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Kids Say the Darndest Things: Minors and the Internet

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CARDOZO LAW REVIEW
de•novo

KIDS SAY THE DARNDDEST THINGS: MINORS
AND THE INTERNET

Emily DiRoma[†]

*“Our personal information belongs to us. It is not a commodity to be controlled and traded. . . .”*¹

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[†] *de•novo* Editor, *Cardozo Law Review*. J.D., Benjamin N. Cardozo School of Law, 2018; B.A., Lehigh University, 2012. I would like to thank Professor Aaron Wright for his invaluable guidance and patience while writing this note. Thank you to the editors of the *Cardozo Law Review* for all the hard work that was taken in the publication of this Note. Special thank you to my friends and family, especially my husband Michael, for all their love and support during not only the notes writing process but through all of law school as well. All mistakes are my own.

¹ *Privacy: Internet: Minors: Hearing on S.B. 568 Before S. Rules Comm.*, 2013–2014 Reg. Sess. (Cal. Aug. 29, 2013) [hereinafter S.B. 568 Hearing].

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INTRODUCTION

Close your eyes and picture yourself walking down a busy New York City street. At any given moment on your walk almost every person you encounter is engaged with some form of personal electronic device.² Talking on the phone, listening to music, checking email, and scrolling through social media has become part of society’s daily routine.³ Cellphones, laptops, iPods, and other personal electronic devices have taken hold as a major part of daily life for adults and teenagers alike; people of all ages are no longer meeting up at parks and coffee shops to converse on the daily.⁴ Typically, teenagers⁵ across the United States spend on average between six and nine hours on entertainment media such as the internet, which includes surfing the web and social media use, among other activities.⁶ Included in their daily entertainment media use, a significant number of teenagers say they use social media every single day,⁷ with many of them using multiple social platforms on a day-to-day

² Malohat Ibrohimovna et. al, *Reputation-Based Service Management and Reward Mechanisms in Distributed Cooperative Personal Environments*, in *ADVANCES IN NEXT GENERATION SERVICES AND SERVICE ARCHITECTURES* 407, 408 (Anand R. Prasad et. al. eds., 2011).

³ Bianca Bosker, *Addicted to Your iPhone? You’re Not Alone*, *THE ATLANTIC* (Nov. 2016), <http://www.theatlantic.com/magazine/archive/2016/11/the-binge-breaker/501122> (“Our generation relies on our phones for our moment-to-moment choices about who we’re hanging out with, what we should be thinking about, who we owe a response to, and what’s important in our lives.”) (internal quotation marks omitted).

⁴ *How Smartphones Are Changing Consumers Daily Routines Around the Globe*, NIELSON (Feb. 24, 2014), <http://www.nielsen.com/us/en/insights/news/2014/how-smartphones-are-changing-consumers-daily-routines-around-the-globe.html>.

⁵ Teenagers for purposes of this Note is defined as age eight to eighteen.

⁶ VICKY RIDEOUT, COMMON SENSE MEDIA, *THE COMMON SENSE CENSUS: MEDIA USE BY TWEENS AND TEENS 13* (2015), https://www.commonsensemedia.org/sites/default/files/uploads/research/census_researchreport.pdf. Entertainment media includes activities such as listening to music, watching TV, playing video games, using social media, and reading books. It includes devices such as computers, smartphones, and tablets. *Id.*

⁷ *Id.* at 13–14, 39–40. Social media is defined as “forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos).” *Social Media Definition*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/social%20media> (last visited Oct. 18, 2016); see generally MARY MADDEN ET. AL., PEW RES. CTR., *TEENS, SOCIAL MEDIA, AND PRIVACY*, (2013), <http://www.pewinternet.org/2013/05/21/teens-social-media-and->

basis.⁸ Some of the heaviest teen social media users even admit to checking each of their multiple social media sites upwards of one hundred times each day.⁹

In this ever increasing digital age,¹⁰ a large part of a teenager's social development is occurring while that teenager navigates through the digital world, whether it be online on a computer or through their cell phone.¹¹ With a rise in online use by teenagers, the federal government passed the Children's Online Privacy Protection Act (COPPA), which took effect in April of 2000.¹² COPPA specifically protects the privacy of teenagers and adolescents under the age of thirteen by requesting parental consent for the collection or use of any personal information of those users.¹³ The Act was passed in response to a growing awareness of Internet marketing techniques directly targeted at those minors¹⁴ under thirteen and the collection of their personal information by websites without any parental notification.¹⁵ The Act specifically applies to commercial websites and online services that are directed at children.¹⁶

Following the federal governments footsteps in September 2013, California's Governor Jerry Brown signed Senate Bill 568 (SB 568) into law¹⁷, which came into effect in 2015.¹⁸ The law aims to specifically

privacy. A 2013 study showed that eight out of ten teens who use the Internet use some kind of social media site. *Id.*

⁸ OFF. OF ADOLESCENT HEALTH, U.S. DEP'T HEALTH HUMAN SERVICES, TEENS' SOCIAL MEDIA USE: HOW THEY CONNECT AND WHAT IT MEANS FOR HEALTH (May 13, 2016), <http://www.hhs.gov/ash/oah/news/e-updates/february2016-ahi.html>. Platforms such as Facebook, Instagram, and Snapchat are the most popular of the social media sites, and seventy-one percent of teenagers reported they use more than one of these such social media site. *Id.*

⁹ Chuck Hadad, *Why Some 13-year-olds Check Social Media 100 Times a Day*, CNN (Oct. 13, 2015, 3:55 PM), <http://www.cnn.com/2015/10/05/health/being-13-teens-social-media-study>.

¹⁰ Margaret Rouse, *Information Age*, TECHTARGET, <http://searchcio.techtarget.com/definition/Information-Age> (last visited Oct. 19, 2016) ("The Information Age, also called the Computer Age, the Digital Age and the New Media Age, is coupled tightly with the advent of personal computers.").

¹¹ OFFICE OF PRESIDENT PRO TEM DARRELL STEINBERG, SB 568 FACT SHEET: PRIVACY RIGHTS FOR CALIFORNIA MINORS IN THE DIGITAL WORLD 1, 1, <https://achieve.lausd.net/site/handlers/filedownload.ashx?moduleinstanceid=16043&dataid=15328&FileName=SB%20568%20FACT%20SHEET.pdf> [hereinafter SB 568 FACT SHEET].

¹² 15 U.S.C. §§ 6501–6505 (2012); see *Children's Online Privacy Protection Act (COPPA)*, ELECTRONIC PRIVACY INFO. CTR., <https://epic.org/privacy/kids> (last visited Oct. 17, 2016) [hereinafter EPIC COPPA Primer].

¹³ *Id.*

¹⁴ Minors for the purpose of this Note are under the age of eighteen.

¹⁵ See EPIC COPPA Primer, *supra* note 12.

¹⁶ *Id.* COPPA defines a child/kid as under the age of thirteen. 16 C.F.R. § 312.2 (2016).

¹⁷ CAL. BUS. & PROF. CODE §§ 22580–81 (2013); see also Privacy and Data Security Team, *Update: California Governor Brown Signs into Law S.B. 568, "Privacy Rights for California Minors in the Digital World"*, ALSTON AND BIRD PRIVACY AND DATA SEC. BLOG (Sept. 23, 2013), <http://www.alstonprivacy.com/update-california-governor-brown-signs-into-law-s-b-568-privacy-rights-for-california-minors-in-the-digital-world>.

¹⁸ BUS. & PROF. § 22580–81.

protect California minors online¹⁹ and particularly attacks websites which are directed towards minors or have knowledge that minors are using their site.²⁰ SB 568 contains two main provisions: the first is directed towards online advertisements and the other focuses on a minor's right to "erase" his or her online posts.²¹

The first provision of the law prohibits operators of websites from advertising certain products or services to minors, mainly those that minors cannot legally purchase, such as indoor tanning.²² The second provision, the "eraser" provision, requires operators of websites to allow minors to remove content posted on the website unless the content falls within one of the exceptions.²³ In line with the state's objective of protecting minors, California's legislation expanded the age of protection and the definition of a minor as promulgated under COPPA from under thirteen years old to under eighteen years old; thus broadening the age range of children and the scope of the law's protection.²⁴ California's enactment of SB 568 focuses on expanding the online safeguards that the Federal Trade Commission (FTC) put in place for minors and children with COPPA, as well as including an additional element, one which is a topic of heavy debate in Europe—the right to be forgotten.²⁵

This Note argues that due to the inherent failures of COPPA and the ever rising online presence of both teenagers and minors, the FTC should expand COPPA to include eraser and advertisement protection provisions similar to those found in SB 568 in order to further ensure the protection teenagers and minors online. This Note analyzes both the federal law COPPA and California's law SB 568, and discusses the changes that the FTC should make in order to further increase the protections COPPA provides to minors online.

Part I examines the rise in online presence of and use by teenagers and the response by the federal government through COPPA and

¹⁹ See Thomas R. Burke et al., *California's "Online Eraser" Law for Minors to Take Effect Jan 1, 2015*, DAVIS WRIGHT TREMAINE (Nov. 17, 2014), <http://www.dwt.com/Californias-Online-Eraser-Law-for-Minors-to-Take-Effect-Jan-1-2015-11-17-2014/>.

²⁰ See SB 568 FACT SHEET, *supra* note 11, at 1.

²¹ *Id.* at 2.

²² BUS. & PROF. § 22580; California bans minors under the age of eighteen from using indoor tanning beds. *Id.* § 22706(b)(3).

²³ The exceptions are if the content is anonymized, was posted by a third party, or is required to be maintained by other provisions of law. BUS. & PROF. § 22581; see also Randy Shaheen and Lauren Arrendodo-Santisteban, *California Enacts Law Protecting Minors' Digital Privacy Rights*, ALL ABOUT ADVERT. L. (Nov. 24, 2014), <http://www.allaboutadvertisinglaw.com/2014/11/california-enacts-law-protecting-minors-digital-privacy-rights.html>.

²⁴ BUS. & PROF. § 22580.

²⁵ See Shaheen and Arrendodo-Santisteban, *supra* note 23; see also Steve C. Bennett, *The "Right to Be Forgotten": Reconciling EU and US Perspectives*, 30 BERKELEY J. INT'L L. 161, 167 (2012). Under the right to be forgotten, both minors and adults in the EU may request the deletion of personally posted content and third-party content relating to the individual. *Id.* at 162–63. The "right to be forgotten" is similar to the concept of "forgive and forget," which embodies a fundamental human value, and that US law (bankruptcy, credit reporting and criminal law, among others) actually does recognize at least some elements of a "right to be forgotten." *Id.* at 166–67.

California though SB 568. Part II analyzes both criticisms and laudations of COPPA and SB 568, including SB 568's attempts to reconcile COPPA's deficits in California. Part III offers a proposal for the federal government to further expand COPPA and its protections by including provisions similar to SB 568. Part III further analyzes how expansion of COPPA would further the FTC's goal of protecting minors online while additionally decreasing the burden on online providers in the anticipation that multiple states could start enacting their own individual laws similar to California's SB 568. Thus, this Note stresses the importance of protecting minors and teenagers online through the enactment of amendments to COPPA.

I. BACKGROUND

A. *Minors and the Internet*

One of the fundamental characteristics of the modern age is the convergence of technology and the Internet with everyday life.²⁶ Especially prominent in the lives of adolescents are social media platforms such as Twitter, Instagram, Snapchat, and Facebook which are used for everything from communicating with peers to searching for information.²⁷ Teenagers ages thirteen to seventeen are going online increasingly more frequently than ever before.²⁸ A recent study by the Pew Research Center found that ninety-two percent of teenagers report going online daily—including twenty-four percent who say they go online almost constantly.²⁹

The simplicity of accessing the internet and social media on personal electronic devices such as smartphones makes it easier for teenagers to have endless connection.³⁰ Presently, teenagers are far more likely to access social media on their smartphones than through any other device.³¹ The ease of access to, and constant presence of, smartphones makes

²⁶ See EPIC COPPA Primer, *supra* note 12.

²⁷ OFF. OF ADOLESCENT HEALTH, U.S. DEP'T HEALTH HUMAN SERVICES, TEENS' SOCIAL MEDIA USE: HOW THEY CONNECT AND WHAT IT MEANS FOR HEALTH (Feb. 2016), <https://www.hhs.gov/ash/oah/news/e-updates/february-2016-teens-social-media-use/index.html>.

²⁸ See AMANDA LENHART, PEW RES. CTR., TEENS, SOCIAL MEDIA, & TECHNOLOGY OVERVIEW 2015, at 16 (Apr. 9, 2015), <http://www.pewinternet.org/2015/04/09/teens-social-media-technology-2015> ("Teens ages 13 to 17 are also going online frequently. Aided by the convenience and constant access provided by mobile phones . . .").

²⁹ *Id.*

³⁰ *Id.* Nearly three-quarters of teens have or have access to a smartphone. *Id.* "In terms of time spent on social media on different devices, sixty-three percent of teens' social media time is spent on smartphones, eighteen percent on computers, eleven percent on tablets, and eight percent on iPod Touches." See RIDEOUT, *supra* note 6, at 40.

³¹ See LENHART, *supra* note 28.

posting statuses, pictures, and commenting increasingly more effortless and subsequently increases the chances of teenagers acting in a quick and rash state of mind.³²

Many teenagers strive to fit in; a desire which can reduce sound judgment and cause many teenagers to feel a level of anxiety tied to what they do, especially online.³³ But, since teenagers are still developing mentally, their ability to make smart decisions using critical thinking and judgment, is not always at its highest level³⁴ and in fact decision-making skills can be further lowered by a teenager's increased use of the internet and social media.³⁵ The strong desire of teenagers to fit in with their peers, coupled with a certain lack of judgment,³⁶ and unhindered accessibility to social media, can lead teenagers to make decisions they may regret.³⁷

A teenager's online reputation is a growing concern given the rise of online social networking and profiles.³⁸ Social media is no longer

³² See Hillary Crosley Coker, *What Are Teens Thinking Before Posting on Social Media? Literally Nothing*, JEZEBEL (Aug. 27, 2015), <http://jezebel.com/what-are-teens-thinking-before-posting-on-social-media-1726923392>. (“[A]ccording to a recent Ask.fm survey that found 80 percent of teens post photos, status updates or tweets without thinking about the consequences of their actions.”).

³³ See Hadad, *supra* note 9. A recent CNN study on social media and teenagers, #Being13, found that teenagers are most anxious online when it comes to monitoring their own popularity, and defending their popularity status against those who challenge it. *Id.* In the #Being13 study, CNN found that sixty-one percent of teenagers who used social media, such as Facebook, wanted to see if their online posts were getting likes and comments from their peers. *Id.*; see also, Madison Malone Kircher, *A Bunch of Teens Told Us Why Some Instagram ‘likes’ Mean More Than Others*, BUS. INSIDER (Feb. 16, 2016), <http://www.businessinsider.com/what-instagram-likes-mean-to-teens-2016-2>. In a teenager's world, a high number of likes on a social media post translates to popularity and social status. *Id.*

³⁴ See SB 568 FACT SHEET, *supra* note 11; see *What is the Impact of Marketing on Teens?*, COMMON SENSE MEDIA, <https://www.commonsensemedia.org/marketing-to-kids/what-is-the-impact-of-advertising-on-teens#> (last visited Oct. 14, 2016). By simply seeing an advertisement on Facebook or friends posting pictures of themselves partaking in certain activities, a teenager may be more inclined to emulate these activities or purchase certain products. *Id.* (discussing brands exploiting teen vulnerabilities).

³⁵ See Amanda MacMillan, *Internet Addiction Linked to ADHD, Depression in Teens*, CNN (Oct. 5, 2009, 4:48 PM), <http://www.cnn.com/2009/HEALTH/10/05/depression.adhd.internet.addiction/index.html> (“Although an Internet addiction is not an official diagnosis, signs of a potential problem include using the Internet so much for game playing or other purposes that it interferes with everyday life and decision-making ability.”).

³⁶ See Jericka Duncan, *Teens on Social Media go from Dumb to Dangerous*, CBS NEWS (April 28, 2016, 7:31 PM), <http://www.cbsnews.com/news/teens-on-social-media-from-dumb-to-dangerous>. A teen's better judgment can be overridden by their desire to be connected to and respected by their peers, especially online. *Id.*

³⁷ See Valerie Ulene, *A Teen's Friends are a Powerful Influence*, L.A. TIMES (April 11, 2011), <http://articles.latimes.com/2011/apr/11/health/la-he-the-md-teens-friends-20110411>. See also MADDEN ET AL., *supra* note 7, at 9. (“59% of teens have deleted or edited something that they posted in the past, while 19% of teens report they have posted updates, comments, photos, or videos that they later regretted sharing.”).

³⁸ See Brian Berglund, *Parents, Wake Up: The Hidden Dangers of the Internet*, MEDIA PLANET, <http://www.futureofbusinessandtech.com/online-and-mobile-safety/parents-wake-up-the-hidden-dangers-online> (last visited Nov. 28, 2016).

focused solely on connecting to family and friends—other people who want to know about online users, especially employers, are increasingly turning to social media sites as a way of understanding co-workers, job applicants, and other non-friend groups.³⁹ Schools and employers are rejecting young people for school programs, internships, college admissions, and jobs after researching applicants' online activities and posts.⁴⁰ Forty percent of college admissions officers say that in addition to an applicant's grade point average and application essay, they visit applicants' social media pages to learn about them, their habits, and their overall demeanor as a person.⁴¹

In addition to the college admissions officers, sixty percent of employers recently revealed that they use social networking sites to research job candidates.⁴² Out of all the online searches, though social media or search engines, almost half of hiring managers who screen candidates via social networks said they uncovered information that caused them not to hire a candidate.⁴³ A single Facebook status or poorly thought out tweet can have lasting ramifications on the teenager who made the post and shared it online through their social media profile.⁴⁴

³⁹ See *Privacy Part I: How Do We Define Privacy in the Digital Age?*, TEEN SAFE (May 6, 2015), <http://www.teensafe.com/blog/privacy-part-define-privacy-digital-age>.

⁴⁰ See Berglund, *supra* note 38.

⁴¹ Kaitlin Mulhere, *Lots More College Admissions Officers Are Checking Your Instagram and Facebook*, TIME (Jan. 13, 2016), <http://time.com/money/4179392/college-applications-social-media/>. This is a four-time increase from college admissions officers who did in 2008, according to a recent survey from Kaplan Test Prep. *Id.*; see also Andrea Peterson, *Author of California Online Eraser Law: It's Not Always Easy to Find the Delete Button*, WASH. POST (Sept. 25, 2013), <https://www.washingtonpost.com/news/the-switch/wp/2013/09/25/author-of-california-online-eraser-law-its-not-always-easy-to-find-the-delete-button/> (“The thing that really shocked me on this was the fact that a number of colleges and universities around the country have the technology to properly access the Web sites, the Facebook pages, of college applicants.”).

⁴² See Amy McDonnell, *60% Employers Use Social Media to Screen Job Candidates*, CAREER BUILDER (Apr. 28, 2016), <https://www.careerbuilder.com/advice/60-of-employers-are-peeking-into-candidates-social-media-profiles>. The number of employers using social media to screen applicants has increased 500 percent in the last decade alone and by fifty-two percent in the last year. *Id.* Additionally, fifty-nine percent of hiring managers use search engines to research candidates, whereas only a little over fifty percent did so last year. *Id.* Such an increase in social media screening is not too hard to believe, considering the overall popularity jump in social media use throughout the decade. See ANDREW PERRIN, PEW RES. CTR., SOCIAL MEDIA USAGE: 2005-2015, at 2(2015) <http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015>.

⁴³ See McDonnell, *supra* note 42. In 2009, Connor Riley tweeted “Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work” to which the company saw and responded. Courtney Comstock, *Morgan Stanley Uses the “CiscoFatty” Story to Teach Its New Hires How NOT to Use Twitter and Facebook*, BUS. INSIDER (Jan. 24, 2011, 9:40 AM), <http://www.businessinsider.com/morgan-stanley-uses-the-cisconfatty-story-to-teach-its-new-hires-how-to-use-twitter-and-facebook-2011-1>. Although it is not fully clear whether her offer was rescinded, her story provides a cautionary tale. *Id.*

⁴⁴ See Suren Ramasubbu, *Influence of Social Media on Teenagers*, HUFF. POST (May 26, 2015, 3:44 PM), http://www.huffingtonpost.com/suren-ramasubbu/influence-of-social-media-on-teenagers_b_7427740.html; see, e.g., *Stagehorn v. Indep. Sch. Dist. No. 728*, 122 F. Supp. 3d 842, 849 (D. Minn. 2015) (noting that Reid Stagehorn was suspended from school following a tweet jokingly responding to a question about “making out” with a teacher at his school).

The increased presence of adolescents and teenagers online has correspondingly raised serious concerns about the safety of Internet and social media use.⁴⁵ While navigating the online world may be tricky, teenagers' blame their cavalier attitude towards online risks such as sexting, cyberbullying, and exposure to inappropriate content on difficulty in self-regulation, both by the parents and minors themselves, in addition to the lack of awareness of repercussions and susceptibility to peer pressure.⁴⁶

But how does one define privacy in this digital age? Can it even be expected? In the modern world of Wi-Fi, mobile devices, and digital media, it is easy to lose sight of where privacy ends and social sharing begins.⁴⁷ Teenagers are sharing more personal information online than ever before.⁴⁸ But not all teenagers take information sharing lightly;⁴⁹ many teenage Facebook users report confidence in managing their profile settings and take proactive steps to keep their profiles private.⁵⁰ Many teenagers take further preserve their reputation and conceal information that they do not want others to have access to.⁵¹ But, when it comes to social media and the Internet, the basic thinking should be that nothing remains private online—odds are someone will see it.⁵²

B. *The Federal Way: COPPA*

Minors can be victims of their own inexperience with technology.⁵³ Given this danger, many have argued that both parents and the government have a legal basis for protecting children.⁵⁴ However, it is not always clear which institution, parent or government, should have the most control over protecting minors online.⁵⁵ During the 1990s, the Internet served as a catalyst for business operations ranging from

⁴⁵ See Suren Ramasubbu, *Teenagers and the Internet*, HUFF. POST (Apr. 7, 2015, 2:43 PM), http://www.huffingtonpost.com/suren-ramasubbu/teenagers-and-the-internet_b_7012050.html.

⁴⁶ *Id.*

⁴⁷ See TEEN SAFE, *Privacy Part I*, *supra* note 39.

⁴⁸ See MADDEN ET AL., *supra* note 7; see also OFF. OF ADOLESCENT HEALTH, *supra* note 8 (“A survey of over 600 teens from 2012 found that nearly all shared their real name and photos of themselves, and most shared their school name, birthdate, and the city or town where they lived.”).

⁴⁹ See MADDEN ET AL., *supra* note 7. Sixty percent of teenage Facebook users elect to keep their profiles private. *Id.* at 6.

⁵⁰ *Id.* at 6–7.

⁵¹ *Id.* at 8–9 (noting high numbers that either delete or block friends).

⁵² See TEEN SAFE, *Privacy Part I*, *supra* note 39.

⁵³ See Berglund, *supra* note 38.

⁵⁴ See *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors.”); Melanie L. Hersh, Note, *Is COPPA a Cop Out? The Child Online Privacy Protection Act as Proof That Parents, Not Government, Should Be Protecting Children’s Interests on the Internet*, 28 FORDHAM URB. L. J. 1831, 1833 (2000).

⁵⁵ Hersh, *supra* note 54, at 1833.

marketing and sales, to distribution of products and services.⁵⁶ Congruently, the Internet had a growing segment of online minor users.⁵⁷ In response to the rapidly growing number of minor online users, the federal government made two major attempts to protect children's interests on the Internet in the mid-1990s, both of which subsequently failed.⁵⁸ The failures, the Communication Decency Act (CDA) of 1996⁵⁹ and the Child Online Protection Act (COPA) of 1997⁶⁰, dealt with the protection of children from exposure to obscene materials online.⁶¹

Congress's first substantial attempt at protecting minors online came in the form of the CDA, adopted as part of the Telecommunications Act of 1996.⁶² The CDA attempted to implement standards for the Internet similar to those that the Federal Communications Commission (FCC) used for regulating broadcast indecency.⁶³ Similar to the FCC, the CDA's goal was to criminalize telecommunications contact that was intended to send indecent and obscene materials, such as pornography, to minors.⁶⁴ The CDA even went as far as to include statutory good faith defenses for Internet Service Providers that sought to limit access to underage individuals.⁶⁵ But many critics argued the law would not be able to work in accordance with the nature of the Internet and its constant changes.⁶⁶ The ACLU challenged CDA on First Amendment grounds, arguing that the ban on "indecent" and "patently offensive" speech transmitted online was unconstitutional.⁶⁷ Ultimately, the Federal District Court for the Eastern District of Pennsylvania found CDA unconstitutional.⁶⁸

The unconstitutional ruling on CDA prompted Congress to introduce a new law much narrower in focus in order to avoid a fate

⁵⁶ See EPIC COPPA Primer, *supra* note 12.

⁵⁷ *Id.*

⁵⁸ See Hersh, *supra* note 54.

⁵⁹ 47 U.S.C. § 223 (2012).

⁶⁰ 47 U.S.C. § 231.

⁶¹ Robert Corn-Revere, *Ashcroft v. ACLU II: The Beat Goes On*, 2004 CATO SUP. CT. REV. 299, 300–01.

⁶² 47 U.S.C. § 223.

⁶³ See Corn-Revere, *supra* note 61, at 300.

⁶⁴ 47 U.S.C. § 223(a).

⁶⁵ 47 U.S.C. § 223(c)(2)(A).

⁶⁶ See Hersh, *supra* note 54, at 1847–56 (discussing the history of Acts that led to the enactment of COPPA).

⁶⁷ *ACLU v. Reno*, 929 F. Supp. 824, 854 (E.D. Pa. 1996). See also Hersh, *supra* note 54, at 1847.

⁶⁸ *Id.*; See also Hersh, *supra* note 54, at 1847–48 (“The Federal District Court for the Eastern District of Pennsylvania found the CDA violate[d] the First and Fifth Amendments, as there was no way to determine the ages of persons accessing the information. The Supreme Court then upheld the ruling [in *Reno v. ACLU*, 521 U.S. 844 (1997)], finding that Congress violated the First Amendment by attempting to regulate content on the Internet. The Court found the statute was overbroad and lacked the precision needed to statutorily limit the First Amendment.”) (internal citations omitted).

similar to that of CDA.⁶⁹ Unlike its predecessor, COPA did not focus on sexually-oriented information, but rather prohibited communications made for commercial purposes and restricted material viewed as harmful to minors.⁷⁰ COPA quickly suffered the same fate as CDA at the hands of the ACLU: both laws mandated governmental control of regulatory issues on the Internet, and both were found unconstitutional.⁷¹

By the end of the 1990's, "almost ten million children across United States had access to the Internet."⁷² In response to the failures of CDA and COPA, the federal government enacted COPPA in 1998.⁷³ COPPA, unlike its predecessors CDA and COPA, focuses on children's online privacy rather than what they are exposed to while browsing on the Internet.⁷⁴ Aimed to handle privacy issues, COPPA applies to the online collection of personal information from children under thirteen years of age.⁷⁵ COPPA details extensively what must be included in a website's privacy policy, when and how to seek verifiable consent from a parent or guardian, and what responsibilities are owed to protect children's privacy and safety online.⁷⁶

The primary goal of COPPA is to give parents control over what

⁶⁹ See Corn-Revere, *supra* note 61, at 300 (some call COPA the "son of CDA"); see also 47 U.S.C. § 231(e)(6). Material that is harmful to minors is defined in the act as:

any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id.

⁷⁰ 47 U.S.C. § 231(a)(1).

⁷¹ *Reno v. ACLU*, 521 U.S. 844, 849 (1997); *ACLU*, 929 F. Supp. at 883; see Hersh, *supra* note 54, at 1847, 1850. In *ACLU v. Reno* "the Federal District Court for the Eastern District of Pennsylvania . . . found the CDA [violated] the First and Fifth Amendments, as there was no way to determine the ages of persons accessing the information. . . . In *ACLU v. Reno* [sic], the Supreme Court found COPA unconstitutional on free speech grounds." *Id.*

⁷² See EPIC COPPA Primer, *supra* note 12.

⁷³ 15 U.S.C. §§ 6501–06.; see *Complying with COPPA: Frequently Asked Questions*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions> (last visited Oct. 16, 2016) [hereinafter *Complying with COPPA*]. "COPPA . . . [first] became effective on April 21, 2000." The Act was amended in December of 2012. "The amended [Act] took effect on July 1, 2013." *Id.*

⁷⁴ *Complying with COPPA*, *supra* note 73.

⁷⁵ See *id.* COPPA, unlike CDA and COPA deals with privacy. *Id.* COPPA is applicable to U.S. businesses as well as any foreign business, if they collect personal information from children under thirteen residing in the U.S. *Id.*

⁷⁶ 15 U.S.C. § 6502.

information is collected from their children online⁷⁷ The Act was designed to protect children under the age of thirteen, while considering the constantly changing nature of the Internet.⁷⁸ COPPA applies to “operators of commercial websites and online services (including mobile applications) directed to children under thirteen that collect, use, or disclose personal information from children.”⁷⁹ The law further extends to include compliance from operators of websites directed to general audiences that have actual knowledge that they are collecting, using, or disclosing personal information from children under thirteen that are using their site.⁸⁰ COPPA additionally extends to further cover websites or online services that collect information from other sites.⁸¹

1. COPPA’s Mandates

The five key requirements of COPPA are: (1) notice; (2) parental consent; (3) parental review; (4) limits on the use of games and prizes; and (5) security.⁸² Under COPPA, operators of websites⁸³ and apps⁸⁴ directed at children,⁸⁵ or who knowingly collect personally identifiable

⁷⁷ *Complying with COPPA, supra* note 73.

⁷⁸ *Id.*; *see also* Hersh, *supra* note 54, at 1834 (“Regulating Internet communication is like trying to regulate whom children can speak with on the street or playground.”).

⁷⁹ *See Complying with COPPA, supra* note 73; 15 U.S.C. § 6502.

⁸⁰ 15 U.S.C. § 6502.

⁸¹ *See Complying with COPPA, supra* note 73 (“The Rule also applies to websites or online services that have actual knowledge that they are collecting personal information directly from users of another website or online service directed to children.”).

⁸² 15 U.S.C. §§ 6501–6506.

⁸³ 15 U.S.C. § 6501. An operator is defined as:

any person who operates a Web site located on the Internet or an online service and who collects or maintains personal information from or about the users of or visitors to such Web site or online service, or on whose behalf such information is collected or maintained, or offers products or services for sale through that Web site or online service, where such Web site or online service is operated for commercial purposes involving commerce.

Id.; *see also Complying with COPPA, supra* note 73 (“Foreign-based websites and online services must comply with COPPA if they are directed to children in the United States, or if they knowingly collect personal information from children in the U.S. The law’s definition of ‘operator’ includes foreign-based websites and online services that are involved in commerce in the United States or its territories.”).

⁸⁴ *See* Byron Acohido, *Apps, Social Networks Pose New Threat to Kids*, USA TODAY (Sept. 6, 2011, 8:21 PM), <http://usatoday30.usatoday.com/money/media/story/2011-09-06/Apps-social-networks-pose-new-threat-to-kids/50287992/1>. (“‘We want to make it crystal clear, to app developers and to others in this new mobile space, that we believe the protection under COPPA is not platform specific,’ says David Vladeck, director of the FTC’s consumer protection bureau. ‘If you can’t do it online, you can’t do it in an app.’”); *See also Complying with COPPA, supra* note 73.

⁸⁵ *See Complying with COPPA, supra* note 73.

The amended Rule sets out a number of factors for determining whether a website or

information⁸⁶ from children,⁸⁷ are required to follow a set of privacy standards.⁸⁸ Website providers directed at children must post a clear, comprehensive, and accessible online privacy policy describing their practices for collecting information from children.⁸⁹ Providers must also provide direct notice to parents as well as obtain verifiable parental consent,⁹⁰ with limited exceptions⁹¹, before collecting personal information from children using their site.⁹² Parents must also be given a choice by providers as to whether or not to consent to the operator's collection and internal use of their child's information.⁹³ Parents can prohibit the operator from disclosing information to third parties unless such disclosure is integral to the site or service, which must be made clear to parents.⁹⁴ Further, parents have the option to make a request to the providers to access to their child's personal information to review and/or

online service is directed to children. These include subject matter of the site or service, its visual content, the use of animated characters or child-oriented activities and incentives, music or other audio content, age of models, presence of child celebrities or celebrities who appeal to children, language or other characteristics of the website or online service, or whether advertising promoting or appearing on the website or online service is directed to children. . . . [T]he amended Rule also considers a website or online service to be 'directed to children' where it has actual knowledge that it is collecting personal information directly from users of another website or online service that is directed to children.

Id.; see also Gesswein, *infra* note 113.

⁸⁶ 15 U.S.C. § 6501. The amendments in 2013 to COPPA expanded the definition of personal information:

The term "personal information" means individually identifiable information about an individual collected online, including

- (A) a first and last name;
- (B) a home or other physical address including street name and name of a city or town;
- (C) an e-mail address;
- (D) a telephone number;
- (E) a Social Security number;
- (F) any other identifier that the Commission determines permits the physical or online contacting of a specific individual; or
- (G) information concerning the child or the parents of that child that the website collects online from the child and combines with an identifier described in this paragraph.

15 U.S.C. § 6501(8).

⁸⁷ 15 U.S.C. § 6502. COPPA does not apply to information about children collected online from parents or other adults. See *Complying with COPPA*, *supra* note 73 ("COPPA only applies to personal information collected online from children, including personal information about themselves, their parents, friends, or other persons.").

⁸⁸ 16 C.F.R. § 312.1 (2013).

⁸⁹ 16 C.F.R. § 312.3.

⁹⁰ 16 C.F.R. § 312.5.

⁹¹ 15 U.S.C. § 6502(b)(2).

⁹² 16 C.F.R. § 312.5.

⁹³ *Id.*

⁹⁴ 16 C.F.R. § 312.3.

have the information deleted.⁹⁵

COPPA also requires that operators maintain the “confidentiality, security, and integrity” of any and all information they collect from children, including taking reasonable steps in order to ensure that third parties coming into contact with the information are also capable of maintaining the confidentiality and security of the information.⁹⁶ Website providers do not have unlimited and unfettered use of the information; they can only retain personal information collected online from a child for only as long as is “necessary to fulfill the purpose for which the information was collected.”⁹⁷ Once the information collected is no longer necessary, “providers must delete the information using reasonable measures to protect against” its unauthorized access or use.⁹⁸ Other mandates of COPPA give parents the opportunity to prevent further use or online collection of a child’s personal information.⁹⁹

There are a number of exceptions to COPPA’s rules.¹⁰⁰ Parental consent, for example, is not required when the operator collects personal information, such as the name or contact information of a parent or child in order to secure further parental consent.¹⁰¹ Another immunity exists under the one-time-contact exception.¹⁰² The one-time contact exception allows websites to circumvent parental consent when they respond directly, on a one-time basis, to a specific request from the child. However, this exception requires that any information obtained cannot be used to re-contact the child or for any other purpose.¹⁰³ Instead, promptly after responding to the specific request, the exception requires that the information not be disclosed and must be deleted by the operator from its records.¹⁰⁴

C. *Privacy for Minors in California: SB 568*

In early 2013, during a period when the White House and Congress were criticized for moving at a glacial pace¹⁰⁵ regarding Internet

⁹⁵ 16 C.F.R. § 312.4.

⁹⁶ 16 C.F.R. § 312.8.

⁹⁷ 16 C.F.R. § 312.10.

⁹⁸ *Id.*

⁹⁹ 16 C.F.R. § 312.4.

¹⁰⁰ 15 U.S.C. § 6502(b)(2) (2012).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ 16 C.F.R. § 312.5.

¹⁰⁴ *Id.*

¹⁰⁵ See Michelle Quinn, *California Driving Internet Privacy Policy*, POLITICO (Oct. 8, 2013), <http://www.politico.com/story/2013/10/california-internet-privacy-policy-97964.html>. (“We are all watching what is going on in Washington, D.C., with great concern that our colleagues are not able to get very much done. Elected officials in California have embraced the issue of online privacy as an important matter to their constituents.”) (quoting Ellen Corbett) (internal quotation marks

regulations, California was moving full steam ahead with a series of online privacy laws.¹⁰⁶ The burst of activity was a sign that California – often viewed as the frontrunner when it comes to digital privacy¹⁰⁷ – was setting the agenda and raising the bar for Internet regulations.¹⁰⁸ Already a technology-forward state, with Silicon Valley at its heart, California’s response to a cultural shift towards more privacy and online protection and the rise in teenager and minor social media use¹⁰⁹ was the enactment of Senate Bill 568 (SB 568), entitled Privacy Rights for California Minors in the Digital World.¹¹⁰

Nicknamed “the eraser button law,” the purpose of the new law is to protect the online privacy of children and teenagers who are under eighteen years of age and reside in the state of California.¹¹¹ California’s new eraser button law contains two key elements: it gives teens the right to delete social-media posts and prohibits certain types of advertising from targeting them.¹¹² The provisions of SB 568, similar to those found in COPPA, are geared towards websites that are directed towards minors.¹¹³ Use by both adults and minors alike does not trigger a site to

omitted).

¹⁰⁶ *Id.* (“Once again California is taking the lead, which is not surprising when you consider how dysfunctional Congress has become.”) (quoting John Simpson) (internal quotation marks omitted).

¹⁰⁷ See Somini Sengupta, *Sharing, with a Safety Net*, N.Y. TIMES (Sept. 19, 2013), <http://www.nytimes.com/2013/09/20/technology/bill-provides-reset-button-for-youngsters-online-posts.html>. (“[California] was the first state to require companies to report data breaches, and [] requires Web sites and mobile apps to post privacy policies that explain how personal information is used.”).

¹⁰⁸ See Quinn, *supra* note 105.

¹⁰⁹ See Peterson, *supra* note 41.

[W]hat grabbed my attention was the story . . . about why this kind of legislation as important, of young teenage girls who go on a Web site to look at fashion — which is completely appropriate — only to then have that decision be used by marketers selling diet pills to barrage them with ads for diet pills. That was where my radar went off. I have a teenage daughter. It to me was the clearest example of how an appropriate activity by a teenager, using great technology, can easily be turned a negative way and in a way that can harm them.

Id.

¹¹⁰ CAL. BUS. & PROF. CODE § 22581 (2013). See Quinn, *supra* note 105 (“‘We have a culture in this state that not only appreciates innovation but also appreciates individual privacy,’ said Al Muratsuchi, a Democratic state Assembly member and author of the new Do Not Track transparency law. Lawmakers don’t want to hurt the tech industry by upending business models, he said, but ‘Californians clearly care about individual privacy and we will continue to explore individual opportunities to balance those interests.’”).

¹¹¹ Privacy and Data Security Team, *supra* note 17.

¹¹² See CAL. BUS. & PROF. CODE §§ 22580–81 (§ 22580 discusses the advertising prohibition whereas § 22581 discusses the right to delete).

¹¹³ CAL. BUS. & PROF. CODE § 22580. Under the California law, a website directed towards minors is defined as a site “that it is created for the purpose of reaching an audience that is predominantly comprised of minors, and is not intended for a more general audience comprised of adults.” *Id.* An example of a website that is directed towards minors is kids.nationalgeographic.com. See Megan Gesswein, *15 of the Best Websites for Kids*, BABBLE

be categorized as directed towards minors under the California law.¹¹⁴ Under the advertising provision of SB 568, it is up to website operators to determine whether their site is directed towards minors.¹¹⁵ California's enactment of SB 568 was geared towards further expanding the safeguards the FTC put in place for minors¹¹⁶ in COPPA.¹¹⁷ California's legislature concluded that children and teenagers, as compared to their adult counterparts, were at greater risk online because children lack fully developed self-regulating abilities and easily succumb to online-driven peer pressure.¹¹⁸

1. Minors and Website Advertisements

At their core, the majority of social networks are advertisement based companies with the objective of selling an Internet user's attention to their business partners or other third parties.¹¹⁹ High social media use can lead minors to being inundated with numerous advertisements and products.¹²⁰ Simply by logging into a social media site, internet users of all ages are exposed to advertisements on a wide range of services from clothing stores to restaurants to the newest indoor tanning locations.¹²¹

<https://www.babble.com/kid/15-of-the-best-websites-for-kids> [https://web.archive.org/web/20140319045438/https://www.babble.com/kid/15-of-the-best-websites-for-kids].

¹¹⁴ CAL. BUS. & PROF. CODE § 22580(e):

“Internet Web site, online service, online application, or mobile application directed to minors” mean an Internet Web site, online service, online application, or mobile application, or a portion thereof, that is created for the purpose of reaching an audience that is predominately comprised of minors, and is not intended for a more general audience comprised of adults. Provided, however, that an Internet Web site, online service, online application, or mobile application, or a portion thereof, shall not be deemed to be directed at minors solely because it refers or links to an Internet Web site, online service, online application, or mobile application directed to minors by using information location tools, including a directory, index, reference, pointer, or hypertext link.

Id.

¹¹⁵ See S.B. 568 Hearing, *supra* note 1.

¹¹⁶ A minor, as defined by SB 568, is a person under the age of eighteen. CAL. BUS. & PROF. CODE § 22580. This is unlike the Federal legislation COPPA (Children's Online Privacy Protection Act) which defines a minor as a person under the age of 13. 15 U.S.C. § 6501 (2012).

¹¹⁷ See Privacy and Data Security Team, *supra* note 17.

¹¹⁸ See SB 568 FACT SHEET, *supra* note 11.

¹¹⁹ Natasha Singer, *Your Online Attention, Bought in an Instant*, N.Y. TIMES (Nov. 17, 2012) <https://www.nytimes.com/2012/11/18/technology/your-online-attention-bought-in-an-instant-by-advertisers.html>.

¹²⁰ Christopher Elliott, *Yes, There Are Too Many Ads Online. Yes You Can Stop Them. Here's How*, HUFFPOST (Feb. 8, 2017, 4:08 PM), https://www.huffingtonpost.com/entry/yes-there-are-too-many-ads-online-yes-you-can-stop_us_589b888de4b02bbb1816c297 (“Marketing strategist Mehmood Hanif, who represents Bad Ad Johnny, estimates that the average Internet user is served 11,250 ads per month.”).

¹²¹ See *Social Media Marketing*, FLASHPOINT, <https://flashpointagency.com/marketing/digital->

Under the first provision of SB 568, § 22580, Internet companies are prohibited from marketing products to minors that are otherwise forbidden to be offered and sold to minors outside the Internet including guns, alcohol, dietary supplements, and cigarettes.¹²² In passing SB 568, the California legislature held that it was their responsibility to ensure that children and minors “are not bombarded with inappropriate advertisements while they are learning to be responsible consumers” in the online world.¹²³ Minors are viewed as being more susceptible to online marketing, especially the advertisements of harmful products, as they are still developing their critical thinking skills and judgment.¹²⁴

Section 22580 of the bill contains mandates regulating advertisements on websites directed towards minors.¹²⁵ First, the section prohibits site operators from collecting, using, and disclosing the personal information of minors with the intent to market goods or services that minors cannot legally consume or engage in as minors in the state of California.¹²⁶ Section 22580 also further prohibits these operators from knowingly allowing third parties to gather and use the personal information of these minors for the same marketing purposes.¹²⁷ Generally speaking, the act prohibits digital sites directed to minors from advertising or marketing services or products that minors cannot legally purchase or use under California law.¹²⁸ Simply put, “if you can’t sell it to a minor in a retail outlet or face to face, you can’t sell it, advertise it, or solicit on the Internet.”¹²⁹

As per Senator Darrell Steinberg, the author of SB 568, Internet companies will be left to determine the appropriate filters to prevent prohibited advertisements from reaching minors.¹³⁰

marketing/social-media (last visited Oct. 18, 2016) (“[S]ocial media serves as a relatively inexpensive platform for organizations to implement marketing campaigns.”).

¹²² CAL. BUS. & PROF. CODE § 22580(i) (2013).

¹²³ See SB 568 FACT SHEET, *supra* note 11.

¹²⁴ *Id.*

¹²⁵ BUS. & PROF. § 22580.

¹²⁶ See SB 568 FACT SHEET, *supra* note 11.

¹²⁷ *Id.*

¹²⁸ BUS. & PROF. § 22580.

¹²⁹ See Peterson, *supra* note 41. Under the advertising provision of SB 568, the bill prohibits the advertising of products such as alcoholic beverages; firearms and handguns; ammunition; aerosol containers of paint, materials potentially used for graffiti; tobacco products, blunt wrappers, and other any other preparation of tobacco, or any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco or controlled substances; BB guns; fireworks; ultraviolet tanning devices; dietary supplements; lottery tickets; tattoos; electronic cigarettes, and obscene material. BUS. & PROF. § 22580(i)(1–12)(15)(17)(18).

¹³⁰ See Peterson, *supra* note 41.

2. Minor's Erasing Tool: Time to Reflect

The second provision of SB 568, Section 2258, is often referred to as the “eraser button” provision.¹³¹ The provision ensures that minors are given not only the option, but moreover the opportunity, to erase personally-posted material online.¹³² One of the objectives of the bill is to allow minors a second chance when it comes to impetuous decisions they may make online.¹³³ The eraser provision requires that Internet companies provide minors user-friendly tools that aid in deleting a post or a picture before it is transmitted to a third party.¹³⁴

Under Section 22581, websites have to not only allow minors the ability to erase what they have personally posted, but additionally, must provide notice to the minors that they are allowed to request erasure, along with instructions on how to do so.¹³⁵ Under this provision, operators of Internet websites that are either directed to minors or whose operators have actual knowledge that a minor is using their site, must permit a registered user minor to remove or to request and further obtain removal of posted material.¹³⁶ The caveat is that registered minor users of the website may request the removal only of information that they themselves have personally posted.¹³⁷ Internet operators furthermore must provide notice and clear instructions to minor users on how to request removal as well as guide them through the removal process.¹³⁸ An important provision to Section 22581 is that additional notice must be provided to

¹³¹ BUS. & PROF. § 22581; *see also* Peterson, *supra* note 41.

¹³² BUS. & PROF. § 22581. “The purpose, of course, is to allow minors—and we’ve all been teenagers who sometimes act in ways that they regret a few moments or an hour later or makes their parents looking over their shoulder say ‘why did you post that?’—and allows them to remove it before it can be embarrassing to themselves or harmful to somebody else.” *See* Peterson, *supra* note 41. “This bill provides minors with the opportunity to erase potentially harmful or embarrassing content.” *Id.*; *see also* SB 568 FACT SHEET, *supra* note 11.

¹³³ *See* Peterson, *supra* note 41. Author of the bill, California Senate President pro Tem Darrell Steinberg, explained:

[W]hether it’s cyber-bullying, whether it’s the posting of an inappropriately picture or a derogatory comment about a third party — sometimes young people make impetuous decisions and this allows them to, yes, if recognized in a very timely manner, to be able to take it back. The thing that really shocked me on this was the fact that a number of colleges and universities around the country have the technology to properly access the Web sites, the Facebook pages, of college applicants. So a comment a young person posts that may seem innocuous, if it’s derogatory, or it’s embarrassing, or shows them in a negative light, it could actually affect their future in a very obvious way. And so this is a fail-safe.

Id.; *see also* Sengupta, *supra* note 107.

¹³⁴ BUS. & PROF. § 22581; *see also* Peterson, *supra* note 41.

¹³⁵ BUS. & PROF. § 22581.

¹³⁶ BUS. & PROF. CODE § 22581(a)(1).

¹³⁷ *Id.*

¹³⁸ BUS. & PROF. CODE § 22581(a)(3).

minors to inform them that the procedures mandated by SB 568 do not ensure complete, total removal of the content or information posted.¹³⁹

The eraser law does, however, contain exceptions to content removal.¹⁴⁰ Under Section 22581, a website is not required to erase, remove, or enable the removal in a number of cases, some of which could be problematic to teenagers.¹⁴¹ For example, content that was posted to a website by a third-party and not the minor user is not required to be removed under Section 22581.¹⁴² Furthermore, content does not have to be removed if the minor does not follow the specific removal request instructions in place by the website.¹⁴³ Moreover, if the minor registered user received compensation for their post, website providers are not required to take down the content, even if requested.¹⁴⁴

II. THE SHORTCOMINGS OF COPPA AND CALIFORNIA'S ATTEMPT TO TAKE THE LEAD

COPPA has been both celebrated and criticized¹⁴⁵ and unlike the federal government's other attempts at protecting minors online, COPPA has persisted to this day.¹⁴⁶ In response to concern that COPPA was becoming outdated in the age of social media and behavioral advertising,¹⁴⁷ the Act was amended in 2013 to address changes in the way children use and access the Internet, including the increased use of mobile devices and social networking.¹⁴⁸ COPPA, however, still contains what some critics would argue are obvious structural deficiencies.¹⁴⁹ One

¹³⁹ BUS. & PROF. CODE § 22581(a)(2).

¹⁴⁰ BUS. & PROF. CODE § 22581(b).

¹⁴¹ BUS. & PROF. § 22581.

¹⁴² *Id.* "Thus, if a minor posts a picture or status, and a friend shares the picture on his page, the web service must facilitate removal of the picture from the minor's social media page, but has no obligation to remove the picture from the friend's page." Stephen Wu, *California's New "Eraser" Privacy Law Aimed at Protecting Minors*, RSA CONF. (Sept. 29, 2013), <https://www.rsaconference.com/blogs/californias-new-eraser-privacy-law-aimed-at-protecting-minors>.

¹⁴³ BUS. & PROF. § 22581.

¹⁴⁴ *Id.* For example, if a minor posts a photograph or status in return for a free product or service, this could potentially be considered "compensation" under SB 568 and thus would not be required to be removed.

¹⁴⁵ See Hersh, *supra* note 54, at 1834–35.

¹⁴⁶ Children's Online Privacy Protection Rule, 16 C.F.R. § 312 (2013); see also *supra* Part I.B.

¹⁴⁷ John J. Heitmann, et. al., "Big Three" Weigh in On Online Privacy: FTC, FCC, an NCIA Testify at Privacy Hearing, 13 NO. 8 E-COMMERCE L. REP. 1 (2011).

¹⁴⁸ 16 C.F.R. § 312. See *Complying with COPPA*, *supra* note 73; see also Natasha Singer, *New Online Privacy Rules for Children*, N.Y. TIMES (Dec. 19, 2012), <http://www.nytimes.com/2012/12/20/technology/ftc-broadens-rules-for-online-privacy-of-children.html>. "The revised children's privacy rule makes clear that companies must obtain parental consent before collecting certain details that could be used to identify, contact, or locate a child." *Id.* "These include photos, video, and audio as well as the location of a child's mobile device." *Id.*

¹⁴⁹ See Eric Goldman, *The FTC's New Kid Privacy Rules (COPPA) Are a Big Mess*, FORBES (Dec. 20, 2012, 11:19 AM), <http://www.forbes.com/sites/ericgoldman/2012/12/20/the-ftcs-new->

of the most glaring issues with COPPA is the lack of protection for children over the age of thirteen.¹⁵⁰ Teens are still legally defined as minors and cannot legally enter into binding contracts—including privacy policies frequently found on the Internet.¹⁵¹ The statute thus leaves an odd gap for thirteen to seventeen-year-olds, some of the heaviest online users, who are not covered by COPPA.¹⁵²

COPPA, some scholars argue, has led to a number of unintended consequences, including shutting out younger children to expansive portions of the Internet,¹⁵³ as many sites have viewed banning users under the age of thirteen as a simple, more cost effective way of attempting to tackle COPPA and its mandates.¹⁵⁴ Even then, some websites have found that minors may lie about their age which creates a loop hole to circumvent COPPA.¹⁵⁵ Critics further point out that COPPA places unintended economic burdens on website providers, mainly those categorized as small business,¹⁵⁶ even impacting a number of small sites enough to put them out of business all together.¹⁵⁷ Larger, more economically stable companies such as Disney and Nickelodeon, faced much fewer problems adhering to COPPA regulations and continued to serve children without limiting the ages of the children their sites

kid-privacy-rules-coppa-are-a-big-mess/#72413d774988.

¹⁵⁰ 16 C.F.R. § 312.2.

¹⁵¹ See Goldman, *supra* note 149.

¹⁵² See *id.* For example, twenty-three percent of all of Snapchat users are age thirteen to seventeen. *Snapchat User Demographics: Distribution of Unites States Snapchat Users as of February 2016, by Age*, STATISTA, <https://www.statista.com/statistics/326452/snapchat-age-group-usa> (last visited Oct. 5, 2017).

¹⁵³ See Ben Charny, *Disney: The Mouse That Won't Roar*, ZD NET (Oct. 11, 2000, 5:51 AM), <http://www.zdnet.com/article/disney-the-mouse-that-wont-roar>. “Entertainment giant Walt Disney [] stopped letting anyone under the age of 12 into its un-moderated chat rooms.”. *Id.* The decision affected multiple properties in the Disney family of websites such as ESPN.com, ABC.com and Go.com. *Id.*

¹⁵⁴ See Sara M. Grimes, *Revisiting the Children's Online Privacy Protection Act*, JOAN GANZ COONEY CTR. (March 25, 2013), <http://www.joanganzcooneycenter.org/2013/03/25/revisiting-the-childrens-online-privacy-protection-act>.

¹⁵⁵ See *id.*; see also Kristina E. Hatch, *Determining the Effects of Technology on Children*, DIGITAL COMMONS @ U.R.I., 1, 17 (2011), <http://digitalcommons.uri.edu/cgi/viewcontent.cgi?article=1212&context=srhonorsprog> (“A 47-year-old Cape Cod mother said, ‘You know, I feel like a hypocrite, because I’m saying I don’t think children should have a Facebook before they’re sixteen . . . but he’s eleven, and he has one. And we had to lie about his age, and say he was thirteen.’”).

¹⁵⁶ See Larry Magid, *Unintended Consequences of FTC's New COPPA Children's Online Privacy Rules*, HUFF. POST (Aug. 4, 2012, 5:13 PM), http://www.huffingtonpost.com/larry-magid/unintended-consequences-o_1_b_1741703.html; see also Jonathan Zuck, *ACT Letter to Small Biz Committee on COPPA*, ACT (July 19, 2006), <http://actonline.org/2006/07/19/act-letter-to-small-biz-committee-on-coppa> (“For example, Wall Street Journal Interactive reported that FreeZone, a web portal for kids between 8 and 14, estimates it will spend about \$100,000 per year to comply with COPPA. Another company, Zeeks.com, pulled all of its interactive content because the \$200,000 per year cost to employ chat-room supervisors, monitor phone lines to answer parents’ questions, and process COPPA permission forms was “the straw that broke the camel’s back.”).

¹⁵⁷ See Magid, *supra* note 156.

served.¹⁵⁸ Nonetheless, some small businesses survived the burdens of COPPA to become COPPA compliant and new companies continue to emerge that operate within COPPA's guidelines.¹⁵⁹

Other scholars have observed debates over certain statute definitions or requirements. For example, Sara Grimes highlighted debates over "the Act's definition of what counts as personal information is too narrow," and arguments over whether "the requirements for parental consent are problematic for being either too stringent or not adequately enforced."¹⁶⁰ The FTC however, continues to enforce COPPA, filing numerous actions against companies for violating the Act, including a number of very popular and large sites such as Sony BMG, Yelp, and Hersey Foods.¹⁶¹ The methods for collection of parental consent have continuously been one of the largest sources of criticism for COPPA.¹⁶² Critics have asserted that the methods approved by the FTC for verification—sending/faxing signed printed forms, calling toll-free numbers, or forwarding digital signatures through email—are too costly and cumbersome.¹⁶³ A "sliding scale" within the FTC's rules allows websites to vary how they obtain permission, depending on the type of information being gathered and how the website intends to use the information they acquire.¹⁶⁴ But cost

¹⁵⁸ See *id.*

¹⁵⁹ See *id.*

¹⁶⁰ See Grimes, *supra* note 154. Some methods that the FTC lays out for websites to obtain parent consent are: providing a consent form to be signed by the parent and returned via U.S. mail, fax, or electronic scan (the "print-and-send" method); requiring the parent, in connection with a monetary transaction, to use a credit card, debit card, or other online payment system that provides notification of each discrete transaction to the primary account holder; having the parent call a toll-free telephone number staffed by trained personnel, or have the parent connect to trained personnel via video-conference; or verifying a parent's identity by checking a form of government-issued identification against databases of such information, provided that you promptly delete the parent's identification after completing the verification. See *Complying with COPPA*, *supra* note 73.

¹⁶¹ See *United States v. Hershey Food Corp.*, No. 4CV-03-350 (M.D. Pa. 2003), FED. TRADE COMM., https://www.ftc.gov/taxonomy/term/246/type/case?type=All&field_mission_tid=All (last visited Feb. 14, 2017); *United States v. Sony BMG Music Entertainment*, No. 08 CV 10730 (S.D.N.Y. 2008), FED. TRADE COMM., https://www.ftc.gov/taxonomy/term/246/type/case?type=All&field_mission_tid=All (last visited Feb. 14, 2017); *United States v. Yelp*, No. 3:14-cv-04163 (N.D. Cal. 2014), FED. TRADE COMM., https://www.ftc.gov/taxonomy/term/246/type/case?type=All&field_mission_tid=All (last visited Feb. 14, 2017). For further example, see Press Release, Fed. Trade Comm'n, *Sony BMG Music Settles Charges Its Music Fan Websites Violated the Children's Online Privacy Protection Act*, (Dec. 11, 2008), <https://www.ftc.gov/news-events/press-releases/2008/12/sony-bmg-music-settles-charges-its-music-fan-websites-violated>.

¹⁶² See generally Emma Llanso, *COPPA Rule Brings Regs Up to Date . . . but Who Must Comply?*, CDT (Dec. 20, 2012), <https://cdt.org/blog/coppa-rule-brings-regs-up-to-date-but-who-must-comply/> ("obtaining verified parental consent is one of the more onerous obligations for operators under the COPPA Rule . . .").

¹⁶³ See EPIC COPPA Primer, *supra* note 12.

¹⁶⁴ See Jeri Clausing, *New Privacy Rules for Children's Web Sites*, N.Y. TIMES (Oct. 21, 1999), <http://www.nytimes.com/1999/10/21/technology/new-privacy-rules-for-children-s-web-sites.html>. "For example, websites will be required to use more reliable forms of consent, such as credit card or 'digital signatures' before children can participate in the site's chat rooms or give out personal information that will be made available to third parties." *Id.*

continues to be a problem.¹⁶⁵ Recent amendments were implemented to COPAA to continue combating the issue of obtaining parental consent while further developing with the evolution of the Internet.¹⁶⁶

Children's privacy advocates, however, praise the FTC on the safeguards COPPA continues to provide in order to protect children's privacy online.¹⁶⁷ When COPPA was originally passed, the FTC was praised for executing a very thorough and conscientious job of developing rules that were not only flexible and effective but a good compromise between the Internet industry and the government.¹⁶⁸ With the recent amendments, the FTC was praised for continuing to better develop, amend, and improve COPPA in order to stay current with changing times.¹⁶⁹ Changes to the type of information website operators cannot collect without parental supervision¹⁷⁰ is just one example of the FTC's continued efforts to keep COPPA up-to-date with the constant evolution of the Internet.¹⁷¹

SB 568 stands as California's response to the deficiencies it believes COPPA presents.¹⁷² "Unlike COPPA, SB 568 is narrowly focused on

¹⁶⁵ See *id.* ("A number of companies had argued that e-mail from a parent is more than sufficient, saying that other methods can be too costly for small start-ups.")

¹⁶⁶ See Llanso, *supra* note 162. "The Commission also updated the procedures for obtaining verified parental consent, retaining the popular "email plus" method and introducing video chat and submission of scanned signed permission forms to the list of approved methods. Importantly, the Commission also reminded operators that it hopes to encourage innovation in the field of consent mechanisms; to that end, it has created a process for operators to seek public review and Commission approval of new methods. Obtaining verified parental consent is one of the more onerous obligations for operators under the COPPA Rule, and the development of lower-cost consent methods that are both reliable and easier for operators to implement could foster the growth of rich online content designed for children." *Id.*

¹⁶⁷ See Jeff Chester, *Children's Privacy Advocates Praise FTC on Proposed Safeguards to Protect Children's Information Online*, CTR FOR DIGITAL DEMOCRACY (Sept. 15, 2011), <https://www.democraticmedia.org/content/childrens-privacy-advocates-praise-ftc-proposed-safeguards-protect-childrens-information>. "Since its passage in 1998, COPPA has served as an important safeguard for young consumers under the age of 13 in the online marketing environment It established a level playing field by creating a law that applied to every commercial player—from the largest children's media companies to the smallest start-ups. And it sent a strong signal to the online marketing industry: If you are going to do business with our nation's children, you will have to follow some basic rules." *Id.* (statement of Kathryn Montgomery) (internal quotation marks omitted).

¹⁶⁸ See Clausing, *supra* note 164 (internal quotation marks omitted).

¹⁶⁹ See *Consumers Union Praises FTC Proposal to Improve, Update Rules for Children's Online Privacy*, CONSUMER UNION (Sept. 16, 2011), <http://consumersunion.org/news/consumers-union-praises-ftc-proposal-to-improve-update-rules-for-childrens-online-privacy>.

¹⁷⁰ See Singer, *supra* note 148. "In an era of widespread photo sharing, video chatting and location-based apps, the revised children's privacy rule makes clear that companies must obtain parental consent before collecting certain details that could be used to identify, contact or locate a child. These include photos, video and audio as well as the location of a child's mobile device." *Id.*

¹⁷¹ See *FTC Strengthens Kids' Privacy, Gives Parents Greater Control Over Their Information By Amending Childrens Online Privacy Protection Rule*, FED. TRADE COMM'N. (Dec. 19, 2012), <https://www.ftc.gov/news-events/press-releases/2012/12/ftc-strengthens-kids-privacy-gives-parents-greater-control-over>.

¹⁷² SB 568 FACT SHEET, *supra* note 11.

giving minors the right to [request] the removal of information they post online and preventing online marketers from targeting [minors] with offers for [prohibited] products and services.”¹⁷³ Similar to its federal counterpart, SB 568 has been met with both applause and criticism.¹⁷⁴ Forbes Magazine called the bill “mockable,” “puzzling,” and an “ill-advised” attempt to rewrite history.¹⁷⁵ Critics question how the deletion tool is any different than those readily available online to not only minors, but adults as well.¹⁷⁶ Further, some critics believe that the third party repost exception to deletion undermines the goal of the eraser provision completely.¹⁷⁷ The most common criticisms claim that the law is too ambiguous¹⁷⁸ and a constitutional violation of the Dormant Commerce Clause by California.¹⁷⁹

Advocates of the bill, such as Common Sense Media, however, applaud the law, believing it represents an important milestone in the protection of minors online.¹⁸⁰ In their view, SB 568 creates an entirely new class of specially-protected minors who are not covered by COPPA, those teenagers older than thirteen, but under the age of eighteen.¹⁸¹ Further, advocates hope that the passage of SB 568 will continue to incentivize and push Congress to continue expanding protection for minors’ privacy online.¹⁸² SB 568 has also been applauded for giving

¹⁷³ See Andrew M. Baer, *Thanks to California, It’s Time to Update Your Privacy Policy*, BAER CROSSEY (Oct. 8, 2013), <http://www.baercrossey.com/1341/thanks-to-california-its-time-to-update-your-privacy-policy>.

¹⁷⁴ Note, at the time of writing there is no case law or lawsuits regarding SB 568.

¹⁷⁵ See Eric Goldman, *California’s New ‘Online Eraser’ Law Should Be Erased*, FORBES (Sept. 24, 2013, 1:35 PM), <http://www.forbes.com/sites/ericgoldman/2013/09/24/californias-new-online-eraser-law-should-be-erased>.

¹⁷⁶ See Peterson, *supra* note 41. *But see* Katy Waldman, *California’s Internet Eraser Law: Nice Idea, But It Won’t Work*, SLATE (Sept. 25, 2013, 3:07 PM), http://www.slate.com/blogs/xx_factor/2013/09/25/sb_568_california_digital_eraser_law_for_minors_is_unlikely_to_work.html (“As Gregory Ferenstein of *TechCrunch* observes, almost every service out there already provides a delete button. At least theoretically, teens (and adults) have long enjoyed the option to Windex away their social media indiscretions.”).

¹⁷⁷ See Stephen J. Astringer, *The Endless Bummer: California’s Latest Attempt to Protect Children Online is Far Out(Side) Effective*, 29 NOTRE DAME J.L. ETHICS & PUB. POL’Y 271, 276 (2015) (“Content eligible for removal is only that which is generated by the minor, and does not include anything ‘republished’ or ‘reposted.’ The California Legislature included this provision to combat First Amendment issues, but the exception likely swallows the entire rule and is the most critical facial defect of the law.”). For example, “screenshots of a particular post on Facebook could be posted to another site” like news sources such as CNN and FOX, and would not have to be removed by the website provider, even if a minor requests removal. *Id.* at 276 n.28.

¹⁷⁸ See Thomas R. Burke et al., *California’s “Online Eraser” Law For Minors To Take Effect Jan. 1, 2015*, DAVIS WRIGHT TREMAINE (Nov. 17, 2014), <http://www.dwt.com/Californias-Online-Eraser-Law-for-Minors-to-Take-Effect-Jan-1-2015-11-17-2014>.

¹⁷⁹ See James Lee, *SB 568: Does California’s Online Eraser Button Protect the Privacy of Minors?*, 48 U.C. DAVIS L. REV. 1173, 1191 (2015).

¹⁸⁰ See Sengupta, *supra* note 107.

¹⁸¹ See Baer, *supra* note 173.

¹⁸² See Quinn, *supra* note 105. “‘From our perspective, we’ll take it where we can get it,’ said Joni Lupovitz, vice president of policy at Common Sense Media. ‘When California passes a

minors a second chance when it comes to their activities online,¹⁸³ especially since, proponents of the law argue, deletion options are not always obvious.¹⁸⁴ Growing up is synonymous with learning from one's mistakes and teenagers deserve the chance to erase their foolish mistakes in private, without the threat of future repercussions from future onlookers.¹⁸⁵

III. PROPOSAL: THE FTC SHOULD FURTHER AMEND COPPA TO INCLUDE ERASER AND ADVERTISEMENT PROVISIONS IN LINE WITH CALIFORNIA'S SB 568 TO FURTHER PROTECT MINORS ONLINE

Social media takes on a particular importance in society today because of the influence it wields on children and teenagers, who are among the heaviest users of social networking, particularly with regard to their developmental vulnerability.¹⁸⁶ There is a necessity to protect children and teenagers, beyond the protections of COPPA, and to extend digital protections to teenagers over the age of thirteen, but under eighteen.¹⁸⁷ Although COPPA currently does not apply to teenagers over the age of thirteen but under the age of eighteen, the FTC has made it clear it is concerned about teenage privacy on the Internet and protecting this age group online.¹⁸⁸

In proposing COPPA, four goals were addressed:

- (1) to enhance parental involvement in a child's online activities in order to protect the privacy of children in the online environment;
- (2) to enhance parental involvement to help protect the safety of children in online fora such as chatrooms, home pages, and pen-pal services in which children may make public postings of identifying information;
- (3) to maintain the security of personally identifiable information of children collected online; and
- (4) to protect children's privacy by limiting the collection of personal information from children without

measure, it can unleash a wave of measures across the country.” *Id.*

¹⁸³ See S.B. 568 Hearing, *supra* note 1, at 9 (“This bill empowers kids, teens, and their families by providing this important option. Regardless of the platforms we use, our personal information belongs to us. It is not a commodity to be controlled and traded by online and mobile companies.”).

¹⁸⁴ See Peterson, *supra* note 41. Author of the bill, California Senate President pro Tem Darrell Steinberg has argued that “it’s not always easily accessible to delete and it can still be accessed even if it is deleted I think in many instances with the right kind of technology. This will allow it to be removed and not be accessed by anybody subsequently.” *Id.*

¹⁸⁵ See *generally* Waldman, *supra* note 176.

¹⁸⁶ See Ramasubbu, *supra* note 44. “The percent of teens that use social network sites almost doubles between ages twelve and thirteen. In fact, over 80% of thirteen-year-old users actively use social media.” SB 568 FACT SHEET, *supra* note 11, at 1; see also *supra* Part I.A.

¹⁸⁷ See SB 568 FACT SHEET, *supra* note 11, at 1.

¹⁸⁸ *Complying with COPPA*, *supra* note 73 (“Although COPPA does not apply to teenagers, the FTC is concerned about teen privacy and does believe that strong, more flexible, protections may be appropriate for this age group.”).

parental consent.¹⁸⁹

These goals, which continue to remain important today, need to evolve in order to meet the changes in online use by minors, including more frequent and widespread use and ease of accessibility.¹⁹⁰

To further these four goals, COPPA was designed to confront two problems: “(1) overmarketing to children and collection of personally identifiable information from children that is shared with advertisers and marketers, and (2) children sharing information with online predators who could use it to find them offline.”¹⁹¹ With an increased accessibility to the Internet, children are interacting online more than ever, leading to an increase in personal information being posted online.¹⁹² The potential to over share information, such as personal home addresses or geotagging¹⁹³ one’s location, combined with how habitually minors and teenagers alike post online, increases the risk of online predators being able to find minors online and use the information shared to their advantages.¹⁹⁴

In order to further deal with the concern regarding teenage privacy online as well as further protecting all minor Internet users, the FTC should take the lead from California and further expand COPPA. In expanding COPPA, the FTC should broaden the Act to include provisions

¹⁸⁹ 144 CONG. REC. S11657 (daily ed. Oct. 7, 1998) (statement of Rep. Bryan).

¹⁹⁰ See Bonnie Rochman, *Young Kids Increasingly Use the Internet Regularly*, TIME (Mar. 18, 2011), <http://healthland.time.com/2011/03/18/young-kids-increasingly-hang-out-online>.

¹⁹¹ See Hersh, *supra* note 54, at 1854 (internal citations omitted).

¹⁹² See Steven Woda, *The “TMI” Epidemic: Are My Teens Oversharing Online*, UKNOWKIDS (Aug. 6, 2014, 11:40am), <http://resources.uknowkids.com/blog/the-tmi-epidemic-are-my-teens-oversharing-online>.

¹⁹³ See *id.* (“Commonly known as “Geotagging”, teens use this information to share location-specific information with other people. If they find a nice restaurant, they might geotag it on their phones and tell their friends - and if they don’t turn the function off, then their phone could send information about their location to anyone who knows how to search for it.”); see also Kate Murphy, *Web Photos That Reveal Secrets, Like Where You Live*, N.Y. TIMES (Aug. 11, 2010), <http://www.nytimes.com/2010/08/12/technology/personaltech/12basics.html> (“Security experts and privacy advocates have recently begun warning about the potential dangers of geotags, which are embedded in photos and videos taken with GPS-equipped smartphones and digital cameras. Because the location data is not visible to the casual viewer, the concern is that many people may not realize it is there; and they could be compromising their privacy, if not their safety, when they post geotagged media online.”).

¹⁹⁴ See Woda, *supra* note 192 (“If your teen geotags a place that made them feel better when they’re depressed, then a stalker knows where to look the next time their status update says they’re unhappy. If your child posts their phone number, someone could use that to track them down and accost them.”).

similar to both the eraser provisions¹⁹⁵ and advertising protections¹⁹⁶ found within California's SB 568. As with the current COPPA provisions, the eraser and advertising provisions would apply to websites directed towards minors or those with knowledge that minors are using their site. While COPPA can continue to leave the original age range of thirteen-and-under for the parental consent and information collecting provisions already enacted,¹⁹⁷ in implementing the expanded COPPA, the FTC should increase the age of protection to eighteen-and-under for the eraser provisions and advertising protections in line with SB 568.¹⁹⁸ The expansion of COPPA would allow all teenagers under the age of eighteen to request the removal of content they personally post online as well as to be guaranteed the protections of not being inundated by illegal products. By increasing the age of protections, the FTC would ensure that all minors and teenagers on the Internet are afforded the safeguards they require online. An expansion of COPPA would further confront and address the problems COPPA was originally designed to resolve.¹⁹⁹

Websites targeted by both COPPA and SB 568 already have deletion options in place, thus furthering the extension of deletion tools available to minors would not be a difficult or costly provision for website providers to comply with.²⁰⁰ However, although many websites that minors use, such as Facebook and Twitter, have obvious delete buttons, deletions tools on other websites and services are not as obvious, and many users are left wondering how to delete their content.²⁰¹ Snapchat, for example, allows users to delete posts, but they still remain

¹⁹⁵ CAL. BUS. & PROF. CODE § 22581 (West 2013). Similar to erasing a past criminal records, advocates, such as Google's chairman, are calling for a "delete" button for the web — "some effective way of permanently erasing data once and for all." See Chris Welch, *Eric Schmidt on an Internet 'Delete' Button: 'There is a Time When Erasure is a Right Thing'*, VERGE (May 6, 2013, 2:18 PM), <http://www.theverge.com/2013/5/6/4305588/eric-schmidt-says-there-should-be-a-delete-button-for-internet>.

¹⁹⁶ BUS. & PROF. CODE § 22580 (West 2013).

¹⁹⁷ By keeping the original under thirteen age range for the parental consent provision, the expanded COPPA would ensure that companies which already comply with the current version of COPPA would not be burdened; especially small business websites and mobile applications, which are impacted greater by regulation changes. See generally Jonathan Zuck, *ACT Letter to Small Biz Committee on COPPA*, ACT (July 19, 2006), <http://actonline.org/2006/07/19/act-letter-to-small-biz-committee-on-coppa>.

¹⁹⁸ BUS. & PROF. CODE § 22580–81 (West 2013).

¹⁹⁹ See Hersh, *supra* note 54, at 1853–56. Critics may argue that an expansion of COPPA will continue to burden small business owners who develop websites and apps for children. See *supra* text accompanying notes 158–61. Under the new expanded COPPA, the FTC could implement a "sliding scale" which looks at the number of minors who use a company's website or application and corresponds that number with the amount of time that company has to become compliant with the new COPPA.

²⁰⁰ See Waldman, *supra* note 176.

²⁰¹ See Peterson, *supra* note 41 (California Senate President pro Tem Darrell Steinberg explaining how SB 568 makes it easier to than the sort of delete button that most social media sites already have now, using Snapchat as an example where something that is deleted can still be retrieved).

retrievable.²⁰² Thus, content that is deleted by current technology's delete button is not necessarily completely erased.²⁰³ The erasure provision in an expanded COPPA would ensure that Internet providers give minors easy access to the tools that guarantee once something is deleted it stays deleted.²⁰⁴ Putting a minor-specific section into a website provider's privacy policy, including explanations explaining how minors can delete content or request the erasure of their data together with explanations of what the erasure actually entails, could only be beneficial to minors.²⁰⁵

A further benefit of expanding COPPA to include the provisions found in SB 568 is that a reduction in advertisement of products minors cannot legally purchase face-to-face could lead to an actual reduction of the illegal sale of these products.²⁰⁶ When amending COPPA in 2013 to improve privacy protections and increase parental control over what information website operators collect from children, FTC Chairman Jon Leibowitz observed website operators collecting children's personal information to create user profiles curated for future targeting with different marketed advertisements.²⁰⁷ Legislatures have observed that minors and teenagers are more susceptible to online marketing of harmful products as they are still developing their ability to use sound judgment, both in the real world and online as well.²⁰⁸ These developmental growths make them increasingly vulnerable to targeted advertising campaigns.²⁰⁹ Due to minors' and teenagers' vulnerability to advertising, proponents of SB 568 assert that the government should make sure that both minors and teenagers alike are not overwhelmed by inappropriate advertisements while they navigate the Internet.²¹⁰ By prohibiting operators from marketing certain products and collecting information for the purpose of marketing directly to minors and teenagers, SB 568,²¹¹ and a further amended COPPA, can further preserve minors' safety online. Since COPPA was designed to deal with over-marketing to children and

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *The "Online Eraser" Law*, TERMSFEED, <https://termsfeed.com/blog/online-eraser> (last visited Jan. 8, 2017). Websites such as Facebook have a minor-specific section in their privacy policy section. *Id.*

²⁰⁶ An FDA report mentions studies that suggest "that cigarette advertising helps young people to decide what is normal or socially acceptable behavior, and that those who overestimate the prevalence of smoking seem to be more likely to begin smoking and progress to regular smoking." U.S. FOOD & DRUG ADMIN., CHILDREN AND TOBACCO, EXECUTIVE SUMMARY, FINAL RULE (1996), <http://www.lawpublish.com/fdarule.html>. Tobacco is one of the banned advertisements under SB 568. *See supra* note 129.

²⁰⁷ *See* Brian Geremia, *Chapter 336: Protecting Minors' Online Reputations and Preventing Exposure to Harmful Advertising on the Internet*, 45 MCGEORGE L. REV. 433, 438 (2014).

²⁰⁸ SB 568 FACT SHEET, *supra* note 11.

²⁰⁹ *See* S.B. 568 Hearing, *supra* note 1, at 5.

²¹⁰ *See* SB 568 FACT SHEET, *supra* note 11. *See also* Geremia, *supra* note 207.

²¹¹ CAL. BUS. & PROF. CODE § 22580 (West 2013).

collection of personally identifiable information from children that is shared with advertisers and marketers, by adding the advertising provisions found in SB 568 to COPPA, the FTC would continue to further its goals of protecting minors and teenagers from the marketing tactics used to attack their still developing judgment.²¹²

Critics of SB 568 do not want to see California become the nation's laboratory for online privacy laws.²¹³ Instead, these critics argue that Congress is better suited to legislate on these issues.²¹⁴ Legislation that affects interstate commerce, including Internet legislation, belongs to Congress, and when states like California attempt to take control of the wheel, it sets a dangerous precedent of differing regulations state to state.²¹⁵ Opponents of laws such as SB 568 argue for uniform regulation of the Internet and oppose fragmented regulation stemming from the states.²¹⁶ California has a great interest in protecting its minors and teenagers online, but that makes it no different than any other state.²¹⁷ If other states pass similar laws, companies would be forced to devise multiple policies for the underage residents of different states—confusing both website providers as well as consumers and “creating unwieldy requirements for Web businesses that are essentially stateless.”²¹⁸ To avoid confusion and burden, website providers might just stop allowing all minors to use their sites until they are of age.²¹⁹ By passing a more expansive national law to children's online privacy, the FTC would be lessening the burdens and confusion upon Internet providers that would

²¹² See *Complying with COPPA*, *supra* note 73. In enacting COPPA, Congress “recognized that younger children are particularly vulnerable to overreaching by marketers and may not understand the safety and privacy issues created by the online collection of personal information.” *Id.* “[T]he FTC is concerned about teen privacy and does believe that strong, more flexible, protections may be appropriate for this age group.” *Id.*

²¹³ See Quinn, *supra* note 105 (“‘California seems like it is willing to declare the Internet its own private fiefdom and rule it with its own privacy fist,’ said Adam Thierer, a senior research fellow at the Mercatus Center at George Mason University.”).

²¹⁴ *Id.*; see also Hersh, *supra* note 54, at 1858–59 (“... government has a mechanism of enforcement immediately built into its laws, unlike industry regulations that have no legal authority. The government has the manpower and funds to enforce its own laws, which keeps it from needing to employ help from other channels.”). Additionally, there are many parents who simply do not understand the dangers of the Internet well enough to protect their children, and many who do not believe in the dangers about which they are warned: many parents still do not use the Internet and others are apathetic about its potential threat. *Id.* at 1859.

²¹⁵ See Astringer, *supra* note 177, at 298. Other states like Maryland and New Jersey have also passed legislation regarding the internet. *Id.*

²¹⁶ See Sengupta, *supra* note 107. Stephen Balkam, president of the Family Online Safety Institute, said he favored Congressional and administrative oversight on online privacy issues. *Id.* (“Where California leads, others follow,” he said. “I think it will be a mess.”).

²¹⁷ See Astringer, *supra* note 177, at 290.

²¹⁸ See Sengupta, *supra* note 107; see also Astringer, *supra* note 177, at 288 (“The danger of regulations like SB 568 is that they set a national floor, and website operators will comply with the most restrictive.”).

²¹⁹ See e.g., Ben Charny, *Disney: The Mouse That Won't Roar*, ZD NET (Oct. 11, 2000, 12:51 PM) <http://www.zdnet.com/article/disney-the-mouse-that-wont-roar>.

have to comply with multiple state laws, as well as reducing the risk of Internet providers violating one of these laws.²²⁰ The expansion of COPPA to include an eraser provision and advertising protection on a national scheme would require all websites hosted in the United States the protections available in SB 568, thus easing websites from the responsibility of having to distinguish between minor users from different states.²²¹ Consequently, websites would be free from geographic location burdens typically found in state laws and their burdens would further be minimized.²²²

Accordingly, implementing the eraser button and advertising protections of SB 568 on a national level could protect minors on the Internet, without facing constitutional challenges.²²³ SB 568 has been criticized for potentially violating the Dormant Commerce Clause,²²⁴ a threat other states could potentially face with similar laws their legislatures may wish to enact.²²⁵ For example²²⁶, assume a New York-based child-directed website blocks advertisements from a New Jersey advertising service of items restricted under SB 568 because a portion of the website's user population comes from California.²²⁷ Consequently, the advertising restriction would impact all users of the New York-based

²²⁰ See Lee, *supra* note 179, at 1203.

²²¹ See *id.*

²²² *Id.*; see Astringer, *supra* note 177, at 296 (“Even for companies like Google or Facebook, it can be nearly impossible to track every state legislature for laws that may greatly affect them; this problem is exacerbated for start-ups.”).

²²³ See Lee, *supra* note 179, at 1203–04. *People v. Hsu*, 99 Cal.Rptr.2d 184, 190 (2000) (“The Internet is undeniably an incident of interstate commerce . . .”).

²²⁴ See Goldman, *supra* note 175 (“Do all websites/apps around the country have to comply with California's law on the chance that some users may come from California? That would violate the Dormant Commerce Clause, a Constitutional doctrine that says only Congress can regulate interstate commerce.”); see also Elizabeth Barcohana, *Rash California Minors Get An Online “Eraser Button,”* SHEPPARD MULLIN AD BRIEFS (Nov. 6, 2013), <http://www.coveringyourads.com/2013/11/articles/privacy/rash-california-minors-get-an-online-eraser-button/> (“Critics have also complained that some aspects of the legislation are vague, and the law may be subject to constitutional challenge based on First Amendment and federal preemption under the federal Children’s Online Privacy Protection Act (“COPPA”), which governs the collection and use for marketing of personal information about children under 13.”); Lee, *supra* note 179. SB 568 has been criticized for violating the Dormant Commerce Clause by placing an undue burden on out of (California) state internet providers and the benefits to California not outweighing those burdens. *Id.* As of the time of this note, no lawsuits have been filed in regards to this.

²²⁵ For state laws that are nondiscriminatory on their face but still influence interstate commerce, such as SB 568, the Supreme Court applies the *Pike* balancing test. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Under this test, a court will uphold a state statute if “the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” *Id.* at 142.

²²⁶ Based on an example given by Eric Goldman. See Eric Goldman, *California’s Latest Effort To ‘Protect Kids Online’ Is Misguided And Unconstitutional*, FORBES (Sept. 30, 2013, 11:50 AM), <http://www.forbes.com/sites/ericgoldman/2013/09/30/californias-latest-effort-to-protect-kids-online-is-misguided-and-unconstitutional/#8b177382eb7e>.

²²⁷ *Id.*

website, regardless of the user's state—even if the minor user could legally purchase the item outside California.²²⁸ Thus, the California law unconstitutionally regulates communications between two non-California parties through its restriction of interactions between, in this example, a New York and New Jersey party.²²⁹ Proponents of SB 568 and scholars argue, however, that the benefits given to minors in California in a situation similar to the above example outweighs the burden that out-of-state regulators would face, thus surviving the constitutionality challenge though the *Pike* balancing test.²³⁰ Nevertheless, website providers outside the state of California would be burdened, especially when dealing with geographically distinguishing between its users to ensure compliance; a burden that could tip the balancing test towards a constitutional violation.²³¹

The threat of SB 568 being held unconstitutional could reduce the protection minors and teenagers have online; laws that other states could enact face the threat of being repealed. Other states may become disincentivized from even passing similar laws in the first place. An expansion of COPPA would ensure that even if other states attempt to make their own laws regarding online privacy, minors' privacy rights would continue.

A national regulation utilizing California's framework within COPPA could act as a U.S. equivalent to the European Union's "right to be forgotten", although on a more limited level due to fact that online eraser provisions only apply to minors and content they personally posted.²³² More extensive than the provisions found in SB 568 and COPPA, "the right to be forgotten" not only protects minors and adults alike but also allows for both personally posted content and third-party posted content to be requested for deletion.²³³ Such legislation would be

²²⁸ *Id.* For example, minors in New Jersey under the age of seventeen may not use an indoor tanning bed, but minors of at least seventeen years can use an indoor tanning bed as long as they have parental consent. NJ Rev. Stat. § 26:2D-82.1 (2013). But, all minors under the age of eighteen in California may not use indoor tanning beds, even with parental consent. CAL. BUS. & PROF. CODE § 22706(b)(3).

²²⁹ Goldman, *supra* note 226.

²³⁰ E. Wesley Campbell argues that since SB 568 does not discriminate between the parties it regulates, it is not a facial violation of the Dormant Commerce Clause. Additionally, Mr. Campbell believes that SB 568 does survive the *Pike* balancing test, given "the profound impact advertising can have on the consumption habits of minors" outweighs the burden providers may have to deal with. E. Wesley Campbell, *But It's Written in Pen: The Constitutionality of California's Internet Eraser Law*, 48 COLUM. J. L. & SOC. PROBS. 583, 597–603 (2015).

²³¹ See Lee, *supra* note 179.

²³² *Id.* at 1203; see Bennett, *supra* note 25, at 167 The "right to be forgotten" is similar to the concept of "forgive and forget," which embodies a fundamental human value. "U.S. law (bankruptcy, credit reporting and criminal law, among others) actually does recognize at least some elements of a "right to be forgotten." *Id.*

²³³ Lee, *supra* note 179, at 1203. See also Bennett, *supra* note 25.

viewed as unconstitutionally broad,²³⁴ however, a similar but more limited “right to be forgotten” in the United States—one that only applied to minors and only affected content personally posted—could be received with approval²³⁵ and be deemed constitutional.²³⁶ Thus, the “right to be forgotten” found in the expanded COPPA would not lead to the same fate as CDA and COPA.²³⁷

Some scholars argue however, that parents, not the government, should be the ones monitoring minors, citing research that shows “that there is a positive correlation between parents’ level of privacy concern and that of their children.”²³⁸ Thus, these scholars argue, parents wield influence over their children’s attitudes and behavior online because of correlation with parent’s own concerns and attitudes.²³⁹ However, these scholars caution against parental monitoring as teenagers might practice deception tactics as a defense against parental insurgence into their private space, thus nullifying any parental attempts at aiding their child’s online safety.²⁴⁰ Parental supervision is not always practical given children’s easy access to the Internet.²⁴¹ To further the goal of protecting minors online in COPPA, the FTC could continue to further release materials²⁴² to help educate and guide both parents on how to further protect their minor children, and minors on how to further protect themselves from the harms of the Internet.²⁴³ While no system is one hundred percent foolproof, by extending education to parents and minors, the FTC can further help ensure that the newly expanded COPPA does its job properly.

Recently, bipartisan Senators and Representatives from Massachusetts, Texas, and Illinois have introduced comprehensive children’s online privacy legislation in both the Senate and the House.²⁴⁴

²³⁴ Lee, *supra* note 179, at 1203. *See also* Bennett, *supra* note 25.

²³⁵ Lee, *supra* note 179, at 1203; Bennett, *supra* note 25, at 175–76 (“Political developments in the United States suggest that regulators and law makers may be particularly receptive to discussions on the merits of enhanced privacy protection.”); *see* Katie Kindelan, *Will Europe’s Online Privacy Laws Jump The Pond To The US?*, ADWEEK (Mar. 21, 2011), <http://www.adweek.com/digital/will-europes-online-privacy-laws-jump-the-pond-to-the-us/?red=st> (noting that calls for reform of data protection in the European Union come at a time when both the President and Congress are “calling for tougher online privacy regulations in the United States.”).

²³⁶ *See* Bennett, *supra* note 25, at 166–67; Lee, *supra* note 179, at 1203–04.

²³⁷ *See supra* Part I.B.

²³⁸ *See* Ramasubbu, *Teenagers and the Internet*, *supra* note 45.

²³⁹ *Id.*

²⁴⁰ *See id.*

²⁴¹ *See* Amy Joyce, *Protecting Your Kids Online Takes A Lot More Than Tracking Their Devices*, WASH. POST (Sept. 8, 2016), https://www.washingtonpost.com/news/parenting/wp/2016/09/08/how-can-parents-protect-their-children-online/?utm_term=.2611e4e25a73 (“...discovered her daughter using her phone in the middle of the night.”).

²⁴² *See Complying with COPPA*, *supra* note 73. The FTC has issued a number of education and guidance documents for teens and their parents which can be found www.OnguardOnline.gov. *Id.*

²⁴³ *See* Lee, *supra* note 179.

²⁴⁴ *See* EPIC COPPA Primer, *supra* note 12.

Similar to SB 568, the bill, named the Do Not Track Kids Act, would amend COPPA by extending the protection to teenagers ages thirteen to fifteen and by creating an eraser button that allows children to delete personal information online—all while continuing to require consent for the collection of personal information.²⁴⁵ The Do Not Track Kids Act, however, has been unsuccessful in the legislature.²⁴⁶ Critics of the Do Not Track Kids Act fault its expansion of protection to the age of fifteen as being too confusing, arguing that the distinction between sites aimed at teenagers and children is much more clear than those aimed at various subsets of teenagers.²⁴⁷ The proposal in this Note is better equipped to handle a minor's privacy protection online than the Do Not Track Kids Act. The proposal in this Note extends eraser and advertising protections to all minors under the age of eighteen, making it easier to distinguish between sites aimed at different age groups, ensuring protection for minors online continues while reducing confusion among web providers who are required to figure out which age group they are tailored towards. Further updates to COPPA similar to those presented to the Senate and House have been presented in recent years before the Senate Commerce Committee, but have also failed.²⁴⁸ Clearly there is a desire to see an expansion made to COPPA that not only broadens the ages the Act protects, but also one that allows minors the ability to be able to take control of what they post.

Research reveals that today's teenagers desire more privacy than ever before.²⁴⁹ By amending COPPA with a more comprehensive approach to minor's privacy online—though the implementation of the eraser provisions and advertisement protections—the FTC would also be giving all minors, not just those in California, an increased level of privacy online. Minors everywhere would be given a chance to erase their hasty posts,²⁵⁰ reducing the effect that social media posts have on any future college and job prospects.²⁵¹ A revised COPPA could allow the

²⁴⁵ Do Not Track Kids Act, H.R. 2734, 114th Cong. § (2015); *see also* EPIC COPPA Primer, *supra* note 12 (“The bill would also require online companies to explain the types of personal information they are collecting, how that information is used and disclosed, and the policies for collection of said personal information.”).

²⁴⁶ *See* Bilyana Petkova, *The Safeguards of Privacy Federalism*, 20 LEWIS & CLARK L. REV. 595, 614 (2016).

²⁴⁷ *See* Astringer, *supra* note 177, at 285; *see also* Emma Llansó, *Do Not Track Kids Bill Revives Minors' Online Privacy Debate*, CDT (Nov. 26, 2013), <https://cdt.org/blog/do-not-track-kids-bill-revives-minors%E2%80%99-online-privacy-debate>.

²⁴⁸ *See* EPIC COPPA Primer, *supra* note 12.

²⁴⁹ *Id.* (A report released by the Intelligence Group, a youth-focused, research-based consumer insights company, revealed that teenagers want more online privacy than ever before).

²⁵⁰ *See* Sengupta, *supra* note 107 (“Kids and teenagers often self-reveal before they self-reflect”).

²⁵¹ *See* Mulhere, *supra* note 41; *see also* Peterson, *supra* note 41 (“The thing that really shocked me on this was the fact that a number of colleges and universities around the country have the technology to properly access the Web sites, the Facebook pages, of college applicants.”).

saying—once it is out there, you cannot get it back—to become a thing of the past.²⁵²

CONCLUSION

The nation as a whole has a legitimate interest in protecting minors from harm on the Internet.²⁵³ With constant technological advances, more and more threats²⁵⁴ may present themselves to minors online.²⁵⁵ Young children and teenagers are still developing their critical thinking skills and judgment and much of this development is now taking place online through interactions on social media.²⁵⁶ Overall, COPPA has helped establish a general understanding that the collection and use of information on young children should be treated with care and avoided if possible.²⁵⁷ This general understanding is a sensible approach that recognizes both the unique vulnerabilities of young children as well as the limitation of a self-regulatory approach, which would place the burden on minors to interpret privacy policies and make informed decisions about the disclosure and use of their personal information.²⁵⁸

California's privacy and data security framework, as seen in SB 568, is similar to what the Federal Government wants to see implemented on

²⁵² See Alan Henry, *How You're Unknowingly Embarrassing Yourself Online (and How to Stop)*, LIFEHACKER (May 8, 2013, 8:00 AM), <http://lifehacker.com/how-youre-embarrassing-yourself-online-without-knowing-495859415>.

²⁵³ SB 568 FACT SHEET, *supra* note 11; see also *President Kennedy's UNICEF Appeal* (July 25, 1963), <https://www.jfklibrary.org/Research/Research-Aids/Ready-Reference/JFK-Fast-Facts/Appeal-UNICEF.aspx> ("Children are the world's most valuable resource and its best hope for the future."). See generally Astringer, *supra* note 177 at 298 ("It is hard to disagree with President Kennedy that children are our most valuable resource. As such, they deserve protection online comparable to what they receive in the physical world.").

²⁵⁴ For example, a mobile advertising company was recently charged with "deceptively track[ing] the locations of hundreds of millions of consumers—including children—without their knowledge or consent to serve them geo-targeted advertising." See Press Release, FTC, *Mobile Advertising Network InMobi Settles FTC Charges It Tracked Hundreds of Millions of Consumers' Locations Without Permission* (June 22, 2016).

²⁵⁵ See STUDY ON THE EFFECTS OF NEW INFORMATION TECHNOLOGIES ON THE ABUSE AND EXPLOITATION OF CHILDREN, U.N. OFF. ON DRUGS AND CRIMES (2015), https://www.unodc.org/documents/organized-crime/cybercrime/Study_on_the_Effects.pdf ("[t]he Council expressed concern that increasingly rapid technological advances have created new possibilities for the criminal misuse of new information and communication technologies."); see also *An Examination of Children's Privacy: New Technologies and the Children's Online Privacy Protection Act (COPPA): Hearing Before the S. Comm. on Com., Sci. and Transp.*, 111th Cong. 2 (2010) (statement of Marc Rotenberg, Executive Director, EPIC) ("It is clear that the single biggest change impacting the privacy of children since the adoption of COPPA has been the emergence of social network services such as Facebook, Myspace, and Twitter. These web-based platforms provide new opportunities for kids to interact online and also for companies to gather up information.").

²⁵⁶ See 568 FACT SHEET, *supra* note 11.

²⁵⁷ *An Examination of Children's Privacy*, *supra* note 255.

²⁵⁸ *Id.*

a nationwide scale.²⁵⁹ Indeed, the FTC and the White House call for “greater protections” for personal data obtained from minors.²⁶⁰ By further amending COPPA to cover a larger age group and include both erasure and advertising protection provisions found in SB 568,²⁶¹ the FTC and the federal government will ensure that privacy protection for minors online does not fall to the wayside and stays current with the changing times.

²⁵⁹ Gregory James Evans, *Regulating Data Breaches: How State Laws Can Shore Up The FTC’s Authority to Regulate Data Breaches, Privacy, and More*, 67 ADMIN. L. REV. 187, 212 (2015).

²⁶⁰ WHITE HOUSE, CONSUMER DATA PRIVACY IN A NETWORKED WORLD: A FRAMEWORK FOR PROTECTING PRIVACY AND PROMOTING INNOVATION IN THE GLOBAL DIGITAL ECONOMY 5, 15 (2012), <https://obamawhitehouse.archives.gov/sites/default/files/privacy-final.pdf>.

²⁶¹ CAL. BUS. & PROF. CODE §22580–81 (2013).