

# THE MONETIZATION OF CHILDHOOD: HOW CHILD SOCIAL MEDIA STARS ARE UNPROTECTED FROM EXPLOITATION IN THE UNITED STATES

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## I. INTRODUCTION

The Fair Labor Standards Act (“FLSA”) expressly provides that “No employer shall employ any oppressive child labor in commerce ... *or in any enterprise engaged in commerce.*”<sup>1</sup> Yet, since the ratification of FLSA, a gap remains in protections for child performers.<sup>2</sup> In an effort to compensate, statutes known as “Coogan Laws,” have been enacted in a sparse number of states to fill the gap.<sup>3</sup> These regulations, however, are insufficiently developed to protect “oppressive” conduct to which children are subject in social media, online videos, and reality television programs, in exchange for money diverted to their parents.<sup>4</sup> Indeed, the FLSA contains no such law whatsoever, despite the egregious circumstances to which children are subjected for the profit of others. This absence of protections goes against the very reasoning that prompted the enactment of the statute as the “purpose of the child labor act was not merely to regulate oppressive child labor but to abolish [it] altogether.”<sup>5</sup>

Vlogs<sup>6</sup> featuring children, sometimes called “Family vlogs,” continue to be a cause of concern for children’s safety.<sup>7</sup> There is a lack of protections for online child celebrities financially, emotionally, and physically, and they lack agency to control what is posted. As will be discussed below,<sup>8</sup> there has been a growing surge of family-style vlogs where the child is the main focus, and the question of child safety is only addressed after a public moral outcry.<sup>9</sup>

In 2007, YouTube allowed advertisements to appear on uploaded videos, opening a now widely recognized avenue of monetization.<sup>10</sup> With

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<sup>1</sup> 29 U.S.C.A. § 212(c) (emphasis added).

<sup>2</sup> 29 C.F.R. § 570.125

<sup>3</sup> Coogan Law, SAG-AFTRA, <https://www.sagaftra.org/membership-benefits/young-performers/coogan-law> (last visited Oct. 24, 2020, at 8:28 PM).

<sup>4</sup> *Id.*

<sup>5</sup> 29 U.S.C.S. § 212 (note); *Mitchell v. Munier*, 38 Lab. Cas. (CCH) ¶65781, 14 Wage & Hour Cas. (BNA) 375 (S.D. Cal. 1959)

<sup>6</sup> Vlog is defined as, “a blog that contains video materials”; *see Vlog*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/vlog> (last visited Mar. 13, 2021, 9:59 AM).

<sup>7</sup> Emma Nottingham, ‘DAD! CUT THAT PART OUT!’ CHILDREN’S RIGHTS TO PRIVACY IN THE AGE OF ‘GENERATION TAGGED’: SHARENTING, DIGITAL KIDNAPPING AND THE CHILD MICRO-CELEBRITY, in *THE ROUTLEDGE INTERNATIONAL HANDBOOK OF YOUNG CHILDREN’S RIGHTS I* (2019).

<sup>8</sup> *See, infra* Huxley in Part III

<sup>9</sup> *See, infra* Part II C.

<sup>10</sup> Nicholas Jackson, *Infographic: The History of Video Advertising on YouTube*, THE ATLANTIC (Aug. 3, 2011), <https://www.theatlantic.com/technology/archive/2011/08/infographic-the-history-of-video-advertising-on->

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the ability to profit from their videos, creators flocked to the platform to generate income at a faster pace.<sup>11</sup> By 2009, YouTube hit more than one billion views per day,<sup>12</sup> and since 2010 ninety-four out of AdAge's<sup>13</sup> top one hundred advertisers were running campaigns on YouTube and the Google display network.<sup>14</sup> YouTube, within the span of a decade, created a new digital advertising platform that is a "must" for any businesses ad campaign.<sup>15</sup> At the same time, increasingly more subscribers were watching and creating content for the new mass audience.<sup>16</sup> Seeing this new way to connect with others while also earning some money, parents and their children decided to be their own creators and start making videos.<sup>17</sup>

In 2011, one of these new creators was a young thirteen-year-old girl named "Allie."<sup>18</sup> What started as a way to connect with other "vloggers," and share her interests, became a "review," channel where she would try new toys in what felt like a "low-budget," infomercial.<sup>19</sup> When she started gaining more subscribers, her mother encouraged her to monetize the channel; allowing ads to play before the video and earn fifty-five percent of

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youtube/242836/#:~:text=In%20January%202009%2C%20YouTube%20started,billion%20video%20views%20per%20day.

<sup>11</sup> Hunter Walk, "YouTube is still the only place where you can passively monetize your content" – *Online Content Evolution From Awestruck's Sarah Penna*, LINKEDIN (Mar. 5, 2016), <https://www.linkedin.com/pulse/youtube-still-only-place-where-you-can-passively-monetize-hunter-walk/>.

<sup>12</sup> Nicholas Jackson, *Infographic: The History of Video Advertising on YouTube*, THE ATLANTIC (Aug. 3, 2011), <https://www.theatlantic.com/technology/archive/2011/08/infographic-the-history-of-video-advertising-on-youtube/242836/#:~:text=In%20January%202009%2C%20YouTube%20started,billion%20video%20views%20per%20day>.

<sup>13</sup> Adage is a news outlet focused on recent marketing trends and focuses on forecasting and providing the best insight into the marketing industry. *See, About Us*, ADAGE.COM (last visited Oct. 24, 2020, 11:23am), <https://adage.com/help/about-us>.

<sup>14</sup> Jackson, *supra* note 10; The Google Display Network allows for advertisers to reach the targeted demographic, "at the right time and right place," by placing advertisements to potential customers before a video or on a the page the customer was searching, *See About Display ads and the Google Display Network*, GOOGLE ADS HELP, Last visited Feb. 12, 2021, 8:54 AM), <https://support.google.com/google-ads/answer/2404190?hl=en>.

<sup>15</sup> Stephanie Mialki, *Know Before You Spend: The Best Digital Advertising Channels*, INSTAPAGE BLOG, (last updated May 28, 2020), <https://instapage.com/blog/best-digital-advertising-channels>.

<sup>16</sup> Nicholas Jackson, *Infographic: The History of Video Advertising on YouTube*, THE ATLANTIC (Aug. 3, 2011), <https://www.theatlantic.com/technology/archive/2011/08/infographic-the-history-of-video-advertising-on-youtube/242836/#:~:text=In%20January%202009%2C%20YouTube%20started,billion%20video%20views%20per%20day>.

<sup>17</sup> Rachel Dunphy, *The Dark Side of YouTube Family Vlogging*, INTELLIGENCER (Apr. 17, 2017), <https://nymag.com/intelligencer/2017/04/youtube-family-vloggings-dark-side.html>.

<sup>18</sup> Rachel Dunphy, *The Dark Side of YouTube Family Vlogging*, INTELLIGENCER (Apr. 17, 2017), <https://nymag.com/intelligencer/2017/04/youtube-family-vloggings-dark-side.html>.

<sup>19</sup> *Id.*

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the profits.<sup>20</sup> Due to YouTube's policies, the account had to be made in the name of Allie's mother, leaving the money unavailable to Allie.<sup>21</sup> What was once a fun activity became a job, where Allie's mother would call her "lazy" and assert entitlement for the profits.<sup>22</sup> Allie's mother wanted Allie to become sufficiently famous to enable her mother to quit her job and allow the family to thrive off Allie's money.<sup>23</sup> After developing an anxiety disorder for not making more videos, she left her mother's house with her father—abandoning the channel she once loved and grew to hate.<sup>24</sup>

While social media platforms continue to expand, there is a void concerning the rights of children. The history of child performers gaining the same rights as other child workers has been a long battle to protect their wages and have safer working conditions. For example, it took the California legislature less than a decade to enact legislation to protect a child actor's finances, for fear of parents hoarding a young actor's income, and then almost fifty years to strengthen those codes to include work hours to protect the mental health of children.<sup>25</sup> Unfortunately, those same legal protections do not protect current online child performers. When that child reaches age of majority, there is no "Actor's Fund," waiting with their earnings, and what they thought was their private life is accessible online for anyone to see.<sup>26</sup> Presently, there is little incentive for parents to save the profits from the videos created or to refrain from posting videos or photos of their children for profit.

This Note seeks to explain the current concerns child social media stars face, and proposes that, to rectify the growing problem, there are two solutions: one monetary and one based on current privacy concerns. Part II addresses the history of the child performer's lack of protection and state-by-state approach to child performer regulations. Part II also addresses the recent phenomena of children being used to influence a large audience, known as "kidfluencers". Part III addresses the current problem of regulating the rights of child performers, on the television screen to any mobile device. Because of the narrow definition of child performer,<sup>27</sup> and the general lack of

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<sup>20</sup> *Id.*

<sup>21</sup> Rachel Dunphy, *The Dark Side of YouTube Family Vlogging*, INTELLIGENCER (Apr. 17, 2017), <https://nymag.com/intelligencer/2017/04/youtube-family-vloggings-dark-side.html>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Saira Din, *Chapter 667: Instituting Proper Trust Funds and Safeguarding the Earnings of Child Performers from Dissipation by Parents, Guardians and Trustees*, 35 McGeorge L. Rev. 473 (2004).

<sup>26</sup> *Id.*

<sup>27</sup> Kimberlianne Podlas, *Does Exploiting A Child Amount to Employing a Child? The FLSA'S Child Labor Provisions and Children On Reality Television*, 17 UCLA Ent. L. Rev. 39 (2010).

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coordinated protections between different State's,<sup>28</sup> the conditions of child social media stars are left unregulated and unprotected. This Note proposes in part IV that, to protect children from being exploited by their parents, there needs to be reform to the existing Coogan Laws<sup>29</sup> that protect young actor's finances by an expansion of children performer rights, and a new view of children's privacy designed to protect them. This concept of children's privacy is the most essential, as it lies at the core of any law designed to protect them in this area.

## II. BACKGROUND: HOW CHILD ACTING WENT FROM SILVER SCREEN TO DIGITAL SCREEN

### A. *The Child Performer Exemption in Child Labor Laws*

In 1938, the Fair Labor Standards Act ("FLSA") was passed, and with it the first national policy protecting minors from unsafe or oppressive labor.<sup>30</sup> The Act set an eighteen-year minimum age of employment, stating that, "employment in any occupation found and declared by the Secretary of Labor to be particularly hazardous for the employment of minors of such age or detrimental to their health or well-being," would no longer be permitted.<sup>31</sup> There were two notable exceptions: one for children working in agriculture and the other for child actors.<sup>32</sup> The exemption provided that "any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions," were not subject to FLSA regulations.<sup>33</sup> This exemption allowed studios to continue to use child actors in their productions, and was known as the "Shirley Temple Exception."<sup>34</sup> The decision to create an exemption was made by Congress for two reasons: first, the belief that acting was not "oppressive" labor but was "imagined" to allow a child to develop the talents needed, and therefore was in their best interest; and, second, that Shirley Temple was enormously popular and if "child actor" was included in the FLSA, Shirley Temple would be banned from performing.<sup>35</sup> For these reasons, Congress decided not to make any regulations for child performers, allowing the industry and families to dictate child performers.

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<sup>28</sup> *Id.*

<sup>29</sup> Cal. Lab. Code § 1308.9 (West 2004).

<sup>30</sup> 29 U.S.C.A. § 212.

<sup>31</sup> 29 U.S.C.A. § 203(1).

<sup>32</sup> 29 U.S.C.A. § 213(C)(1) and (3).

<sup>33</sup> 29 C.F.R. § 570.125 (13)(c).

<sup>34</sup> Kimberlianne Podlas, *Does Exploiting A Child Amount to Employing a Child? The FLSA'S Child Labor Provisions and Children On Reality Television*, 17 UCLA Ent. L. Rev. 39 (2010).

<sup>35</sup> Podlas, *supra* note 34 at 58.

*B. Who was Jackie Coogan?*

Without any federal regulations of child performers, child actors could be exploited by not only their employers for long hours, but by their parents. The first high profile example of exploitation took place soon after FLSA was enacted, involving child actor, Jackie Coogan.<sup>36</sup> Jackie Coogan was born in 1914 to a family of performers in Los Angeles.<sup>37</sup> His parents, John and Lillian, taught Jackie all the skills he would need to perform, and, when Jackie was four, he made his first on stage performance doing a “shimmy” dance.<sup>38</sup> Jackie’s first success was when he was 9 years old, when he was noticed by Charlie Chaplin and cast in his films.<sup>39</sup> The First National Studio was so impressed and charmed by Jackie Coogan, that, with some influence from Chaplin, the studio offered Coogan a contract.<sup>40</sup> With the contract, Jackie Coogan became one of the highest-paid actors in Hollywood at age nine.<sup>41</sup> However, because Jackie was not old enough to manage his own account of around four million dollars, his father managed his contracts and capital with the promise that, when Jackie was an adult, he would receive all the funds.<sup>42</sup>

Unfortunately, like many child stars, as Jackie grew older, he was seen as less desirable for movies.<sup>43</sup> Jackie’s lack of acting roles also could have occurred due to his father demanding high fees, and in retaliation, Metro-Goldwyn-Mayer (“MGM”) cut Jackie from production.<sup>44</sup> Furthering the end of Jackie’s career, MGM forbade partner companies from working with him.<sup>45</sup> Jackie decided to wait until he was an adult to start a new life with the funds he earned as a child.<sup>46</sup> However, tragedy occurred when Jackie’s father and three members of Jackie’s production company died in a car accident, and his mother almost immediately married the man who was then managing

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<sup>36</sup> Deepa Pokharel, *The Story of Actor Jackie Coogan – A Millionaire Child, Who Was Beaten to the Ends by His Own Parents*, THE MEDIUM (Oct. 31, 2019), <https://medium.com/the-dustbin/the-story-of-actor-jackie-coogan-a-millionaire-child-who-was-beaten-to-the-ends-by-his-own-8d319ab9b02c>.

<sup>37</sup> Pokharel, *supra* note 36.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Pokharel, *supra* note 36; World Heritage Encyclopedia, *First National Pictures*, [http://www.self.gutenberg.org/articles/First\\_National\\_Pictures](http://www.self.gutenberg.org/articles/First_National_Pictures) (last visited December 17, 2020 at 12:04pm).

<sup>41</sup> Pokharel, *supra* note 36.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

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Jackie's company.<sup>47</sup> From there, Jackie's mother and step-father stopped giving Jackie the \$6 pocket money he was once receiving before, and then used \$4 million on themselves – thinking Jackie could earn more. In 1938, at the age of 24 years old, Jackie sued his mother and stepfather for not putting his money aside for him, and not fulfilling the promise to him made by his father.<sup>48</sup>

At trial, Mrs. Coogan argued to court that, first, the money minors make from their acting careers was property of the parents.<sup>49</sup> Second, Jackie was a “bad boy” that recklessly spent his money, even claiming that his father had warned Jackie that, “if you had money, you’d go completely haywire in two months.”<sup>50</sup> Mrs. Coogan also declared that the only discussion between Jackie and his father that she remembered was that there was no estate to give Jackie—that everything he earned went to his parents.<sup>51</sup>

However, after a year and a half of discovery and a public trial, the truth was brought out – the company Mr. Coogan made for his son was supposed to save Jackie's money, but only a fraction of the original earnings remained (around \$250,000).<sup>52</sup> Both of Jackie's parents had squandered their son's earnings, and owed thousands of dollars.<sup>53</sup> By order of the court, Jackie received only \$126,000, an old home in Los Angeles and the rights to his films—which could no longer bring income.<sup>54</sup> The rest of the money quickly went to lawyers and debt, and although Jackie invested in a car repair business, he also lost that.<sup>55</sup>

The result of this public trial led to growing concern for young actors who had no legal protections for their capital.<sup>56</sup> Due to rumors spreading of how child actors were being left with none of their hard-earn profits, the California legislature passed the California Child Actor's Bill, known as the Coogan Act, in 1938.<sup>57</sup> The Coogan Act allowed for a court, when asked by the child or employer, to set aside up to fifty percent of a child's “net income”

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<sup>47</sup> Pokharel, *supra* note 36.

<sup>48</sup> *Id.*

<sup>49</sup> *Coogan A 'Bad Boy,' His Mother Testifies*, N.Y. TIMES, Apr. 19, 1938, at 24.

<sup>50</sup> N.Y. TIMES, *supra* note 49.

<sup>51</sup> N.Y. TIMES, *supra* note 49.

<sup>52</sup> Pokharel, *supra* note 36.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Pokharel, *supra* note 36.; Brendon Connelly, *Two Child Actors, and a 'what not to do' of film directing*, FILM STORIES, (Sept. 24, 2020), <https://www.filmstories.co.uk/features/two-child-actors-and-a-what-not-to-do-of-film-directing/>.

to be put in a trust or savings plan.<sup>58</sup> In 1999 the Coogan Act was updated after two weaknesses in the law allowed for too many child actor's still losing their profits.<sup>59</sup> The two new amendments cured the defects by first, requiring at least fifteen percent of the child's gross earnings to be set aside in a trust that the employers are required to set the money aside.<sup>60</sup> Second, the earnings of a child actor are "the sole legal property of the minor child," meaning that no money can be withdrawn from the trust without judicial approval.<sup>61</sup> The second amendment was seen as important since the child's "net income" was defined to exclude the cost of "support, care, maintenance, education and training of the minor," and some parents used this loophole to benefit themselves, but claimed it was for the child.<sup>62</sup>

*C. The Recent Phenomena of "Kidfluencers" and Social Media Stars*

How did children online influencers, known as "kidfluencers," become such a large social phenomenon? One reason may be the development of, what some have called, the "Cult of Authenticity."<sup>63</sup> The "Cult of Authenticity," allows for the viewer to feel as if they are part of the vloggers intimate life.<sup>64</sup> Sarah Penna, the founder of a management company for online creators, said in an interview that, "authenticity is huge in the YouTube Community."<sup>65</sup> Authenticity can drive up viewership, and therefore ad revenue, by making the viewer feel "part of the act," and in on the little jokes of the creator.<sup>66</sup> The video essayist, Lindsey Ellis, in her video essay on this phenomena notes that, "YouTube is the medium of authenticity," where more latitude is given to creators trying to sell more products.<sup>67</sup> This perceived authenticity, especially for videos depicting daily life, often called "slice of life," has downsides, specifically, that watchers demand more "authentic" content.<sup>68</sup>

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<sup>58</sup> *California Strengthens "Coogan Law" to Provide Child Actors with More Protection for their Earnings By Requiring At Least 15% Be Put In Trust*, 21 No. 6 ENT. L. REP. 19 (1999).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *California Strengthens*, *supra* note 58.

<sup>63</sup> Lindsey Ellis, *Manufacturing Authenticity*, YOUTUBE (Sept. 11, 2018), [https://www.youtube.com/watch?v=8FJEtCvb2Kw&ab\\_channel=LindsayEllis](https://www.youtube.com/watch?v=8FJEtCvb2Kw&ab_channel=LindsayEllis).

<sup>64</sup> *Id.*

<sup>65</sup> Walk, *supra* note 11.

<sup>66</sup> Ellis, *supra* note 63.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*



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Both parents and their kids have found great success in creating content based on their “daily” lives.<sup>69</sup> While some parents choose to overshare their children’s private lives,<sup>70</sup> some have chosen the path of vlogging shocking content to drive up viewership.<sup>71</sup> Two brief examples of this spectrum of content is the channel “The Ohana Adventure,” about a large family from Hawaii, and the brief child celebrity known as Lil’Tay.

Jase Bennet started “The Ohana Adventure,” channel after he first spoke to other family vloggers, learned the amount of income they had made from their YouTube channels, and decided to try it as a fun activity with his own large family.<sup>72</sup> The Bennett’s channel has an air of authenticity, allowing the family members to film day-to-day occurrences, and more personal moments such as the mother discovering, and removing, skin cancer.<sup>73</sup> Now the channel has over three million subscribers, not including the children’s own channel, and with every video update the family is bringing in income.<sup>74</sup> Some estimate that the family is worth twelve million dollars, including the Bennet’s skateboarding business.<sup>75</sup>

On the opposite side of the spectrum are children like Lil’Tay (real name Claire) who rose to influencer fame by creating a fake “authentic” personality. Lil’Tay was nine years old when she first rose to fame on Instagram, and then YouTube, roasting other YouTubers, creating generic raps, and making memes.<sup>76</sup> While she quickly rose to fame, and collaborated with rappers and other YouTubers, it eventually came out that her half-brother was scripting Lil’Tay’s antics and she was not in reality a child who

<sup>69</sup> Liron Segev, *How Family Vloggers Can Get Millions of Views on YouTube: TubeTalk 170 with Jase Bennet*, VIDIQ (Mar. 24, 2020), <https://vidiq.com/blog/post/how-family-vloggers-can-get-more-views-youtube-tubetalk-170/>.

<sup>70</sup> See *infra* “Sharenting,” Emma Nottingham, ‘Dad! Cut that Part Out!’ Children’s Rights to Privacy in the Age of ‘Generation Tagged’: sharenting, digital kidnapping and the child micro-celebrity, in *The Routledge International Handbook of Young Children’s Rights* (Oct. 2019).

<sup>71</sup> Lauren Levy, *Who Was Lil Tay? The making, and Marketing, of a 9-year-old Meme Machine*, THE CUT (Jan. 23, 2019), <https://www.thecut.com/2019/01/who-was-lil-tay.html>.

<sup>72</sup> Segev, *supra* note 69.

<sup>73</sup> *The Ohana Adventure*, YOUTUBE, <https://www.youtube.com/channel/UCuDTc9ztKJbsI6yleL3W2Vg> (last visited Feb. 14, 2022).

<sup>74</sup> *Id.*

<sup>75</sup> Julian, *How Much Money The Ohana Adventure Makes on YouTube – Net Worth*, NAIBUZZ <https://naibuzz.com/much-money-ohana-adventure-makes-youtube-net-worth/> (last visited Mar. 18, 2021).

<sup>76</sup> Lauren Levy, *Who was Lil Tay? The making, and marketing, of a 9-year-old meme machine*, THE CUT (Jan. 23, 2019), <https://www.thecut.com/2019/01/who-was-lil-tay.html>; Luke Morgan Britton, *Lil Tay Found Fame as a Child Grotesquely Spoofing Rap Culture; Now Her Life is a Tired Tale of Warring Stage Parents*, NME, (Mar. 11, 2019) <https://www.nme.com/blogs/nme-blogs/lil-tay-story-behind-the-instagram-meme-2460173>.

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was highly involved in the “rapper” lifestyle.<sup>77</sup> Her short term career has been postponed when her father, learning that his daughter was taken to Los Angeles by his ex-wife and was not going to school, fought for custody and subsequently ended the young girl’s influencer career for now.<sup>78</sup> There have been claims that Claire’s father has been also trying to help her influencer career by getting her work permits and attempting to trademark her name, but due to custody disputes and other behind the scenes family legal disputes, Claire is being home-schooled and keeping out of the news.<sup>79</sup>

With the rise of the “kidfluencers,” and the demand for authentic content, advertisers found that they can market their products successfully to a preferred niche market by attaching themselves with these channels.<sup>80</sup> Instead of marketing on multiple platforms such as television and radio, marketers can narrow their focus to ‘underserved’ groups and target them directly.<sup>81</sup> The relationship between advertiser and content creator is mutually beneficial, since the YouTuber (or parent to the YouTuber) has a drive-in viewership and gets extra revenue, and the advertiser gets to reach more viewers with their product.<sup>82</sup> Ryan Kaji is one example of this advertiser-creator relationship: Ryan is a nine year old who opens toys on YouTube and judges them, and had made \$29.5 million dollars in 2020.<sup>83</sup> That number does not include the estimated \$200 million made from Ryan’s World branded toys and clothing, a pajamas sponsorship, or the rumored deal for a Nickelodeon series.<sup>84</sup> However, with Ryan’s success has come more concerns from the Federal Trade Commission that the advertisements are not properly disclosed, and parents worried over “kidfluencers” influence on their own children.<sup>85</sup>

## III. THE PROBLEM: HOW THE UNITED STATES CONTINUES TO FAIL IN

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<sup>77</sup> Levy, *supra* note 71.

<sup>78</sup> *Id.*

<sup>79</sup> Levy, *supra* note 71; Luke Morgan Britton, *Lil Tay Found Fame as a Child Grotesquely Spoofing Rap Culture; Now Her Life is a Tired Tale of Warring Stage Parents*, NME, (Mar. 11, 2019) <https://www.nme.com/blogs/nme-blogs/lil-tay-story-behind-the-instagram-meme-2460173>.

<sup>80</sup> In an interview with Sara Penna, who founded BigFrame who focused on online—specifically YouTube—marketing and how advertisers are working with YouTube and creating content to passively make a profit. Walk, *supra* note 11.

<sup>81</sup> *See Id.* Sarah Penna talks about finding their niche market in Millennial Moms and finding success.

<sup>82</sup> Walk, *supra* note 11.

<sup>83</sup> Rupert Neate, *Ryan Kaji, 9, earns \$29.5m as This Year’s Highest-Paid YouTuber*, THE GUARDIAN (Dec. 18, 2020), <https://www.theguardian.com/technology/2020/dec/18/ryan-kaji-9-earns-30m-as-this-years-highest-paid-youtuber>.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

## PROTECTING CHILDREN ACTORS, ON TV AND ONLINE

*A. Current State's with Coogan Laws and Reality Star Void*

As of 2020, there are only a handful of state's that have labor laws protecting child performers and models from financial exploitation: California, New York, Louisiana, and New Mexico.<sup>86</sup> While thirty-two states do have some child labor act in place for performers, they have a wide range of rules from having the minor get permission from the state labor commission, to stronger state regulation requiring a child actor to have a maximum set of hours, on-set teachers, and requiring Coogan accounts.<sup>87</sup> Only half of states that have some protections also require a work permit, which can be obtained as an online application, and must be completed before the child starts working on set—though the different application processes vary by state.<sup>88</sup> Eighteen states have no regulation on child acting at all.<sup>89</sup> Because of this disparity between states, child stars—more specifically, reality and social media stars—are left with no protections for their finances or further exploitation.

Today, the category of “child actor” has yet to include other types of fame, including being part of a reality-tv production. Reality-TV stars have limited protections on their image since the actors are “participants,” that are not “working” and the producer only requires consent to film.<sup>90</sup> For this reason, child reality stars are not protected by child labor laws and the Coogan laws have not been broadened to include this category of child actor.<sup>91</sup> Producers of reality television further circumvent FLSA standards by not calling the children actors “workers,” but rather as participants who let the film crew into their homes to watch their daily lives.<sup>92</sup> A void has

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<sup>86</sup> *Coogan Law*, SAG-AFTRA, <https://www.sagaftra.org/membership-benefits/young-performers/coogan-law> (last visited Oct. 24, 2020).

<sup>87</sup> Marsha Mercer, *Few Protections Child Performers*, USA TODAY (Aug. 29, 2013), <https://www.usatoday.com/story/news/nation/2013/08/29/child-actors-protections-laws-pew/2734035/>.

<sup>88</sup> *Employ Child Performers, Certificate of Eligibility*, NYC BUSINESS <https://www1.nyc.gov/nycbusiness/description/child-performer-permit> (last visited February 12, 2021); Bonnie Wallace, *Does My Child Need a Work Permit*, HOMETOWN TO HOLLYWOOD <https://hometowntohollywood.com/does-my-child-actor-need-a-work-permit/> (last visited February 12, 2021).

<sup>89</sup> Marsha Mercer, *Few Protections Child Performers*, USA TODAY (Aug. 29, 2013), <https://www.usatoday.com/story/news/nation/2013/08/29/child-actors-protections-laws-pew/2734035/>.

<sup>90</sup> Kimberlianne Podlas, *Does Exploiting A Child Amount to Employing A Child? The FLSA's Child Labor Provisions and Children on Reality Television*, 17 UCLA ENT. L. REV. 39, 61 (2010).

<sup>91</sup> Christopher C. Cianci, *Entertainment or Exploitation?: Reality Television and Inadequate Protection of Child Participants Under the Law*, 18 S. CAL. INTERDISC. L. J. 363, 381 (2009).

<sup>92</sup> Jessica Rey, *Are Children Who Appear on Reality Television Adequately Protected by Federal and State Law?*, 398 LAW SCHOOL STUDENT SCHOLARSHIP 7 (2013).

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been left in the law in protecting children reality stars, furthering the absence of laws protecting this new category of social media star.

Currently, FLSA does not consider participating in a reality television show to be considered “work” for the children or adult participants.<sup>93</sup> Presently, the industry does not see reality television stars as “performing.”<sup>94</sup> Courts have found that when a person sues for their image being used in a news piece or documentary, the person is in public and—as long as the image is not being used for commercial purposes—it can be used in the end product (i.e. film or show).<sup>95</sup> These same courts have found that reality television is more similar to a documentary so, when the celebrity does bring a suit for unlawful use of their public image, the court will side with the production – leaving the reality star in a quasi-acting position, without protections.<sup>96</sup> However, with the growing industry of reality television, the question of how to regulate the employment of these “performers,” comes more into focus.

In California, there has been steps to rectify the issue of child stars being exploited by reality tv show producers.<sup>97</sup> In 2003, David L. Gurley, a staff attorney for the Labor Commissioner’s office, sent a letter responding to a production company’s concern over the application of California labor laws regarding child actors in a reality-based production.<sup>98</sup> Gurley said that, the question wasn’t about how to describe the type of production, but “whether [the production company was] acting as an employer, and whether the minors involved in [the show] are employees of the company.”<sup>99</sup> Given the long work hours, the disruption of the child’s day with cameras, and that some are subject to some direction by directors, Gurley found that child reality-star participants were subject to all the rules and regulations that govern minors in the entertainment industry.<sup>100</sup> However, these protections are only extended to children who reside in California, and have yet to be applied to social media kidfluencers.<sup>101</sup> Some producers have found this loophole, avoiding hiring children with little performance experience or who do not reside in California.<sup>102</sup> The acting unions have become more aware of this

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<sup>93</sup> Podlas, *supra* note 27 at 61.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Podlas, *supra* note 27 at 63.

<sup>97</sup> Christopher C. Cianci, *Entertainment or Exploitation?: Reality Television and Inadequate Protection of Child Participants Under the Law*, 18 S. CAL. INTERDISC. L. J. 363, 382 (2009).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Cianci, *supra* note 91, at 383.

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growing issue of reality participants leading to less bargaining power for reality show contestants.<sup>103</sup>

The Screen Actors Guild – American Federation of Television and Radio Artists (“SAG-AFTRA”) unions has been pushing for producers to include reality-show participants for enhanced protections, but producers have pushed back stating that they are ‘participants’ and not actors.<sup>104</sup> Because of the grey area of what constitutes the employer-employee relationship, children reality stars – and by extension social media stars—are left without bargaining protections or any regulations for their safety.<sup>105</sup> It wasn’t until 2018 that a deal was struck between the union and the main broadcasters (i.e. ABC, CBS, NBC and FOX) that reality programming would be considered part of the union in contracts, guaranteeing certain benefits.<sup>106</sup> However, that still doesn’t address the growing trend of reality shows on various networks, both on cable and steaming, or social media stars.

*B. YouTube’s Money-Making Model and Their Blindspot*

In order to make money from advertising, YouTube has created an arrangement where influencers can join in the YouTube Partner Program (“YPP”).<sup>107</sup> YPP entitles an influencer to “copyright match” tools, creator support teams, and most importantly, monetization. In order to monetize in the YPP program, the eligibility page states that, at minimum, a Youtuber must, “1. Follow all the YouTube monetization policies. 2. Live in a country or region where [YPP] is available. 3. Have more than 4,000 valid public watch hours in the last 12 months. 4. Have more than 1,000 subscribers. 5. Have a linked AdSense account.”<sup>108</sup> On a separate page, YouTube also notes that, to be eligible, a person must be eighteen years or older.<sup>109</sup> In order to earn money, a Youtuber would need to create an AdSense account which requires them to provide their tax information (depending on where the Youtuber is from).<sup>110</sup> After confirming the Youtuber’s identity, and when

<sup>103</sup> Cianci, *supra* note 91, at 383.

<sup>104</sup> Cianci, *supra* note 91, at 386.

<sup>105</sup> Cianci, *supra* note 91, at 386.

<sup>106</sup> Dave McNary, *SAG-AFTRA Members Ratify Deal on Non-Primetime Television*, VARIETY (Aug. 16, 2018), <https://variety.com/2018/tv/news/sag-aftra-members-ratify-network-television-1202907993/>.

<sup>107</sup> How to Earn Money on Youtube, GOOGLE, <https://support.google.com/youtube/answer/72857?hl=en> (last visited December 17, 2020).

<sup>108</sup> *YouTube Partner Program Overview & Eligibility*, GOOGLE, <https://support.google.com/youtube/answer/72851> (last visited December 17, 2020).

<sup>109</sup> *How to earn money on Youtube*, *supra* note 107

<sup>110</sup> *Steps to Getting Paid*, GOOGLE, [https://support.google.com/adsense/answer/1709858?hl=en&ref\\_topic=1727182](https://support.google.com/adsense/answer/1709858?hl=en&ref_topic=1727182) (last visited Feb. 21, 2022).

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enough of the “payment threshold” is met, AdSense sends the YouTuber a paycheck from the monthly revenue earned from the ads on their videos.<sup>111</sup> The more engagement the video and channel get, the more likely a channel will get a sponsorship; YouTubers will ask viewers to “like,” “subscribe,” and leave comments to help the videos get more attention via the algorithm and, as a result, get more ads.<sup>112</sup>

Going through the process, a person’s age is asked twice: once during the YPP process, and then again when trying to make an AdSense account.<sup>113</sup> Despite the multiple authentication checks, YouTube or AdSense will allow a user under the age guidelines to qualify if they use a parent or older siblings tax information, or bank account, in order to qualify—nullifying any attempts made by the company to stop young YouTubers from monetizing.<sup>114</sup> Dozens of teens have posted on YouTube about how they were able to make money by putting their parents’ or guardians’ tax information, and then creating their own bank account for direct payments.<sup>115</sup> Nowhere in this process is the content of the video checked to see if it’s a family taking videos of their children or young people vlogging for profit since the YPP is designed so that the YouTuber will “self-certify” they are following the guidelines.<sup>116</sup> If that fails, there is an internal algorithm that YouTube claims is monitoring videos, but it can get the content warning wrong, for which a YouTuber can request “human review” of the decision.<sup>117</sup> As long as there are no copyright

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<sup>111</sup> *Id.*

<sup>112</sup> Lindsay Ellis, *YouTube: Manufacturing Authenticity (For Fun and Profit!)*, YOUTUBE (Sept. 11, 2018), [https://www.youtube.com/watch?v=8FJEtCvb2Kw&ab\\_channel=LindsayEllis](https://www.youtube.com/watch?v=8FJEtCvb2Kw&ab_channel=LindsayEllis).

<sup>113</sup> How to earn Money on Youtube, Youtube Help, <https://support.google.com> (<https://support.google.com/youtube/answer/72857?hl=en>) (last visited December 17, 2020 at 6:53pm); Steps to Getting Paid, AdSense Help, [https://support.google.com/adsense/answer/1709858?hl=en&ref\\_topic=1727182](https://support.google.com/adsense/answer/1709858?hl=en&ref_topic=1727182).

<sup>114</sup> YouTube Marketing, *Can you Make MONEY on YouTube if your UNDER 18?*, YouTube (Sept. 26, 2015), [https://www.youtube.com/watch?v=LoN14opq0kw&ab\\_channel=YouTubeMarketing](https://www.youtube.com/watch?v=LoN14opq0kw&ab_channel=YouTubeMarketing).

<sup>115</sup> Greta Jane, *MY FIRST YOUTUBE PAYCHECK 2019 + How To Receive Pay If You're Under 18*, YOUTUBE, (Jun. 25, 2019), [https://www.youtube.com/watch?v=B6Ds-TSW-vw&ab\\_channel=GretaJane](https://www.youtube.com/watch?v=B6Ds-TSW-vw&ab_channel=GretaJane); Jada Marie, *My First YouTube Paycheck + How To Receive Pay If You're Under 18*, YOUTUBE, (Oct. 14, 2017), [https://www.youtube.com/watch?v=3TGMMyre-nU&t=407s&ab\\_channel=JadaMarie](https://www.youtube.com/watch?v=3TGMMyre-nU&t=407s&ab_channel=JadaMarie) (She mentions that there use to be actual checks coming in, but that has since ended and only direct deposit is now possible).

<sup>116</sup> Advertiser-Friendly Content Guidelines, YOUTUBE, <https://support.google.com/youtube/answer/6162278#zippy=%2Cguide-to-self-certification>. (last visited February 12, 2021 at 10:37am).

<sup>117</sup> Advertiser-Friendly Content Guidelines, YOUTUBE, <https://support.google.com/youtube/answer/6162278#zippy=%2Cguide-to-self-certification>. (last visited February 12, 2021 at 10:37am).

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infringements, signs of abuse, or fake engagement<sup>118</sup> the videos are free to be uploaded and monetized.<sup>119</sup>

However, even when the terms of services have been broken—for signs of abuse, as is in most family vlog cases—it can take months, and a lot of viewer anger, to have YouTube finally stop allowing advertisements on the video, called “demonetize.”<sup>120</sup> One example is the case of “DaddyofFive,” a YouTube family vlog where the parents “prank” their children for views.<sup>121</sup> The Maryland couple, Michael and Heather Martin, uploaded “pranking” videos of their children.<sup>122</sup> Their frequent targets were the youngest two children, who were Michael’s biological children and Heather’s stepchildren, and were subject to the adults yelling at them, and in one instance pushing the youngest boy hard enough to cause a bloody nose.<sup>123</sup> After the videos went viral, several calls were made to the Frederick County Police Department, and the parents lost custody of the two children.<sup>124</sup> Michael took a plea deal from the county, taking custody away from him, letting the two youngest live with their biological mother, and ordered the couple to not post anymore videos of the two children.<sup>125</sup> However, even though YouTube did take down the “DaddyofFive” channel, the couple just created a second channel (“FamilyofFive”), and continued to post videos of “pranking,” the other three children.<sup>126</sup> After more backlash from the public and former-fans, YouTube took that channel down as well.<sup>127</sup> Even after the lawsuit, the current appeal to reduce their sentence, and YouTube taking down the couple’s channel for a second time, there are still other channels willing to

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<sup>118</sup> Where bots are used to populate a comment section, leading for the algorithm to show it to more user, *See Fake Engagement Policy, YouTube*, <https://support.google.com/youtube/answer/3399767?hl=en>, (last visited February 12, 2021 at 10:37am).

<sup>119</sup> Terms of Service, *YouTube*, <https://www.youtube.com/static?template=terms>. (last visited December 17, 2020 at 7:09pm).

<sup>120</sup> Tasneem Nashrulla, *Parents Who Were Charged With Child Neglect For “Pranking” Their Kids on YouTube Are Still Making Videos With Their Children*, *BUZZFEED* (July 18, 2020), <https://www.buzzfeednews.com/article/tasneemnashrulla/youtube-daddyofive-videos-criticism>.

<sup>121</sup> Josh Katzowitz, *DaddyofFive parents get reduced sentence for Child Neglect*, *DAILYDOT* (Jan. 10, 2019), <https://www.dailydot.com/upstream/daddyofive-parents-get-reduced-sentence-for-child-neglect/?tw=dd>.

<sup>122</sup> Tasneem, *Supra* note 120.

<sup>123</sup> Tasneem, *supra* note 120.

<sup>124</sup> Tasneem, *supra* note 120; Josh Katzowitz, *DaddyofFive parents get reduced sentence for Child Neglect*, *DAILYDOT* (Jan. 10, 2019), <https://www.dailydot.com/upstream/daddyofive-parents-get-reduced-sentence-for-child-neglect/?tw=dd>.

<sup>125</sup> Tasneem, *supra* note 120.

<sup>126</sup> *Id.*

<sup>127</sup> Katzowitz, *supra* note 121.

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forgo copyright concerns or YouTube policies and will re-upload both DaddyofFive and FamilyofFive videos to gain views and revenue.<sup>128</sup>

C. “Sharenting” and the Unwilling Child Celebrity

Parents are still able to post videos without concern for a child’s well-being despite YouTube’s passive attempts to takedown channels that abuse the platform’s policies.<sup>129</sup> Furthermore, where young people—mostly young women—would say that their bedroom was their “private sphere,” their online lives have nearly erased that boundary.<sup>130</sup> Parents are able to take away a child’s agency and post these videos without the child’s consent, or ability to take it down. Policymakers, both nationally and in the European Union, recognize the gaps between adults and children online, but have failed to reflect and/or incorporate children’s actual knowledge of online policies.<sup>131</sup>

The term “Sharenting,” derived from “share” and “parenting,” refers to the recent trend of parents uploading pictures, videos, and other day to day information about their children on social media platforms (i.e., Facebook, Twitter, Instagram).<sup>132</sup> Sharenting usually refers to parents over-sharing information relating to their children on social media, and has been spurred on by the “always-online” culture.<sup>133</sup> Parents will regularly share intimate details of their day-to-day lives online, sometimes “over-sharenting.”<sup>134</sup> While some have argued that “sharenting” is not new, and is just a new way for a person to find a sense of self and identity, there is still a lack of balance between protecting a parent’s social media presence, and protecting a child’s privacy.<sup>135</sup> With added incentives to share their lives in order to become an “influencer,” it has become harder for children to maintain their own agency of their online persona.

As of 2010, it was reported by the digital security company, AVG,<sup>136</sup> that ninety-two percent of two-year old’s in the United States have a digital footprint.<sup>137</sup> A digital footprint entails every comment made on social media,

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<sup>128</sup> Katzowitz, *supra* note 121.

<sup>129</sup> Nottingham, *supra* note 70.

<sup>130</sup> Jane Bailey & Valerie Steeves, *Egirls, eCitizens: Putting Technology, Theory and Policy unto Dialogue with Girls’ and Young Women’s Voices*, 157.

<sup>131</sup> *Id.*

<sup>132</sup> Nottingham, *supra* note 70.

<sup>133</sup> Nottingham, *supra* note 70.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> AVG AntiVirus is a digital security company that offers a wide range of protections for families and businesses. *See* AVG, <https://www.avg.com/en-us/profile> (last visited Mar. 26, 2021).

<sup>137</sup> Nottingham, *supra* note 70.



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the cookies that are attached to a person's online presence, and the passwords for websites a person visits.<sup>138</sup> This sharenting can result in a child having their home or school revealed, what the child looks like, their birthdays, and other identification exposure that could lead to a risk of "digital kidnapping."<sup>139</sup> Digital kidnapping can happen when a person takes the photo of a child and creates a new account, pretending to be that child, for various illegal activity, or to garner attention.<sup>140</sup> A report from the UK suggested that by 2030, sharenting could account for two-thirds of identity fraud, since using the details parents post can allow fraudsters access to personal information.<sup>141</sup> Another estimate says in the next ten years, sharenting could account for approximately seven million incidents of identity theft, and can cause over \$800 million in online fraud.<sup>142</sup>

There is also an emotional harm being done to the children of parents who engage in over-share online, where "the boundaries between parent and child are difficult, if not impossible, to maintain."<sup>143</sup> When families can make money full-time on YouTube, or on other blogging websites, by advertising or being provided with free products to help boost sales, there is a risk of children "being [pressured] or manipulated by their parents, in order to ensure continued followers and financial gain."<sup>144</sup> YouTube families are "entirely unregulated," and therefore, the children in the videos deal with long hours of filming every day and will be denied a part in editing their image.<sup>145</sup> In a majority of states, a child performer has a license to be eligible to be part of a production, and are entitled to have a standard set of hours they can work.<sup>146</sup> This legal protection is not granted for YouTube family stars, and there are no guidelines in place to protect the wellbeing of these children.<sup>147</sup>

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<sup>138</sup> Anhad Singh, *Your Digital Footprint*, THE FALCON PRESS, (Nov. 15, 2021) <https://fmsfalconpress.org/2884/fms-news/your-digital-footprint/>.

<sup>139</sup> Nottingham, *supra* note 70.

<sup>140</sup> Steven Bearak, *Digital Kidnapping: What It Is and How to Keep Your Kids Safe on Social Media*, PARENT MAP (Nov. 16, 2017) <https://www.parentmap.com/article/kidnappers-kids-photos-digital-kidnapping-social-media>.

<sup>141</sup> Emma Nottingham, *'Dad! Cut that Part Out!' Children's Rights to Privacy in the Age of 'Generation Tagged': sharenting, digital kidnapping and the child micro-celebrity*, in *The Routledge International Handbook of Young Children's Rights* (Oct. 2019).

<sup>142</sup> The New York Times, *Why Kids Are Confronting Their Parents About 'Sharenting'* | *NYT Opinion*, YOUTUBE (Aug. 7, 2019), [https://www.youtube.com/watch?v=YRPUZ3pufAg&list=WL&index=14&ab\\_channel=TheNewYorkTimes](https://www.youtube.com/watch?v=YRPUZ3pufAg&list=WL&index=14&ab_channel=TheNewYorkTimes).

<sup>143</sup> Nottingham, *supra* note 70 at 7

<sup>144</sup> Nottingham, *supra* note 70 at 8

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

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Two recent examples of the legal system failing children in the United States can be seen in two recent incidents of vlogging: where children have expressly asked for their images to be taken down and were ignored, and where one young child's life was marketed.<sup>148</sup> More attention has been given, both inside and out of the United States, for children growing up and realizing that their lives are being shared.<sup>149</sup> Presently, a child cannot sue a parent for a tort-related claim as the parent is protected under parental immunity laws.<sup>150</sup> The Parental Immunity doctrine is the common law principle where a child cannot sue their parents for a tort claim since it goes against keeping family tranquility and is seen as the courts undermining parental authority.<sup>151</sup> Historically, the exception to the parental immunity rule was available when an injury to the child was due to "willful, wanton, intentional or criminal conduct," and the family tranquility was already broken.<sup>152</sup> And, presently, there is no case precedent or statutes targeted at parental oversharing, and that any such request of removing a picture online could be argued as a violation of their First Amendment right to free speech.<sup>153</sup>

However, with more and more information being shared about a child, the more legal justifications can be imposed.<sup>154</sup> One recent example was the mommy blogger and online influencer, Christie Tate, whose fourth-grade daughter found out about all the essays her mother had been posting about her online.<sup>155</sup> Despite her daughter's request that all her pictures and essays about her life be taken down, Tate states she was "not done exploring [her] motherhood in [her] writing," and did not find any of the posts on her blog that "embarrassing."<sup>156</sup> Tate has written pieces about her daughter since she was young, describing her potty training, ending of friendships (where Tate

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<sup>148</sup> Tom Harlock, *The Vloggers Who Returned Their Adopted Baby*, YOUTUBE (June 30, 2020), [https://www.youtube.com/watch?v=uBD9ZT4ioNA&ab\\_channel=TomHarlock](https://www.youtube.com/watch?v=uBD9ZT4ioNA&ab_channel=TomHarlock); Ruthie Graham, *That Outrageous Mommy Blogger Who Refuses to Stop Writing About Her Kid Highlights a Key Parent-Child Generational Gap*, SLATE (Jan. 8, 2019), <https://slate.com/human-interest/2019/01/mommy-blogging-christie-tate-generation-gap.html>; Nottingham, *supra* note 70.

<sup>149</sup> Brittany Wong, In The Future, *Will Your Kids Be Able To Sue You For Oversharing Online?*, HUFFINGTON POST (Apr. 23, 2019), [https://www.huffpost.com/entry/parents-overposting-online\\_1\\_5cb4dd23e4b082aab08a5c10](https://www.huffpost.com/entry/parents-overposting-online_1_5cb4dd23e4b082aab08a5c10).

<sup>150</sup> Parental-Immunity Doctrine Law and Legal Definition, USLEGAL.COM, <https://definitions.uslegal.com/p/parental-immunity-doctrine/> (last visited December 20, 2020 at 12:50pm); Parent's Immunity in General; persons in loco parentis § 6:49 (Am. Law of Torts 2020).

<sup>151</sup> *Id.*

<sup>152</sup> Schenk v. Schenk, 241 N.E.2d 12, 13-14 (Ill. App. Ct. 1968).

<sup>153</sup> Wong, *supra* note 149.

<sup>154</sup> Wong, *supra* note 149.

<sup>155</sup> Ruthie Graham, *That Outrageous Mommy Blogger Who Refuses to Stop Writing About Her Kid Highlights a Key Parent-Child Generational Gap*, SLATE (Jan. 08, 2019) <https://slate.com/human-interest/2019/01/mommy-blogging-christie-tate-generation-gap.html>.

<sup>156</sup> *Id.*

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pins some of the blame on her daughter), and discusses how Tate felt during family fights.<sup>157</sup> In order to keep the peace between the two individuals, there has been a parent-child agreement where her daughter has veto power, can be referred by a pseudonym, and will be made aware of what her mother will write about her.<sup>158</sup> While this did not go to court, but instead was only public shaming, it does lead people to question when policies should change in order to address this growing phenomena.

Another question is to what parents should be able to market to the public, given that the new trend is to specifically advertise to targeted audiences, and if this can be seen as a form of human trafficking or child abuse.<sup>159</sup> The most recent controversy came into the public eye when family vloggers, the Stauffers, documented and posted a series about their adoption of a child from China.<sup>160</sup> In 2017, Myka Stauffer started posting videos about the family's decision to adopt a baby from China, and the process it took to get Huxley, the adopted child.<sup>161</sup> The family's viewership increased with the new content, and several high-profile companies offered the Stauffers sponsorships.<sup>162</sup> Myka also appeared on national news stations to talk about international adoption, and when the family needed extra financial support, the parents asked for donations in their videos.<sup>163</sup> In some videos, Myka said that the more people donated (around five dollars), a puzzle piece would be removed from a picture showing a picture of Huxley.<sup>164</sup> Before Huxley was even brought to the United States, the Stauffers uploaded between thirteen and twenty videos—and based on some calculations from a fellow YouTuber—the family was able to move into a mansion with the new rise in viewership.<sup>165</sup> The Stauffers continued to engage their audience about Huxley, and even shared intimate details such as finding out Huxley require

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Walk, *supra* note 11; Tom Harlock, *The Vloggers Who Returned Their Adopted Baby*, YOUTUBE (June 30, 2020), [https://www.youtube.com/watch?v=uBD9ZT4ioNA&ab\\_channel=TomHarlock](https://www.youtube.com/watch?v=uBD9ZT4ioNA&ab_channel=TomHarlock); [Video].

<sup>160</sup> Tom Harlock, *The Vloggers Who Returned Their Adopted Baby*, YOUTUBE (June 30, 2020), [https://www.youtube.com/watch?v=uBD9ZT4ioNA&ab\\_channel=TomHarlock](https://www.youtube.com/watch?v=uBD9ZT4ioNA&ab_channel=TomHarlock); [Video]; Stephanie McNeal, *A YouTuber Placed Her Adopted Autistic Son From China With A New Family – After Making Content With Him For Years*, BUZZFEED (May 28, 2020), <https://www.buzzfeednews.com/article/stephaniemcneal/myka-stauffer-huxley-announcement>.

<sup>161</sup> Stephanie McNeal, *A YouTuber Placed Her Adopted Autistic Son From China With A New Family – After Making Content With Him For Years*, BUZZFEED (May 28, 2020), <https://www.buzzfeednews.com/article/stephaniemcneal/myka-stauffer-huxley-announcement>.

<sup>162</sup> McNeal, *supra* note 161.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> Tom Harlock, *The Vloggers Who Returned Their Adopted Baby*, YOUTUBE (June 30, 2020), [https://www.youtube.com/watch?v=uBD9ZT4ioNA&ab\\_channel=TomHarlock](https://www.youtube.com/watch?v=uBD9ZT4ioNA&ab_channel=TomHarlock); [Video].

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special care for an undisclosed mental health issue, and questioning if they could handle that kind of responsibility.<sup>166</sup> However, despite the hesitation and the warnings from doctors in the United States about the tough life they may have, the Stauffers continued with the adoption of Huxley, continuing the monetization of Huxley's adoption and adapting to his new home.<sup>167</sup>

Two years after Huxley was adopted, and after Myka had posted more sponsored videos, written more articles and even had her fifth child's birth featured in *People* magazine, videos by the Stauffers started being posted without Huxley.<sup>168</sup> After a few months of no videos of Huxley, fans became concerned and started making Instagram accounts and directly messaging Myka to ask where the child was.<sup>169</sup> Eventually, the couple made a video explaining that Huxley had to be re-homed, and Huxley was no longer in their care.<sup>170</sup> Many former fans, shocked by the Stauffer's decision and way they handled the adoption, criticized the couple and even started a petition to have YouTube demonetize the videos, having any payments from the advertisements made from the videos featuring Huxley stopped.<sup>171</sup> While YouTube has not demonetized the videos (or the videos in controversy were taken down by the Stauffers to stop some of the backlash from former-fans), companies did pull sponsorships with Myka in order to avoid controversy.<sup>172</sup> However, some fans were unsatisfied, and contacted the Stauffers' local police department, saying that bringing Huxley to the United States with a GoFundMe was a form of human trafficking.<sup>173</sup> While the police department found no foul play, and did not consider the family's actions as a crime, the adoption fiasco made many fans and "internet watchers" concerned with children's lives being monetized, without any further protections.<sup>174</sup>

#### IV. PROPOSAL: EXPANDING THE COOGAN LAWS AND ADOPTING THE RIGHT TO BE FORGOTTEN

##### *A. Preventing Monetary Exploitation of Children with Trusts and*

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<sup>166</sup> *Id.*

<sup>167</sup> McNeal, *supra* note 161; Harlock, *Supra* note 165.

<sup>168</sup> *Id.*

<sup>169</sup> McNeal, *supra* note 161.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Nhaz Tingson, *YouTuber Myka Stauffer Loses Partnership with Several Companies Including Kate Hudson's Fabletics*, *TECH TIMES* (Jun. 1, 2020), <https://www.techtimes.com/articles/250026/20200601/youtuber-myka-stauffer-loses-partnership-with-several-companies-including-kate-hudsons-fabletics.htm>.

<sup>173</sup> McNeal, *supra* note 161.

<sup>174</sup> *Id.*

*Work Permits*

There is a dire need to update the FLSA to include child performers. To date, there are no federal protections for child actors or models, allowing for misuse and exploitation.<sup>175</sup> Child social media stars should be included in the new definition of “child performer,” since they face the same work as non-digital child actors and models and similar employer-employee relationship: social media stars face the same long hours, cameras constantly following them, and the same mental exhaustion as their industry counterparts.<sup>176</sup> The same mental strains still apply to social media stars, and still no protections for their health and safety.

The preferable first step in creating better regulations regarding child performers would be using the Coogan Law model, or other precedents by states that require work permits and a set number of hours for child workers and including it in FLSA. While this may be difficult to pass through Congress, steps have already been taken in order to address the current issue.<sup>177</sup> There have been two recent attempts to nationalize Coogan laws into FLSA to include child actors and models; one dealt with online child modeling, and the other regarded child actors.<sup>178</sup> Both acknowledged the problems encountered by online child stars, and what current FLSA guidelines lack.

In 2005, Representative Mark Foley introduced the Child Modeling Exploitation Prevention Act (H.R. 1142) to address online modeling of children—specifically young girls—that were being exploited by digital platforms.<sup>179</sup> Representative Foley’s proposal sought to amend Section 12 of the FLSA to include “no employer may employ a child model in exploitive child modeling,” and further defined the term “exploitive child modeling” to mean “modeling involving the use of a child under 17 years old for financial gain without the purpose of marketing a product or service other than the image of the child.”<sup>180</sup> This language would apply broadly—including whether the employment relation was “direct or indirect, or contractual or noncontractual, or is termed that of an independent contractor.”<sup>181</sup> Further,

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<sup>175</sup> 29 C.F.R. § 570.125 (2016).

<sup>176</sup> Farah Mohammed, *Instagram, YouTube, and the New Child Stars*, JSTOR DAILY (Oct. 28, 2017) <https://daily.jstor.org/instagram-youtube-and-the-new-child-stars/>.

<sup>177</sup> GERALD MAYER, CONG. RSCH. SERV., RL31501, CHILD LABOR IN AMERICA: HISTORY, POLICY, LEGISLATIVE ISSUES (2013); H.R. Con Res. 3383, 114th Cong. (2015).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

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the legislation proposed both fines and imprisonment for violators.<sup>182</sup> If the legislation had been enacted in 2005, YouTube and other platforms that have online ads with models would have needed to reconsider how these children's images are being used on their platforms, despite having the consent of the parent YouTuber. However, this is a limited view of what is currently occurring online given the wide range of offenses from parents and children and would miss a huge demographic of social media stars being exploited that would need to still be addressed. Yet, this was an important first step in acknowledging the issue and at minimum try and regulate some online activities.

The other attempt made to modify FLSA in regard to child actors was in 2015.<sup>183</sup> The bill, sponsored by Representative Grace Meng, would match the Fair Labor Standards for child actors to those in state Coogan Laws.<sup>184</sup> The bill introduced would not allow employment of a child performer unless a trust meeting specified requirements was established on the child performer's behalf, and the employer obtained the account number of the trust account or of other proof of its existence.<sup>185</sup> Furthermore, an employer or contractor would not be able to provide compensation to any child performer in "any other form other than cash wages, exclusive or board, lodging, or facilities."<sup>186</sup> The bill also included that any employer that did not follow such limitations and requirements would be treated as "oppressive labor."<sup>187</sup> The presented bill included liability for discrimination on the basis of sex,<sup>188</sup> and allowed for civil action in any general court to "recover equitable relief and compensatory and punitive damages," brought on behalf of the child.<sup>189</sup> Unfortunately, the current legislation has no clear timetable of when it will be addressed again by Congress and awaits for more sponsorship. While this would be a small step in creating stronger protections for child actors as a whole—not just current child social media stars—it would still be limited in its reach. To remedy this, FLSA should be updated to modernize the "child performer," to the same protections as other

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<sup>182</sup> Foley did not specify if the violator would be seen as solely on the online platform, or also the parent as well, *See*, GERALD MAYER, CONG. RSCH. SERV., RL31501, CHILD LABOR IN AMERICA: HISTORY, POLICY, LEGISLATIVE ISSUES (2013); H.R. Con Res. 3383, 114th Cong. (2015).

<sup>183</sup> H.R. Con Res. 3383, 114th Cong. (2015).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Based on some recent findings, young girls are targeted differently than young boys in the digital space, *See*, Jane Bailey and Valerie Steeves, *eGirls, eCitizens: Putting Technology, Theory and Policy into Dialogue with Girls' and Young Women's voices*, 157 (2015).

<sup>189</sup> H.R. 3383

child workers to ensure their income is protected and they are not working over certain number of hours.

*B. Regulations Protecting Child Social Media Stars on a State Level*

The second avenue to take in order to create stronger protections would be acting at the state level. So far, only a handful of states have taken it upon themselves to create protections for child performers.<sup>190</sup> In 2000, California had updated their laws protecting child performers to include more clearly defined financial protections, making it so a set percentage of profits would be placed in a trust.<sup>191</sup> Furthermore, these trusts with a gross income would be court-monitored, as well as given a court-appointed representation if ever a parent tried to bring action against the child.<sup>192</sup> There has also been an attempt to include “kidfluencers” in new California legislation as recently as 2018.<sup>193</sup> The recent provisions attempted to add “social media advertising,” to the definition of “employment,” to strengthen the already strict child labor rules.<sup>194</sup> Under this bill, children under the age of majority working in the “digital sphere” would, like their child acting counterparts, obtain a work permit and follow the regulations already required under the Coogan Law.<sup>195</sup> This bill was spearheaded by the founder of BizParentz, a nonprofit organization that began advocating for children in entertainment, after a local news story of an Arizona mother told a news outlet that, “she was able to quit her day job and pursue social media full-time after her twin daughters...blew up on Instagram.”<sup>196</sup> While the bill was signed into law, it was significantly diluted; allowing some digital creators who are unpaid and work shorter than an hour to be exempt from getting work permits due to critics arguing that enforcing work permits would be too difficult.<sup>197</sup> However, albeit difficult, some managers for child social media stars are already forcing the parents of their clients to set up Coogan accounts to protect their child actors from exploitation.<sup>198</sup> One manager, Byron Austen Ashley of Settlebello

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<sup>190</sup> For a summary of how three states, New York, Florida, and California have created protections for Child Performers. See, Jessica Krieg, *There's No Business Like Show Business: Child Entertainers and The Law*, 6 U. PA. J. LAB. & EMP. L. 429, 433 (2004).

<sup>191</sup> *Id.* at 437.

<sup>192</sup> *Id.*

<sup>193</sup> Harper Lambert, *Why Child Social Media Stars Need a Coogan Law to Protect them From Parents*, HOLLYWOOD REPORTER (Aug. 20, 2019), <https://www.hollywoodreporter.com/business/digital/why-child-social-media-stars-need-a-coogan-law-protect-parents-1230968/>.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> Lambert, *supra* note 193.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

Entertainment, requires accounts to protect his child-clients, noting that parents are “unprepared” for a “kidfluencer’s fame.”<sup>199</sup> Yet, this method of self-policing can only go far if only the managers are requiring it. If more states could pass legislation that would strengthen child labor laws (or even first create a provision for child actors), including social media advertising, parents would be required to set up these trusts without prompting.<sup>200</sup>

A third solution may be to compel YouTube or Instagram, as the platformer and arguably the “studio,” to require child content creators to have the profits of the creator to be put in a trust. Currently, as discussed above, parents provide their own tax information and receive direct deposits into their designated bank accounts thus bypassing the child’s receipt of funds as part of the “YouTube Partner Program,” and all ad revenue will be directly deposited in the parent’s bank account.<sup>201</sup> If the state or Federal Government required Coogan Trusts for kidfluencers, the platform would ask for the trust account information to deposit the profits instead of going through a parent. While it may create another step for platforms, it would also protect them from liability if parent creators have been discovered exploiting children.

Another possibility would be if an advertiser on said platform would prefer to work directly with a certain creator, they would ask for their Coogan account information and directly deposit it into their account. While this may seem “anti-parent,” as the California bill was accused of, the protection would help prevent the exploitation of the child media star and allow for a remedy if the parent took a larger portion of the profit. However, given that this approach would involve a person-to-person contract, it may be harder to enforce on a state or local level.

*C. The French Model of Protecting Children against Exploitation and The Right to Be Forgotten*

To remedy child media stars’ inability to control their appearance online of their own personas posted by their parents, the best, and logical, solution would be to simply allow a child to go to the platform and have those posts removed. One of the strongest actions the United States could take on the federal level would be recognizing the Right to be Forgotten or the right to erasure. Recently, the French legislature has taken two measures to prevent the exploitation of a child’s image against the child’s wishes: one to protect a child against financial exploitation, and the second to prevent

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> Jane, *supra* note 115.



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exploitation of a child's privacy.<sup>202</sup> This latter concept is of great significance, as all protection of children whose persona appear online is founded on the fundamental concept of privacy, violation of which lies at the core of all injury. Being the first law in the European Union to address child social media stars, the new law that passed targets those child social media stars who spend significant amounts of time and hours working online and generate income using social media platforms.<sup>203</sup> The law gives the child actors the same protections given to child models and actors in France, placing their earnings in a bank account until the child is sixteen, and requiring the companies wishing to employ the child influencer to obtain permission from local authorities.<sup>204</sup> While these provisions may appear as paternalistic, they allow for more protection and ensure employers not finding loopholes in employing child social media stars.

Along with the monetary protections, French law has gone a step further and, under their strict privacy law, allows a child over the age of majority to sue a parent for, "putting their security or privacy at risk for photos posted to Facebook and elsewhere when they were younger."<sup>205</sup> Because of recent incidents where a child's picture from Facebook appeared on pedophilic websites, France's law is designed to prevent parents from posting pictures of their children without thinking of the embarrassment, or even danger, that comes from posting these pictures.<sup>206</sup>

The reason the French legislators had the ability to broaden privacy protections is a result of the General Data Protection Regulation ("GDPR") highlighting, in recent data, laws entitled the "Right to be Forgotten."<sup>207</sup> The European Union has spearheaded the legal "Right to be Forgotten," or right to erasure, by allowing "individuals a right under certain circumstance to force search engines to remove links about them from the past."<sup>208</sup> Under the GDPR, a data subject can claim one of four reasons to ask for their information to be removed; 1. is the data is no longer necessary for the purposes it was originally obtained, 2. when the data subject revoked consent when the consent was required for the initial data collection, 3. the person

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<sup>202</sup> *France Passes New Law to Protect Child Influencers*, BBC (Oct. 7, 2020), <https://www.bbc.com/news/world-europe-54447491>.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> Jess Staufenberg, *French parents 'could face prison' for posting photos of their children on Facebook*, THE INDEPENDENT (Mar. 2, 2016), <https://www.independent.co.uk/news/world/europe/french-parents-told-their-children-might-sue-them-pictures-put-facebook-a6906671.html>.

<sup>206</sup> *Id.*

<sup>207</sup> David L. Hudson Jr., *Right to Be Forgotten*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1562/right-to-be-forgotten>.

<sup>208</sup> *Id.*

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exercised the right to object, 4. when the collection or processing of the data violates any provision of the GDPR.<sup>209</sup> After two years of being ratified, the first decision based on the claim of “right to erasure” came to the European Court of Justice (“ECJ”) in *Google v. Spain*.<sup>210</sup>

Mario Costeja Gonzalez in 2010 asked Google Spain and a Spanish newspaper to remove two articles published in 1998 and the search engine links that corresponded to the articles.<sup>211</sup> The articles in question were about the auction of his home due to his failure to pay social security debts, and implied he had financial trouble.<sup>212</sup> While the Spanish Data Protection Authority denied the claim to remove the newspaper article, the court ordered Google Spain SL and Google Inc. to take steps to remove the data index.<sup>213</sup> Both parties appealed to the Audiencia Nacional, which requested a preliminary ruling from the European Court of Justice. The ECJ said, on the relevant issue of whether a “data subject can demand a search engine to remove the indexation of a certain piece of information,” that with passing time, it can “become unlawful to maintain [the data] when the data becomes inadequate, irrelevant, or excessive for the purpose of the processing.”<sup>214</sup> Because it was over sixteen years since the article was written, Google could be asked to take down the search link if requested by the data user since it could cause prejudice.<sup>215</sup> The ECJ found that a “‘fair balance should be sought’ between the legitimate interests of searchers and the individuals privacy and data protection rights.”<sup>216</sup> Whether this may be excessive, the right to be forgotten in the European Union is broad and can allow for a party to ask for information about themselves to be removed. This lays the foundation for children asking for their images to be removed from digital platforms in an attempt to gain back their agency to their image. The fair balance allows legislatures, like those in France, to give back agency to the child media star to avoid exploitation.

In the United States, a similar model has yet to be recognized.<sup>217</sup> Some legal theorists worry it would be akin to the government compelling

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<sup>209</sup> Ignacio Cofone, *Google v. Spain: A Right To Be Forgotten?*, 15 CHI-KENT J. INT’L & COMP. L. 1, 3 (2015).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> Stefan Kulk & Frederik Zuiderveen Borgesius, *Google Spain v. Gonzalez: Did the Court Forget About Freedom of Expression?*, 5 EUR. J. RISK REG. 389 (2014).

<sup>213</sup> Cofone, *supra* note 208.

<sup>214</sup> *Id.*

<sup>215</sup> Kulk & Zuiderveen Borgesius, *supra* note 212.

<sup>216</sup> *Id.*

<sup>217</sup> David L. Hudson Jr., *Compelled Speech*, THE FIRST AMENDMENT ENCYCLOPEDIA <https://mtsu.edu/first-amendment/article/933/compelled-speech>, (last visited Feb. 17, 2021).

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individual's or group's to censor others and hence would be impermissible under the First Amendment.<sup>218</sup> However, as time goes on, more and more people (around seventy-four percent) embrace the concept of "Right to be Forgotten," for fear of personal information being widely available to people.<sup>219</sup> As recently as 2021, some newsrooms, including the Boston Globe, started "Fresh Start" so a person can request that a story or names to be taken down on their online forum.<sup>220</sup> If a ten-journalist panel agrees that the column causes long-lasting embarrassment and is having a disastrous effect on the person's inability to move on, the column and/or name will be taken down.<sup>221</sup> While this is a step in the right direction, the question is how much more is needed from the Federal Government to make the practice standardized to assure people what was posted of them as a child does not haunt them into their more senior years.<sup>222</sup> Despite concerns of censorship, there needs to be a remedy for privacy violations of young people who, coming of age, learn that their intimate pictures or their personal lives have been left available for employers or other social groups to find ten to twenty years in the future.

If the platforms can have an option of a user to reach out and request a takedown, there could be a panel of moderators to check the validity of the request and remove the personal information of the person making the request. For former-child celebrities, or people now at the age of majority, the person can request for YouTube or Instagram to take down the posts their parents had once updated without permission. By allowing the right to erasure, young children today can rest assured that in twenty years, they can ask the platform to take down their outdated posts and keep them from being used against them for job prospects, credit reports, or any other social changes.

## V. CONCLUSION

Social Media is the new driver of information and continues to influence every part of daily life. Children are more and more likely to find

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<sup>218</sup> *Id.*

<sup>219</sup> Brooke Auxier, *Most Americans Support Right to Have Some Personal Info Removed from Online Searches*, PEW RESEARCH (Jan. 27, 2020), <https://www.pewresearch.org/fact-tank/2020/01/27/most-americans-support-right-to-have-some-personal-info-removed-from-online-searches/>.

<sup>220</sup> Chris Stokel-Walker, *It's Time America Adopted 'the Right to be Forgotten'*, BUSINESS INSIDER (Feb. 7, 2021), <https://www.businessinsider.com/newspapers-offering-right-to-be-forgotten-practice-widely-adopted-consistent-2021-1>.

<sup>221</sup> *Id.*

<sup>222</sup> Chris Stokel-Walker, *It's Time America Adopted 'the Right to be Forgotten'*, BUSINESS INSIDER (Feb. 7, 2021) <https://www.businessinsider.com/newspapers-offering-right-to-be-forgotten-practice-widely-adopted-consistent-2021-1>.

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themselves online by their parents' publication of their image and their private life online. With the rise of social media comes the rise of the child influencer, and the opening for mistreatment. Currently, kidfluencers and child social media stars are unprotected in terms of physical and emotional safety, finances, and their own sense of privacy. Because of the loose definition of "child performer," children on reality programs to YouTube vlogs are left unprotected from abuse from advertising companies and their own families.

To remedy this fast-growing issue, Congress should address legislation updating the Federal Labor Standards Act to include "child performers," and broaden their definition to children being used by advertisers online, and to ensure at minimum fifteen percent of the income made goes into a trust. If Congress cannot ensure this change, it is incumbent upon the states to protect their young residents from being exploited. Finally, to ensure privacy for children online, the United States should adopt the Right to be Forgotten on a federal level. The right to be forgotten is recently growing as a way to counter people's lives being overly shared online. Children growing up in the digital age should have the right to take down posts their parents once uploaded if it continues to put them in a false light. Because these online platforms will only become more influential in the future, now is the time to start regulating what privacy protections people can have online.<sup>223</sup>

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