2015 reform, includes involvement in decisions that the minor because of his level of maturity could take on his own, without his legal representative's consent.¹¹⁹ In these situations, parents' intervention may give them resources that guarantee a free development of the child's personality.¹²⁰

Particularly, in relation to the exercise of these rights,¹²¹ the new Article 162.1 authorizes some intervention of parents because they are specifically significant.¹²²

E. Other protective measures in relation to personal data

Apart from the possible intervention of a minor's parents, when the exercise of his personality rights is through a social network site or profile it should be emphasized that the social network is responsible for using data fairly and for limited, specific purposes. The social network is not allowed to give the data to third parties and to go beyond the purposes for which the minor gave his consent, as we have seen above. Much depends on the privacy configuration the user of the social network has chosen. Facebook allows the user to impose restrictions as to what people may access his or her profile or see photos or comments on the user's wall; the user

¹¹⁵ See HELENA DÍEZ GARCÍA, *Artículo 162*, en RODRIGO BERCOVITZ RODRÍGUEZ-CANO (coord.), *Las modificaciones al Código Civil del año 2015*, 424 (Tirant lo Blanch, 2016).

¹¹⁶ All those duties are part of the content of *patria potestas*.

¹¹⁷ AMELIA SÁNCHEZ GÓMEZ, *El marco normativo tradicional para la protección de los derechos de la personalidad del menor. ¿Alguna asignatura pendiente en el siglo XXI?*, Revista Doctrinal Aranzadi Civil-Mercantil (Nº 11, 2016). Available on: Aranzadi Instituciones (Spanish Database) 4 (reference BIB 2016\85671) [downloaded on 09/28/2016].

¹¹⁸ Official translation, Spanish Civil Code, *supra* note 81.

¹¹⁹ HELENA DÍEZ GARCÍA, *supra* note 115, at 423.

¹²⁰ *Id.* at 424.

¹²¹ It is worth noting that only the holder of these rights could exercise them.

¹²² HELENA DÍEZ GARCÍA, *supra* note 115, at 427 and AMELIA SÁNCHEZ GÓMEZ, *supra* note 117, at 4.

may restrict such viewing to “friends” or “friends of friends” or may allow it for the public in general.¹²³ A social network provider must abide by such limitations.

On the other hand third parties who have permission to access a minor’s profile are responsible for the processing and movement of such data. The European Union regulation distinguishes between a “controller” or “processor” on the one hand and a “third party” on the other, by defining “third party” to mean “a natural or legal person, public authority, agency or body other than the data subject, controller, processor and persons who, under the direct authority of the controller or processor, are authorized to process personal data”.¹²⁴ Under Spanish legislation, this third party has permission to access personal data but is also responsible for the processing of that data. The Spanish Constitutional Act 15/1999 on Personal Data Protection states in Article 12.1: “Third party access to data shall not be regarded to constitute data disclosure when such access is necessary to provide a service whose recipient is the controller”.¹²⁵ For example, in the case we are talking about, the controller is Facebook and the third parties are vendors, service providers and other partners to whom Facebook regularly transfers information.¹²⁶

Third parties that access social network profiles are an example of this situation. A harmful use of data thus obtained is subject to the imposition of the sanctions described in Article 44 of the Spanish Constitutional Act 15/1999 on Personal Data Protection.¹²⁷

Sometimes an illegitimate use of personal data could, in addition, cause damage to a minor’s personality rights. An example could be the reproduction of an image on the website of a third party without the consent of the minor. “Friends” also are responsible for the data they have access to, so they couldn’t reproduce them on their walls without the consent of the minor to whom the data related.¹²⁸

IV. Conclusions

This paper has briefly examined the exercise of the rights to personality: honor, privacy, and one’s own image. European law generally has sought to deal with the application of these rights of minors by standards based on the minor’s ability to consent. The law has struggled to

¹²³ In relation to the question “How is this information shared?” Facebook’s Data Policy (section III) states: “People you share and communicate with. When you share and communicate using our Services, you choose the audience who can see what you share. For example, when you post on Facebook, you select the audience for the post, such as a customized group of individuals, all of your Friends, or members of a Group. Likewise, when you use Messenger, you also choose the people you send photos to or message. Public information is any information you share with a public audience, as well as information in your Public Profile, or content you share on a Facebook Page or another public forum. Public information is available to anyone on or off our Services and can be seen or accessed through online search engines, APIs, and offline media, such as on TV”.

¹²⁴ Article 4 (10) of 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, *supra* note 78.

¹²⁵ Official translation, Ley Orgánica 15/1999, de 13 de diciembre, de Protección de Datos de Carácter Personal, *supra* note 6.

¹²⁶ Facebook’s Data Policy (Section III), in relation to the question “How is this information shared?” *supra* note 60.

¹²⁷ EDUARDO VÁZQUEZ, *supra* note 18, at 42-43.

¹²⁸ *Id.* at 40-44.

deal with the near impossibility of judging this ability. The approaches taken by Spanish law are described above.

One provision in Spanish law specifies the age (14) at which one is eligible to open an account on a social network site (although, as we know, numerous minors below that age have opened such accounts). Spanish law in these matters has important consequences in the law for the protection of personal data, the right to honor (as the minor is exposed to all forms of visitors' comments), the right to privacy (one publishes on one's wall information that reveals aspects of his or her private life), and to one's image (consider the continuous uploading of photographs by other users of the site).

This Article has endeavored to determine whether or not minors have the capacity to exercise those rights of personality, an exercise that depends on one's level of maturity. To do this, I have examined the risks and consequences of the use of social media on people's lives. After analyzing this, it is imperative to judge whether or not a minor can perceive these risks. In general, younger minors have no awareness of the full implication of participating in social media sites, owing, in particular, to their lack of knowledge of how to manage Facebook's privacy configuration.

However, we continue to need adequate mechanisms of control to verify access, in order to protect the minor from spreading too far his personal and family privacy and from interference. In this context, we have seen how Spanish law has created a strengthened system of protection by establishing that all interference prejudicial to the minor is illegitimate, even if consent is given under the conditions imposed by the law, if the interference may damage the minor's honor, reputation or interests. At this point, it is crucial for lawgivers to focus on what is currently being called "Rights of the New Technologies".