

[Sonia Livingstone](#), John Carr, Ian Walden

The legal basis of children's and young people's engagement with the internet

Seminar report

Original citation:

Originally presented at Livingstone, Sonia, Carr, John and Walden, Ian (2012) *The legal basis of children's and young people's engagement with the internet*. In: The legal basis of children's and young people's engagement with the internet, 31 Oct 2012, London, UK. (Unpublished)

This version available at: <http://eprints.lse.ac.uk/55435/>

Available in LSE Research Online: January 2014

© 2012 The Authors

LSE has developed LSE Research Online so that users may access research output of the School. Copyright © and Moral Rights for the papers on this site are retained by the individual authors and/or other copyright owners. Users may download and/or print one copy of any article(s) in LSE Research Online to facilitate their private study or for non-commercial research. You may not engage in further distribution of the material or use it for any profit-making activities or any commercial gain. You may freely distribute the URL (<http://eprints.lse.ac.uk>) of the LSE Research Online website.

The legal basis of children's and young people's engagement with the internet

Seminar Report

Agenda

1. Welcome – Professor Sonia Livingstone
2. Introduction – John Carr
3. Children and contracts – Professor Ian Walden
4. Tort, privacy, consumer protection and jurisdiction

October 31, 2012

14.00.-17.00

The Archbishops' Room

1 Millbank, London SW1P 3JU

Participants

Sonia Livingstone, *Professor, LSE*

Ian Walden, *Professor, QMC*

John Carr, *LSE*

Orla Lynskey, *Lecturer, LSE*

Steve Creed, *Policy Adviser, UK Council for Child Internet Safety*

Anna Fielder, *Executive Member, Privacy International*

Alisdair Gillespie, *Professor of Law, Lancaster University*

David Greenwood, *Partner, Jordans*

Graham Hill, *British Board of Film Classification*

Julia Hornle, *Lecturer of Law, Queen Mary's College*

Pete Johnson, *CEO, Authority for Television on Demand*

Anne Lawrence, *Barrister*

Maggie McDonald, *Policy Adviser for Domestic Data Protection, Ministry of Justice*

Jeremy Olivier, *Head of Internet Policy Consumer Group, Ofcom*

Allison Powell, *Lecturer, LSE*

Joseph Savirimuthu, *Senior Lecturer of Law, Liverpool University*

Andrew Scott, *Lecturer of Law, LSE*

Graham Smith, *Partner, Bird & Bird*

Steve Wood, *Policy Delivery, Office of Information Commissioner*

Richard Scorer, *Partner, Pannone*

Teresa Hughes, *Lucy Faithfull Foundation*

Introduction

There has been surprisingly little written about how the civil law might impinge on children's and young people's engagement with the internet.

The discussion that will take place on 31st October ought to mark the beginning of a dialogue which will seek to clarify a number of key questions. If we cannot reach a consensus we can at least hope to come out the other end with a better understanding.

The historic position of the internet industry was parents had sole responsibility for any and all aspects of their children's engagement with the internet: hardware and device manufacturers, online vendors, connectivity providers, advertisers, service providers, all their legal liabilities and responsibilities were set at nought whereas parents' liabilities and responsibilities and to a lesser extent schools' were set at 100%.

Today that seems absurd. But it is probably true to say that, *pace* certain very specific circumstances e.g. in areas such as data privacy, there is still no widely shared general understanding about where a number of important lines should be drawn. Many companies that fully accept they have social or moral obligations towards children and young people who use their products or services might nonetheless balk at the idea these could be grounded in law.

As e-commerce continues to grow and children's and young people's engagement with it increases commensurately, questions about privacy policy and practice are bound to become sharper. This in turn is often wrapped up in advertising policy and practice. A more complex pattern starts to emerge.

Some of these areas of enquiry could lead us right back to more familiar child safety territory. For example, for an adult to allow data about their physical location to be broadcast to the world or given to a company, and for it then to be misused is one thing. If the data subject is a child potentially it raises quite different issues.

For this first session we intend to look at four topics. The fifth, jurisdiction, has been listed more by way of flagging it at this stage. The selection is not exactly random although it ought to be emphasised that we are only likely to be sketching out headings with a view to arranging a larger event, probably early in the New Year.

1. Contracts

As Appendix 1 shows there seems to be precious little uniformity in the contracts or terms of service of major internet players active in the UK.

The general assumption is that many commercially oriented services available on the internet are provided on the basis of a contract. Yet at the same time 13 is commonly, not universally, stated as the minimum age at which a person is allowed to engage. Are 13 year olds able to form contracts of this kind? What is the

significance or standing of a “voidable contract.” How do the laws relating to unfair contractual terms and standard form contracts play into this space?

What is the position of the tens of millions of children who are below the age of 13 who are also known to use internet services where 13 or some other higher age e.g. 18, is stated as the entry point to the service?

2. Data protection and privacy

How do the regulations or laws on data privacy intersect with the laws of contract where minors are concerned? If a contract cannot lawfully exist the common assumption is that no data pertaining to its performance may properly be gathered and processed.

Is it really the case that online companies are meant to conduct assessments of each child’s capacity to understand the nature of the data transaction being put to them before letting the child in *without* prior parental consent? How far is it reasonable to expect companies to go to do this? How should prior parental consent be obtained? Is the position any different where the company knows or ought to know that large numbers of children below their stated threshold are in fact using their service?

3. Tort

We are all responsible for the reasonably foreseeable consequences of our actions. How far does that duty extend in the online space?

For example, what duty of care might Google owe to a 9 year old UK resident? If a contract is not or cannot be the basis of a 9 year old child’s engagement with a particular service, what is the legal basis of that child’s involvement with it? Is it a licence? If so what are its terms and likely limits?

4. Consumer protection

One aspect of this refers to a point made earlier i.e. unfair contractual terms, but what are the expectations generally of companies that either manufacture hardware products or supply services which will principally be sold to children and young people or are likely to be bought or used by them in large numbers? Does anyone owe any sort of duty to anticipate that vulnerable children might become users?

5. Jurisdiction

How far will UK courts go to “pierce the veil” of corporate liability? Can companies always expect to escape criminal or civil liability by the simple expedient of establishing franchises, operating companies or agencies that in effect fully represent them in different territories but nominally are at legal arm’s length from their foreign-based parent?

Report of Seminar

What follows is a summary of a discussion that took place in October on the above topic. This summary will help shape a seminar that is to be organized at the LSE in the New Year.

The purpose of the discussion and the subsequent seminar is to explore the extent to which different aspects of the civil law might apply to or impinge upon one or other aspect of the legal basis on which children and young people engage with the internet.

The context for the discussion was recognition of the many uncertainties regarding the interpretation, application and enforcement of existing legislation to protect children in England and Wales as they go online. In relation to the criminal law, the position of online interactions has been widely debated and, as a result, has become clearer. The efficacy of self-regulatory arrangements is less clear, partly because the internet is global (raising difficulties of jurisdiction and enforcement), and partly because protecting the interests of children provides few incentives within current business models. Hence the present inquiry into the civil law framework for the internet. In addition the fact that it is currently very difficult to identify who is and who is not a child in an online environment poses challenges. Some argue that it is in any event undesirable to collect data about people's age because this in itself would raise issues in relation to an individual's right to privacy.

Contracts

Even the briefest examination of the terms of service used by many different online providers reveals there is no consistency of practice. Some expressly refer to their agreements being "contracts" others do not.

In its new terms of service, implemented March 2012 for roughly 51 Google products (not including YouTube) Google abandoned their use of the term 'contract' and any mention of the minimum age one needed to be in order to use the product or service in question. Quite why Google decided to keep the original form for YouTube, which refers to the necessity to be able to form a "legally binding contract" - and change the rest is unclear. In discussions with them Google said the differences in wording which now existed did not mean there was any material difference between the two.

Contracts don't sit in isolation but they operate within a wider legal framework.

A contract can be thought of as a form of self-regulation because, as between the user and the provider, it sets out conditions which both parties accept voluntarily. These "regulate" behaviour.

There are a range of statements that appear on the web sites of online service providers that appear to impose obligations either upon the users or the provider, or typically both.

These can be classified into 4 main types

- (1) terms of service
- (2) acceptable use policy
- (3) service level agreements
- (4) privacy policy

Quite often the privacy policy is presented by the service provider as being an aspect of the agreement they ask users to enter into. In truth, however, key aspects of privacy law cannot be overridden or modified by agreement.

There 4 types of rules which arise in relation to contracts

- (1) procedural or formal requirements: the law requires that contracts contain certain components or go through certain procedures for them to be valid
- (2) laws determining which jurisdiction is applicable
- (3) incorporation: statutory law and the common law incorporate terms into agreements even if the parties haven't explicitly agree them. This is an area that is surrounded by much uncertainty e.g. English law has traditionally concerned itself with goods or services. It is not entirely clear what view the courts would take in relation to items supplied over the internet e.g. if one buys a streamed video has one paid for a good or a service? The Government has recently consulted on this issue, proposing new rules for 'digital content'.
- (4) statutory: if certain terms and conditions are deemed unfair, harsh or oppressive—they will not be enforceable

When a contract is formed the terms and conditions that constitute that contract should be brought to the notice of the party entering into it. In France, the court's decision that Facebook's attempt to have disputes resolved before courts in Santa Clara, California, was held to not to have been brought to the attention of the FB user and thus isn't part of the contract.

In terms of the capacity of children to enter into contract, English law generally holds that contracts involving minors are *voidable*. This implies that only the service provider is bound by the terms. However, the Minors' Contracts Act 1987 states that even if you have an unenforceable contract with a minor, if that contract gives rise to some transfer of property to the minor in certain circumstances the court, in what is known as restitution, will require the minor to return that property, or make good the loss that was suffered by the seller.

In English common law there is a subset of contracts for "necessities". These are binding on minors. Necessities are things which are of real use to the minor as distinguished from ornamental items or things which might provide for greater comfort or convenience. This covers both goods and services. In turn this raises an uncertainty about to what extent these digital services are necessities (some children perceive Facebook as a necessity).

To further complicate this, however, courts will also hold that no contracts will be imposed on a minor who's not old enough to understand the nature of the transaction, or the fact that they are entering into an agreement, or to understand the obligations that come with the contract.

If the contract is voidable then, in effect, all that the online service providers are doing is setting out what they think the behaviour of the two parties should be. In the event of a dispute they will not be able to take action on the contract but may be able to take action under a different heading. But does Google or other online providers really care whether there is a contract or not?

Children engage with the world in all sorts of ways offline that normally don't involve contracts, at least as they are commonly understood for example when buying candy in a sweetshop. So does the law of contract matter very much when it touches or concerns children? To what extent in the services that we are describing is contract even an issue? The terms and conditions in this discussion seem to have more to do with the defensive position of the organisation who's putting it there. Companies are seeking to say that 'we have secured the user's consent to our use of their personal data and we're not complicit in any criminal behaviour that any user of the service might engage in'.

The representative of a statutory regulator suggested that, based on their experience with the Digital Economy Act, 2010, and the Audio Visual Media Services Directive, these issues will be more easily and more effectively be addressed through soft pressure and procedures rather than the creation of new statutory regulation. This isn't to say that the latter can't and won't have a role, but it's a very unfocussed mechanism for securing compliance.

Internet giants such as Google and Facebook are the ones whose behaviour we're principally talking about here, not every single provider of a hyperlink based service or every one that enables people to post user-generated content. We have to establish first what we want major actors to do. They're important because of the volume of their engagement with adults and children—i.e. the big Internet companies are also the ones that children are most likely to use, and the regulations imposed on them will guide the behaviour of the other players. At the same time it would be wrong to ignore small companies as well, given the speed with which they can grow.

The most obvious example of self-regulation is a contract. Yet although all service providers have them, to what extent do they really have any real impact or are they truly binding impact on the user? The costs and risks of litigation mean there is room for considerable doubt about the extent to which users can in practice bring claims against providers.

Data Protection and Privacy

In the USA the Child Online Privacy Protection Act, 1998, (COPPA) makes 13 the age at which a person can begin render data to commercial third parties without the third party first obtaining parental consent.

In the UK the Information Commissioner has advised that, broadly speaking, kids aged 12 and above are able to grant consent to third parties to process their personal data without prior reference to their parents.

But consent and capacity are not the same thing: a child can consent to something that may be valid under data protection law but even so it may not be a binding obligation from a contractual perspective. This difference may be important depending on the context.

Torts

We are all held to be liable for the reasonably foreseeable consequences of our actions. It's entirely foreseeable that many children will and are using Google Search and many other of its "free" services and that some of these children will be at risk of harm.

But does Google have a duty of care if it doesn't know exactly who is using its services or who these children are? The duty of care isn't just about foreseeability, but also proximity. Under the EU Electronic Commerce Directive, companies providing intermediary services are granted immunities from liability, including tort, for 3rd party content in respect of certain forms of conduct, specifically 'mere conduit', 'caching' and 'hosting'. These rules discourage providers from monitoring such 3rd party content, which can have both beneficial and problematic consequences.

If there is a duty of care, what types of harm might be encompassed by it? In the cases dealt by the courts so far, there's generally a threshold of harm, in the form of a recognised psychiatric or physical injury. Distress or upset is generally not sufficient to establish a claim for compensation.

To what extent are companies taking steps to try and identify the age of a person, especially when people can very easily lie about it on the Internet? This also touches upon the issue of data retention—should we be prompting companies to gather more data about a user?

Tort at present doesn't seem to impose a duty of care on companies to the world at large, but at the same time we realise that Internet companies are in fact providing a service to the world at large.

In tort, if something is inherently dangerous, the duty of care is different. A view was advanced that the Net is full of porn and other hazards so Google is bound to be dangerous to some degree in that it gives access to porn.

Product liability and consumer protection

There are 2 different principles:

(1) Donoghue v Stevenson

If a manufacturer puts a physical product on the market and it damages somebody, causing personal injury or damage to property, that person may sue for a breach of the duty of care even though the manufacturer could not have known the particular

individual in advance. In the context of digital goods you also have a very large class of persons to whom a duty of care is owed. Proximity isn't really an issue, but there may be questions about the nature of the harm or damage suffered which affect one's ability to bring a claim.

(2) Hedley Byrne v Heller

This concerns reliance on incorrect information. Here the duty of care is generally owed to a small class of persons. Generally there has to be close proximity between the person giving the information and the one damaged by it. It isn't the world at large.

The online arena is one where these two areas could merge, throwing up new challenges for the courts.

Hitherto there have been very few cases that deal with information torts that have caused physical harm. The law needs to be clarified and developed. Where there is a foreseeable consequence of physical harm can an information provider owe a duty of care to a large class of persons?

Staying with the theme of proximity, to use Facebook at all, and to use parts of Google e.g. Google Circles, you have to have an account. Does that change anything in relation to the idea of proximity? Is there a material difference between someone who uses an online service who's just a member of the public as opposed to someone who has opened up an account and therefore has surrendered some information about themselves?

Research shows there is a considerable diversity of harms which can face younger people, but it also shows that harms arises for an extremely small percentages

The question of harm is often a question of evidence. What is the level of evidence required for these harms to be considered problems under the civil law? More important, what is harm in various different areas of the civil law? Are there different standards or tests?

Consumer protection

The challenge of digital goods is that we don't have a clear legal framework governing them. Should they be dealt with in the same way as physical goods and services? Or by something sui generis. Unique. Do we need new rules specifically for digital content?

There is still an absence of cases. What we hear, particularly in the US, is that when a case gets going the companies will be very quick to settle and pay to bring the action to an end. They do this not just to avoid bad publicity but they fear that if the law was made crystal clear, as it might be in the decision of a higher court, they will end up with liabilities or with their actions constrained in ways that they would not be if the law remained ambiguous.

Exposure to paedophiles, child abuse images and bullying that have historically been of prime concern, but in the main these are matters for the criminal law. But with the rise of the privacy agenda more commercial aspects are coming to the fore.

If age was the only criterion that mattered in relation to a particular transaction, there are technologies available where trusted third parties can verify an individual by reference to several attributes, of which age is one. An individual could then surrender that information, and only that information, to a company. This is consistent with the notion of data minimisation. The company does not have to collect any other information about an individual, but of course it is not in the interests of many companies solely to do that. They want as much information about you as they can get to assist their marketing and advertising activities.

One solution would be to impose obligations on online payment providers to avoid children from conducting unwanted transactions for goods and services they shouldn't be purchasing

The idea of some kind of an identity token from which the age of an individual transacting or using the service can be demonstrated. The issue to think about is one which may strongly differentiate between, on the one hand companies like Google, in which a search transaction has an economic value of thousandth of a cent, and Amazon for which even the smallest transaction has a real, material profit margin through which the cost of that digital transaction can be recovered.

Even as we think about the different actors, we also have to think about the different opportunities that exist to get them to participate, or what their obligations might be, which in turn reflects their economic relationship to the users. This will be different for each service provider

Self-regulation seems only to be adopted if it's in the company's commercial self-interest. Search engines may not be a very useful target for regulation.

Jurisdiction

Jurisdiction laws normally affect breach of contract.

The key question is, what is the balance of responsibilities between the provider of potentially harmful content on the internet, and an actor like Google, which helps people find things, including the potentially harmful content?

In principle, it is the content provider whom one should look to first to secure appropriate controls to prevent potential harm to children, not Google.

Yet in another sense Google isn't really simply an intermediary because they are the *only* practical means or channel by which certain content can be found. If you can't find something in Google, it might as well not exist. Google invites you on to their (virtual) premises. Its search engine is its commercial property. If they invite or entice you on to it they can't escape any liability for things that happen to you as a result.

The courts' view at the moment is that those without knowledge or control over illegal content cannot be liable for it in any way.

Conclusion

There are indeed many uncertainties regarding the application of the civil law to children's engagement with the internet. These arise because of difficulties of age verification, jurisdiction in a global domain, confusion about the status of digital goods and services, the use of 'contract'-like language on websites, the lack of proximity (or foreseeability) in the relation between provider and user, and a host of other practical challenges. Importantly, few cases have been brought to court, so there is little case law or public deliberation by which such challenges may be resolved. There are also good counter reasons why the relations between providers and users should be left substantially as they are (privacy, free speech, net neutrality). And there is a constant need to update and disseminate the evidence base in order to understand better the scale of 'the problem' (is it pornography, user-generated content, selling knives to minors, or other risks that matter most?).

It was agreed that there were a number of themes emerging from the discussion that merit in-depth examination. It was also proposed that short papers should be prepared in advance of the next meeting, to focus the discussion:

- Contract. What is the relevance or limits of contract in relation to tort, and as applied to what appear to be contracts online (or terms and conditions, etc). What are companies' contractual obligations to child users? (especially when there are many such users, hardly proximate to the provider and of unknown age) When a child clicks 'I agree', what follows?
- Self-regulation. What are the interests and incentives at stake for industry players (across a complex and international value chain) in ensuring child protection. Can we envisage altering the incentives so as to better align children's interests with business interests?
- Privacy/age verification/parental consent. As COPPA is being revised in the US, and with parallel debates in Europe, what is the situation regarding data provided by or known about children as they use the internet? Is parental consent or age verification technically feasible? Is 13 the right age? Must Europe follow what the US decides?
- The nature of harm. What is the scale of the problem posed to children by the internet? What is the relation between risk and harm? What's the incidence and severity of harm? What are the different conceptions of harm in the laws of contract, tort, data protection, etc – varying definitions, different standards of evidence.

---000---

Appendix 1

Extracts from the terms of service of several different online service providers

You Tube

Paragraph 2.3 of YouTube's Terms of Service reads as follows

You may not use the Service and may not accept the Terms if (a) you are not of legal age to form a binding contract with YouTube, or (b) you are a person who is either barred or otherwise legally prohibited from receiving or using the Service under the laws of the country in which you are resident or from which you access or use the Service.

Elsewhere on the site YouTube makes clear that the minimum age to use YouTube is 13.

Google

Google's main terms of service no longer mirror those of YouTube's although they did until March, 2012. The pages which have replaced the previous terms do not use much legal language at all, the word "contract" appears nowhere, nor does any reference to a minimum age. However, Google's general terms open with the following statement:

By using our Services, you are agreeing to these terms. Please read them carefully.

Our Services are very diverse, so sometimes additional terms or product requirements (including age requirements) may apply. Additional terms will be available with the relevant Services and those additional terms become part of your agreement with us if you use those Services.

Facebook

On Facebook, the following appears

This Statement of Rights and Responsibilities ("Statement," "Terms," or "SRR") derives from the [Facebook Principles](#), and is our terms of service that governs our relationship with users and others who interact with Facebook. By using or accessing Facebook, you agree to this Statement, as updated from time to time in accordance with Section 14 below. Additionally, you will find resources at the end of this document that help you understand how Facebook works.

That and what follows it looks like the language of a contract but the word itself never appears. 13 is their minimum age of entry. In some countries in excess of 60% of sub-13s are members. In the UK the figure is around 40%.

Yahoo

With Yahoo, again the word "contract" does not appear. But this does

3. YOUR REGISTRATION OBLIGATIONS AND SUPERVISING CHILDREN

In consideration of your use of the Services, you agree to: (a) provide true, accurate, current and complete information about yourself as prompted by the Services' registration form (such information being the "Registration Data") and (b) maintain and promptly update the Registration Data to keep it true, accurate, current and complete. If you provide any information that is untrue, inaccurate, not current or incomplete, or Yahoo! has reasonable grounds to suspect that such information is untrue, inaccurate, not current or incomplete...

Yahoo! is concerned about the safety and privacy of all its users, particularly children. For this reason parents who wish to allow their children access to the Services should assist them in setting up any relevant accounts and supervise their access to the Service.....as the legal guardian it is your responsibility to determine whether any of the Services and/or Content....are appropriate for your child.

MSN

On MSN's home page, if you click the link the following appears

13.3. Europe. *If you live in (or, if you are a business, you are headquartered in) Europe, you are contracting with Microsoft Luxembourg S.à.r.l., 20 Rue Eugene Ruppert, Immeuble Laccolith, 1st Floor, L-2543 Luxembourg and the laws of Luxembourg govern the interpretation of this agreement and apply to claims for breach of it, regardless of conflict of laws principles, unless you live in or your business is headquartered in Spain, in which case the laws of Spain govern the interpretation of this agreement. All other claims, including claims regarding consumer protection laws, unfair competition laws, and in tort, will be subject to the laws of the country to which we direct your service. With respect to jurisdiction, you and Microsoft may choose the country to which we direct your service for all disputes arising out of or relating to this agreement, or in the alternative, you may choose the responsible court in Luxembourg.*

No reference to a particular age could be found.

Spotify

Spotify® Terms and Conditions of Use

This document (the "**Agreement**") is a legally binding agreement between you and Spotify Limited, a company registered in the UK under number 06436047 ("**Spotify**") that governs+

Contract formation

By creating a Spotify account, either through Spotify or a third party such as Facebook Ireland Limited ("**Facebook**"), or commencing download of the Spotify Software Application at the Facebook website or by using the Spotify Software Application (including but not limited to the downloading of said application) or the Spotify Service, you confirm that you are 18 years of age or more or that you are 12 years of age or more and that you have received your parent's or guardian's consent to enter into this Agreement

Amazon

17 CHILDREN

We do not sell products for purchase by children. We sell children's products for purchase by adults. If you are under 18 you may use the Amazon Services only with the involvement of a parent or guardian.

Mobile phone companies

None of the UK's mobile phone operators state a minimum age in any of their documents though with monthly contracts there is an implication that all users will be aged 18 or above because there are references to credit checks.