**Submission to the Committee on the Rights of the Child in view of the intention to draft a General Comment on children’s rights in relation to the digital environment**

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**This contribution relates to articles 3, 6, 13, 16 and 34 UNCRC and aims to provide a partial answer to the question of how States can better realise their obligations to children's rights in relation to the digital environment. It presents research results from the research project “Minors and online sexual acts: a study of legal qualifications and regulatory approaches from a children’s rights perspective”, which is funded by the Research Fund Flanders. More information about this research project and its (preliminary) results can be obtained from the authors.**

**Introduction**

Children use and interact with digital media from a very young age (Chaudron et al., 2015) and for a broad variety of aspects of their (private) lives. The digital environment can also be a space in which they explore and experiment with their sexual identity. In this context, online acts and behaviours of a sexual nature are often associated with negative connotations or consequences. Phenomena such as forced webcam sex, sextortion, and sharing of “revenge porn” fall within the broad range of coercive acts that may take place in the online environment and are punishable offences (Crofts, Lee, McGovern & Milivojevic, 2015; Stanley et al., 2016; Van Ouytsel, Ponnet, Walrave & d’Haenens, 2017).

Over the past years, however, social science scholars have found that children are engaging with technology to establish and maintain intimate relationships and develop their identity, including sexual aspects thereof (De Ridder, 2017; Lenhart, 2015; Livingstone, Mascheroni & Staksrud, 2017; Ringrose et al., 2012). The widespread phenomenon of “sexting”, meaning “the creating, sharing and forwarding of sexually suggestive, nude or nearly nude images through mobile phones and/or on the internet” (Ringrose and others, 2012, p.6) is one of the ways in which this exploration materialises.

On the one hand, sexting is associated with notions of risk and harm and has been attracting considerable public anxiety. Risks that may arise are, for instance, coercion to produce such pictures, further distribution of intimate images without the consent of the person who is pictured (Walrave, Van Ouytsel, Ponnet & Temple, 2018), and, subsequently, the inclusion thereof in the corpus of circulating child sexual abuse material (Interpol and ECPAT International, 2018, p.16).

On the other hand, however, sexual acts or expressions may constitute a part of children’s legitimate exploration of their sexual identity and a way to express their sexual individuality. In this sense, the production of sexually suggestive or explicit images by children may be conceived as falling within the scope of a child’s freedom of expression and right to privacy (Livingstone, Lansdown & Third, 2017; articles 13 and 16 UNCRC). Research has found, for instance, that most sexting occurs within the context of a romantic relationship and can be considered a positive experience (Van Ouytsel, Walrave & Ponnet, 2018). According to recent findings, consensual sexting is becoming a more common practice among youth, with prevalence rates increasing in recent years and as youth age (Madigan, Ly, Rash, Van Ouytsel & Temple, 2018).

The phenomenon of “sexting”, which serves at the same time as a *corollary* and an *expression* of childhood mediatisation, presents a picture of how the notions of trust, control and privacy are challenged within our digital society. *Trust*, *control* and *privacy* are reflected in a multidimensional perception of the practice of sexting and the interrelations between actors involved in such digitalised sexual behaviour (Zemmels & Khey, 2015).

Affording (virtual or digital) “space” to youngsters for the development of the sexual aspects of their personality presupposes not only societal tolerance and acceptance, but also actual legal protection. When considering the need for trust between sender and recipient and the need for having control over (self-generated) sexual images of oneself, it is essential that a relevant legal framework enables the legitimate exploration and expression of one’s sexual identity, and aims to minimise adverse consequences thereof.

However, in the context of certain legislative instruments, and especially when a strict interpretation is adopted, sexting may fall under the concept of production, possession and/or dissemination of child sexual abuse material (CSAM) and may, therefore, be criminalised according to CSAM legislation (Crofts & Lievens, 2018). When such behaviour consensually occurs among children, though, criminalisation could destabilise the anticipated cultivation of trust and establishment of control and privacy rights.

**Trust, control, and privacy in the context of sexting[[1]](#footnote-1)**

***Trust in the context of sexting***

The concept of trust remains to date particularly vague and hard to define with certainty (Simon, 2013). Trust is intrinsically linked to risk, vulnerability (Baier, 1986) and uncertainty (van den Berg & Keymolen, 2017) and is usually meant to be cultivated within a familiar world (Luhman, 1988). In other words, trust is achieved in contexts where the so-called “trustor” may become subject to a risk, such as exposure (in the case of sexting), yet chooses to “believe that another person is intrinsically motivated to take one’s own best interests into account when acting” (Boon, 1994).

In the “offline” landscape trust is perceived as “contributing to adolescents’ capacity of sustaining successful relationships” (Norona, Welsh, Olmstead & Bliton, 2017). In the digital environment, the amplification of risks related to online behaviour, such as the simplified (online) spreadability, persistence and visibility of content (boyd, 2014), intensify the need for the cultivation of trust within (online) intimate communications.

At first sight, the establishment of *trust* is essential for initiating the exchange of sexual messages between adolescents. This does not mean, however, that online sexual disclosure only occurs *within* a romantic relationship (Van Ouytsel et al., 2017). According to scholarship, a number of different motives may instigate the sharing of intimate texts, pictures or videos online. Sexting may constitute a form of flirting or gaining romantic attention; sexting may occur within existing romantic relationships; sexting may merely constitute an expression of adolescents’ experimental mood; or sexting could be the result of pressure from a romantic or sexual partner or friends (Cooper, Quayle, Jonsson & Svedin, 2016; Van Ouytsel, Walrave & Ponnet, 2018).

Trust plays a central role in the context of consensual sexting that occurs among individuals that either already know each other (most commonly due to an established – consensual – romantic or sexual relationship or encounter or, less frequently, due to an existing friendship) or aim for the establishment of a romantic or sexual relationship or encounter. In this landscape, trust, being an important component of intimacy (Norona et al., 2017), usually serves as a mental prerequisite for the consensual sharing of intimate material. Trust may be interpreted as a cultivated expectation that the recipient of the intimate content will respect the nature of the material as well as its sender. In other words, the adolescent sender usually needs to feel confident that his or her intimate images are safe with the recipient and will not be forwarded without consent.

***Control in the context of sexting***

Control relates to the ability of self-determining one’s sexual identity and (online) sexual representation. During adolescence, a highly developmental period of a person’s life (United Nations Committee on the Rights of the Child, 2016), experimenting with one’s sexual identity through sexting presupposes and at the same time is expressed through the exercise of control over one’s image. It is fundamental that (also) a young person under the age of 18 maintains the ability to decide on essential factors, such as the content which will be produced and exchanged, the person(s) who will have access to the sexual(ly) expressive or suggestive content, and the time and duration of the exchange and access.

In this sense, control, as a prerequisite of sexting, is intrinsically connected to children’s autonomy rights. According to the UN Committee on the Rights of the Child (2016), the exploration of sexual identity is considered part of the complex transmission from childhood to adulthood and, the exploration of adolescents’ emerging identities and sexualities is part of their development. In fact, since the healthy development of children includes the respect for individuality, and individuality includes a dimension that carries a sexual element, the right to sexual exploration and conduct could be regarded as falling under the protection of Article 6 of the UNCRC (right to development).

When reflecting on the exercise of control in the context of online sexual acts such as sexting, the concept of “consent”, which denotes “the autonomy of individuals to have control over their lives” (van der Hof, 2017, p. 418), is essential (Hasinoff, 2015). Providing consent, either explicitly or silently, for the creation and sharing of intimate (audio)visual material of oneself is an essential aspect of *exercising control*.

***Privacy in the context of sexting***

Privacy, as well, is a highly debated concept that is not susceptible to a single overarching definition; an understanding of the concept may be acquired through Koops’ et al. typology of privacy (2016). The potential violation of privacy does present a risk for individuals who engage in sexting, as online spatial boundaries seem to be blurred and the often unknown number of individuals who may gain access to a piece of information or image create the impression that digital spaces are inherently public. However, there is a wide consensus on rejecting the assumption that everything digital is automatically public (Albury, 2017; Madden et al, 2013; Nissenbaum, 2011; Solove, 2007); individuals maintain the right to protect their personal information from being accessed or monitored in case they decide to share intimate imagery or texts of sexual content.

**A legal perspective on *trust*, *control*, and *privacy* in the context of sexting**

From a legal perspective, trust, control and privacy as prerequisites for engaging in sexting, are safeguarded in a number of ways. First and foremost, the exploration and expression of one’s sexual identity fall within one’s private sphere. On the basis of international human rights instruments, such as Article 16 UNCRC, Article 8 of the European Convention on Human Rights (ECHR) and Article 7 of the Charter of Fundamental Rights of the European Union (CFREU), children merit protection of their sexual development and expression as part of their established right to protection of private life. Although in certain circumstances and under strict conditions, certain restrictions may be imposed on an individual’s right to privacy, an absolute restriction of the right of children to explore their sexual identity as part of their private life would constitute a violation of the right to privacy. Second, images of a recognisable individual may be protected under the right to image, a personality right which attributes control rights to persons about whether and how their image can be taken and disseminated, and which can in many jurisdictions be enforced before a court, or under data protection legislation, as images may also constitute ‘personal data’. In this respect, unlawful use of personal data may for instance be complained about with national Data Protection Authorities under the 2016 EU General Data Protection Regulation. Third, increasingly, in national legal frameworks, specific legislation is being adopted that criminalises the non-consensual dissemination of sexual images (Beyens & Lievens, 2016). This type of legislation usually focuses on the further dissemination of such images where the pictured person has not consented to this or is even unaware that the images are distributed further, and labels this a criminal offence.

Yet, whereas the three above-mentioned rights and legislative instruments may actually allow to enhance and enforce trust, control and privacy in the context of sexting, other regulatory frameworks – still – exist that – at least from a theoretical point of view – consider even consensual sexting between children to be a criminal offence under legislation that originally was adopted to criminalise child sexual abuse acts by adults.

In fact, an analysis of the legal provisions regulating the production, possession and acquisition of CSAM across Europe, on the one hand, and the interpretation and enforceability of these provisions by the respective States, on the other hand, reveal an emerging gap between theoretical criminalisation and non-implementation of the legislation in practice (Chatzinikolaou & Lievens, forthcoming). For instance, the Member States of the Council of Europe are afforded the possibility to decriminalise the ‘production and/or possession of pornographic material involving children who have reached the age of sexual consent [as set by the national legislator] and where these images are produced and possessed by them with their consent and only for their own private use’ (art. 20, para. 3 Lanzarote Convention). At the same time, the Member States of the European Union are afforded the discretion to decide whether the legislation on the production, possession or acquisition of child pornography applies ‘to the production, acquisition or possession of material involving children who have reached the age of sexual consent where that material is produced and possessed with their consent and only for the private use of the persons involved, in so far as the acts did not involve any abuse’ (art. 8, para. 3 Directive 2011/93/EU). While only a few European States have explicitly provided for a relevant exemption in respect of consensual sexting between minors (for instance Austria, Cyprus, Germany, and Liechtenstein), most states clarify that in practice children shall not be prosecuted. The finding of such a divergence between theory and practice gives rise to legal uncertainty, both for citizens and law enforcement authorities, and calls for additional (legislative and policy) clarity.

**Recommendations**

Having clear and foreseeable national regulatory frameworks that protect consensual sexual activities in which children may be involved and which can be regarded as the normal exploration of sexuality in the course of human development, on the one hand, but address coercive and non-consensual acts, on the other hand, is of crucial importance in today’s digital information society in which children grow up. To that end, such frameworks should include provisions that enhance and safeguard trust, control and privacy for children.

This entails that national legislators ought to adopt policies that balance the need to protect children from exploitation or abuse (article 34 UNCRC) with children’s integrity and autonomy rights (article 13 and 16 UNCRC), in view of their best interests (article 3 UNCRC), following an evidence-based child rights impact assessment. One of the elements that such an impact assessment could address is the role of the age of sexual consent, for instance in describing exceptions to criminalisation of production and possession of sexual material involving children. Letting the applicability of such an exception depend on the age of consent may in reality create a problematic grey zone for children who have not yet reached that age, but nonetheless consensually produce and/or possess sexually explicit imagery for their own private use. Research findings indicate that children under the age of 15 or 16 years, which is commonly set as the age of sexual consent in a number of national legislations, engage in the practice of consensual sexting. Hence, even an explicit legislative exemption based on the age of sexual consent may not dissolve the legal uncertainty for all children as a certain age group of children may still not fall under the exemption. How this reality should be reflected in legislation requires careful consideration by policymakers. Moreover, while the different age thresholds adopted across countries reflects differences in their societal and legal culture, it leads to a fragmented approach as to the criminalisation (or not) of similar behaviour performed by children residing in different countries. Finally, the realisation of the best interests of the child and the restriction of any harmful outcomes that may be associated with phenomena such as sexting also rests upon educating and cultivating awareness on the importance of *consent* as a fundamental element for the legitimate online sexual exploration, and avoiding blaming individuals who engage in sexting, rather than blaming those who breach the trust or engage in abusive behaviours (Walrave, Van Ouytsel, Ponnet & Temple, 2018).

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1. Please note that parts of this contribution are currently under review for publication in the Journal of Children and Media. [↑](#footnote-ref-1)