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2022

## New Kidfluencers on the Block: The Need to Update California's Coogan Law to Ensure Adequate Protection for Child Influencers

Joan Reardon

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### Recommended Citation

Joan Reardon, *New Kidfluencers on the Block: The Need to Update California's Coogan Law to Ensure Adequate Protection for Child Influencers*, 73 Case W. Rsrv. L. Rev. 165 (2022)

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— Note —

NEW KIDFLUENCERS ON THE BLOCK:  
THE NEED TO UPDATE CALIFORNIA'S  
COOGAN LAW TO ENSURE ADEQUATE  
PROTECTION FOR CHILD INFLUENCERS

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INTRODUCTION

2020's highest-earning YouTuber was ten-year-old Ryan Kaji, a social media influencer whose work yielded nearly \$30 million over the

course of the year.<sup>1</sup> Ryan's YouTube channel, Ryan's World, is updated daily with new videos,<sup>2</sup> the topics of which include everything from science experiments to Ryan's private life.<sup>3</sup> Ryan's work has generated over \$200 million in retail sales, an Amazon Prime television show, a line of toys, and even a Macy's Thanksgiving Day Parade float.<sup>4</sup>

Because of his age, Kaji is not guaranteed to receive income generated from his work and has no guarantee of retaining personal privacy as an adult. Laws protecting child entertainers do not apply to children who work as social media influencers.<sup>5</sup> As such, every cent of Ryan's earnings legally belongs to his parents, who are free to do what they please with Ryan's income.

This is the harsh reality for every child influencer in the United States. An influencer is a celebrity spokesperson who generates interest in an experience or product by posting about it on social media sites such as YouTube, TikTok, and Instagram. Influencers make money by monetizing the traffic their media receives, which is measured by the number of followers, clicks, likes, or some other metric, depending on which social media platform they use.<sup>6</sup> Child influencers, also known as "kidfluencers," are not afforded the same workplace protections as other children working in the entertainment industry despite working under similar conditions, generating income, and experiencing a significant amount of intrusion into their personal lives due to the invasive nature of their work.<sup>7</sup>

Paul Petersen, a former child star and the founder of A Minor Consideration, a support and advocacy group for former child performers,

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1. Madeline Berg, *How Nine-Year-Old Ryan Kaji, YouTube's \$30 Million Man, Just Keeps Getting Richer*, FORBES (Dec. 18, 2020, 6:30 AM), <https://www.forbes.com/sites/maddieberg/2020/12/18/how-nine-year-old-ryan-kaji-youtubes-30-million-man-just-keeps-getting-richer/?sh=35b5832f6c16> [<https://perma.cc/FDW5-MWSD>].
  2. Ryan's World, YOUTUBE, [https://www.youtube.com/channel/UChGJGhZ9SOOHvBB0Y4DOO\\_w](https://www.youtube.com/channel/UChGJGhZ9SOOHvBB0Y4DOO_w) [<https://perma.cc/FDW5-MWSD>] (last visited Aug. 29, 2022).
  3. Berg, *supra* note 1.
  4. *Id.*
  5. Julia Carrie Wong, *'It's Not Play if You're Making Money': How Instagram and YouTube Disrupted Child Labor Laws*, THE GUARDIAN (Apr. 24, 2019, 1:00AM), <https://www.theguardian.com/media/2019/apr/24/its-not-play-if-youre-making-money-how-instagram-and-youtube-disrupted-child-labor-laws> [<https://perma.cc/DG2G-5HLD>].
  6. *See id.*; Allie Volpe, *How Parents of Child Influencers Package Their Kids' Lives for Instagram*, THE ATLANTIC (Feb. 28, 2019), <https://www.theatlantic.com/family/archive/2019/02/inside-lives-child-instagram-influencers/583675> [<https://perma.cc/24PX-RRHE>].
  7. Wong, *supra* note 5.

argues that California's Coogan Law,<sup>8</sup> which protects the income and rights of child entertainers within the state, should protect all kidfluencers who use California-headquartered social media platforms.<sup>9</sup> Because every top-ten social media platform is headquartered in California,<sup>10</sup> California's Coogan Law should be (1) updated to protect kidfluencers who use these platforms and (2) expanded to include specific provisions for kidfluencers that address the problems they face within their field. More specifically, the Coogan Law should be updated using France's recently passed kidfluencer protection law<sup>11</sup> as a framework for the updates. The French kidfluencer law includes a right to be forgotten—the ability to remove one's images from the internet upon command—and specific provisions that protect kidfluencers.<sup>12</sup> The right to be forgotten is important for all child entertainers, but is particularly important for kidfluencers, who may wish to remove certain aspects of their childhood from the public eye. Under the Coogan Law update, advertising companies and kidfluencers' parents would be legally responsible for failing to set aside a portion of kidfluencers' incomes. This would ensure that kidfluencers' incomes receive the protection that other child entertainers' incomes receive.

This Note is divided into several parts. Part I covers the history of child entertainer protection. Part II briefly addresses and describes the right to be forgotten. Part III covers the rise of kidfluencing worldwide. Part IV examines why protection for kidfluencers is needed. Part V explores what kind of protection is needed versus what kind of protection is not needed, and Part VI explores potential objections to the Coogan Law updates.

## I. HISTORY OF CHILD ENTERTAINER PROTECTION

In order to understand why the Coogan Law kidfluencer updates are necessary, one must first understand the complex history behind the Coogan Law and child labor regulation in the United States, which is complicated by shifting employment practices, changing societal

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8. CAL. FAM. CODE §§ 6750–53 (Deering 2021).

9. See FAM. § 6752; Wong, *supra* note 5.

10. Shelley Walsh, *The Top 10 Social Media Sites and Platforms 2022*, SEARCH ENGINE J. (May 30, 2022), <https://www.searchenginejournal.com/social-media/biggest-social-media-sites/#close> [https://perma.cc/CQZ8-RF5B].

11. Loi 2020-1266 du 19 octobre 2020 visant à encadrer l'exploitation commerciale de l'image d'enfants de moins de seize ans sur les plateformes en ligne [Law 2020-1266 of October 19, 2020 Aimed at Regulating the Commercial Exploitation of the Image of Children Under the Age of Sixteen on Online Platforms], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 20, 2020, p. 7.

12. See *id.* art. 5–6.

norms, and the risks and benefits of employing children. New technology in the workplace and the relatively safe nature of modern work have made employment easier and less hazardous for children. However, the modernization of some equipment has made the workplace much more dangerous, especially for children.<sup>13</sup>

This Part is divided into two subparts. The first explores the early history of protecting child laborers. The second explores protections for child entertainers.

#### *A. Child Labor Generally*

Regulation directed specifically at child labor did not begin gaining traction as a contested topic in the United States until the early 1900s. Despite the detrimental effects work can have on a child's wellbeing, the 1900 census revealed that there were approximately two million working children in the United States.<sup>14</sup> This revelation sparked a national movement to regulate child labor throughout the country.<sup>15</sup>

The federal government first attempted to regulate child labor in 1916 when Congress passed the Keating-Owen Act,<sup>16</sup> which prohibited the interstate sale of goods manufactured by children, indirectly regulating child labor via the federal government's power to regulate interstate commerce. Opponents contested the measure, arguing it was an inappropriate use of the federal government's Commerce Clause power. The Supreme Court accepted this argument in *Hammer v. Dagenhart*.<sup>17</sup> The Court held that Congress used its power to regulate interstate commerce as a proxy for regulating child labor, which was a power reserved for the states.<sup>18</sup>

*Hammer v. Dagenhart* was intensely controversial, in part because it was a 5–4 ruling with a powerful dissent by Justice Holmes.<sup>19</sup> Even though the Keating-Owen Act regulated goods that crossed state lines, the majority reasoned that Congress did not have the power to prohibit the manufacture of goods *that children produced* because the Constitution does not explicitly give Congress the power to regulate child labor.

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13. See CONG. RSCH. SERV., RL31501, CHILD LABOR IN AMERICA: HISTORY, POLICY, AND LEGISLATIVE ISSUES 8–10, 17 (2013) [hereinafter HISTORY].
  14. JOHN A. FLITER, CHILD LABOR IN AMERICA: THE EPIC LEGAL STRUGGLE TO PROTECT CHILDREN 74 (2018).
  15. *Id.* at 73–75.
  16. An Act to Prevent Interstate Commerce in the Products of Child Labor, and for Other Purposes. Ch. 432, 39 Stat. 675 (1916), *invalidated by* *Hammer v. Dagenhart*, 247 U.S. 251 (1918).
  17. 247 U.S. 251, 276 (1918).
  18. *Id.*
  19. *Id.* at 277–81 (Holmes, J., dissenting).

As such, the Court determined that the regulation of child labor is a power reserved to the states.<sup>20</sup>

The dissenting Justices believed that the Commerce Clause did in fact permit Congress to regulate all interstate commerce, regardless of the intent behind the regulation.<sup>21</sup> Justice Holmes also argued that Congress's power to regulate commerce and other constitutional powers "could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any State,"<sup>22</sup> essentially arguing that any state's child labor policy could not override Congress's ability to regulate interstate commerce.

Congress once again attempted to regulate child labor in 1919 when it passed the Revenue Act of 1919 (also known as the Child Labor Tax Law),<sup>23</sup> which used the government's taxing and spending power to regulate child labor rather than its ability to regulate interstate commerce.<sup>24</sup> In *Bailey v. Drexel Furniture Co.*,<sup>25</sup> the Supreme Court held that Congress's use of its taxing and spending power to regulate child labor was unconstitutional because Congress attempted to use its taxing power to regulate child labor, a right reserved to the states.<sup>26</sup> An 8–1 ruling in which the dissenter did not write separately,<sup>27</sup> *Bailey* was much less contentious than *Dagenhart*. The Court reasoned that even though Congress's power to tax and spend is broad, the Child Labor Tax Law was an improper use of its taxing and spending power because the law went beyond the limits set by the Constitution. The Court further held that the Child Labor Tax Law violated the Tenth Amendment because it limited states' ability to regulate the behavior of their citizens.<sup>28</sup>

The rulings in *Dagenhart* and *Bailey* made it virtually impossible for Congress to pass legislation regulating child labor. Congresspeople who supported regulation of child labor vied to pass a constitutional amendment that would have granted Congress the ability to regulate child labor, the Child Labor Amendment. Despite its significant support, the movement stalled in the 1920s.<sup>29</sup>

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20. *Id.* at 276.

21. *Id.* at 277–78.

22. *Id.* at 278.

23. Tax on Employment of Child Labor, Ch. 18, 40 Stat. 1057, 1138–40 (1919), *invalidated by* *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

24. FLITER, *supra* note 14, at 106.

25. 259 U.S. 20 (1922).

26. *Id.* at 39.

27. *Id.* at 44.

28. *Id.* at 37–38.

29. HISTORY, *supra* note 13, at 4–5.

Congress did not manage to pass lasting federal legislation that protected child laborers until 1938, when it passed the Fair Labor Standards Act.<sup>30</sup> The Fair Labor Standards Act also set minimum wage and maximum hour rules that applied very broadly throughout the nation's industries.<sup>31</sup>

The Supreme Court upheld the Fair Labor Standards Act in *United States v. Darby*.<sup>32</sup> Writing for a unanimous Court, Justice Stone affirmed Congress's power to regulate all interstate commerce. The Court held that the purpose of the Fair Labor Standards Act was to prevent a race to the bottom in which a state could use labor practices to attract businesses to the state's economic advantage. The Court determined that Congress acted within its power when it prohibited substandard labor conditions because those conditions had a substantial effect on interstate commerce.<sup>33</sup> It followed from *Darby* that the federal government *does* have the power to regulate child labor. As such, *Darby* explicitly overruled *Dagenhart*.<sup>34</sup>

Under the Fair Labor Standards Act, employers may not use "oppressive child labor in commerce or in the production of goods for commerce."<sup>35</sup> The Fair Labor Standards Act excludes both child entertainers and children employed by their parents,<sup>36</sup> both of which are categories that kidfluencers fall under. The parental employment exception, in practice, applies only to children *exclusively* employed by their parents, not to children jointly employed by their parents and an outside employer.<sup>37</sup> The Secretary of Labor determines what constitutes "oppressive child labor."<sup>38</sup>

#### *B. Specific Protection for Child Entertainers*

When drafting the Fair Labor Standards Act, Congress inserted an exception for child entertainers, ensuring that they were not afforded the same protection as other child workers.<sup>39</sup> The exception, known as

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30. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (current version at 29 U.S.C. §§ 206–207 (2018)).

31. 29 U.S.C. §§ 206–207.

32. 312 U.S. 100, 125 (1941).

33. *Id.* at 108–11, 115, 126.

34. *Id.* at 115–17.

35. 29 U.S.C. § 212(c).

36. *Id.* §§ 213(c)(3), 203(l)(1); *see also* 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, 57 (2010).

37. 29 C.F.R. § 570.126 (2020).

38. 29 U.S.C. § 203(l).

39. *Id.* § 213(c).

the Shirley Temple Act, states, “The provisions . . . of this title relating to child labor shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.”<sup>40</sup> When drafting this exception, Congress recognized that very few child entertainers were actually employees, and those who were employees provided the United States with “pleasant and wholesome entertainment.”<sup>41</sup>

Under the Shirley Temple Act, exempted child entertainers are still subject to wage and hour restrictions set by federal law.<sup>42</sup> However, children employed exclusively by their parents are not subject to wage and hour restrictions set by federal law. As such, if children are employed by both their parents and another individual, wage and hour restrictions apply.<sup>43</sup>

Laws protecting child entertainers are rooted in state law and vary wildly from state to state.<sup>44</sup> Only two-thirds of states regulate child entertainment, and only half require child entertainers to obtain work permits.<sup>45</sup>

In 1939, the California legislature passed the California Child Actor’s Bill, more commonly known as the Coogan Law, to protect the income of child entertainers.<sup>46</sup> The Coogan Law was named in honor of child actor Jackie Coogan, who began his career as a silent star alongside Charlie Chaplin. Coogan’s parents had spent the majority of the millions of dollars he earned throughout his childhood by the time Coogan reached adulthood.<sup>47</sup> The Coogan Law provides that for a contract pursuant to which a minor is employed or agrees to render artistic or creative services, the minor’s employer must set aside “15 percent of the minor’s gross earnings pursuant to the contract . . . in trust, in an account or other savings plan, and preserved for the benefit of the minor.”<sup>48</sup> At least one of the minor’s parents or legal guardians must “be appointed as trustee of the funds,” unless the court determines

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40. *Id.*

41. 82 CONG. REC. 1770, 1780 (1938) (statement of Rep. Kramer).

42. 29 C.F.R. § 570.103(c) (2020).

43. *Id.* § 570.126.

44. *Child Entertainment Laws as of January 1, 2022*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/whd/state/child-labor/entertainment> [<https://perma.cc/DV92-DKNE>] (Jan. 1, 2022).

45. California has “extensive requirements” for child entertainers’ employment in comparison to other states, including work permits, documentation regarding schooling, work hour limits, and income protection. *See id.*

46. CAL. FAM. CODE §§ 6750–53 (Deering 2021); *see also* Ana Saragoza, Comment, *The Kids Are Alright? The Need for Kidfluencer Protections*, 28 AM. U. J. GENDER SOC. POL’Y & L. 575, 579 (2020).

47. Saragoza, *supra* note 46.

48. FAM. § 6752(b)(1).



“that appointment of a different individual, individuals, entity, or entities . . . is required in the best interest of the minor.”<sup>49</sup> Furthermore, within seven business days after execution of the contract, the trustee must establish a trust account, “known as a Coogan Trust Account . . . at a bank, savings and loan institution, credit union, brokerage firm, or company registered under the Investment Company Act of 1940, that is located in the State of California.”<sup>50</sup> This does not apply to services as an extra, background performer, or in other similar positions.<sup>51</sup> These provisions of the Coogan Law are overseen by the Actors’ Fund of America.<sup>52</sup>

Some flaws in the original statute resulted in additional abuse of child actors’ finances,<sup>53</sup> resulting in several amendments. It was not until the 1999 overhaul that California legislators took the step of stating in law that child performers own all of their earnings, not just the 15 percent set aside in Coogan accounts.<sup>54</sup> Parents can use the remaining 85 percent to care for the child, whether that involves purchasing a house, covering their expenses, or even paying themselves a salary to manage the child’s career, but the money is the child’s property.

## II. THE RIGHT TO BE FORGOTTEN

The “right to be forgotten”—an individual’s ability to have personal information removed from the internet or a specific website—is a necessary right for kidfluencers. There are significant risks associated with the loss of privacy that come with the nature of kidfluencing, which are discussed extensively in Part IV of this Note. Kidfluencers may seek to mitigate these risks as they age or attempt to remove them entirely. Kidfluencers cannot fully mitigate these risks unless they possess the right to be forgotten. To understand why this right is necessary, one must first understand the right to be forgotten in a European context, which provides insight into French kidfluencers’ right to be forgotten. This is discussed in Subsection A. One must also understand the right to be forgotten in an American context, as this

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49. *Id.* § 6752(b)(2).

50. *Id.* § 6753(a). The Investment Company Act of 1940 regulates the organization of investment companies and the activities they engage in and sets standards for the investment company industry. It is enforced and regulated by the Securities and Exchange Commission. 15 U.S.C. §§ 80a-10, -12 (2018).

51. FAM. §§ 6750(a), 6752(b)(1).

52. *Id.* § 6752(b)(9).

53. Saragoza, *supra* note 46, at 580.

54. S.B. 1162, 1999 Leg. § 771(b) (Cal. 1999) (enacted).

provides insight into how it may be implemented in California. This is discussed in Subsection B.

*A. The Right to Be Forgotten in Europe*

The right to be forgotten first captured widespread attention in 2014 when the European Court of Justice ruled against Google in a privacy case. In *Google Spain SL v. Agencia Española de Protección de Datos*,<sup>55</sup> an individual brought suit after Google refused to remove a link that featured information about his forced property sale listings and his failure to pay taxes.<sup>56</sup> Because the man was not a public figure, and because the information was no longer relevant to the public, the European Court of Justice found that Google must remove the information from its search results per the individual's request, establishing the right to be forgotten in the European Union.<sup>57</sup>

The European Union codified the right to be forgotten in the 2018 General Data Protection Regulation (GDPR).<sup>58</sup> The GDPR applies to all entities that store, collect, or process the personal data of residents or citizens of the European Union.<sup>59</sup> The GDPR defines personal data as "any information relating to an identified or identifiable natural person,"<sup>60</sup> and an identifiable person as "one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person."<sup>61</sup> Companies that do not comply with the GDPR can be fined up to 4 percent of their annual gross revenue or €20 million.<sup>62</sup>

*B. The Right to Be Forgotten in America*

The United States does not currently have a law or regulation that allows one to remove their personal information from search results or

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55. Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, ECLI:EU:C:2014:317 (May 13, 2014).

56. *Id.* ¶¶ 14–16.

57. *Id.* ¶ 94.

58. EU Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. 2016 (L 119) 1.

59. *Id.* art. 2(3).

60. *Id.* art. 4(1).

61. *Id.*

62. *Id.* art. 83(6).

online databases.<sup>63</sup> Though some states have considered laws that would grant their citizens the right to be forgotten, none have adopted provisions as expansive as the GDPR.<sup>64</sup>

Even though U.S. citizens do not currently have the right to be forgotten, the vast majority of Americans favor adopting the right. Seventy-four percent of American adults would prefer “keep[ing] things about themselves from being searchable online,” with only 23 percent saying it is more important to have the ability to “discover potentially useful information about others.”<sup>65</sup> Eighty-seven percent of Americans specifically agree with this idea in the context of embarrassing photos and videos. Seventy-nine percent believe that Americans should have the right to have personal data collected by a tax preparer deleted by the organization or person that holds the information, while 69 percent believe Americans should have the right to have personal data collected by a health care provider deleted by the organization or person that holds the information.<sup>66</sup> This demonstrates that there are more Americans who believe that one’s online footprint should be deleted at will than Americans who believe that tax and medical information should be deleted at will.

In 2015, California adopted a quasi right to be forgotten for minors.<sup>67</sup> Under this law, websites are required to provide minors with a mechanism for deleting content they posted before it is transmitted to a third party.<sup>68</sup> Websites must clearly articulate this right.<sup>69</sup> Though helpful for minors running their own accounts, this law is insufficient to protect kidfluencers due to the extreme amount of control parents exert over kidfluencers’ accounts,<sup>70</sup> which is described in Part III(B) of this Note.

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63. Brooke Auxier, *Most Americans Support Right to Have Some Personal Info Removed from Online Searches*, PEW RSCH. CTR. (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/> [https://perma.cc/5UXP-6MDV].

64. *Id.*

65. *Id.*

66. *Id.*

67. Privacy Rights for California Minors in the Digital World, 2013 Cal. Stat. 91 (codified at CAL. BUS. & PROF. CODE §§ 22581–22582 (Deering Supp. 2022)).

68. CAL. BUS. & PROF. CODE § 22581 (Deering Supp. 2022).

69. *Id.*

70. Wong, *supra* note 5; Sapna Maheshwari, *Online and Making Thousands, at Age 4: Meet the Kidfluencers*, N.Y. TIMES (Mar. 1, 2019), <https://www.nytimes.com/2019/03/01/business/media/social-media-influencers-kids.html> [https://perma.cc/N74Q-E7H5].

In 2018, California also passed the California Consumer Privacy Act (CCPA),<sup>71</sup> which grants California residents a right to be forgotten that is limited to companies that do business in California and buy, share, or sell the personal data of at least 50,000 California residents; earn at least 50 percent of their revenue from the sale of personal data; or have an annual revenue greater than \$25 million.<sup>72</sup> The CCPA has a relatively broad definition of personal information that includes items such as postal addresses, passport numbers, blood types, and IP addresses.<sup>73</sup> A company's violation of the CCPA creates a private right of action that can result in penalties of up to \$7,500 for each violation.<sup>74</sup>

### III. THE RISE OF KIDFLUENCING

Since the early days of digital content creation, parents have catalogued the daily lives of their children online and have experienced the lucrative lifestyle associated with influencing. As blogging became less popular as a result of the rise of visual social media sites, parents have an easy way to make money—posting a picture of a child enjoying a product, rather than writing an entire narrative surrounding the product. As such, the rise of kidfluencing as we know it today is sharply tied to the history of social media.<sup>75</sup>

#### *A. The History of Influencing and Social Media*

Since the 1760s, businesses have used customers' social influence to expand their brands and advertise their products. The first influencer was potter Josiah Westwood, the "father of modern marketing," who created a tea set for Queen Charlotte and publicized himself as the "Potter of her Majesty."<sup>76</sup> Influencing expanded in the 1980s when Michael Jordan and Nike created custom-designed Air Jordan sneakers. This event marked the first celebrity endorsement deal.<sup>77</sup>

"Kidfluencing" has had a significant presence on the internet since the earliest days of online influencing. "Mommy bloggers" first emerged in the early 2000s, sharing tips, tricks, and products that they believed helped them parent their children. These mommy bloggers influenced the way other parents raised their own children, resulting in

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71. California Consumer Privacy Act, 2018 Cal. Stat. 91 (codified at CAL. CIV. CODE §§ 1798.100–1798.199.100 (Deering Supp. 2022)).

72. Civ. § 1798.140(d).

73. *Id.* § 1798.140(o).

74. *See id.* § 1798.155(b).

75. Volpe, *supra* note 6.

76. Gemma Weinstein, *A History of Social Media Influencers*, FIND YOUR INFLUENCE (July 26, 2021), <https://findyourinfluence.com/a-history-of-social-media-influencers/> [https://perma.cc/J8D7-MJ3S].

77. *Id.*

several brands taking notice of the potential influencers possessed, discovering a new way to market the goods and services they offered.<sup>78</sup>

In 2010, the social media app Instagram launched.<sup>79</sup> The picture-based app became the first social media site to introduce paid advertisements on specific user posts. This made it much easier for influencers and the brands they sponsored to connect with fans across the platform.<sup>80</sup> TikTok was founded in 2016 and introduced the concept of a “For You” page, which tailors content toward specific users and more often than not features videos from users they do not follow.<sup>81</sup> This has greatly aided influencers, who are able to ensure their content appears on others’ For You pages by following trends within the app. This allows them to boost their personal following both on TikTok and other apps and put their sponsored content front-and-center on the platform.<sup>82</sup>

All major social media sites are domiciled in California. This includes the popular influencing apps YouTube, TikTok, Instagram, Snapchat, and Twitter.<sup>83</sup> Nearly 70 percent of American adults use these social media sites—up from 5 percent when Facebook first launched in 2004.<sup>84</sup> Influencer marketing is a \$13.8 billion industry as of 2021. Nearly 60 percent of brands have a budget for social media content marketing, and 75 percent of them have a specific budget reserved for influencer marketing.<sup>85</sup> Today, advertisers recognize that leveraging existing audiences is one of the most efficient ways to take advantage of social media’s popularity. This manner of advertisement is slowly replacing other forms of advertisement, such as television and radio advertisements.<sup>86</sup>

*B. Differences Between Kidfluencing and Traditional  
Child Entertainment*

Unlike traditional child entertainment, kidfluencing is largely an at-home endeavor involving the parent and the child as the exclusive

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78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. Walsh, *supra* note 10.

84. *The Evolution of Social Media: How Did It Begin, and Where Could It Go Next?*, MARYVILLE UNIV., <https://online.maryville.edu/blog/evolution-social-media/> [<https://perma.cc/Y4PG-FRC2>] (last visited Sept. 26, 2022); *Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media/> [<https://perma.cc/247C-E9JR>].

85. Weinstein, *supra* note 76.

86. MARYVILLE UNIV., *supra* note 84.

content makers.<sup>87</sup> Children are sometimes completely unaware of their online presence, as parents inform them that they are “playing” when in actuality they are creating an advertisement.<sup>88</sup> The actual nature of the work can shift depending on the product the child is advertising. Parents of kidfluencers typically have more control over their children than parents of child entertainers have over their children. Parents of kidfluencers have total control over their child’s work schedule and the nature of their work, often working as director, producer, writer, and manager for their children.<sup>89</sup>

When using kidfluencers to advertise their products, brands, or an experience, companies often make money from videos that feature children “playing” or engaging in work they interpret as play.<sup>90</sup> This differs from traditional child entertainers, whose work was nearly indistinguishable from their adult counterparts. When parents earn money by posting images of their children, it can be hard to draw a line between what is work and what is play.<sup>91</sup> The responsibility of determining the difference lies with the parents who manage the children’s accounts.<sup>92</sup>

Kidfluencers also make their money based on the social media traffic their accounts receive rather than receiving direct compensation for acting or performing like traditional child actors.<sup>93</sup> Some brands are willing to pay \$10,000 to \$15,000 for promotional Instagram posts, \$45,000 for promotional YouTube videos, and \$15,000 to \$25,000 for “[a] 30 to 90 second shout-out in a longer video.”<sup>94</sup> Children can also be paid directly in goods and services rather than in a monetary fashion. For example, in 2019, the toy company Melissa & Doug offered free toys and monetary compensation if parents posted pictures of their children “having fun with the toys!” over a six-week period. The company offered to pay “\$10 per 1,000 followers for individual Instagram posts and \$5 per 1,000 followers for Instagram Story posts.”<sup>95</sup>

The medium of delivery also differs as anything delivered by the internet falls distinctly under interstate commerce. However, states have authority to adopt regulations that might affect interstate commerce as long as those regulations neither discriminate against interstate commerce nor impose an undue burden on interstate

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87. Volpe, *supra* note 6.

88. Wong, *supra* note 5.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. Maheshwari, *supra* note 70.

94. *Id.*

95. *Id.*

commerce.<sup>96</sup> Additionally, states *do* have the power to regulate child labor, so the Coogan Law could apply to kidfluencers who use California-based platforms.

*C. History of Kidfluencer-Specific Regulation*

Social media platforms typically attempt to prevent minors from running their own accounts, though this has minimal levels of success as they only require individuals signing up to attest they are above a certain age, with no way of confirming the age of the individual.<sup>97</sup> A considerable number of kidfluencer accounts make it clear in their descriptions that the accounts are run by the parents, not the children featured on the account, though this once again cannot be easily confirmed by the social media platform in the case of older children.<sup>98</sup>

France recently passed a law protecting kidfluencers that aims to provide a legal framework to regulate the activities of kidfluencers on YouTube, TikTok, Instagram, and other online platforms.<sup>99</sup> Under French labor law, children less than sixteen years of age are generally not permitted to work.<sup>100</sup> But the French Labor Code contains a carveout for children employed as entertainers such as child actors or models,<sup>101</sup> similar to the Shirley Temple Act carveout in the Fair Labor Standards Act.<sup>102</sup>

Under the new law, kidfluencers in France will receive legal protection similar to the protection other French child entertainers

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96. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090–95 (2018) (holding that state regulations impacting interstate commerce that effectuate a legitimate local public interest will be upheld unless the burden imposed on commerce outweighs the local benefits).
97. Mary Madden, Amanda Lenhart, Sandra Cortesi, Urs Gasser, Maeve Duggan, Aaron Smith & Meredith Beaton, *Teens, Social Media, and Privacy*, PEW RSCH. CTR. (May 21, 2013), <https://www.pewresearch.org/internet/2013/05/21/teens-social-media-and-privacy> [https://perma.cc/YX3Z-FE9W].
98. Maheshwari, *supra* note 70.
99. Marie-Andrée Weiss, *Pour les Enfants : A New French Law Regulates Influencers Who Are Under the Age of 16*, L. OFF. OF MARIE-ANDRÉE WEISS (Feb. 1, 2021), <https://www.maw-law.com/uncategorized/pour-les-enfants-a-new-french-law-regulates-influencers-who-are-under-the-age-of-16> [https://perma.cc/NWG3-EPM5] (law enacted on Oct. 19, 2020).
100. *Id.*
101. Loi 2020-1266 du 19 octobre 2020 visant à encadrer l'exploitation commerciale de l'image d'enfants de moins de seize ans sur les plateformes en ligne [Law 2020-1266 of October 19, 2020 Aimed at Regulating the Commercial Exploitation of the Image of Children Under the Age of Sixteen on Online Platforms], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 20, 2020, p. 7; *see also* Weiss, *supra* note 99.
102. 29 U.S.C. § 213(c)(3) (2018).

receive.<sup>103</sup> French lawmakers extended the scope of article L7124-1. The expansion includes article L7124-1 5°, which broadens the definition of child entertainers to include children who “work for an employer who makes audiovisual recordings of minors under the age of sixteen with intent to distribute the recordings on social media sites,”<sup>104</sup> expanding the definition of child entertainers to include kidfluencers. This ensures that kidfluencers are afforded the protection afforded to their more traditional cohorts by article L7124-1. This law protects all child entertainers, even those who do not work under a contract, which is most often the case for kidfluencers as they usually work for their parents.<sup>105</sup>

The law also requires that parents of kidfluencers obtain government authorization before the child engages in influencing work that amounts to a labor relation. French law weighs three factors when determining whether work is a labor relation: work performance, remuneration, and relationship of subordination. Some kidfluencing activities, such as a child being recorded in daily life, a child being recorded for a non-monetized video, and a child being in a video in which the child does not receive instructions on how to behave in front of a camera, do not meet these conditions. However, a child receiving or following instructions in order to create online content for an influencer platform would count as a labor relation.<sup>106</sup>

As part of the authorization process under the French law, the child’s parents receive information on the rights of their child and on the potential consequences of the release of images of their child on the internet. The law also applies to a grey zone in which the kidfluencer is not involved in a labor relation but does spend a significant amount of time generating content or receives a significant amount of income as a result of the content the child produces.<sup>107</sup>

The new law states that if both the direct *and* indirect income derived from the distribution of the videos exceed a threshold set by decree in the Council of State over a given period of time, the income received from the date on which this threshold is exceeded must be paid without delay by the marketing company to the Caisse des Dépôts et Consignations, a French financial institution under control of the

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103. Law 2020-1266 of October 19, 2020, art. 2 (Fr.); *see also* Weiss, *supra* note 99.

104. Law 2020-1266 of October 19, 2020, art. 1 (Fr.).

105. Weiss, *supra* note 99.

106. Weiss, *supra* note 99; *see also* Bruno Studer & Gilles Le Gendre, *visant à encadrer l’exploitation commerciale de l’image d’enfants de moins de seize ans sur les plateformes en ligne*, COMMISSION DES AFFAIRES CULTURELLES ET DE L’ÉDUCATION SUR LA PROPOSITION DE LOI, (Dec. 17, 2019), [https://www.assemblee-nationale.fr/dyn/15/textes/l15b2519\\_proposition-loi](https://www.assemblee-nationale.fr/dyn/15/textes/l15b2519_proposition-loi) [<https://perma.cc/T2BG-UZAV>].

107. Law 2020-1266 of October 19, 2020, art. 1, 3 (Fr.).



French Parliament, which will then manage the income until the child reaches the age of majority or becomes otherwise emancipated. A portion of the income, determined by the competent authority, can be left at the disposal of the child's legal representatives.<sup>108</sup> This is similar to the Coogan Law's requirement that 15 percent of the minor's income be placed in a trust for the child when they reach the age of eighteen or are otherwise emancipated.<sup>109</sup>

The law also provides kidfluencers with the right to be forgotten, which is provided to them under a French data privacy law,<sup>110</sup> and is not covered under the Coogan Law.<sup>111</sup> Under this article, social media sites must adopt charters that facilitate minors' right to be forgotten using clear, precise, and understandable terms so that the child may exercise this right. Kidfluencers do not need their parents' permission to exercise this right.<sup>112</sup>

The updated law requires advertisers who employ kidfluencers to verify whether the child's income must be paid to the Caisse des Dépôts et Consignations with the person responsible for creating the post featuring the advertisement. In these situations, the marketing company pays a portion of the kidfluencer's salary to the Caisse des Dépôts et Consignations, while another portion goes to the child's legal representatives (usually their parents). Failure to comply results in a fine.<sup>113</sup> These provisions are similar to the payment provisions already set forth in the Coogan Law,<sup>114</sup> with additional requirements for the advertising companies that employ kidfluencers.<sup>115</sup>

#### IV. WHY KIDFLUENCERS NEED PROTECTION

##### *A. Financial Exploitation*

Kidfluencers, much like traditional child entertainers, can easily fall victim to financial exploitation by their parents and the companies that sponsor their accounts. Companies compensate families based on following, offering free toys in exchange for posts and offering payments

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108. *Id.*; see also Weiss, *supra* note 99.

109. CAL. FAM. CODE § 6752 (Deering 2021).

110. Law 2020-1266 of October 19, 2020, art. 6 (Fr.); see also Weiss, *supra* note 99.

111. See FAM. §§ 6750–6753.

112. Law 2020-1266 of October 19, 2020, art. 5, 6 (Fr.); see also Weiss, *supra* note 99.

113. Law 2020-1266 of October 19, 2020, art. 3 (Fr.); see also Weiss, *supra* note 99.

114. FAM. § 6753.

115. Law 2020-1266 of October 19, 2020, art. 3, 4 (Fr.); see also Weiss, *supra* note 99.

for likes.<sup>116</sup> Social media influence promises parents fame and fortune.<sup>117</sup> Unless parents decide to set aside the money their children earn from kidfluencing, there is no guarantee that the kidfluencers will see the money. Additionally, kidfluencers are not currently considered “employees” of the companies that sponsor them because the companies do not have significant control over the children’s work. As a result, kidfluencers do not have protections like “wage standards, workers compensation, and the right to unionize under the National Labor Relations Act.”<sup>118</sup> As such, kidfluencers, despite completing significant amounts of work, are not afforded the same protections as other employees.

*B. Risks Associated with Loss of Privacy*

The lack of privacy associated with kidfluencing poses significant risks to kidfluencers. Social media use is closely linked with “poor body image, negative self-concept, and depression among young people.”<sup>119</sup> Kidfluencers are at a particular disadvantage compared to other child entertainers. Kidfluencers use their real names, take photos and videos in their own homes, and have their lives intertwined with social media and displayed for a large audience—encouraging commentary from and interaction with unknown followers.<sup>120</sup> In order to maintain a following and brand, the posts and interaction must be constant, ensuring that these children are constantly in front of a camera and working to gain attention online.<sup>121</sup> Additionally, kidfluencers are at a heightened risk for online harassment and stalking because of the relative ease with which one can message individuals with public online profiles. Furthermore, geotagging and other location-related practices allow followers to track the location of influencers, substantially increasing danger and decreasing privacy for these children. Some kidfluencers have received threats to the point that their parents felt the need to remove followers’ ability to comment on their videos.<sup>122</sup> Clearly, having a substantial online presence poses significant health and safety risks for kidfluencers.

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116. Marina Masterson, Comment, *When Play Becomes Work: Child Labor Laws in the Era of ‘Kidfluencers’*, 169 U. PA. L. REV. 577, 593 (2021).

117. *Id.*

118. *Id.* at 594.

119. *Id.* at 595.

120. *Id.*

121. *Id.* at 595–96.

122. *Id.* at 596.

## V. WHAT KIND OF PROTECTION?

In order to ensure that kidfluencers receive protection similar to the protection other child entertainers receive, the Coogan Law must be updated. The definition of “child entertainer” must be expanded to include kidfluencers. Then, the Coogan Law must be further updated to apply to kidfluencers, specifically including a right to be forgotten without parental permission. France’s recently updated kidfluencer law provides a helpful framework that California lawmakers can use to update the Coogan Law.

### *A. Including Kidfluencers Under the Definition of Child Entertainers*

The Coogan Law must be updated to include most major provisions of the recently passed French kidfluencer law. The first aspect of the French update that should be included within the updated Coogan Law is article L7124-1 5°, which broadened the definition of child entertainers within the French Labor Code to include children who work for individuals who make videos of minors and intend to distribute those videos on social media sites for profit, and therefore included kidfluencers under the umbrella of “child entertainers,” giving them the same level of protection as their peers who work in similar fields. Additionally, the updated law should include the French provision that protects child entertainers who do not work under a contract.<sup>123</sup> This provision is absolutely necessary in order to protect American kidfluencers, as a considerable portion of them work exclusively for their parents and not under a contract.

### *B. Further Updating the Coogan Law with Provisions that Specifically Protect Kidfluencers*

France’s influencer law provides a framework under which California lawmakers can update the Coogan Law to afford kidfluencers necessary protections beyond simply including kidfluencers under the definition of child entertainers. The Coogan Law should also be updated with the French provision that states that kidfluencers’ parents must receive information on the rights of their child and on the potential consequences of the release of images of their child on the internet.<sup>124</sup> It should be included in social media platforms’ terms of service, rather

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123. Loi 2020-1266 du 19 octobre 2020 visant à encadrer l’exploitation commerciale de l’image d’enfants de moins de seize ans sur les plateformes en ligne [Law 2020-1266 of October 19, 2020 Aimed at Regulating the Commercial Exploitation of the Image of Children Under the Age of Sixteen on Online Platforms], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 20, 2020, p. 7; *see also* Weiss, *supra* note 99.

124. Law 2020-1266 of October 19, 2020, art. 1–3 (Fr.); *see also* Weiss, *supra* note 99.

than as part of a formal governmental authorization process, as is the case in France.

Income protections found in the French law are very similar to the Coogan Law. Both set aside a given amount of a child entertainer's income in a reputable bank for them to later access as adults. The updated Coogan Law should include the added provisions within the French law that provide that the company using the kidfluencers' services is responsible for paying 15 percent of the kidfluencers' income to a reputable institution.<sup>125</sup> Advertisers would be responsible for making sure that 15 percent of a kidfluencer's income is placed in a reputable institution with the individual responsible for running the kidfluencer's account or platform. In the case of the Coogan Law, this will be to a "bank, savings and loan institution, credit union, brokerage firm, or company registered under the Investment Company Act of 1940, that is located in the State of California."<sup>126</sup> These provisions of the Coogan Law are overseen by the Actors' Fund of America.<sup>127</sup> This will ensure that 15 percent of kidfluencers' incomes are placed in trusts for them until they reach the age of eighteen or are otherwise emancipated.<sup>128</sup>

It is also important that kidfluencers, and other child entertainers, are provided with the right to be forgotten.<sup>129</sup> The right to be forgotten is not covered by the Coogan Law.<sup>130</sup> The French kidfluencer law allows kidfluencers to remove their images from their platforms at any time, with or without their parents' consent.<sup>131</sup> This is necessary for kidfluencers to maintain their privacy and control their own images. Kidfluencers do not necessarily consent to becoming kidfluencers, as they are often told they are "playing" rather than acting, and allowing kidfluencers to remove their images from social media as they get older and understand the nature of their work will help kidfluencers maintain a certain level of privacy and autonomy.

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125. Law 2020-1266 of October 19, 2020, art. 1, 3 (Fr.); CAL. FAM. CODE § 6752-6753 (Deering 2021).

126. FAM. § 6753(a); 15 U.S.C. §§ 80a-1 to -64 (2018). The Investment Company Act of 1940 regulates the organization of investment companies and the activities they engage in and sets standards for the investment company industry. It is enforced and regulated by the Securities and Exchange Commission.

127. FAM. § 6752(b)-(c).

128. *Id.*

129. Law 2020-1266 of October 19, 2020, art. 4, 6 (Fr.); *see also* Weiss, *supra* note 99.

130. FAM. §§ 6750-6753.

131. Law 2020-1266 of October 19, 2020, art. 6 (Fr.); *see also* Weiss, *supra* note 99.

*C. What Should Not Be Included*

The updated Coogan Law should not require kidfluencers to receive work permits as it is impracticable given the fact that it would require children to have a permit to live their daily lives. Kidfluencing is largely based on “authenticity” and usually involves parents filming and photographing children for social media within their home. Additionally, it may be impractical for American parents to receive governmental approval before the child can engage in online video activities. This should be required to be part of social media sites’ terms of service and prominently displayed when parents are making accounts for their minor children. Parents will thus receive information pertaining to their children’s rights and the consequences of violating those rights when signing up for social media.

VI. DIFFICULTIES APPLYING THE COOGAN LAW TO  
KIDFLUENCERS

California lawmakers and activists have encountered some difficulties when attempting to extend the Coogan Law to kidfluencers: the distinction between work and play, non-monetary compensation, parental rights, and objections to the right to be forgotten. Though these issues are difficult to work around, there are solutions to all of these problems that already exist within California law, federal law, or the French influencer law that can provide guidance.

*A. Work and Play*

The first difficulty is the distinction between work and play. Kidfluencing involves children playing with toys and merchandise sent to them by advertising companies, usually at the direction of their parents.<sup>132</sup> A California lawmaker who introduced an unsuccessful bill to amend the Coogan Law cited this as the reason that particular provision faced difficulty. She stated, “We ran into the challenge of how do we comply with the Coogan [Law] . . . when they are being paid by tickets and toys and clothes and other little things? We need to get the wrinkles ironed out before we can take it to the next level.”<sup>133</sup>

The French kidfluencer law provides a solution for this issue as it defines labor as it relates to kidfluencers, providing factors which individuals determining whether a kidfluencer is working or playing, specifically the kidfluencers’ parents and the company employing the use of a kidfluencer, can use to determine whether a kidfluencer is entitled to income for their actions. The French law specifies that a child being recorded in daily life, being recorded for a non-monetized video, and being in a video in which the child does not receive

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132. Wong, *supra* note 5.

133. *Id.*

performance instructions do not meet the “working” conditions under the definition of “work” provided by the French law. However, a child receiving or following *any* directions in order to create online content for an influencer platform *would* count as a labor relation.<sup>134</sup> As such, California lawmakers can adopt this definition of “work” in the expanded Coogan Law to ensure kidfluencers’ work is adequately covered.

### *B. Compensation Style*

The second difficulty is the fact that some kidfluencers receive non-monetary compensation in the form of “free” goods and services, which are difficult to assign a monetary value to. However, the Internal Revenue Service does provide some direction. Most influencers, including kidfluencers, receive some type of 1099 form upon being paid or receiving a good or service from a company. This form outlines the income the influencer receives from each company or individual that they partner with, provided they have received a total of \$600 or more. The monetary value of any products, merchandise, or services provided to these influencers in exchange for promotion on social media also appear on these forms.<sup>135</sup> As such, kidfluencers’ non-monetary income is measured in a monetary fashion on the 1099 forms. This would allow parents and brands to properly measure their income and thus determine exactly how much money should be getting placed in the child’s Coogan Account. As only 15 percent of a child entertainer’s income is required to be placed in a Coogan Account, with the rest of the income being used to care for the child,<sup>136</sup> non-monetary compensation could be included in the 85 percent of income that must be directed toward childcare.

### *C. Parental Autonomy*

The right to parental autonomy has an impact on the difficulty of extending the Coogan Law to kidfluencers. The Supreme Court first recognized parents’ rights to exercise control over their children’s

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134. Weiss, *supra* note 99; *see also* M. BRUNO STUDER, AU NOM DE LA COMMISSION DES AFFAIRES CULTURELLES ET DE L’ÉDUCATION SUR LA PROPOSITION DE LOI VISANT À ENCADRER L’EXPLOITATION COMMERCIALE DE L’IMAGE D’ENFANTS DE MOINS DE SEIZE ANS SUR LES PLATEFORMES EN LIGNE, No. 2651 (Feb. 5, 2020) (Fr.), [https://www.assemblee-nationale.fr/dyn/15/rapports/cion-cedu/115b2651\\_rapport-fond](https://www.assemblee-nationale.fr/dyn/15/rapports/cion-cedu/115b2651_rapport-fond) [<https://perma.cc/R7CC-24PJ>].

135. *Do Social Media Influencers Have to Pay Taxes?*, ROBERT HALL & ASSOCS., TAX CONSULTANTS (Jul. 23, 2021), <https://www.roberthalltaxes.com/blog/small-business-tax-advice-tips/do-social-media-influencers-have-to-pay-taxes/> [<https://perma.cc/9RTB-ZYXR>]; 26 C.F.R. § 1.6041-1 (2021).

136. CAL. FAM. CODE §§ 6750(c)(1), 6752 (Deering 2021).

upbringing in the 1920s. In *Meyer v. Nebraska*,<sup>137</sup> the Court deemed a Nebraska law that required public school teachers to instruct students in the English language unconstitutional.<sup>138</sup> The Court determined that the Fourteenth Amendment guaranteed the right to establish a home and bring up children, and generally to enjoy those privileges long recognized at common law as essential to the pursuit of happiness.<sup>139</sup> The Court stated that the state could not interfere with such guaranteed liberty interests under the guise of protecting the public interest.<sup>140</sup> The Court found that the statute materially interfered with the power of parents to control the education of their children, and therefore violated the liberty interests guaranteed by the Fourteenth Amendment.<sup>141</sup> This decision demonstrates that parents' ability to control the upbringing of their children is a liberty interest essential to the pursuit of happiness.

In *Pierce v. Society of Sisters*,<sup>142</sup> the Supreme Court upheld its decision in *Meyer* when the Court determined that a law requiring parents to send their children to public schools was unconstitutional.<sup>143</sup> The Society of Sisters was a Catholic corporation whose private schools provided both secular and religious education for youth. The Supreme Court unanimously ruled that the law was unconstitutional, concluding that the state may not "unreasonably interfere with the liberty of parents and guardians to direct the upbringing and education of children under their control," recognizing that a child is "not the mere creature of the State."<sup>144</sup> The Court, however, also noted the state has an important interest in determining which educational institutions meet states' educational standards,<sup>145</sup> and thus also recognized that the state can override parents' right to control their child's education if their decisions harmed the child's education.

The rulings in *Pierce* and *Meyer* demonstrate that parents' ability to control their children's upbringing is essential to the parents' liberty. Thus, parents reserve the right to allow their children to have an online presence, include them in their own influencing endeavors, or allow the children to become influencers themselves.

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137. 262 U.S. 390 (1923).

138. *Id.* at 399.

139. *Id.*

140. *Id.* at 399–400.

141. *Id.* at 399–400, 403.

142. 268 U.S. 510 (1925).

143. *Id.* at 534–35.

144. *Id.* at 535.

145. *Id.* at 534.

However, the Supreme Court has limited parental authority when it affects children's welfare. In *Prince v. Massachusetts*,<sup>146</sup> the Court upheld a law preventing legal guardians from allowing their child to sell literature or goods in public despite religious parents' objections.<sup>147</sup> Writing for the majority in the 5–4 ruling, Justice Rutledge stated that the state cannot enter the private realm of family life, but can limit “parental freedom and authority in things affecting the child's welfare.”<sup>148</sup> The Court specifically included matters related to child labor under the umbrella of “things affecting the child's welfare.”<sup>149</sup> As such, the Court determined that the state can regulate child labor practices that parents approve of that could harm a child's welfare despite a family's right to autonomy and self-expression.

The state's ability to regulate child entertainers' rights against their parents is made evident by the fact that several famous child entertainers have been able to successfully sue their parents for violating the Coogan Law, including Leighton Meester of *Gossip Girl*, Ariel Winter of *Modern Family*, Mischa Barton of *The O.C.*, and Chris Warren of *High School Musical*.<sup>150</sup> Though parents can choose to have their child work in show business, it does not give them absolute authority over the child's income. In fact, the exact opposite is true as the Coogan Law's 1999 update provides that child performers own all of their earnings, not just the 15 percent set aside in Coogan accounts.<sup>151</sup>

It is unlikely that concerns about parental authority will substantially limit the Coogan Law's expansion to kidfluencers. The state has a substantial interest in protecting the welfare of children, and specifically has an interest when child labor practices that harm children's welfare are involved. Additionally, California minors may disaffirm contracts that their parents make before the minor reaches the age of majority or within a reasonable time afterwards,<sup>152</sup> which shows that California already allows minors to override their parents' decisions related to their economic and social lives in certain situations. It is more than likely that parental autonomy will not limit the

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146. 321 U.S. 158 (1944).

147. *Id.* at 171.

148. *Id.* at 167.

149. *Id.* at 167–68.

150. Saragoza, *supra* note 46, 579–81 (first citing *Meester v. Meester*, No. BC466072, 2011 WL 2941537, ¶ 7 (Cal. Super. Ct. July 22, 2011)); and then citing Katherine Webb, *All the Child Stars Who Sued Their Parents*, SHOWBIZ CHEATSHEET (June 6, 2018), <https://www.cheatsheet.com/entertainment/child-stars-who-sued-their-parents.html/> [https://perma.cc/PPD9-TW2G].

151. S.B. 1162, 1999 Leg., 1999–2000 Reg. Sess. (Cal. 1999) (codified at CAL. FAM. CODE § 771 (Deering 2021)).

152. FAM. § 6710.



California legislature's ability to extend Coogan Law protections to kidfluencers.

*D. Debate Surrounding the Right to Be Forgotten*

There is an ongoing debate as to the constitutional permissibility of the right to be forgotten,<sup>153</sup> which could impact the California legislature's ability to provide kidfluencers with a right to be forgotten. Courts may hold that because kidfluencers are public figures, they have a limited right to privacy due to the public's interest in kidfluencers' lives. In *Sidis v. F-R Publishing Corp.*,<sup>154</sup> the court ruled that a former child prodigy had a limited right to privacy because the public had a substantial interest in the outcome of his life, which he should have expected both when he originally decided to become a celebrity and when he gave an interview with a popular newspaper to discuss updates on his life.<sup>155</sup> As such, the prodigy should have expected others to be interested in the peculiarities of his "appearance, dress, speech, and mode of living and his personal fads, eccentricities and private life, both past and present," for the purposes of their amusement.<sup>156</sup> California courts could apply this ruling to kidfluencers.

Despite this ongoing debate, California already has two laws that provide certain California citizens with the right to be forgotten, which were discussed in Part II(B) of this Note. Additionally, the voluntary effort an individual makes toward earning fame plays a large role in determining the amount of privacy the individual should expect from the press and the public. A striking example of the voluntary nature of celebrity playing a role in determining the privacy celebrities should expect from the public is the case of Pamela Anderson Lee's 1998 sex tape. Because Lee was considered a voluntary figure who made an effort to become famous, the court deemed that Lee's right to privacy was restricted as she should have expected the media attention the tape would generate.<sup>157</sup> Kidfluencers, due to their age, cannot consent to celebrity or the dissemination of their images. As they are often too young to understand the consequences and lack of privacy that comes with being a celebrity, it is likely an American court would not consider kidfluencers voluntary celebrities who actively work to become famous. As such, courts could, and would likely, afford them the right to be

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153. The debate primarily relates to the right to be forgotten as it relates to both freedom of speech and the right to privacy. *See generally* John W. Dowdell, Note, *An American Right to Be Forgotten*, 52 TULSA. L. REV. 311 (2020).

154. 34 F. Supp. 19 (S.D.N.Y. 1938), *aff'd sub nom.*, 113 F.2d 806 (2d Cir. 1940).

155. *Id.* at 24–25.

156. *Id.* at 23.

157. *See generally* Michaels v. Internet Ent. Grp., Inc., 5 F. Supp. 2d 823 (C.D. Cal. 1998).

forgotten under the American understanding of celebrity due to the fact that kidfluencers do not consent to their situations. The voluntary nature of celebrity being the crux upon which privacy expectations turn and the California laws that already provide the right to be forgotten to certain California citizens demonstrate that a Coogan Law expansion that includes the right to be forgotten for kidfluencers will likely go unchallenged.

#### CONCLUSION

At present, kidfluencers can fall victim to the same exploitations that other child entertainers face, including financial exploitation and loss of privacy.<sup>158</sup> Despite this, they are not afforded the same protections that California provides other child entertainers within the Coogan Law. Their hard-earned income remains entirely in the hands of their guardians; their images remain online in an extremely public, personal way without their express consent; and the law provides them no avenue to protect their income or their privacy.

In order to fully protect kidfluencers from the perils their work poses, California should update the Coogan Law, using France's kidfluencer protection law as a roadmap for these updates. This will ensure the Coogan Law adequately covers kidfluencers under expanded definitions of "child entertainer" and "work," includes provisions detailing how kidfluencers' income is to be handled, and includes a right to be forgotten. It is necessary to include kidfluencers under the definition of child entertainers because kidfluencers, though similar to traditional child entertainers, differ substantially from them in terms of what a typical "work day" looks like and often lack a contract.<sup>159</sup> The right to be forgotten is necessary for kidfluencers as it would provide them with an avenue to remove images they do not consent to from the internet at any point, as they may not entirely be able to consent to the publication of these images as children.

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158. Masterson, *supra* note 116, at 594.

159. Wong, *supra* note 5.

For all of these reasons, California should update the Coogan Law with the provisions described in this Note in order to protect kidfluencers in the same manner the state protects other child entertainers.

*Joan Reardon*<sup>†</sup>

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<sup>†</sup> J.D. expected 2023, Case Western Reserve University School of Law; B.A. 2020, The Ohio State University. Joan thanks Professor Jonathan Entin and the editors of the *Case Western Reserve Law Review* for their guidance. She would also like to thank her parents and grandparents, for inspiring her love of law and writing, and her brother Timmy, for his continued support. She especially thanks her fiancé Ben, for being the most wonderful person on Earth, and her sister Shannon, for providing invaluable updates on TikTok's top kidfluencers during evening FaceTimes.