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Attorney at Law, Munich, international IT/IP Law,
Data Protection and Privacy Law



Netherlands: No Household Exemption for Posting Pictures of Minors on Social Media

GDPR Art. 2 para. 2 lit c) and Art. 8; UAVG Article 5

1. Posting pictures of minors (here: grandchildren) on social media without a secure setup preventing their (further) sharing or indexing by search engines, does not qualify as purely personal or household activity so that the household exemption in Art. 2 para. 2 lit. c) GDPR does not exclude the application of data protection law.

2. Posting pictures of minors on social media requires the consent by the holder of parental responsibility. *(all ed.)*

Gelderland District Court, decision of 13 May 2020 in case NL:RBGEL:2020:2521 by mr. S.J. Peerdeman

Summary & Comment

► Facts

The case concerns a summary judgment about (the processing of) personal data (pictures) of minors between the children's mother as claimant and their grandmother as defendant. By the time of the judgment, the claimant and defendant were estranged from one another for a year. Previously, the eldest grandchild had been living with the defendant for seven years. The claimant has shared parental responsibility over the eldest child with her ex-partner, and sole parental responsibility over the two youngest children. The defendant had placed multiple pictures of her (grand)children on social media (Facebook), without the permission of the claimant or, in case of the eldest child, the father. During the court hearing it also turned out that a picture of the defendant with all three children was still posted on Pinterest.

The claimant had involved both the police and a lawyer to request the defendant to remove the pictures from Facebook. When the defendant failed to remove the pictures, the claimant requested a preliminary injunction against the publishing of the pictures in summary proceedings which were conducted by telephone due to pandemic lockdown.

At the time of the proceedings, the defendant claimed that she had removed all pictures of her grandchildren from Facebook except one of the eldest child. She also acknowledged that a picture on Pinterest was still online.

The claimant requests an executable summary judgment prohibiting the posting online of pictures of claimant's minor children on social media or their distribution in another manner and an order to immediately remove the posted pictures from social media, and impose a € 250 penalty payment for each day defendant fails to comply with the judgment.

The claimant bases her claim on either tort or violation of the GDPR. The claimant wished to protect the privacy of the children. According

to the claimant, posting pictures of the minor children on social media establishes a serious privacy infringement.

The defendant requested permission to keep one picture of her eldest grandchild posted on Facebook because it had an emotional value to her, since she had taken care of the child for seven years.

► Held

The Gelderland District Court found that the defendant had to remove both pictures, from Facebook and Pinterest, because the placing pictures of minors under the age of 16 required the consent by the holder of parental responsibility., the court held that. Furthermore, the defendant was not allowed to post new pictures on social media without the relevant consent. The defendant's emotional interest did not persuade the Court to hold otherwise. The penalty payment was set on € 50 per day with a maximum of € 1,000.

Urgency for Summary Judgment: Since summary proceedings were chosen, it first had to be decided if the case involved a matter of urgency. The Court established that during the hearing both the Facebook picture of the eldest grandchild as well as the Pinterest picture of the claimant with her three children were still posted online. Apparently, this was sufficient ground to establish the urgency. As a preliminary point, the Court considered that it cannot be established who has made the relevant pictures. Consequently, the court assumes that the Dutch Copyright Act does not apply.

Applicability of GDPR: The quintessence of this case concerns the question whether posting pictures on social media by a natural person constitutes processing „in the course of a purely personal or household activity“. If the answer is affirmative, the actions of the defendant fall outside the scope of the GDPR, as laid down in Article 2 para. 2 lit. c) GDPR. On the other hand, if the answer is negative, the Dutch Data Protection Act (UAVG) supplementing the GDPR prescribes that parental consent is required in case of minors up to the age of sixteen. In casu, all three children were under the age of 16, so that consent of the claimant (and in case of the eldest child also the ex-partner) was required.

Criteria for Social Media: Against this background, the Court presents three criteria to establish whether the household exemption applies to pictures on social media:

- (i) **Settings:** First, it has not been made clear by the defendant during the hearing which settings she used for both the Facebook and Pinterest accounts, and in which manner she had shielded her accounts.
- (ii) **Search:** Secondly, it remained unclear if the pictures could be traced through a search engine such as Google.
- (iii) **Dissemination:** Finally, the Court made the somewhat ambiguous statement that in case of Facebook it cannot be excluded that posted pictures can be circulated and fall in the hands of third parties.

The evaluation of these criteria led the Court to conclude that in the context of a summary proceeding, it has not sufficiently been established that the personal data processing has merely taken place in the course of a purely personal or household activity. Consequently, the Court held that the GDPR and the UAVG apply to the case.

► Comment

The case is of great significance for interpreting the role of social media giants such as Facebook. Even though companies such as Facebook, Pinterest and Google were no party to the case, their presence was ubiquitous. Unfortunately, the Gelderland District Court fails to refer to Recital 18 GDPR the interpretation of which is pivotal for scenarios like this in families or otherwise. Recital 18 GDPR states:

"This Regulation does not apply to the processing of personal data by a natural person in the course of a purely personal or household activity and thus with no connection to a professional or commercial activity."

Personal or household activities could include correspondence and the holding of addresses, or social networking and online activity undertaken within the context of such activities.

However, this Regulation applies to controllers or processors which provide the means for processing personal data for such personal or household activities."

Qualification of Social Media: The Court takes the position that the household exemption of article 2 para. 2 lit c) GDPR, as illuminated by Recital 18 GDPR, should be interpreted in a narrow manner: The mere fact that social media is used by a natural person, does not constitute personal or household activity. The Court indicates that several factors including the three criteria elaborated in its judgement are decisive. These factors, however, also point to the service providers in question such as Facebook and Google.

Burden of Proof: By doing so, the Court puts the burden of proof on the natural person posting on social media. Whoever posts a picture of a minor on social media (i.e. Facebook) has to prove that the posted picture is prevented from being circulated or falling in the hands of third parties. This may be a difficult task for any natural person, especially because it seems to be only a question of digital expertise and effort to access any content on social media.

A key tenet of the GDPR is the protection of data subjects, in particular minors. Reading the Court's judgment one cannot but be left in doubt what is the purpose of such task. A simple interpretation could be that the Court simply meant that pictures posted on Facebook should not be shared with other Facebook users. However, in view of ongoing surveillance capitalism concerns, it cannot be ruled out that the Court has actually taken the much stronger position of suspecting the social media provider (i.e. Facebook) of potentially circulating pictures of minors to third parties. Unfortunately, the Court does not indicate leaning to either interpretation. However, given the language of Recital 18 GDPR which does not contain such explicit criteria, it appears more likely that the Court in Gelderland has made an effort to somewhat stretch the protection of pictures posted online on social media, using the term „purely“ personal or household activity in Article 2 para. 2 lit. c) GDPR to set its footprint. Ultimately though, the CJEU may have to provide guidance at some point.

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EU: No Communication to the Public By Hiring Out Vehicles With Radio Receivers

Article 3(1) of Directive 2001/29/EC; Article 8(2) of Directive 2006/115/EC

Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society and Article 8(2) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property must be interpreted as meaning that the hiring out of motor vehicles equipped with radio receivers does not constitute a communication to the public within the meaning of those provisions. (offic.)

CJEU (5th Chamber), decision of 2 April 2020 in case C-753/18 by Regan, President of the Chamber, Jarukaitis, Juhász, Ilešič (Rapporteur) and Lycourgos, Judges – Stim and SAMI v. Fleetmanager Sweden AB et al.