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# KIDFLUENCERS: NEW CHILD STARS IN NEED OF PROTECTION

MiKayla B. Jayroe\*

## I. INTRODUCTION

It was just an entertaining and harmless YouTube channel featuring children playing out fantastical “super hero” scenes.<sup>1</sup> At least, that is what the more than 700,000 subscribers and 242 million viewers of the YouTube channel *Fantastic Adventures* believed prior to the shocking revelation that Machel Hobson, a mother of seven, had been abusing her children while profiting nearly \$300,000 a year from the channel.<sup>2</sup> Behind the scenes of the family-centric videos existed a much more sinister and disturbing reality.<sup>3</sup> Police charging documents revealed that not only had the Hobson children been taken out of school for years in order to keep making videos, but that they had also been subjected to beating, pepper-spraying, molesting, and starving simply for failing to properly recall their lines or participate in YouTube videos as directed by their mother.<sup>4</sup> The heartbreaking fate suffered by the Hobson children illustrates the potential

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1. Lily Altavena, *How YouTubers Like Mom Accused of Child Abuse Make Money off Popular Videos*, AZCENTRAL (Mar. 21, 2019, 4:19 PM), [<https://perma.cc/6S2Y-MRL5>].

2. Julia Carrie Wong, *‘It’s Not Play if You’re Making Money’: How Instagram And YouTube Disrupted Child Labor Laws*, THE GUARDIAN (Apr. 24, 2019, 1:00 AM), [<https://perma.cc/F79D-XVPA>].

3. *Id.*

4. Zach Crenshaw, *‘A Failure of the System’: Kids Told DCS and Police About Prior ‘YouTube Mom’ Abuse*, ABC 15 ARIZONA (May 15, 2021, 12:35 AM), [<https://perma.cc/Z2UE-ZG56>].

exploitation children face, even at the hands of their own parents and guardians, when monetized on social media.<sup>5</sup> Despite the explosive growth of social media and various lobbying efforts, the legal system has fallen woefully behind in extending labor protections to children engaged in social media production.<sup>6</sup>

Given access to a smartphone and a social media account, anyone has the potential to transform what once would have simply been a home movie into a booming business reaching millions of viewers and bringing in thousands of dollars.<sup>7</sup> Today, the influencer market has skyrocketed, amassing a worth totaling over fifteen billion dollars.<sup>8</sup> “Kid Influencers or ‘Kidfluencers’

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5. Marina A. Masterson, *When Play Becomes Work: Child Labor Laws in the Era of “Kidfluencers”*, 169 U. PA. L. REV. 577, 579 (2021). Several allegations of parents exploiting their children on social media have arisen in recent years. In 2017, the husband and wife duo that ran the YouTube channel *DaddyOFive* were sentenced to five years of probation for child neglect after posting videos of themselves screaming profanity at their children, breaking their children’s toys, and making their children cry hysterically. Sam Levin, *Couple Who Screamed at Their Kids in Youtube ‘Prank’ Sentenced to Probation*, THE GUARDIAN (Sept. 12, 2017, 6:07 PM), [https://perma.cc/7EGG-ZHYP]. Prosecutors in that case claimed that the children experienced “substantial impairments of their mental or psychological ability to function.” *Id.* Another couple was arrested for suspicion of child endangerment after posting videos on YouTube of the woman’s eight-year-old son “sloshing around the bed of a truck filled with water and gel beads . . .” while traveling. Veronica Rocha, *Youtube Video Showing Boy Riding in Truck Filled With Gel Beads Leads to Arrests in Corona*, L.A. TIMES (Mar. 10, 2017, 3:05 PM), [https://perma.cc/67NT-EQSU]. Family influencer Myka Stauffer faced intense criticism after re-homing her adopted son Huxley. Huxley had numerous health and behavioral problems including autism and brain damage. *Myka Stauffer: Backlash After Youtubers Give Up Adopted Son*, BBC (May 28, 2020), [https://perma.cc/EL2J-CSMR]. Many critics claimed that Stauffer “got rid” of Huxley after making money off of his experiences. *Id.* Stauffer heavily documented Huxley’s adoption process and “his life following adoption” including “updates on [his] developmental progress.” *Id.* Stauffer monetized many of the posts that included Huxley. *Id.* Despite the money generated from Huxley’s appearances on the Stauffer’s social media sites, under the current law he is not entitled to any earnings. *Id.*; Aditi Murti, *A Parenting Influencer Re-Homed Her Son, Raising Questions About Digital Privacy, Exploitation*, THE SWADDLE (May 29, 2020), [https://perma.cc/ZJS3-CFLW].

6. Masterson, *supra* note 5, at 579; Amanda G. Riggio, *The Small-er Screen: YouTube Vlogging and the Unequipped Child Entertainment Labor Laws*, 44 SEATTLE U. L. REV. 493, 515 (2021).

7. Riggio, *supra* note 6, at 496; Nila McGinnis, “They’re Just Playing”: Why Child Social Media Stars Need Enhanced Coogan Protections to Save them from Their Parents, 87 MO. L. REV. 247, 251 (2022).

8. Ismael El Qudsi, *The State of Influencer Marketing: Top Insights for 2022*, FORBES (Jan. 14, 2022, 7:30 AM), [https://perma.cc/9N6E-CFXG]; Valentina Dencheva, *Global Influencer Market Size 2020-2025*, STATISTA (Jan. 16, 2023), [https://perma.cc/79X2-FWL4]; Taylor Mooney, *Companies Make Millions Off Kid Influencers, and the Law Hasn’t Kept Up*, CBS NEWS (Aug. 26, 2019, 6:19 AM), [https://perma.cc/AF5N-BE8C].

are children who have been posted online on different social media platforms generating large numbers of viewers and followers, often earning money for sponsored content.”<sup>9</sup> Kidfluencers make up a large portion of the contemporary influencer market.<sup>10</sup> Twelve-year-old twins Leah and Ava Clements, who have nearly two million Instagram followers, demonstrate the lucrative nature of the kidfluencer market by bringing in upwards of ten thousand dollars per sponsored post they share.<sup>11</sup>

Much in the same manner that Uber disrupted the transportation industry and managed to largely side-step regulations, kidfluencers have disrupted the advertising market and effectively side-stepped child labor laws operating instead in an “unregulated wild west.”<sup>12</sup> Despite generating handsome sums of money from their online presence, kidfluencers currently have no legal rights protecting their access to the money they earn from their posts.<sup>13</sup> The inadequacy of protections offered to kidfluencers in the midst of their fame and large earning potential leaves them open to possible financial, psychological, and privacy exploitation.<sup>14</sup> As children’s online exposure to social media continues to grow, the necessity for substantive legal reform to protect kidfluencers increases.<sup>15</sup>

The rise of kidfluencers poses interesting questions regarding how to best protect children from the risk of exploitation, such as whether current child actor protections should be extended to kidfluencers, and, if so, to what extent

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9. Vanessa Cezarita Cordeiro, “Kidfluencers” and Social Media: The Evolution of Child Exploitation in the Digital Age, HUMANIUM (Feb. 23, 2021), [<https://perma.cc/VDX6-R92D>].

10. *Id.*; McGinnis, *supra* note 7, at 248 (noting that “[c]hildren with large social media followings have been indispensable to the rise of influencer marketing . . .”).

11. Ines Novacic, “It’s Kinda Crazy”: Kid Influencers Make Big Money on Social Media, and Few Rules Apply, CBS NEWS (Aug. 23, 2019, 8:08 AM), [<https://perma.cc/2J6G-MF27>]; Ava and Leah Clements (@clementstwins), INSTAGRAM, [<https://perma.cc/AG9V-FQFD>] (last visited Oct. 12, 2023).

12. Katie Collins, *TikTok Parents Are Taking Advantage of Their Kids. It Needs to Stop*, CNET (Aug. 7, 2022, 5:00 AM), [<https://perma.cc/BCQ2-3H2P>]; Wong, *supra* note 2.

13. Wong, *supra* note 2; McGinnis, *supra* note 7, at 249; Masterson, *supra* note 5, at 594.

14. McGinnis, *supra* note 7, at 264; Masterson, *supra* note 5, at 579.

15. See *infra* Section III.D.

given the constitutional right to parental authority and the inherently unique nature of social media. This Comment will offer a solution to the current gray area surrounding kidfluencers and the lack of protections they are afforded. First, this Comment will discuss the emergence and growth of the kidfluencer industry and explore the legal history of child labor laws in the United States, specifically evaluating protections historically provided to child actors.<sup>16</sup> Second, this Comment will explain why posts by kidfluencers should be considered work, explore the harms facing kidfluencers, and advocate that protections—carefully balanced against parental rights—should be extended to kidfluencers.<sup>17</sup> Finally, it will propose a reasonable recommendation on how to best minimize the potential exploitation kidfluencers face through the creation of federal legislation inspired by child actor protections.<sup>18</sup>

## II. BACKGROUND

### A. The Kidfluencer Explosion in an Evolving Lucrative Market

Even before baby Halston Blake Fisher was born, she had accumulated over 112,000 Instagram followers.<sup>19</sup> By the time she was four months old, her followers had grown to more than half a million.<sup>20</sup> Following in the footsteps of her older sisters, Taytum and Oakely Fisher, who have more than three million followers themselves, baby Halston quickly made her splash on social media.<sup>21</sup> In a 2010 survey, more than ninety percent of two-year-olds and eighty percent of babies younger than two in the United States were determined to have established an online

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16. *See infra* Section II.B.

17. *See infra* Section III.A-C.

18. *See infra* Section III.D.

19. Jack Morse, *So It's Come to This: An Unborn Baby "Kidfluencer" Has Instagram Followers*, MASHABLE SE ASIA (Mar. 2, 2019), [<https://perma.cc/EAF9-X98H>].

20. Novacic, *supra* note 11.

21. Taytum and Oakely Fisher (@taytumandoakley), INSTAGRAM, [<https://perma.cc/8RH5-8UXF>] (last visited Oct. 12, 2023).

presence.<sup>22</sup> While not every child with a social media presence has experienced fame, a segment of children, like the Fisher girls, have become a new type of child star.<sup>23</sup>

With the decline of television, advertisers and brands have flocked to social media influencers, defined as “a person who is able to generate interest in something . . . by posting about it on social media,” to promote their products.<sup>24</sup> Kidfluencers have played an integral role in this new medium of marketing.<sup>25</sup> The kids digital advertising market alone was projected to be worth approximately \$1.7 billion in 2021.<sup>26</sup> Influencer Ross Smith illuminated the dynamic role of kidfluencers stating, “Kids are the new social influencer . . . . Kids grow up and become less relevant. The sweet spot is between 2 and 4, [after which] they’re not that cute.”<sup>27</sup> Content of kidfluencers opening boxes, playing with toys, and modeling clothes, usually posted online by their parents, has effectively created a “thriving economy of kid personalities,” or as labeled by critics, a “continued commodification of childhood.”<sup>28</sup>

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22. Adrienne LaFrance, *The Perils of ‘Sharenting’*, THE ATLANTIC (Oct. 6, 2016), [https://perma.cc/BJ88-L2RM].

23. Novacic, *supra* note 11.

24. *Influencer*, MERRIAM-WEBSTER, [https://perma.cc/6V5V-ED5P] (last visited Oct. 12, 2023); Joel Matthew, *Understanding Influencer Marketing and Why It Is So Effective*, FORBES (July 30, 2018, 8:00 AM), [https://perma.cc/YX4Y-PPLC]; Sapna Maheshwari, *Online and Earnings Thousands, at Age 4: Meet the Kidfluencers*, N.Y. TIMES (Mar. 1, 2019), [perma.cc/WW5X-X6TE]. The word influencer was added to the dictionary in 2019. Masterson, *supra* note 5, at 583. Studies have shown that videos featuring children under the age of thirteen receive nearly three times as many views on average. Patrick Van Kessel, Skye Toor & Aaron Smith, *A Week in the Life of Popular YouTube Channels*, PEW RSCH. CTR. (July 25, 2019), [https://perma.cc/V3QB-P5FC].

25. Masterson, *supra* note 5, at 577; *The Influencer Report: Engaging Gen Z and Millennials*, MORNING CONSULT, [https://perma.cc/5PBQ-U4QZ]. “‘Kidfluencer’ partnerships can help advertisers successfully navigate a market with tremendous potential . . . .” Harvey Schwartz, *Unboxing #Kidfluencers*, WHOSAY (June 21, 2019), [https://perma.cc/8GC3-XLT9].

26. Schwartz, *supra* note 25.

27. Katherine Rosman, *Why Isn’t Your Toddler Paying the Mortgage?*, N.Y. TIMES (Sept. 27, 2017), [https://perma.cc/3V4K-UY9U].

28. Zoha Qamar, *Why ‘Kidfluencers’ Have So Few Protections – Even As Americans Support Regulating the Industry*, FIVETHIRTYEIGHT (Jan. 3, 2023, 11:33 AM), [https://perma.cc/MB6H-6HG7]; Jane Herz, *Insta-‘Kidfluencers’ on the Rise, Despite Risk of Child Exploitation: Study*, N.Y. POST (May 3, 2023, 9:29 PM), [https://perma.cc/7LC8-KY3Z].

The children who participate in this industry, especially those who are highly successful and frequently sought after, can easily accumulate large streams of revenue from sponsorships.<sup>29</sup> In a *New York Times* article a parent revealed, “brands might pay \$10,000 to \$15,000 for a promotional Instagram post while a sponsored YouTube video might earn \$45,000.”<sup>30</sup> Ten-year-old kidfluencer Ryan Kaji, who reviews toys on YouTube, was among the highest-paid YouTubers in 2021, bringing in an astonishing \$27 million.<sup>31</sup> In 2021, at the age of seventeen, TikTok star Charli D’Amelio also out-earned many United States CEOs, bringing in \$17.5 million from her TikTok account.<sup>32</sup>

The money kidfluencers earn comes from several different sources.<sup>33</sup> Oftentimes, companies, including the likes of Walmart, Staples, and Mattel, will compensate kids for posting videos playing with or reviewing their products.<sup>34</sup> Additionally, Google AdSense generates money for kidfluencers by paying them on a per-click basis for running ads on their accounts.<sup>35</sup> Lastly, kidfluencers are also often compensated by receiving free merchandise from their sponsors.<sup>36</sup>

The incredibly lucrative nature of the kidfluencer market and ease with which individuals can participate in it heightens the possibility that parents or guardians may attempt to exploit their children in search for wealth or fame especially given the current absence of any meaningful regulations.<sup>37</sup>

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29. Maheshwari, *supra* note 24.

30. *Id.*

31. Todd Spangler, *MrBeast Ranks as Highest-Paid YouTube Star Ever, Earning an Estimated \$54 Million in 2021*, VARIETY (Jan. 14, 2022, 8:48 AM), [https://perma.cc/A2C5-AQHR].

32. Joseph Pisani & Theo Francis, *These TikTok Stars Made More Money Than Many of America’s Top CEOs*, THE WALL ST. J. (Jan. 13, 2022, 7:49 AM), [https://perma.cc/26DC-FS78].

33. Rachel Fishbein, *Growing Up Viral: “Kidfluencers” as the New Face of Child Labor And the Need for Protective Legislation in the United Kingdom*, 54 GEO. WASH. INT’L L. REV. 127, 132 (2022).

34. Masterson, *supra* note 5, at 584; Maheshwari, *supra* note 24.

35. Masterson, *supra* note 5, at 584; McGinnis, *supra* note 7, at 262; Fishbein, *supra* note 33, at 132.

36. Masterson, *supra* note 5, at 584; McGinnis, *supra* note 7, at 262.

37. Masterson, *supra* note 5, at 584.

## B. Legal Background

Before exploring the nuances of competing interests and potential solutions in the wake of the rising kidfluencer phenomenon, it is important to provide a general overview regarding the history of child labor laws in the United States to fully understand where kidfluencers might fit into the current legal framework. This Section will detail the legal landscape at both the federal and state level regarding child labor protections and display the immense need to develop new legislation targeted expressly at protecting kidfluencers. More specifically, this Section will explain laws aimed at protecting child actors. Although child entertainment provisions have not consistently been extended to kidfluencers, the similar nature of the two industries provides a viable template for drafting kidfluencer specific legislation.<sup>38</sup>

### *1. History of Child Labor Protections in the United States: The FLSA*

The history of child labor in the United States finds its roots in England as many impoverished children were sent to the colonies.<sup>39</sup> Children in the early colonies worked in various capacities including in the cotton industry, mills, and apprenticeships.<sup>40</sup> However, the amount of child laborers employed in the United States increased dramatically as industrialization took place.<sup>41</sup> The number of child laborers grew along with their families' need to generate income.<sup>42</sup> Parents commonly relied on their children's work.<sup>43</sup> By 1900 there were 1.75 million youth workers in the United States.<sup>44</sup>

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38. Cordeiro, *supra* note 9.

39. Seymour Moskowitz, *Dickens Redux: How American Child Labor Law Became a Con Game*, 10 WHITTIER J. CHILD & FAM. ADVOC. 89, 98-99 (2010).

40. *Id.* at 99-100.

41. *Id.* at 99.

42. *Id.* at 101.

43. *Id.*

44. Moskowitz, *supra* note 39, at 101.



The conditions which many children worked in were incredibly hazardous.<sup>45</sup> In fact, children were often given the most “unhealthful work” where their lungs were exposed to lint-dust, microscopic glass particles, fine sawdust, alkaline dust, and coal particles.<sup>46</sup> Exposure to complex and harsh machinery was also very common.<sup>47</sup> Children in the labor force were no strangers to tragic accidents, as “it is believed that young boys under the age of sixteen had twice as many accidents as adult workers, while girls had three times as many accidents as adult women.”<sup>48</sup>

Despite the recognition of the dangers facing children in the workforce, reform was slow.<sup>49</sup> Parents were traditionally thought to be entitled to their child’s labor as a type of “parental property” and as stated above parents largely depended upon their children to help generate income.<sup>50</sup> Children often played a significant role in the economic stability of their family.<sup>51</sup>

Slow reform of child labor laws occurred after significant efforts were put forth by the child labor rights movement, including groups such as the National Child Labor Committee.<sup>52</sup> In the early twentieth century, states began passing child labor legislation.<sup>53</sup> In fact, by 1916 nearly every state had some form of regulation targeted at child labor.<sup>54</sup> The first significantly substantive federal legislation concerning child labor came in 1938 when Congress passed the Fair Labor Standards Act

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45. *Id.* at 103.

46. *Id.*; JOHN SPARGO, *THE BITTER CRY OF THE CHILDREN* 175-80 (1906).

47. *History of Child Labor in the United States – Part 2: the Reform Movement*, U.S. BUREAU OF LAB. STAT. (Jan. 2017), [<https://perma.cc/UT92-ZUA3>] [hereinafter *Reform Movement*].

48. Moskowitz, *supra* note 39, at 103-04.

49. *Reform Movement*, *supra* note 47.

50. Moskowitz, *supra* note 39, at 101; *Reform Movement*, *supra* note 47; Barbara Bennett Woodhouse, *Who Owns the Child?: Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1059-1060, 1064 (1992).

51. Moskowitz, *supra* note 39, at 101; Woodhouse, *supra* note 50, at 1060.

52. Moskowitz, *supra* note 39, at 107-08; Woodhouse, *supra* note 50, at 1055; ELLEN C. KEARNS ET AL., *THE FAIR LABOR STANDARDS ACT*, CHAPTER 12. CHILD LABOR 4 (Aaron D. Kaufmann et al. eds., 4th ed. 2020) (ebook), Bloomberg Law [hereinafter *FAIR LABOR STANDARDS ACT*].

53. Moskowitz, *supra* note 39, at 107-08.

54. *FAIR LABOR STANDARDS ACT*, *supra* note 52, at 4.

(“FLSA”).<sup>55</sup> The FLSA expressly prohibited “oppressive child labor.”<sup>56</sup>

Today, the FLSA bars children under the age of sixteen from working outside of the home and prohibits children under eighteen from obtaining work in “particularly hazardous” conditions.<sup>57</sup> While still an important provision, the “particularly hazardous” conditions that the FLSA originally intended to target have largely dissipated from society within the context of child labor.<sup>58</sup> Most modern work held by children is less hazardous, such as freelance summer jobs consisting of tasks like waiting tables, working retail, babysitting, and yardwork.<sup>59</sup> Therefore, the risk of physical harm and interference with school hours is practically nonexistent.<sup>60</sup> Nonetheless, violations of the FLSA’s “oppressive” labor prohibition still occur with estimates of approximately one hundred thousand violations a week.<sup>61</sup>

As the type of work that children engage in has shifted away from textile mills and coal mines, so have the harms and risks that threaten children.<sup>62</sup> While modern harms likely do not meet the “oppressive” or “particularly hazardous” definition as articulated in the FLSA, children are still substantially at risk of being subjected to exploitation, especially considering the lack of protective legislation available.<sup>63</sup> The antiquated nature of the FLSA fails to properly protect children in the modern era as it did not account for the growth in the technology and entertainment

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55. Woodhouse, *supra* note 39, at 107-08.

56. FAIR LABOR STANDARDS ACT, *supra* note 52, at 1; *see generally* 29 U.S.C. §§ 203(l) & 212 (2018).

57. Masterson, *supra* note 5, at 586-87; 29 U.S.C. §§ 203(l) & 212.

58. Masterson, *supra* note 5, at 586-87.

59. McGinnis, *supra* note 7, at 253; Masterson, *supra* note 5, at 587; HUGH D. HINDMAN, CHILD LABOR: AN AMERICAN HISTORY 235 (2002); *Reform Movement*, *supra* note 47.

60. McGinnis, *supra* note 7, at 253; Masterson, *supra* note 5, at 587.

61. “It is estimated that, in any given week, 153,600 children are employed at an activity in violation of the FLSA or state law. The most common violations entail working excessive hours or engaging in a hazardous occupation before the age of 18.” *Reform Movement*, *supra* note 47.

62. McGinnis, *supra* note 7, at 253.

63. *Id.*

industries.<sup>64</sup> Modern harms necessitate the creation of new encompassing legislation to protect children.<sup>65</sup>

## 2. FLSA Shortcomings: Excluding Child Actors

Congress enacted the FLSA for the very specific purpose of protecting children from “oppressive” labor practices.<sup>66</sup> As such, the FLSA explicitly excluded certain categories of child laborers from its protections, including child actors.<sup>67</sup> The relevant portion of the statute states this law “shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.”<sup>68</sup> In essence, Congress viewed the work of child actors as simply a means by which children could grow their talents.<sup>69</sup>

Congress’s motive for the exclusion of child actors from FLSA protections stemmed from the sensational success experienced by child actress Shirley Temple.<sup>70</sup> At less than sixteen-years-old, Shirley Temple would have been excluded from the entertainment industry if the FLSA had not allowed for an exemption in the case of child actors.<sup>71</sup> The belief that child acting was not “oppressive” prevailed and thus insulated the industry from the FLSA.<sup>72</sup>

The exclusion of child actors from FLSA protections resulted in laws pertaining to child actors developing at the state rather than federal level.<sup>73</sup> Consequently, an array of child labor entertainment laws exists offering disparate protections

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64. Riggio, *supra* note 6, at 500-01.

65. *Id.*

66. 29 U.S.C. § 212 (1974).

67. 29 U.S.C. § 213(a)(3) (2018). “By exempting both an entire class of children employed in entertainment and children employed by a parent, the FLSA clearly leaves a gap in child protections that must be filled.” Riggio, *supra* note 6, at 500-01.

68. 29 U.S.C. § 213(a)(3).

69. Masterson, *supra* note 5, at 587. “In part, Congress exempted child acting because it did not believe it was oppressive labor, but imagined that allowing a child to develop her talents could promote a child’s best interest.” Kimberlianne Podlas, *Does Exploiting a Child Amount to Employing a Child? The FLSA’s Child Labor Provisions and Children on Reality Television*, 17 UCLA ENT. L. REV. 39, 58 (2010).

70. Podlas, *supra* note 69, at 58.

71. *Id.*

72. McGinnis, *supra* note 7, at 254.

73. N.Y. LAB. LAW § 35.01 (McKinney 2013); CAL. LAB. CODE § 1706 (West 2016).

dependent upon where in the country one lives and works.<sup>74</sup> While California and New York offer some of the more robust protections for child actors, seventeen states have no laws in place, including Tennessee, a state renowned for its dynamic music industry.<sup>75</sup> The kaleidoscope of protections across states has resulted in the unequal treatment of child actors.<sup>76</sup> Granted the exclusion of child actors from the FLSA, it is highly probable that kidfluencers will also fall outside of the purview of the FLSA.<sup>77</sup> Therefore, state laws pertaining to child labor offer a window into potential solutions to the kidfluencer phenomenon.

### 3. *Filling in the Gap: States Offer Protections for Child Actors*

In the absence of authoritative federal legislation, states have played the sole role in protecting child actors. While far from perfect, some states have developed at least minimum protections for child actors.<sup>78</sup> This Comment will focus on California's response to child actors as it is home to the largest child actor industry in the United States and offers some of the most robust protections.<sup>79</sup>

#### a. Coogan Acts: Protecting The Earnings of Child Actors

Home to Hollywood, California has been at the forefront of extending protections to child actors.<sup>80</sup> One of the most prolific protections granted to child actors came in the form of Coogan Laws. California's first Coogan Law was developed in response to several instances in which parents had exploited their child's

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74. *Child Entertainment Laws as of January 1, 2023*, U.S. DEP'T OF LAB. (Jan. 1, 2023), [<https://perma.cc/8YPM-J567>] [hereinafter *Child Entertainment Laws 2023*].

75. *Id.*; Caroline Sisson, *All Work and No Play Can Make a Kid a Millionaire: Child Labor Laws and the Role of the DOL to Protect Minors in the Growing Industry of Social Media Employment*, ADMIN. L. REV. ACCORD, 2022, at 174-75.

76. Sisson, *supra* note 75, at 175.

77. Masterson, *supra* note 5, at 591; *see also* Podlas, *supra* note 69, at 72-73 (concluding that children filmed by a reality television show fall outside the purview of the FLSA).

78. *Child Entertainment Laws 2023*, *supra* note 74.

79. Sisson, *supra* note 75, at 176.

80. McGinnis, *supra* note 7, at 258; Masterson, *supra* note 5, at 589.

lifelong earnings.<sup>81</sup> Jackie Coogan was a famous child actor in the early 1900s who starred in films such as Charlie Chaplin's *The Kid*.<sup>82</sup> Jackie experienced global fame throughout the 1920s, earning up to four million dollars in income.<sup>83</sup> However, upon turning twenty-one, Jackie discovered that his parents had spent nearly the entirety of his income, "leaving him financially destitute."<sup>84</sup> Upon this discovery, Jackie sued his mother in an attempt to recover his earnings, but he only managed to receive \$126,000, as no true protections existed for child actors at the time.<sup>85</sup> Additionally, under California law, children's earnings belonged to their parents.<sup>86</sup> Jackie's story garnered enough attention that the California legislature enacted a Coogan Law in 1939 for the specific purpose of safeguarding child actors from financial exploitation at the hands of their parents.<sup>87</sup>

Prior to the development of Coogan Laws, children like Jackie were completely dependent upon the goodwill of their parents to protect their earnings.<sup>88</sup> The passage of California's 1939 Coogan Law was the first step to providing at least some minimum level of protection for child actors. Amended and strengthened in 1999, California's Coogan Law requires that parents preserve fifteen percent of their child's acting wages until they reach the age of majority at eighteen-years-old.<sup>89</sup> Essentially, the law creates a fiduciary relationship between parent and child.<sup>90</sup> Under California's Coogan Law, children now maintain the property rights to their earnings.<sup>91</sup>

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81. McGinnis, *supra* note 7, at 256-57.

82. Jennifer González, *More Than Pocket Money: A History of Child Actor Laws*, THE LIBR. OF CONG. (June 1, 2022), [<https://perma.cc/5FL8-ER2Q>].

83. *Id.*

84. *Id.*

85. *Id.*

86. *Coogan Law*, SAG AFTRA, [<https://perma.cc/W2HF-QGFM>] (last visited Oct. 13, 2023).

87. Masterson, *supra* note 5, at 589.

88. McGinnis, *supra* note 7, at 256-58.

89. Phillips v. Bank of America, 236 Cal. App. 4th 217, 222 (2015); Joan Reardon, *New Kidfluencers on the Block: The Need to Update California's Coogan Law to Ensure Adequate Protection for Child Influencers*, 73 CASE W. RES. L. REV. 165, 172 (2022).

90. *Coogan Law*, *supra* note 86; McGinnis, *supra* note 7, at 258.

91. Masterson, *supra* note 5, at 589.

b. Permits and Limitations: Protecting The Well-being of Child Actors

While the financial exploitation of child actors has historically occurred, as with kidfluencers, it is not the only harm faced by child actors.<sup>92</sup> The health and well-being of child actors has historically been jeopardized in the absence of meaningful legislation as well.<sup>93</sup> The harms facing child actors were exemplified in the tragic death of two children, ages six and seven, on the set of *Twilight Zone: The Movie* in 1982 when a helicopter crashed while the children were filming outside of legal working hours for minors in California.<sup>94</sup>

In an effort to protect the well-being of children, California adopted an extensive framework of regulations for child actors.<sup>95</sup> Notably, California requires child actors to acquire work permits from the Labor Commissioner, imposes time restrictions on the number of hours and days children can work, and mandates educational requirements such as having a teacher present on set.<sup>96</sup> Although California's definition of "Entertainment Industry" is broad, including any organization employing a minor in a "[m]otion picture[]" of any type . . . using any format . . . by any medium . . . photography; recording; modeling; theatrical

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92. Shirley Temple is among several other child stars whose fortune was exploited by their parents. At the peak of Temple's career, she received nearly \$10,000 a week. However, after becoming an adult she discovered she only had \$44,000 in her account rather than the \$3.2 million she had earned as a result of her father failing to properly place her earnings in a trust. Destiny Lopez, *7 Celebs Whose Parents Decimated Their Fortunes*, INSIDER (Apr. 2, 2014, 4:47 PM), [<https://perma.cc/5MJX-TFQG>]. More recent child actors, including Leighton Meester from *Gossip Girl*, have experienced financial exploitation at the hands of their parents. Meester sued her mother in 2011 for misappropriating funds. Meester's mother reportedly used the funds provided to her by her daughter for plastic surgery and Botox rather than for providing medical care to Meester's younger brother. Ana Saragoza, *The Kids Are Alright? The Need for Kidfluencer Protections*, 28 AM. U. J. GENDER, SOC. POL'Y & L. 575, 580 (2020). Other actors including Macaulay Culkin, Gary Coleman, Arielle Winter, and Corey Feldman have experienced parental exploitation. Charlotte B. Winckler, *Kidfluencers: How the Law's Failure to Keep up Leaves Children Across the Country at Risk of Labor Abuse and Financial Exploitation*, 16 CHARLESTON L. REV. 111, 118 (2022).

93. Sisson, *supra* note 75, at 169-70.

94. *Id.* at 176.

95. Masterson, *supra* note 5, at 581 n.24.

96. CAL. CODE REGS. tit. 8 § 11760 (2023); Sisson, *supra* note 75, at 176; Masterson, *supra* note 5, at 581 n.24.

productions; publicity; rodeos; circuses; musical performances; and any other performances,” it has not been interpreted by the legislature or courts to apply within the context of social media.<sup>97</sup> Therefore, it is likely that although seemingly encapsulated by the broad definition of “entertainment industry” kidfluencers are not subject to the protections granted to child actors.<sup>98</sup>

Attempts by California Assemblymember Kansen Chu to pass a bill aimed directly at expanding child labor laws to include social media production reiterates the current gray area kidfluencers fall into.<sup>99</sup> Assemblymember Chu attempted to include “social media advertising” defined as “use, demonstration, or placement of a product through a social media communication pursuant to a contract . . .” in California’s Labor Code.<sup>100</sup> This likely would have extended work permit, educational, and Coogan Law protections to kidfluencers.<sup>101</sup> Although the bill passed, any mention of social media had been removed by the time it was submitted to the Governor for signature.<sup>102</sup> Therefore, kidfluencers in California remain vulnerable to exploitation falling outside of the child labor legislative framework.<sup>103</sup> It is crucial that Congress pass regulations specific to kidfluencers and social media.

### III. ANALYSIS

Given the legal landscape surrounding child labor in the United States, it is clear that kidfluencers fall outside the current labor protections available. Social media production, a new and novel field, presents a unique challenge in the development of regulations regarding child labor in a decentralized, digital arena.<sup>104</sup> This Part of the Comment will discuss (A) why posts

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97. CAL. CODE REGS. tit. 8 § 11751 (2023); Winckler, *supra* note 92, at 113.

98. McGinnis, *supra* note 7, at 259; Masterson, *supra* note 5, at 590-91.

99. Harper Lambert, *Why Child Social Media Stars Need a Coogan Law to Protect Them From Parents*, HOLLYWOOD REPORTER (Aug. 20, 2019, 6:00 AM), [<https://perma.cc/G5E2-AEZE>].

100. Saragoza, *supra* note 92, at 583.

101. Lambert, *supra* note 99.

102. *See id.*

103. *Id.*

104. Fishbein, *supra* note 33, at 133.

made by kidfluencers should be viewed as work,<sup>105</sup> (B) the specific harms kidfluencers face in the absence of adequate regulations,<sup>106</sup> and (C) the importance of understanding the right to parental autonomy when developing regulations for kidfluencers.<sup>107</sup>

### A. It is Not Play if You Are Making Money

Today's child stars of social media do not require a studio, craft services, or even a full production team to achieve the same status and fame of child television icons of the past like Mary-Kate and Ashley Olsen.<sup>108</sup> Given a smartphone and internet access, kidfluencers can create and upload their content for the world to see from the comfort of their own home with their family.<sup>109</sup> Often, the young age of kidfluencers necessitates parental participation in creating and distributing content.<sup>110</sup> Many parents of kidfluencers claim it is them and not their children who are actually "working," as it is typically the parents who manage the content creation, negotiate with brands, organize photo shoots, and publish the finished product.<sup>111</sup> Parents also claim that their children are simply "having fun" and being recorded doing normal activities.<sup>112</sup> However, many times the creation of content goes far beyond passively filming a child and transcends to actual work.<sup>113</sup>

Kidfluencers who are truly considered successful within the industry make hundreds of sponsored posts a year.<sup>114</sup> Therefore, children must dedicate a fairly significant portion of their time to content creation. Additionally, children who have deals with sponsors are forced to promote products requiring them to play with specific toys and often must meet deadlines for production

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105. *See infra* Section III.A.

106. *See infra* Section III.B.

107. *See infra* Section III.C.

108. Wong, *supra* note 2.

109. *See generally id.*; Masterson, *supra* note 5, at 585.

110. Masterson, *supra* note 2, at 591-92.

111. Mooney, *supra* note 8.

112. Wong, *supra* note 2.

113. Masterson, *supra* note 5, at 592-93.

114. *Id.* at 592.



purposes.<sup>115</sup> Children are also often coached to say specific things for their posts. Evan Gaines, a seven-year-old kidfluencer complained about creating content stating, “What I don’t like about doing them is they take a superlong time, and sometimes Dad tells me to say hard words. Like ‘subscribe.’”<sup>116</sup> Children recognize the production of content as work. Johnna Gaines, Evan’s sister and fellow kidfluencer, stated that while she likes the spotlight, “[i]f we have to do a script and Dad is telling us what to say, like an ad for a toy, . . . that felt more like work.”<sup>117</sup>

Comments made by parents of kidfluencers illustrate and acknowledge the demanding nature of work often expected of young children. Bee Fisher, a mother of three kidfluencers stated when discussing her children, “If there’re days they’re totally not into it, they don’t have to be . . . Unless it’s paid work. Then they have to be there. We always have lollipops on those days.”<sup>118</sup> Josh Gaines, Evan’s father, referred to his daughter as “a little workhorse,” when discussing transitioning his social media channels to focus on his daughter when his son became disinterested in participating.<sup>119</sup>

Although parents do contribute to building their child’s account and content, it is important to remember it is the child’s image that is often selling the product.<sup>120</sup> Therefore, what might otherwise have been considered “play” becomes “work.”<sup>121</sup>

### **B. Harms Facing Kidfluencers**

Like the child actors of the past, kidfluencers face many potential harms.<sup>122</sup> However, the open and expansive nature of social media greatly amplifies the challenges and dangers confronting kidfluencers. This Section details three specific

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115. *Id.*

116. Rosman, *supra* note 27.

117. *Id.*

118. Wong, *supra* note 2.

119. Rosman, *supra* note 27.

120. McGinnis, *supra* note 7, at 259-60.

121. Masterson, *supra* note 5, at 592.

122. *See infra* Section II.B.

harms facing kidfluencers today: (1) financial,<sup>123</sup> (2) psychological,<sup>124</sup> and (3) privacy.<sup>125</sup>

### *1. Financial*

In 2018, Justin and Ami McClure gave up their jobs as a training manager at a law firm and an accountant in New York to run their daughters' social media accounts, after doubling their annual income to half a million dollars.<sup>126</sup> Given the rise of kidfluencers and expanding amount of sponsorship and monetization opportunities, it is now feasible that social media profiles can become a family's primary source of income.<sup>127</sup> With the ability of kidfluencers to generate enough money to support their entire families, the risk of exploitation arises. Digital anthropologist Crystal Abidin, who has studied family influencers in depth concluded that children can easily be “reduced to props’ in the staging of a money-spinning fantasy of family life.”<sup>128</sup> Although parents like Justin and Ami McClure have placed money in savings and investments for their girls, not all parents should be trusted to be so responsible as evidenced by the Hobson family.<sup>129</sup>

Kidfluencers face the risk of exploitation both from their parents and even from some of the companies who sponsor them.<sup>130</sup> While parents may push their children to create more content in the hopes of making millions, companies also sometimes undercompensate children.<sup>131</sup> Many kidfluencers are not considered employees and are not entitled to any real employment protections.<sup>132</sup> In the absence of regulations,

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123. *See infra* Section II.B.1.

124. *See infra* Section II.B.2.

125. *See infra* Section II.B.3.

126. Deborah Linton, ‘When I’m 16, My Baby Brother Will Take Over’: The Rise of the Kidfluencer, THE GUARDIAN (Mar. 23, 2019, 2:00 AM), [<https://perma.cc/N7Q7-RH5Y>].

127. *Id.*

128. *When is It Okay to Turn a Kid into a Brand?*, FAMILY ZONE, [<https://perma.cc/CL2K-J6CV>] (last visited Oct. 13, 2023).

129. Linton, *supra* note 126.

130. Masterson, *supra* note 5, at 593.

131. *Id.* at 594.

132. *Id.*

kidfluencers have no recourse to protect themselves. Complete trust in parents is the only hope currently available. Coogan Trusts should be required to help create a minimum level of protection for kidfluencers in regard to their financial futures.

## 2. Psychological

While there are still many unknowns surrounding the implications of social media on the health of kidfluencers, several studies have indicated that social media usage generally can have negative effects on a user's body image and mental health.<sup>133</sup> Online harassment on social media has grown expansively over the last decade.<sup>134</sup> Several studies have been undertaken to explore the links between depression, anxiety, and social media.<sup>135</sup> The prevalence of health issues arising from social media are evident through the special attention members of Congress have placed on investigating social media sites.<sup>136</sup> Congress has held numerous hearings on the effects of social media on children's mental health in recent years.<sup>137</sup> The ease at which individuals can connect directly over social media opens kidfluencers to a plethora of ways in which they can be criticized and harassed.<sup>138</sup> Numerous influencers and celebrities have reported receiving personally harassing messages via social media ranging from body shaming to death threats.<sup>139</sup>

## 3. Privacy

Unlike child actors of the past that simply portrayed fictional characters, kidfluencers today typically share their actual

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133. *Id.* at 595.

134. Taylor Lorenz, *Instagram Has a Massive Harassment Problem*, THE ATLANTIC (Oct. 15, 2018), [<https://perma.cc/XW9J-GF3S>].

135. Reardon, *supra* note 89, at 181.

136. Matt Binder, *Congress slams Facebook over Instagram's effects on kids' mental health at hearing*, MASHABLE (Sept. 30, 2021) [<https://perma.cc/2SL4-997L>].

137. *Id.*

138. Lorenz, *supra* note 134.

139. *Id.*; Masterson, *supra* note 5, at 596. "Some kidfluencers have received threats to the point that their parents felt the need to remove followers' ability to comment on their videos." Reardon, *supra* note 89, at 181.

identities with the world.<sup>140</sup> Karen North, director of the University of Southern California social media program and a clinical psychologist, in discussing her concern regarding the consequences of children “living their lives online for millions” stated, “[t]he difference between traditional child actors and social media influencers is that it’s not a kid pretending to be somebody for a show; instead, the show is the kid.”<sup>141</sup> It is not uncommon for intimate details of a kidfluencer’s life such as their name, home, and daily routine to be broadcast online to millions.<sup>142</sup>

The heightened connection between kidfluencers and their audience at the touch of a button creates an amplified risk for the loss of a child’s privacy and even raises serious safety concerns. Incidents of individuals stalking based upon information garnered from social media posts have been reported numerous times.<sup>143</sup> One news report indicated a man “stalked a Japanese pop star after determining her location based on reflections seen in her eyes in social media posts.”<sup>144</sup> Additionally, TikTok star Ava Majury was stalked by an eighteen-year-old male after she refused to send him explicit photos.<sup>145</sup> “[T]he situation escalated to the point where the 18-year-old shot a gun through the front door of Ava’s family home in Florida.”<sup>146</sup> The details shared online by kidfluencers puts them at risk of being stalked, especially given that social media often discloses the location of an individual.<sup>147</sup>

The fame achieved by some kidfluencers can be disruptive and invasive. The experience of Lorenzo Greer, a child YouTube star, highlights this.<sup>148</sup> While on a trip with his class, Lorenzo’s

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140. Riggio, *supra* note 6, at 501.

141. Novacic, *supra* note 11.

142. Riggio, *supra* note 6, at 515.

143. Marie C. Baca, *Your Smartphone Takes Amazing Selfies. Those Selfies Could Tell Stalkers Where You Live*, WASH. POST (Oct. 16, 2019, 6:00 AM), [perma.cc/A8QP-VP2H].

144. *Id.*

145. Madyson Edwards, *Children Are Making It Big (For Everyone Else): The Need for Child Labor Laws Protecting Child Influencers*, UCLA ENT. L. REV. (forthcoming 2023) (manuscript at 20).

146. *Id.*

147. *Id.*

148. See Linton, *supra* note 126.

teachers had to step in to protect him from a crowd of teenagers who recognized him and began trying to take a selfie with him.<sup>149</sup> In an interview, Lorenzo explained that this occurrence was not a single isolated event, elaborating that “[i]t first happened when I was seven and in town with my family . . . I was like, ‘Whaaat?’ Sometimes, Dad takes me out of situations if it’s overwhelming. I only go to the park if there are zero kids there.”<sup>150</sup> Kidfluencers can easily find themselves helplessly exposed to the public after generating a large following.

Furthermore, kidfluencers often do not have the ability to meaningfully consent to the information published about them, as their parents largely generate and control their content.<sup>151</sup> Children may actually object to the intimate details their parents release about their life or the manner in which their parents portray them but likely have no effective recourse to preserve their self-image.<sup>152</sup> This can potentially be incredibly invasive of a child’s privacy.

### C. The Right to Parental Autonomy

Taking place largely in the home and under the direction of parents, the unique nature of social media production invokes constitutional concerns regarding parental autonomy.<sup>153</sup> Therefore, any regulations attempting to address the harms discussed above must be limited as not to violate or impede the parental autonomy granted to parents by the Constitution.

Historically, the Supreme Court has stated that parents have the right to “direct the upbringing and education of children under their control.”<sup>154</sup> As such, the Court is slow to question decisions parents make regarding their children.<sup>155</sup> “The rights to conceive

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149. *Id.*

150. *Id.*

151. Fishbein, *supra* note 33, at 135.

152. “In a survey for CBBC Newsround, a quarter of children reported that when their parents share content of them on social media, they ‘feel embarrassed, anxious, or worried.’” *Id.* at 136.

153. Masterson, *supra* note 5, at 597.

154. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925).

155. *See Masterson, supra* note 5, at 597.

and to raise ones children have been deemed ‘essential.’”<sup>156</sup> Accordingly, children working for their parents have sometimes been exempted from employment regulations.<sup>157</sup> The authority of parents over their children is broad, as they can choose the ideas that their children are exposed to, with whom their children interact, and what activities their children participate in.<sup>158</sup>

Still, while strong, the right to parental autonomy is not absolute. Although a “private realm of family life which the state cannot enter” exists, “the state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare.”<sup>159</sup> Where the health and welfare of children are concerned, states may step in when significant interest exists.<sup>160</sup> Therefore, while the constitutional right to parental autonomy limits potential regulations of kidfluencers, it does not prohibit it.<sup>161</sup> Legislatures should be mindful of the need to respect parental autonomy when drafting legislation. However, they should not be fearful of it as a significant interest exists in protecting kidfluencers.

#### **D. Moving Forward: Crafting Legislation to Protect Kidfluencers**

Under the current legal landscape of the United States, kidfluencers have no legal protections despite some of them having assumed fame and fortune comparable to former child celebrities. Congress should craft federal legislation to address the current plight of kidfluencers. This Section will discuss potential protections that should be embedded in such federal legislation.<sup>162</sup> It will argue that the government should stay out of the parent-child relationship when parents post child-centric

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156. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *McGinnis*, *supra* note 7, at 260.

157. *McGinnis*, *supra* note 7, at 260.

158. *Masterson*, *supra* note 5, at 597.

159. *Id.*

160. *Id.* at 597-598; *Prince v. Massachusetts*, 321 U.S. 158, 160-61 (1944).

161. *See Edwards*, *supra* note 145, at 22.

162. *See infra* Section III.D.

content purely to share it, but that some moderate regulation is necessary when parents use their children's likeness for profit.<sup>163</sup>

### *1. Federal Legislation*

The creation of federal legislation is particularly well suited for kidfluencers because—unlike child actors typically contained within the entertainment markets of California or New York—kidfluencers have emerged in various states.<sup>164</sup> The decentralized nature of kidfluencers and the heightened mobility of social media makes federal legislation ideal to avoid potential forum shopping and to ensure that all kidfluencers are equally protected.<sup>165</sup> Failure to adopt federal legislation would leave kidfluencers at the mercy of their respective states to generate protective laws.<sup>166</sup> This would likely create an inconsistent patchwork of laws that would undoubtedly leave some kidfluencers without any protection, as evidenced by the fact that some states currently have no protections for child actors.<sup>167</sup>

Congress can glean its power to regulate kidfluencers from the Commerce Clause. The Commerce Clause endows Congress with the broad power to regulate interstate commerce.<sup>168</sup> Congress has the ability to regulate “‘channels of interstate commerce,’ ‘instrumentalities of interstate commerce,’ and ‘activities having a substantial relation to interstate commerce.’”<sup>169</sup> Although the Supreme Court has not explicitly recognized the internet as interstate commerce, “unanimous consent exists across courts of appeal and district courts that the Internet is a channel of interstate commerce.”<sup>170</sup> Additionally, Congress has relied upon the Commerce Clause in enacting other

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163. *See infra* Section III.D.

164. Edwards, *supra* note 145, at 11-12; McGinnis, *supra* note 7, at 254-55.

165. Edwards, *supra* note 145, at 11-12.

166. *Id.*

167. *Id.*

168. *Id.* at 11. The Commerce Clause gives Congress the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3.

169. Nina I. Brown & Jonathan Peters, *Say This, Not That: Government Regulation and Control of Social Media*, 68 SYRACUSE L. REV. 521, 531 (2018); U.S. CONST. art. I, § 8, cl. 3.

170. Edwards, *supra* note 145, at 8; Brown & Peters, *supra* note 169, at 531 n.76.

regulations concerning online activities including “internet safety of children . . . prohibitions against certain unfair and deceptive Internet sales practices . . . [and] certain activities relating to material involving the sexual exploitation of minors.”<sup>171</sup> Social media is intrinsically tied to the internet.<sup>172</sup> Therefore, Congress could enact legislation targeted at protecting kidfluencers on social media.<sup>173</sup>

## 2. Coogan Laws for Kidfluencers

Financial protections through the implementation of Coogan Laws offer the most promising protection to kidfluencers. Unlike work permit regulations which can be difficult to monitor and enforce, Coogan Laws provide a relatively non-intrusive manner in which the government can extend protections to kidfluencers.<sup>174</sup> As discussed above, the lucrative nature of the kidfluencer industry heightens the potential for exploitation.<sup>175</sup> While parents are to act in the best interests of their children, previous cases have demonstrated when large sums of money are involved, even the motives of “loving” parents can become perverse.<sup>176</sup> Requiring Coogan Trusts for kidfluencers can protect their financial interests and thus their future by ensuring their parents refrain from spending at least a percentage of their earnings. It also ensures that kidfluencers are compensated for the value they contribute.

This Comment proposes that a Coogan Law for kidfluencers, like that of child actors, should require that fifteen percent of gross earnings be placed in a Coogan Trust.<sup>177</sup> The remaining eighty-five percent of income could then still be used by parents

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171. Brown & Peters, *supra* note 169, at 532 n.77.

172. Edwards, *supra* note 145, at 8.

173. *Id.*

174. McGinnis, *supra* note 7, at 258.

175. *See supra* Section III.B.1.

176. Saragoza, *supra* note 92, at 580 (detailing the parental mismanagement of finances Jackie Coogan, Leighton Meester, Ariel Winter, Mischa Barton, and Chris Warren suffered); Stephanie Marcus, *Shirley Temple's Death Reminds Us There Are Still Few Protections For Child Stars*, HUFFPOST (Feb. 17, 2014), [<https://perma.cc/X5QL-PW43>] (describing that LeAnn Rimes, Mimi Gibson, and Gary Coleman “famously sued their parents for squandering or mismanaging their money”).

177. McGinnis, *supra* note 7, at 258; Saragoza, *supra* note 92, at 600.



to create a better life for their family. The fifteen percent of gross income is respectful of both the energy parents put into creating and publishing content and the work and lack of privacy children experience as the stars of the social media channels.

Any implementation of a Coogan Trust should be narrowly tailored to impact only those who are using their accounts for profit rather than only hobby.<sup>178</sup> Thousands of individuals create and share content featuring their children.<sup>179</sup> Additionally, such content is often created purely as a hobby or brings in only a small amount of money.<sup>180</sup> The regulation of such a large base would be unattainable and invasive. Therefore, Coogan Trust should only be required once a kidfluencer brings in an amount in which the likelihood of them experiencing financial exploitation would be feasible.<sup>181</sup>

### 3. Work Permits and Production Regulations

Kidfluencers are incredibly unique in nature. Unlike child actors who typically work in a studio surrounded by cast and crew, kidfluencers typically work from the comfort of their own home surrounded by only their parents.<sup>182</sup> As a result, the ability to enforce work permits and production regulations would be nearly impossible without encroaching greatly on both parental and privacy rights.<sup>183</sup> While work permits and production regulations serve important purposes in the child actor context

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178. Masterson, *supra* note 5, at 601.

179. See Anonymous, *Sharenting Is Here to Stay, So Now What?*, 45 SEATTLE U. L. REV. 1229, 1230 (2022).

180. See Masterson, *supra* note 5, at 601.

181. The exact amount at which Coogan Trust Laws should be imposed is beyond the scope of this Comment. However, it is important to note that restrictions should be limited as to only impact those who are making some kind of profit off of distributing their child's image. Coogan Trust should apply to those who consistently and actively engage in sponsorships and partnerships. Masterson's article suggests that, if a kidfluencer can collect \$500 or more for a single post, it is likely they have amassed a following and significant online presence, thereby triggering the concerns of financial exploitation and other harms mentioned earlier. But the threshold excludes families who may use social media primarily as a hobby and have not developed the level of commercial operation that puts these children at significant risk. Masterson, *supra* note 5, at 601.

182. Fishbein, *supra* note 33, at 133.

183. Reardon, *supra* note 89, at 184; Masterson, *supra* note 5, at 604, 605; see *supra* Section III.C.

and could potentially do so for kidfluencers, the costs of infringement on family and privacy rights must be carefully considered to justify such an intrusion.<sup>184</sup> The unique production environment of kidfluencers limits the nature of regulations that could reasonably be put in place.<sup>185</sup>

Still, moderate options do exist. Congress could first extend portions of the FLSA to kidfluencers, specifically the hazardous conditions provision. This would act as a shield by ensuring kidfluencers are physically safe. Additionally, Congress could impose a reasonably narrow licensing requirement.<sup>186</sup> Under the licensing provision, parents of kidfluencers who have a substantial following<sup>187</sup> would need to obtain an official license for their children.<sup>188</sup> The license would require parents to submit school attendance records for renewal at the end of each year and a summary of how many hours their child dedicated to content creation.<sup>189</sup> If the school records or summary indicated an alarming pattern, proper officials would receive notification to investigate.<sup>190</sup> Still, opponents would likely raise privacy concerns that such regulation would be difficult to enforce and monitor accurately, thus limiting its effectiveness.<sup>191</sup>

Perhaps the most reasonable and easy means of protecting kidfluencers through work permits and production regulations occurs when they are working on a set outside of the home. While immense privacy concerns emerge when attempting to regulate actions inside the home, those concerns are less prevalent in actions outside the home.<sup>192</sup> When kidfluencers partner with brands to create content on a set outside the home, the ability to extend protections increases. Congress could enact a special

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184. Masterson, *supra* note 5, at 604-05.

185. Fishbein, *supra* note 33, at 133.

186. *See id.* at 151-53 (The solution offered in this Comment is an adaptation of a proposal brought forth in Rachel Fishbein's Note in the *George Washington International Law Review*).

187. The determination of a substantial following is beyond the scope of this Comment. However, this could likely be based upon the same process used in the financial significance determination.

188. Fishbein, *supra* note 33, at 153.

189. *Id.* at 152-53.

190. *Id.* at 153.

191. *See* Masterson, *supra* note 5, at 603.

192. *See supra* Section III.C.

provision, akin to those currently governing child actors, to protect kidfluencers engaged in activities outside the home.

#### 4. *The Right to be Forgotten*

In 2020, France became one of the first nations to officially adopt legislation creating a legal framework aimed at protecting kidfluencers on social media.<sup>193</sup> The framework set limitations on the number of hours kidfluencers could work, mandated money be put into a special account for children, and, importantly, provided for how content could be taken down if the children featured so requested.<sup>194</sup> The explicit inclusion of the “right to be forgotten” in the French law provides a potential framework that could be applied to protect children’s privacy. Under the right to be forgotten, children can demand that platforms remove images and videos of them.<sup>195</sup> Some scholars have claimed that the right to be forgotten “could alleviate the tension between parents’ rights and children’s privacy interests” by balancing the “privacy interests of children and their parents’ right to disseminate information about their children on social networking sites.”<sup>196</sup>

Adopting a right to be forgotten would allow children the opportunity to take control of their privacy interests.<sup>197</sup> Unlike past generations who did not have access to social media, what is posted online about children today has the potential to follow them for the rest of their lives. Therefore, the power to protect one’s image is critical. Still, despite the benefits of the right to be forgotten, it is uncertain whether the United States would ever fully embrace such a right.<sup>198</sup> Historically, the United States has been skeptical of the right to be forgotten, viewing it as

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193. *France: Parliament Adopts Law to Protect Child “Influencers” on Social Media*, LIBR. OF CONG. (Oct. 30, 2020), [<https://perma.cc/5PVN-W2GT>].

194. Qamar, *supra* note 28.

195. *Everything You Need to Know About the “Right to be forgotten”*, GDPR.EU, [<https://perma.cc/6BEP-4S76>] (last visited Oct. 31, 2023).

196. Keltie Haley, *Sharenting and the (Potential) Right to Be Forgotten*, 95 IND. L. J. 1005, 1015 (2020).

197. *See* Reardon, *supra* note 89, at 172.

198. *Id.* at 188.

conflicting with the First Amendment.<sup>199</sup> However, public sentiment has shifted to favor the adoption of some form of a right to be forgotten, with most Americans saying they would prefer “keep[ing] things about themselves from being searchable online. . . .”<sup>200</sup> Congress must seriously consider adopting some form of a right to be forgotten protection for kidfluencers.

#### IV. CONCLUSION

As social media and the kidfluencer industry continues to grow, federal legislative action must be taken to protect kidfluencers from potential exploitation. While tragic stories like that of the Hobson family are hopefully rare, adopting meaningful legislation would help ensure that such horrific acts do not occur in the future. As the law currently stands, kidfluencers fall through the cracks, ripe for exploitation from their parents, sponsors, and social media platforms.<sup>201</sup>

In order to best protect children and prevent further exploitation, Congress should adopt federal legislation creating Coogan protections for kidfluencers.<sup>202</sup> Additionally, Congress should follow France’s lead and consider adopting a narrow version of the right to be forgotten to ensure that children have a means of protecting their privacy and image in the future.<sup>203</sup> While the adoption of work permits and workplace condition requirements like those placed on child actors have appeal, they would likely be unworkable and invasive given the nature of production in the kidfluencer industry.<sup>204</sup> The creation of federal legislation explicitly targeted at protecting kidfluencers’ right to privacy and safeguarding their economic interest offers the best path forward to protecting children.<sup>205</sup>

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199. *Id.*

200. *Id.* at 174.

201. Masterson, *supra* note 5, at 593.

202. *Id.* at 607.

203. Haley, *supra* note 196, at 1017.

204. Reardon, *supra* note 89, at 184-85.

205. Masterson, *supra* note 5, at 607.