

The Small-er Screen: YouTube Vlogging and the Unequipped Child Entertainment Labor Laws

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CONTENTS

INTRODUCTION	494
I. CHILD ENTERTAINMENT LABOR LAWS IN THE UNITED STATES.....	498
<i>A. Federal Level</i>	498
<i>B. State Level</i>	502
1. California	502
2. New York.....	504
<i>C. A Note about Privacy and International Child Entertainment Labor Laws</i>	506
II. THE NATURE OF FAMILY VLOGGING	508
<i>A. Monetization of Content & Children Involved in Ads</i>	508
<i>B. Safety Concerns</i>	512
III. INCORPORATING FAMILY VLOGGERS INTO CHILD ENTERTAINMENT LAWS.....	515
<i>A. Implementing Federal Legislation</i>	516
<i>B. Expanding Definitions in States</i>	517
<i>C. Time Regulations</i>	520
<i>D. Licensing</i>	521
<i>E. An Alternative to Legislation: YouTube Rules and Guidelines</i>	523
<i>F. First Amendment Concerns</i>	526
CONCLUSION.....	529

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INTRODUCTION

Jawed Karim, Chad Hurley, and Steven Chen could not have predicted the astronomical success YouTube would become when they founded the company in 2005,¹ which has gone on to disrupt an industry once monopolized by movie theatres and television screens.² Until 2005, daily documentation of one's life never branched far beyond a tiny square viewfinder in a camcorder the size of a small toaster. Co-founder Karim uploaded the first-ever video to YouTube, which was an eighteen-second clip titled "*Me at the Zoo*."³ In its earlier years, YouTube was home mostly to commercial advertisements, music videos, and short snippets like *Me at the Zoo*.⁴ Over a decade—and two billion monthly users—later,⁵ YouTube is a modern-day entertainment hub comparable in popularity to the box office and television (the "small screen").⁶ Although many people making their living on YouTube are not "actors" per se, they draw the attention of audiences in strikingly similar ways. A year after its inception, Google purchased YouTube for \$1.65 billion,⁷ even though it turned out to be much more than a billion-dollar idea. Today, many content creators monetize their videos on YouTube, and for "family vloggers,"⁸ the line between personal life and work has become blurry—ultimately impacting the lives of their children.

Due to the platform's accessibility, creators of various ages on YouTube have become involved in scandals and controversies on social media even without parental guidance or control.⁹ This was true for

1. Richard Alleyne, *YouTube: Overnight Success Has Sparked a Backlash*, TELEGRAPH (July 31, 2008), <https://www.telegraph.co.uk/news/uknews/2480280/YouTube-Overnight-success-has-sparked-a-backlash.html> [<https://perma.cc/X2D6-VW9G>].

2. *See id.*

3. Jawed, *Me at the Zoo*, YOUTUBE (Apr. 23, 2005), <https://www.youtube.com/watch?v=jNQXAC9IVRw> [<https://perma.cc/3TRN-NPR6>].

4. *See, e.g.*, Sophie Prideaux, *These Are the First 10 Videos Ever Published on YouTube as Site Turns 15*, THE NAT'L (Apr. 23, 2020), <https://www.thenational.ae/arts-culture/these-are-the-first-10-videos-ever-published-on-youtube-as-site-turns-15-1.1009684> [<https://perma.cc/4RQ9-5Z24>].

5. Todd Spangler, *YouTube Now Has 2 Billion Monthly Users, Who Watch 250 Million Hours on TV Screens Daily*, VARIETY (May 3, 2019), <https://variety.com/2019/digital/news/youtube-2-billion-users-tv-screen-watch-time-hours-1203204267/> [<https://perma.cc/7N23-Q3ZK>].

6. *The Small Screen*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/the%20small%20screen> [<https://perma.cc/TH9E-ESYR>].

7. Alleyne, *supra* note 1.

8. Family vloggers film ("video blog") their daily lives and compile those clips into videos, which they upload to YouTube to be viewed and commented on by subscribers. Family vlog content can range anywhere from the daily lives, routines, and hauls of the parents, to the birth and other milestone events in a child's life.

9. *See YouTube's Biggest Scandals*, E! ONLINE (May 16, 2020), <https://www.eonline.com/photos/27344/youtube-s-biggest-scandals> [<https://perma.cc/ME29-MKZV>]; Stacey Grant & Yerin Kim, *15 of YouTube's Most Horrifying Scandals and Controversies*, SEVENTEEN (Jan. 28, 2020), <https://www.seventeen.com/celebrity/movies-tv/g18753797/youtube-scandals-controversies/> [<https://perma.cc/ME29-MKZV>].

Youtuber, Instagram influencer, and TikTok star Danielle Cohn.¹⁰ The young influencer, who had just under four million Instagram followers and almost 1.5 million YouTube subscribers, participated in sponsored brand collaborations in the form of paid YouTube videos and Instagram posts and repeatedly claimed to be fifteen years old.¹¹ After posting about a fake marriage and pregnancy with her boyfriend on her social media accounts, her father revealed via Facebook that Danielle was actually thirteen years old and that she had been lying about her age in her social media posts.¹² Due to the nature of the content Danielle routinely posted, this fact shocked the Internet and her name graced the title of many news articles covering her scandal.¹³ However, not every YouTube scandal or controversy has been so obvious.

Family vloggers are among the millions of content creators on YouTube.¹⁴ In general, vloggers frequently upload recorded videos of their daily lives. Family vloggers are unique because they focus their content around their familial relationships and the lives of their children. One set of family vloggers, the Ace Family, has recorded their children's lives from the day they were born and continue to upload videos of each milestone, including "*Elle Cries on Her First Rollercoaster Ride*" and "*Elle and Alaïa Get Caught Doing What!! **Hidden Camera***."¹⁵ Another vlogging couple, Cole and Savannah LaBrant, post similar

perma.cc/DLU2-78LB]; Lindsay Dodgson, *Another YouTuber Quit Jake Paul's Team 10, and Is Now Claiming He Was Verbally Abused and "Bullied" out of the House*, INSIDER (July 22, 2019), <https://www.insider.com/youtuber-cole-carrigan-bullied-out-of-jake-paul-team-10-2019-7> [<https://perma.cc/CK7J-Q7KY>]; Amanda Krause, *YouTube Beauty Star James Charles Is at War with His Former Mentor Tati Westbrook. Here's the Story of His Controversial Past.*, INSIDER (May 13, 2019), <https://www.insider.com/james-charles-scandals-feuds-2019-5> [<https://perma.cc/6HST-66AW>].

10. Zoe Kleinman, *Danielle Cohn: Are Teen Influencers Being Exploited?*, BBC NEWS (Sept. 23, 2019), <https://www.bbc.com/news/technology-49794327> [<https://perma.cc/HZ4A-GJJE>].

11. Lindsay Dodgson, *Nobody Knew YouTuber Danielle Cohn's Real Age Until Her Own Father Said She's Only 13. Here's What You Need to Know About the Teen Star Who Tricked the Internet into Thinking She Was Pregnant*, INSIDER (Sept. 19, 2019), <https://www.insider.com/danielle-cohn-everything-you-need-to-know-teenage-youtuber-2019-9> [<https://perma.cc/PV2N-V98E>].

12. See Josh Katzowitz, *Danielle Cohn's Dad Says She's Not Really 15 Years Old*, DAILY DOT (Sept. 18, 2019), <https://www.dailydot.com/upstream/danielle-cohn-real-age/> [<https://perma.cc/A64N-T4E8>].

13. See Tanya Chen, *A 15-Year-Old YouTuber and Influencer Has Caused Anger and Concern After Suggesting She Was Married and Pregnant*, BUZZFEED NEWS (Apr. 16, 2019), <https://www.buzzfeednews.com/article/tanyachen/youtuber-influencer-danielle-cohn-implies-pregnant-married> [<https://perma.cc/V2KD-NUS4>]; Lindsay Dodgson, *Danielle Cohn's Age and Wellbeing Are Being Called into Question Again After Audio Was Leaked of Her Mother Saying She Has Had an Abortion*, INSIDER (July 21, 2020), <https://www.insider.com/leaked-audio-danielle-cohn-abortion-2020-7> [<https://perma.cc/J8CT-4TUL>]; Kleinman, *supra* note 10.

14. *YouTube by the Numbers: Stats, Demographics & Fun Facts*, OMNICORE (Feb. 10, 2020), <https://www.omnicoreagency.com/youtube-statistics/> [<https://perma.cc/X3XT-AVZF>].

15. The ACE Family, YOUTUBE, <https://www.youtube.com/channel/UCWwWOFsW68TqXE-HZLC3WIA> [<https://perma.cc/S84V-BUSS>].

content, including videos titled “*Baby Posie’s Health Emergency*” and “*Everleigh Doesn’t Want a Baby Sister*.”¹⁶ Family channels often involve pranks and reactions, most of which are centered around young children.¹⁷ Given their high amounts of views and subscribers, channels like these are monetized by YouTube and granted various brand sponsorships.¹⁸

What looks like studio-quality home videos have actually become part of a booming business, and child labor laws have failed to protect children who have essentially become employees of the Internet. Children on YouTube and social media are not treated the same way as, for example, child actors on a movie set are. Parents are free to involve their children in content in whatever way they desire—as long as they do not violate YouTube community guidelines—without worrying about time regulations, filming conditions, licensing requirements, or setting up funds for their children’s work.

The general concern about children’s safety on the Internet has been especially relevant since the growth of the platform TikTok.¹⁹ Potentially “more than a third of [TikTok’s] 49 million daily users . . . in the United States [are] 14 years old or younger.”²⁰ In fact, TikTok’s most followed creator, Charli D’Amelio, is a minor.²¹ Although the concern for the safety

16. The LaBrant Fam, YOUTUBE, https://www.youtube.com/channel/UC4-CH0epzZpD_ARhxCx6LaQ [<https://perma.cc/AN8E-ZMUF>].

17. See, e.g., Vern Family Vlogs, *End of the World Prank on Our Kids Gone Wrong!!!*, YOUTUBE (June 4, 2019), <https://www.youtube.com/watch?v=EqIj-pQHE> [<https://perma.cc/GLP7-8YBS>]; The Sands Family, *Dropping Our Baby from Balcony Prank on Wife*, YOUTUBE (Sept. 21, 2019), <https://www.youtube.com/watch?v=L6ezL50UbYM> [<https://perma.cc/FMX9-MPNQ>]; see also Tiffany Ferguson, *The Dark Side of Family Vlogging*, YOUTUBE (Nov. 21, 2018), <https://www.youtube.com/watch?v=-yf8Nuj80hM> [<https://perma.cc/889P-MKDC>]; Smokey Glow, *Why I Hate Family Vloggers *A Rant**, YOUTUBE (Jan. 25, 2019), <https://www.youtube.com/watch?v=hBQS0SxMIWE> [<https://perma.cc/D63E-4A5D>]. These videos are examples from “commentary channels” on YouTube that analyze and critique many controversial issues happening on the YouTube platform or elsewhere. The ethics of family vlogging have been a topic of conversation amongst the commentary community on YouTube in recent years.

18. See Jeff Rose, *How Much Do YouTubers Really Make?*, FORBES (Mar. 21, 2019), <https://www.forbes.com/sites/jrose/2019/03/21/how-much-do-youtubers-really-make/#7a2b504a7d2b> [<https://perma.cc/VUR3-URBB>]; *Getting Started with Brand Partnerships*, YOUTUBE: CREATOR ACAD., <https://creatoracademy.youtube.com/page/lesson/partnership-basics> [<https://perma.cc/8DD5-5PT7>].

19. *TikTok for Younger Users*, TIKTOK (Dec. 13, 2019), <https://newsroom.tiktok.com/en-us/tiktok-for-younger-users> [<https://perma.cc/3LYD-782U>]; see also *TikTok Is Violating Children’s Privacy, Advocacy Groups Warn*, ASSOCIATED PRESS (May 15, 2020), <https://www.nbcnews.com/tech/security/tiktok-violating-children-s-privacy-advocacy-groups-warn-n1207716> [<https://perma.cc/GQG5-PBDF>].

20. Raymond Zhong & Sheera Frenkel, *A Third of TikTok’s U.S. Users May Be 14 or under, Raising Safety Questions*, N.Y. TIMES (Aug. 14, 2020), <https://www.nytimes.com/2020/08/14/technology/tiktok-underage-users-ftc.html> [<https://perma.cc/UA7N-6SLW>].

21. Cassidy George, *How Charli D’Amelio Became the Face of TikTok*, NEW YORKER (Sept. 5, 2020), <https://www.newyorker.com/culture/cultural-comment/how-charli-damelio-became-the-face-of-tiktok> [<https://perma.cc/QN5D-S6WB>]; *TikTok Star Charli D’Amelio Has No Idea How She Got*

of younger users on TikTok may be different than the concern for children on YouTube given parental involvement in YouTube content creation,²² the rapid growth and accessibility of TikTok is an example of the ever-growing and evolving social media culture in the United States and around the world.

TikTok utilizes a recommendation style algorithm known as the “For You” page that personalizes a feed of videos for its users.²³ Although the exact algorithm may be somewhat of a mystery, it suggests that the platform itself has some control over which videos users are exposed to based on that user’s activity. TikTok has also become another social media platform where users can monetize their content and include brand sponsorships similar to those found on YouTube and Instagram.²⁴ In 2020, TikTok began planning a \$200 million fund to support its creators.²⁵ Unlike many YouTube videos, “TikToks” are a minute or less in duration,²⁶ making them much more user-friendly for beginners and easier to make and upload. As such, parents uploading videos of their children is also common practice on TikTok, just as it is on YouTube or Instagram. Some parents have even created accounts that consist almost entirely of videos of their babies.²⁷ Although TikTok’s history as a platform is much shorter than YouTube’s,²⁸ it serves as a good example of the

So Famous, COSMOPOLITAN (Apr. 14, 2020), <https://www.cosmopolitan.com/entertainment/celebs/a31019692/who-is-charli-damelio-tiktok/> [<https://perma.cc/7A65-ALJD>].

22. The sentiment here is that minors who are creators themselves on TikTok (or even YouTube) are creating content independent of their parents’ influence or control. The key difference in these scenarios for purposes of this Comment is the absence of choice, consent, choice of content, etc. that is involved specifically in family-run accounts and channels. Although there are certainly safety concerns for minors on TikTok (especially those who appear on parent-run TikTok channels), YouTube as a platform has been around for much longer and many users are by default more established, and often hold more sponsorships, than users on TikTok.

23. Louise Matsakis, *TikTok Finally Explains How the ‘For You’ Algorithm Works*, WIRED (June 18, 2020), <https://www.wired.com/story/tiktok-finally-explains-for-you-algorithm-works/> [<https://perma.cc/29CH-F8M8>].

24. Vanessa Pappas, *Introducing the \$200M TikTok Creator Fund*, TIKTOK (July 22, 2020), <https://newsroom.tiktok.com/en-us/introducing-the-200-million-tiktok-creator-fund> [<https://perma.cc/KB3V-EJRA>].

25. *Id.*

26. Louise Matsakis, *A Beginner’s Guide to TikTok*, WIRED (Mar. 6, 2019), <https://www.wired.com/story/how-to-use-tik-tok> [<https://perma.cc/6H9Z-BLQ4>].

27. *See, e.g.*, @baidaugh, TIKTOK, <https://www.tiktok.com/@baidaugh> [<https://perma.cc/QQ4S-PT2Z>]. This account is controlled by the mother and follows the daily lives of three young boys: Franklin, Grant, and Lincoln.

28. *See* Paige Leskin, *Inside the Rise of TikTok, the Viral Video-Sharing App Wildly Popular with Teens and Loathed By the Trump Administration*, BUS. INSIDER (Aug. 7, 2020), <https://www.businessinsider.com/tiktok-app-online-website-video-sharing-2019-7> [<https://perma.cc/2TUD-4NMV>] (explaining that TikTok was launched in China in September 2016 under the name Douyin).

direction social media is heading toward: content that is becoming easier to upload and watch.

User-generated content on various social media platforms such as YouTube, Instagram, and TikTok is now a prevalent form of modern entertainment, and it involves child participants much like the use of child actors in television and film. Child labor laws fail to keep pace with the rapidly evolving Internet entertainment ecosystem, and this issue requires specific action by the legislature and corporations behind popular social media platforms.

Part I of this Comment will cover child entertainment labor laws in the United States and some of the legislative history behind child labor laws to demonstrate the need for expanded and newly adopted legislation to accommodate the new world of user-generated content. Part II will discuss the nature of family vlogging and how it compares to traditional entertainment media. Part III will argue for a multitude of legislative changes to better protect children's interests when they are featured in social media posts for monetary gain, including: the application of federal child labor laws to family vlogging and social media influencing, the adoption of child entertainment labor laws in individual states, an expansion of the pre-existing provisions to include entertainment on social media platforms, and the adaptation of YouTube community guidelines to better safeguard the interests of children who appear on family vlog channels.²⁹

I. CHILD ENTERTAINMENT LABOR LAWS IN THE UNITED STATES

A. Federal Level

Child labor laws became an issue of particular concern to Congress in the early twentieth century.³⁰ During that time, children worked mostly in industrial settings—including factories, mills, and farms—and

29. YouTube guidelines will be discussed heavily later in this Comment. Guidelines currently exist to protect minors featured in content, but in relatively vague ways. YouTube guidelines instruct creators to “think carefully” about the content they upload featuring minors or other people other than the uploader in general. They also suggest that user’s “don’t post” content that features a minor in a bedroom or bathroom (“private spaces”) or content that reveals personal details about a child. However, none of the guidelines contain provisions that exist in traditional legislative regulations that govern minors in the entertainment industry. The guidelines also do not go in-depth about what classifies as “personal details” and still largely give deference to the creators, urging them to “think carefully” while failing to impose stricter or more specific guidelines that govern content featuring minors. See *Child Safety on YouTube*, GOOGLE: YOUTUBE HELP, https://support.google.com/youtube/answer/2801999?hl=en&ref_topic=9282679 [<https://perma.cc/DP4G-NMG3>].

30. Michael Schuman, *History of Child Labor in the United States-Part 2: The Reform Movement*, MONTHLY LAB. REV. (Jan. 2017), <https://www.bls.gov/opub/mlr/2017/article/history-of-child-labor-in-the-united-states-part-2-the-reform-movement.htm> [<https://perma.cc/D5X6-87PK>].

legislation proposing to put restrictions on this type of employment was a controversial topic in Congress.³¹ Almost half a century later, Congress finally passed an act that included child labor laws that would withstand adjudication of the courts: The Fair Labor Standards Act of 1938 (FLSA).³² Perhaps most notably, the FLSA prohibited the employment of minors in “oppressive child labor.”³³ However, only 6% of children working in 1938 were covered under the FLSA given the limited types of labor that were regulated.³⁴ The Act’s focus on hazardous or oppressive types of labor may help to explain why the regulation of more modern types of child employment were overlooked. For example, Congress did not address child employment in the entertainment industry in the twentieth century. Additionally, whether child employees were protected was also dependent on the needs of society and the economy.³⁵

Historically, child labor protections in the United States clearly and overwhelmingly focused on the dangers of hazardous occupations that were widespread during the industrial age, when child labor laws focused on regulating dangerous occupations held by children due to the societal needs that drove policy decisions at the time. Consequently, this focus left gaps in child labor laws in terms of future child employment scenarios that were not as obviously dangerous. For example, child labor protections tended to recede in times where employment of minors was considered a necessity, such as during World War II.³⁶

The nature of child labor in the modern era, however, includes much more than jobs that require immense amounts of physical exertion and exposure to hazardous conditions. The development of the American film industry throughout the 1900s created a new form of child employment that the FLSA was not designed to protect. Minors employed as actors and performers “in motion pictures or theatrical productions, or in radio or television productions” were and remain unprotected under the limits of working days and working hours included in the FLSA.³⁷ This exemption

31. *Id.*

32. *Id.*

33. 29 U.S.C. § 212(c).

34. Schuman, *supra* note 30.

35. *See id.*

36. Natsuki Aruga, “An’ Finish School”: *Child Labor During World War II*, LAB. HIST. 498, 518–20 (1988).

37. 29 C.F.R. § 570.125 (2020) (quoting FLSA, 29 U.S.C. §213(c)(3)); *see also Entertainment Industry Employment*, U.S. DEP’T OF LAB., <https://www.dol.gov/general/topic/youthlabor/entertainmentemployment> [<https://perma.cc/D7CD-BYV2>]. For example, under current federal regulations, youths aged fourteen to fifteen years old may work outside school hours in non-hazardous working conditions for three hours on a school day, eighteen hours during a school week, eight hours on a non-school day, and forty hours in a non-school week, generally between 7 a.m. and 7 p.m. or until 9 p.m. *See* 29 C.F.R. § 570.35 (2020).

in the Code of Federal Regulations defines a “performer” (including child performers) as follows:

[A] person who performs a distinctive, personalized service as a part of an actual broadcast or telecast including an actor, singer, dancer, musician, comedian, or any person who entertains, affords amusement to, or occupies the interest of a radio or television audience by acting, singing, dancing, reading, narrating, performing feats of skill, or announcing, or describing or relating facts, events and other matters of interest, and who actively participates in such capacity in the actual presentation of a radio or television program.³⁸

Children who do not fall within one of the exemptions of the FLSA, like actors and performers, are protected according to three distinct age minimums and are generally protected from conditions of employment deemed to be “oppressive child labor.”³⁹ In any occupation, apart from agriculture, the general minimum age of employment is sixteen years of age.⁴⁰ For occupations deemed especially hazardous by the Secretary of Labor, the age minimum is eighteen.⁴¹ The regulation further describes “hazardous” as “detrimental to [the minor’s] health and well-being.”⁴² Employment that is detrimental to a minor’s health and well-being traditionally includes jobs involving extensive manual labor, including coal mining, manufacturing, and operating machinery.⁴³

In addition to the FLSA’s exemption of child performers and actors, it also exempts minimum age requirements for minors employed by a parent.⁴⁴ However, one important caveat to this parental exemption is that it does not apply in situations that require a minimum age of eighteen, including employment that is “detrimental to [the minor’s] health and well-being.”⁴⁵ Therefore, parents are not permitted to employ a child in an occupation with a minimum age requirement of eighteen. This policy suggests that parents should not be permitted to employ their own minor children in occupations that are particularly dangerous for children or only suited for adults.

The FLSA, though applicable in all states, affords protection to child employees in a way that reflects its era: the FLSA did not anticipate the growth in technology and entertainment mediums that impact our society today. By exempting both an entire class of children employed in

38. 29 C.F.R. § 550.2(b) (2020).

39. 29 C.F.R. § 779.505 (2020).

40. 29 C.F.R. § 570.2(a) (2020).

41. *Id.*

42. *Id.*

43. *See* 29 C.F.R. §§ 570.50–.68 (2020).

44. 29 C.F.R. § 570.2 (2020).

45. *Id.*

entertainment and children employed by a parent, the FLSA clearly leaves a gap in child protections that must be filled. The drafters of the FLSA could not have anticipated the emergence of social media platforms and their usage as a medium for entertainment. As such, its antiquated exemptions could be detrimental to the well-being of children under their parents' employ on family vlog channels.⁴⁶ Even the definitions of "actors" and "performers" under the FLSA, though broad in 1938, are too narrowly construed now in light of the emergence of vlogging. States provide some levels of protection to minors employed in the entertainment industry, but even the most progressive state statutes are unequipped to encompass both a medium like YouTube and family vlogging. This evolution of technology, culture, and its consequences on children warrant an evolution in federal child entertainment labor standards.

In addition to federal child labor laws, the Communications Decency Act (CDA) of 1996 is a piece of federal legislation relevant to the discussion of YouTube as a platform and its lack of liability associated with user-generated content.⁴⁷ As a platform, YouTube has the ability and potential to protect children whose presence on their parents' YouTube channel generates monetary gain for the parents. Section 230 of the CDA prevents platforms and computer service providers like YouTube from being held responsible for user-generated content that is uploaded to their websites.⁴⁸ Section 230 states, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."⁴⁹ This language bars YouTube and similar platforms from being designated as a publisher, which has allowed for so much freedom of expression to occur on YouTube and every other social media platform. The Act, along with the lack of federal legislation regulating child labor on the Internet, enabled creators to generate the content they choose without major interference or dissent from YouTube.

While Section 230 "has been challenged and upheld on numerous occasions,"⁵⁰ the CDA failed to anticipate the adverse effects of granting companies like YouTube immunity from liability based on user content.

46. See generally Courtney Glickman, *Jon & Kate Plus...Child Entertainment Labor Law Complaints*, 32 WHITTIER L. REV. 147 (2010).

47. 47 U.S.C. § 230.

48. *Id.*

49. 47 U.S.C. § 230(c)(1).

50. CDA 230: Key Legal Cases, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/cda230/legal> [<https://perma.cc/24F8-AKZX>]. See generally Anthony v. Yahoo!, Inc., 421 F. Supp. 2d 1257 (N.D. Cal. 2006); Barnes v. Yahoo!, Inc., 570 F.3d 1096 (9th Cir. 2009); Barrett v. Rosenthal, 40 Cal. 4th 33 (2006); Batzel v. Smith, 333 F.3d 1018, 1033 (9th Cir. 2003); Doe v. MySpace, Inc., 528 F.3d 413 (5th Cir. 2008).

Opening up YouTube and other social media platforms to “publisher status” would make the companies liable for the content its users generate and upload, and fundamentally change how the Internet is used today as an arena for free speech, expression, creativity, and every-day communication. Though increasing liability of social media companies may have positive effects on the “morality” of certain monetized content, its impact might unfairly influence users whose accounts do not present any obvious issues. However, considering that YouTube has been given this broad shield from liability, the platform should take its internal guidelines and rules for user-generated content more seriously to cultivate an environment that prioritizes the interests of vulnerable groups like children.

B. State Level

A majority of states have adopted provisions specifically aimed at regulating child labor laws in the entertainment industry.⁵¹ Some states require entertainment industry employers to obtain a work permit to employ minors of a certain age, some do not require permits at all, and some do not regulate this type of employment altogether based on how they classify employment in general.⁵² Not surprisingly, the state provisions with the most thorough protections come from California⁵³ and New York⁵⁴ because most employment transactions involving child performers occur in those states.⁵⁵ Both states have increased their awareness of the detriments inflicted on children in the entertainment industry, leading to strong regulations in support of child performers.

1. California

Increased awareness about working conditions for children in California’s entertainment industry began in part after a tragic and unfortunate on-set event that occurred during the filming of *Twilight Zone: The Movie* in 1982. On July 23, 1982, during the filming of *Twilight Zone: The Movie*, a helicopter “disabled by a special-effects explosion” plummeted from the sky and killed actor Vic Morrow and two child actors:

51. *Child Entertainment Laws as of January 1, 2020*, U.S. DEP’T OF LAB. (Jan. 2020), <https://www.dol.gov/agencies/whd/state/child-labor/entertainment> [https://perma.cc/TJX7-WNFK]. The most recent state legislation covering child entertainment law was made in Arkansas in January 2019. See ARK. CODE ANN. § 11-12 (2019).

52. U.S. DEP’T OF LAB., *supra* note 51.

53. See CAL. CODE REGS. tit. 8, § 11751 (2020).

54. See N.Y. LAB. § 150-54 (McKinney 2013).

55. Robert A. Martis, Comment, *Children in the Entertainment Industry: Are They Being Protected – An Analysis of the California and New York Approaches*, 8 LOY. L.A. ENT. L. REV. 25, 26 (1988).

Renee Chen and Myca Dihn Lee.⁵⁶ The accident occurred during the early hours of the morning when, under state law, children were not permitted to work.⁵⁷ Although the film's producers received parental permission to employ the children, they never obtained the required work permits.⁵⁸ In a criminal trial for manslaughter that followed, director John Landis, helicopter pilot Dorcey Wingo, production manager Dan Allingham, associate producer George Folsey, and explosives specialist Paul Stewart admitted to breaking child labor laws.⁵⁹ Nevertheless, a Los Angeles jury acquitted the defendants, finding that the helicopter accident was unavoidable.⁶⁰ The *Twilight Zone* accident drew particular attention to problems involving safety on film sets, risk management, and child labor laws. California legislators developed regulatory schemes in response to these issues, seeking to protect and prioritize the rights and interests of child performers employed in the entertainment industry over the rights and interests of their employers.⁶¹

In response, Title 8, Section 11751 of the California Code of Regulations now defines the entertainment industry as

any organization, or individual, using the services of any minor in: Motion pictures of any type (e.g. film, videotape, etc.), using any format (theatrical film, commercial, documentary, television program, etc.) by any medium (e.g. theater, television, videocassette, etc.); photography; recording; modeling; theatrical productions; publicity; rodeos; circuses; musical performances; and any other performances where minors perform to entertain the public.⁶²

The legislature also carved out additional protections for children within certain age categories. For example, to employ minors between the ages of fifteen days to eighteen years old, an employer must obtain a permit issued by the Division of Labor Standards Enforcement (DLSE).⁶³ The DLSE will not issue these work permits "if the environment is

56. Robert W. Stewart, *Attorney Pressed on 'Twilight Zone' Allegations*, L.A. TIMES (Nov. 1, 1985), <https://www.latimes.com/archives/la-xpm-1985-11-01-mn-786-story.html> [<https://perma.cc/8MHN-BN9Y>].

57. *Id.*

58. Martis, *supra* note 55, at 25.

59. Kayleigh Donaldson, *Twilight Zone: The Movie and the Disaster that Changed How Films Are Made*, SYFY WIRE (July 6, 2018), <https://www.syfy.com/syfywire/twilight-zone-the-movie-and-the-disaster-that-changed-how-films-are-made> [<https://perma.cc/HT9R-SC96>].

60. *Id.*

61. *Id.*

62. CAL. CODE REGS. tit. 8, § 11751 (2020).

63. CAL. CODE REGS. tit. 8, §§ 11751(b), 11752–54 (2020); CAL. LAB. CODE § 1308.5 (2012); see DIV. OF LAB. STANDARDS ENF'T, STATE OF CAL., CALIFORNIA CHILD LABOR LAWS 36 (2013) [hereinafter DLSE Child Labor Laws Pamphlet], www.dir.ca.gov/DLSE/ChildLaborLawPamphlet.pdf [<https://perma.cc/TWT2-ZJTM>].

improper for the minor, the employment conditions are detrimental to the minor's health," or the conditions impede on the minor's education.⁶⁴ An infant younger than one month old may not be employed on any motion picture set unless a physician certified in pediatrics verifies that the infant is at least fifteen days old, was carried to full term, was born at a normal weight, has a sufficiently developed immune system, and is physically able to withstand the stress of filmmaking.⁶⁵ These regulations demonstrate the California legislature's concern for the health, safety, and well-being of a child exposed to potentially stressful work environments as actors or performers.

2. New York

New York child performer labor laws⁶⁶ were designed to "protect the safety, morals, health, and well-being of child performers" and "to ensure that child performers . . . are provided with adequate education."⁶⁷ Under New York law, children under fifteen days old may not be employed as child performers, and maximum working hours and educational requirements are imposed on children aged fifteen days to seventeen years.⁶⁸ New York Department of Labor's Child Performer statute lists "live performances" and certain varieties of "radio and television" as exemptions to the scope of these child entertainer labor laws.⁶⁹ The "live performances" exemption includes the participation, employment, use, or exhibition of any child in a church, academy, school, or private home, among others.⁷⁰ Nevertheless, the regulations guiding child performer labor laws do cover "artistic or creative services" connected with a performance "or an appearance in a reality show."⁷¹

New York law defines "reality show" as the "visual and/or audio recording or live transmission, by any means or process now known or hereafter devised, of a child appearing as himself or herself, in motion pictures, television, visual, digital, and/or sound recordings, on the Internet, or otherwise," not including athletic and academic events or interviews.⁷²

64. DLSE Child Labor Laws Pamphlet, *supra* note 63.

65. CAL. LAB. CODE § 1308.8(a) (2012).

66. N.Y. LAB. § 151 (McKinney 2011).

67. N.Y. COMP. CODES R. & REGS. tit. 12, § 186-1.1 (2017).

68. N.Y. DEP'T OF LAB., CHILD PERFORMER PERMITTED WORKING HOURS, <https://www.labor.ny.gov/formsdocs/wp/LS559.pdf> [<https://perma.cc/YCW2-C436>].

69. N.Y. COMP. CODES R. & REGS. tit. 12, §§ 186-1.1, 186-1.3 (2017).

70. *Id.*

71. *Id.* § 186-2.1(a).

72. *Id.* § 186-2.1(s).

While reality television may be the closest analogue to YouTube family vlogs that still exist through traditional forms of entertainment media—and are often filmed at least partially in a private home like family vlogs—the New York child performer regulations do not acknowledge these similarities. However, the regulations *do* acknowledge that live performances may occur in a private home.⁷³ The definition of “reality show” in the regulations includes those that appear on the Internet but does not go any further to specify what that might include.⁷⁴ Although the current regulations do not specifically address vlogging or any other form of monetized YouTube or social media content, they do include a catch-all phrase—“by any means or process now known or hereafter devised”—that could potentially encapsulate vlogging depending on whether or not vlogging properly falls within the category of “reality shows.”⁷⁵

Some key differences between social media platforms like YouTube and traditional reality television pose legal challenges in affording children in family vlogs protection under New York statute. YouTube is a new kind of network on which television series are broadcasted, such as the YouTube original series “Sherwood” and “Weird City.”⁷⁶ However, most videos, including vlogs, are produced and uploaded to individual YouTube channels run by the video creators themselves and (sometimes) their staff.⁷⁷ As such, family vlogs operate in a much different way than traditional reality television series. Additionally, although the vlogs are edited, they are not edited by corporate producers whose agendas may differ from that of the series’ subjects.⁷⁸ YouTube videos are often structured and edited by the same individuals who are uploading them, thus granting them much wider control over the final product than subjects in a traditional reality TV series have. These key differences, among others, may pose potential issues in lumping vlogging in with “reality shows” under New York child entertainment labor laws.

73. *Id.* § 186-1.3(a)(3).

74. *Id.* § 186-2.1(s).

75. *Id.*

76. *YouTube Originals*, YOUTUBE, https://www.youtube.com/channel/UCqVDpXKLMKeBU_yyt_QkItQ/videos [<https://perma.cc/GE6Y-6CBY>]; *Sherwood: Season 1*, YOUTUBE, <https://www.youtube.com/playlist?list=PLjq6DwYksrzc2YaTAaGJ8xj6OwgYqCbM&app=desktop> [<https://perma.cc/52HR-BYK4>]; *Weird City: Season 1*, YOUTUBE, https://www.youtube.com/playlist?list=PLjq6DwYksrzyimlhWPXR_cxX9kUNLVUer [<https://perma.cc/8S2Y-JHYV>].

77. See, e.g., Rae Votta, *What It’s Really Like to Work for a YouTube Star*, DAILY DOT (Mar. 2, 2020), <https://www.dailydot.com/upstream/youtube-behind-the-scenes-crew/> [<https://perma.cc/7MGJ-BYWZ>]. See generally Margaret Holland, *How YouTube Developed into a Successful Platform for User-Generated Content*, 7 ELON J. UNDERGRADUATE RSCH. COMM’NS 52, 53 (2016).

78. See Scott J. Weiland & Kaitlyn Dunbar, *What’s Real About Reality Television?*, 6 J. MASS COMM’N & JOURNALISM 1, 2 (2016).

C. A Note About Privacy and International Child Entertainment Labor Laws

While some countries rely on privacy laws to protect children on the Internet, other jurisdictions must strengthen child entertainment laws to achieve the same result. As of early 2019, 92% of toddlers under two years old already have a unique “digital identity” as a result of the phenomenon called “sharenting”—the use of social media by parents to share content based on their infants’ and children’s activities.⁷⁹ In the United States, children have very little control over what information about them is diffused on the Internet. Because children are easily considered part of their parents’ personal lives, many parents feel that they have the right and freedom to post about their babies and children on any social media platform they have built a presence on.⁸⁰ Many times, several years pass by before these children become aware of their already extant (and permanent) presence on the Internet;⁸¹ although their reactions may differ, no doubt exists that their privacy has been compromised in some way.

A strong majority of parents have reported that posts about their children, whether shared by themselves or by other family members, do not make them feel uncomfortable or anxious about their child’s privacy.⁸² When legislatures first considered implementing child labor laws, and even after troublesome situations involving children in entertainment occurred,⁸³ concerns about children’s safety did not capture the privacy, safety, and health implications that now exist because of “sharenting” and other involuntary social media exposure of children. Thus, current child entertainment laws do not reflect these new and growing concerns. Even if current legislation does not prioritize a child’s right to privacy as highly as a parent’s right to speak and post freely, child privacy issues should not be completely removed from the matter of child entertainment labor laws.

Some European countries implemented protections for children. For example, France’s strict privacy laws allow children to sue their parents for posting “intimate details” of their earlier private lives without their consent.⁸⁴ The penalties for jeopardizing the security and privacy of

79. Taylor Lorenz, *When Kids Realize Their Whole Life Is Already Online*, THE ATLANTIC (Feb. 20, 2019), <https://www.theatlantic.com/technology/archive/2019/02/when-kids-realize-their-whole-life-already-online/582916/> [https://perma.cc/E3FA-JLE7].

80. *See id.*

81. *See id.*

82. *See* Maeve Duggan, Amanda Lenhart, Cliff Lampe & Nicole B. Ellison, *Parents and Social Media*, PEW RSCH. CTR. (July 16, 2015), <https://www.pewresearch.org/internet/2015/07/16/parents-and-social-media/v> [https://perma.cc/T7CY-7AD5].

83. *See* discussion *supra* Section I.B.1 (Twilight Zone accidents).

84. Code pénal [C. pén] [Penal Code] art. 226-1 (Fr.), <https://www.legifrance.gouv.fr/codes/id/LEGIARTI000006417929/2002-01-01/> [https://perma.cc/XC8U-AM8X]; David Chazan, *French Parents ‘Could Be Jailed’ for Posting Children’s Photos Online*, TELEGRAPH (Mar. 1, 2016),

children through social media include serving a year in prison and paying a fine of €45,000 if convicted.⁸⁵ In the European Union (EU) in general, citizens have possessed a “right to erasure” since 2014, which allows them to demand that data and links containing personal information about them be deleted.⁸⁶ The General Data Protection Regulation (GDPR) is Europe’s privacy and security law that imposes requirements on organizations that “target or collect data related to people in the EU.”⁸⁷ The GDPR is also “the toughest privacy and security law in the world.”⁸⁸ In 2018, the GDPR added further guidelines, granting social media platforms one month to assess a citizen’s “right to erasure” request in order to investigate whether they must comply and delete that person’s data.⁸⁹

The “right to erasure” does not apply only to people whose parents posted sensitive or private information about them as a child without their consent.⁹⁰ Many other groups of people have motivations to delete sensitive information about themselves that exist on the Internet, such as individuals with past criminal convictions or—as Google argued in a dispute with a French privacy regulator—“authoritarian governments trying to cover up human rights abuses.”⁹¹ Since 2014, Google has received over 845,000 requests to remove 3.3 million website addresses; 45% of those addresses have been removed.⁹²

Although the European “right to erasure” is a step in the right direction in Europe, Google has no obligation to apply this right on a global scale.⁹³ Not every act of “sharenting” is detrimental or even harmful to a child; some parents make an effort to display their children only in positive ways on the Internet and do them a favor by developing a positive

<https://www.telegraph.co.uk/news/worldnews/europe/france/12179584/French-parents-could-be-jailed-for-posting-childrens-photos-online.html> [<https://perma.cc/G6RG-EGH3>].

85. Chazan *supra* note 84.

86. Google LLC v. CNIL, 2019 E.C.R. 772; see Leo Kelion, *Google Wins Landmark Right to Be Forgotten Case*, BBC NEWS (Sept. 24, 2019), <https://www.bbc.com/news/technology-49808208> [<https://perma.cc/MHK3-ZEQE>].

87. Ben Wolford, *What Is GDPR, the EU’s New Data Protection Law?*, GDPR.EU, <https://gdpr.eu/what-is-gdpr/> [<https://perma.cc/RU4X-57PR>].

88. *Id.*

89. Kelion, *supra* note 86.

90. General Data Protection Regulation 2016/679, art. 17, 2018 O.J. (L 127) (EU), <https://gdpr-info.eu/art-17-gdpr/> [<https://perma.cc/Z55L-LD9Z>]; INFO. COMM’RS OFF., GUIDE TO THE GENERAL DATA PROTECTION REGULATION (DPR) 113 (Jan. 1, 2021), <https://ico.org.uk/media/for-organisations/guide-to-dp/guide-to-the-uk-gdpr-1-1.pdf> [<https://perma.cc/D4AN-AZHU>].

91. Kelion, *supra* note 86.

92. *Id.*; see also *Requests to Delist Content Under European Privacy Law*, GOOGLE TRANSPARENCY REP., <https://transparencyreport.google.com/eu-privacy/overview> [<https://perma.cc/U8Z5-LUQ8>].

93. See GOOGLE TRANSPARENCY REP., *supra* note 92.

social media presence early on.⁹⁴ However, the idea that children's safety, privacy, mental health, and autonomy are being put at risk by parental use of social media is not far-fetched. When courts weigh a child's privacy rights against a parent's right to speak freely, the parent will often win.⁹⁵

If extended protections of children's rights are not able to be achieved through privacy laws, surely there is room in the realm of child entertainment labor laws to afford children born into family vlogging situations further protections. These protections should be based on their daily involvement in the story-telling and money-making efforts of their parents on social media.

II. THE NATURE OF FAMILY VLOGGING

A. Monetization of Content & Children Involved in Ads

YouTube videos of all kinds, including family vlogs, earn money for creators in a variety of different ways.⁹⁶ In a sense, the ability to reach a large audience—and subsequently, the ability to monetize that reach—is what separates YouTube videos and vlogs from “old home videos” that many of us made on clunky camcorders before the dawn of social media. One form of monetization that many of us may already be familiar with is the placement of video advertisements before, after, and in the middle of YouTube videos. YouTube itself, however, also offers creators other features to monetize their videos, such as “Super Chat.” “Super Chat” allows viewers to pay in order to have their messages stand out during live streams, sell merchandise through the merch shelf on YouTube, purchase channel memberships, and crowdfund.⁹⁷

Even though creators have many avenues to monetize their content, involving children in these streams of revenue is what sets family vlogging apart from other video content, placing it in the realm of child labor. Although YouTube is making an effort to limit the number of ads that are exposed to child viewers in content that is targeted toward a child

94. Stacey B. Steinberg, *Sharenting: Children's Privacy in the Age of Social Media*, 66 EMORY L.J. 839, 855 (2017).

95. *Id.* at 856 (“Even when a court recognizes a child's reasonable expectation of privacy, the court often places higher value on the interests of the parent, family, and the state in exercising control over the minor child.”).

96. See Brian O'Connell, *How Much Do YouTubers Make? Revenue Streams and Top Performers*, THE STREET (Oct. 12, 2018), <https://www.thestreet.com/technology/how-much-do-youtubers-make-14743540> [<https://perma.cc/5HLH-LV7H>].

97. *Earn Money on Youtube*, YOUTUBE: CREATOR ACAD., <https://creatoracademy.youtube.com/page/lesson/monetization-intro#strategies-zippy-link-4> [<https://perma.cc/TYQ6-G4K6>]; *What Is Super Chat?*, YOUTUBE: CREATOR ACAD., https://creatoracademy.youtube.com/page/lesson/superchat-and-superstickers_what-is-superchat_video [<https://perma.cc/VWY6-LJUR>].

audience,⁹⁸ children *in front of the camera* are very much still involved in sponsored content on family channels and elsewhere on social media.

With the rise of social media and streaming services comes the rise of companies and brands using alternative methods to advertise products and services, such as influencer marketing.⁹⁹ What used to only be the subject of television commercials now appears on a variety of social media platforms, primarily Instagram and YouTube.¹⁰⁰ Brands have begun allocating their marketing resources to pay individuals on social media—often labeled “influencers”—to advertise their products to their large audiences. Instead of paying actors and models to display products, brands routinely leverage the more personal and human connections between influencers and their subscribers to market products. In the earlier days of YouTube, taking on a brand sponsorship was seen as “somewhat taboo,” and subscriber audiences would often associate sponsorships with an influencer selling out or becoming detached from their audience.¹⁰¹ However, YouTube now encourages its creators to seek out brand sponsorships and prepare their audience for such content accordingly.¹⁰² In this way, YouTube puts monetization from sponsors largely in the hands of the creators.

Although influencers may choose to contract with any brand that reaches out to them for a sponsorship or paid advertisement, influencers often choose to accept brand partnerships that they feel will resonate with and benefit their particular audience.¹⁰³ Vice versa, certain brands will reach out to influencers who they feel have an audience who would

98. Mark Bergen, *YouTube Plans to End Targeted Ads on Videos Aimed at Kids*, BLOOMBERG NEWS (Aug. 20, 2019), <https://www.bloomberg.com/news/articles/2019-08-20/youtube-plans-to-end-targeted-ads-to-kids-to-comply-with-ftc> [<https://perma.cc/X3R6-HZ2B>].

99. See, e.g., Julian Zeng, *Influencer Marketing Budgets Grow Up in 2020*, AM. MKTG. ASS'N (Feb. 25, 2020), <https://www.ama.org/marketing-news/influencer-marketing-grows-up-in-2020> [<https://perma.cc/TZY4-NDJP>].

100. See, e.g., Shane Barker, *Instagram vs. YouTube: Which Platform is Best for Your Influencer Marketing Campaign?*, SHANE BARKER (Sept. 21, 2020), <https://shanebarker.com/blog/instagram-vs-youtube-influencer-marketing-campaign/> [<https://perma.cc/A24Z-45ML>]; *Instagram Influencer Marketing Is a \$1.7 Billion Dollar Industry*, MEDIKIX (Mar. 7, 2019), <https://mediakix.com/blog/instagram-influencer-marketing-industry-size-how-big/> [<https://perma.cc/V7EE-UKHU>]; Sujan Patel, *How You Can Build a Powerful Influencer Marketing Strategy in 2020*, BIGCOMMERCE, <https://www.bigcommerce.com/blog/influencer-marketing/#what-is-influencer-marketing> [<https://perma.cc/A57L-EX5D>].

101. *Getting Started with Brand Partnerships*, YOUTUBE: CREATOR ACAD., <https://creatoracademy.youtube.com/page/lesson/partnership-basics#strategies-zippy-link-3> [<https://perma.cc/7BUE-5T2V>].

102. *Id.*

103. See *Choosing and Landing the Right Brand Partnerships*, YOUTUBE: CREATOR ACAD., <https://creatoracademy.youtube.com/page/lesson/partnership-discovery> [<https://perma.cc/YS54-V5AR>].

appreciate—and buy—their products.¹⁰⁴ In the words of YouTube, “trust can lead to purchases, which is the ultimate goal for a brand.”¹⁰⁵ Accordingly, a creator’s content often aligns, at least to some extent, with the sponsorships and advertisements they choose to take on.

Family vloggers, particularly those with young children, wind up involving their children in sponsored content and advertisements because their audience is at least partially composed of parents with young children. For example, a family with a newborn child may partner with a brand that makes onesies or baby toys, and the child becomes the main subject of those advertisements.¹⁰⁶ Although these infants do not “work” in the same way child actors work on television or movie sets, their presence on the family vlog is the primary draw for sponsorship and advertisement revenue. The infant becomes the face of sponsored campaigns. Without the child, the brand is less likely to reach out to parent influencers for initial sponsorship.¹⁰⁷

Handing over a product campaign to a parent and child rather than handling it internally with models and talent agencies can be a win-win situation and has proven to be very attractive to influencer parents. Parents receive hundreds of dollars’ worth of useful products for their children, the brand reaches a wide and perfectly tailored audience, and children are able to work with their parents in the comfort of their own home.¹⁰⁸

Brands are, of course, contracting with the parents and not their children, and the sponsored content usually ends up on the parents’ Instagram or YouTube accounts; however, it has become common practice for parents to set up Instagram accounts for their babies.¹⁰⁹ The intentions behind creating an Instagram account for a child vary, although influencer

104. See generally Daniel Troesch, *A Complete Guide on How to Reach Out to Influencers*, MEDIUM (Mar. 3, 2020), https://medium.com/@daniel_troesch/a-complete-guide-on-how-to-reach-out-to-influencers-19880df8d877 [<https://perma.cc/H3XS-L8HN>]; Gaurav Sharma, *How to Approach Instagram Influencers the Right Way*, SOC. MEDIA TODAY (Oct. 19, 2019), <https://www.socialmediatoday.com/news/how-to-approach-instagram-influencers-the-right-way-infographic/565378/> [<https://perma.cc/D7YR-W355>]; Jenn Chen, *What Is Influencer Marketing: How to Develop Your Strategy*, SPROUT SOC.: BLOG (Sept. 17, 2020), <https://sproutsocial.com/insights/influencer-marketing> [<https://perma.cc/5FQZ-NGPU>].

105. YOUTUBE: CREATOR ACAD., *supra* note 101.

106. See Rebecca Jennings, *The Best Influencers Are Babies*, RACKED (July 9, 2018), <https://www.racked.com/2018/7/9/17511494/instagram-ads-baby-products> [<https://perma.cc/5E2N-EXA8>].

107. See *id.*

108. *How to Be a Kid Instagram Brand Rep: 6 Insider Secrets*, YOUNG PARENTS (Sept. 13, 2019), <https://www.youngparents.com.sg/pregnancy-baby/insider-secrets-how-get-brands-sponsor-your-child-instagram> [<https://perma.cc/J8PE-5G5H>].

109. Kellie Scott, *Instagram Accounts for Babies Are Becoming More Popular. This Is What Parents Should Consider*, ABC (Oct. 10, 2019), <https://www.abc.net.au/life/considerations-starting-a-social-media-account-for-your-child/11524188> [<https://perma.cc/U8FG-3NNH>].

parents often use them to increase the potential opportunities to create sponsored content.¹¹⁰ Whether a sponsorship comes in the form of monetary payment or in the form of free merchandise in exchange for publicity, these paid promotions often appear to an audience in the middle of a YouTube video or in the middle of an Instagram story or feed.¹¹¹ The promotion becomes payment for the parent and entertainment to the viewer. Paid-brand sponsorships are just one way for a family of vloggers to monetize their content, and as long as family vloggers maintain their audience and continue to profit from their videos and posts, their children's involvement will have some effect on their ability to make money on their platforms.

There are several similarities between children starring in a family vlogger's advertisements and child actors, their "big screen" peers. Like professional actors or performers, children who appear in family vlogs often engage in scripted skits or advertisements with their influencer parents, or they are filmed candidly while performing everyday tasks or behaviors.¹¹² They interact with cameras on a regular basis, and they may be instructed by their parents about what to do when the cameras start rolling. They bring money in for the parents by appearing in YouTube videos and, when applicable, potentially bring sales in for brands who choose to work with them. Perhaps most importantly, they entertain the viewer through a medium that is becoming more and more on par with traditional forms of visual entertainment such as films and television series. However, because of its candid "home video" nature, the business of family vlogging can easily disguise itself as an entirely voluntary, informal, and unorganized way for parents to showcase to the world the harmless fun they have with their children.¹¹³ As a result, the time and effort child vloggers put into their parents' YouTube channel is not taken

110. *Id.*

111. *Add Paid Product Placements, Sponsorships & Endorsements*, GOOGLE: YOUTUBE HELP (Aug. 20, 2020), <https://support.google.com/youtube/answer/154235> [<https://perma.cc/38QV-7XWB>].

112. *See* Sopo Squad Family, *Quarantine Homeschool!! ** Funny Skit!!*, YOUTUBE (Apr. 14, 2020), <https://www.youtube.com/watch?v=TQM1QlruZOI> [<https://perma.cc/NR2K-8DPT>]; *see also* Not Enough Nelsons, *Morning Routine with 16 Kids!!*, YOUTUBE (Sept. 2, 2019), <https://www.youtube.com/watch?v=TznYXOafQGw> [<https://perma.cc/9XVL-KNLF>].

113. *See, e.g.*, The ACE Family, *We Took Our Kids to Coachella!!*, YOUTUBE (Apr. 13, 2019), <https://www.youtube.com/watch?v=1ecCdPxDS0w> [<https://perma.cc/L4F9-3D5Y>]; The ACE Family, *Elle's 4th Birthday Party Special!*, YOUTUBE (May 28, 2020), <https://www.youtube.com/watch?v=oSQfirreuxRg> [<https://perma.cc/WGH6-NA34>]; The LaBrant Fam, *72 Hours Quarantined with 2 Kids...*, YOUTUBE (Mar. 18, 2020), <https://www.youtube.com/watch?v=ID5ObPGmuFY> [<https://perma.cc/5V3F-C25C>]; The LaBrant Fam, *Our New Family Morning Routine with Baby Posie!!!*, YOUTUBE (Jan. 19, 2019), <https://www.youtube.com/watch?v=q2KjvHbvJKE> [<https://perma.cc/8LU4-HL2H>].

as seriously as the time and effort professional child actors or performers put in on television and movie sets.

However, some differences between family child vloggers and child actors highlight the disparity in protections for both kinds of performers. For example, family vloggers may not craft a strict and organized filming schedule when they subject their nonconsenting children to production on a daily basis. In this sense, the rigid schedules of television and movie sets seem like much more tangible reasons to enforce time limitations on the employment of children. In addition, much of the lives and schedules of family vloggers remains private, and YouTube viewers are largely in the dark about what goes on behind the scenes of production. Child performers who appear on television or in movies are subject to a higher form of public scrutiny because their work is shown on a much larger scale.¹¹⁴ Child labor in vlogging is not regulated like traditional child labor is in the entertainment industry: creator parents choose which cameras to use; what lighting to use, if any; and where, when, how long, and what to film. Additionally, film and television producers are subject to limitations dependent on a child actor's age.¹¹⁵ Family vloggers, on the other hand, are currently allowed to include any and all of their children in their entertainment content regardless of the child's age. In fact, many parents make a big deal of showcasing their birth stories featuring their newborn child and may even make it a recurring series on their channels.¹¹⁶

B. Safety Concerns

The similarities and discrepancies between traditional forms of entertainment and family vlogging have yet to warrant increased regulations by government and social media entities. As a result, the effects of social media on a young child's health, well-being, and safety should fill in the gaps. The Twilight Zone lawsuits were a prime example

114. See Ella Olszowska, *Child Stars, the Public Eye, and the Scary Consequences*, THE STUDENT (Nov. 22, 2017), <https://studentnewspaper.org/article/child-stars-the-public-eye-and-the-scary-consequences> [https://perma.cc/B9CJ-THHS]; Stephanie Merry, *Being a Child Actor Has Always Been Tough. Social Media Makes It So Much Worse*, WASH. POST (Jan. 11, 2018), https://www.washingtonpost.com/entertainment/being-a-child-actor-has-always-been-tough-social-media-makes-it-so-much-worse/2018/01/10/b8b8894a-f225-11e7-b390-a36dc3fa2842_story.html [https://perma.cc/CJ3F-2CVL].

115. E.g., N.Y. DEP'T OF LAB., *supra* note 68.

116. See, e.g., The ACE Family, *The Official Ace Family Labor and Delivery!!!*, YOUTUBE (Oct. 20, 2018), <https://www.youtube.com/watch?v=Bz3BhvXv8KY> [https://perma.cc/YJ3U-C6UZ]; The ACE Family, *The Act Family Official Labor and Delivery!!!*, YOUTUBE (June 23, 2020), <https://www.youtube.com/watch?v=tJvCygyNH4I> [https://perma.cc/N7HK-JBL2]; The LaBrant Fam, *The LaBrant Family Official Labor and Delivery*, YOUTUBE (Dec. 29, 2018), <https://www.youtube.com/watch?v=-Ur5Iqx0ZV4> [https://perma.cc/2FBN-NFGX]; The LaBrant Fam, *The Live Birth of Our Son*, YOUTUBE (Aug. 1, 2020), https://www.youtube.com/watch?v=Zxry3s_Od0s [https://perma.cc/92G7-2T8A].

of how the underenforcement of child labor laws can result in tragic incidents or danger to a child's physical health and well-being.¹¹⁷ The potential harm to children involved in the family vlogging business is less obvious and more psychological in nature.

In special circumstances, a child's interests should be protected in a way that maintains parents' autonomy and freedom of speech. Special circumstances that warrant increased protections occur when children are substantially involved in their parents' social media content and that involvement becomes so central to the channel that it attracts monetization. Because of free speech implications, concerns about the psychological health and safety of children should act as a motivation and *justification* for expanding child-entertainment labor laws, rather than act as the *substance* of those laws.

Modern social media platforms like YouTube and Instagram have been around for barely a decade,¹¹⁸ so the long-term effects of social media use are only just beginning to manifest themselves. Although family vlogging has recently become popular, the genre of vlogging has existed for virtually as long as YouTube itself.¹¹⁹ The harmful effects of exposing young children to social media are easily ignored by society because of the potentially beneficial effects young vloggers can have on their parents' channels.¹²⁰ Social media use may enhance children's individual creativity, foster the growth of creative ideas, expand connections and social skills, and improve their sense of individual identity.¹²¹ On the contrary, social media use by children can result in a variety of less fortunate outcomes for children. Psychologists have recognized a phenomenon nicknamed "Facebook depression" that describes the onset of clinical depression symptoms following the extensive use of social

117. See *supra* Section I.B.1.

118. William L. Hosch, *YouTube*, BRITANNICA, <https://www.britannica.com/topic/YouTube> [<https://perma.cc/C2WL-FRN7>] (YouTube was created in 2005); Dan Blystone, *The Story of Instagram: The Rise of the #1 Photo-Sharing Application*, INVESTOPEDIA (June 6, 2020), <https://www.investopedia.com/articles/investing/102615/story-instagram-rise-1-photo0sharing-app.asp> [<https://perma.cc/5DEJ-V95H>] (Instagram launched in October 2010).

119. See *History of Vlogging, the First Vlogger, & How Vlogging Evolved*, DANIEL SANCHEZ, <https://danielsanchez.com/history-of-vlogging/> [<https://perma.cc/3537-G6UZ>]; Amy Duncan, *Why Did the Shaytards Stop Making Videos, Who Are They and What Happened to Them?*, METRO (Mar. 21, 2018), <https://metro.co.uk/2018/03/21/shaytards-stop-making-videos-happened-7403719/> [<https://perma.cc/EFU8-U68M>]; see also Shaytards, YOUTUBE, <https://www.youtube.com/user/SHAYTARDS> [<https://perma.cc/W7T6-6646>]. "Vlogging" as a genre of content has existed since the creation of YouTube. The first video ever uploaded on YouTube could be considered a vlog. As vlogs and YouTube content have evolved generally, family vlog channels have become a subcategory within the vlogging genre.

120. See generally Gwenn Schurgin O'Keeffe & Kathleen Clarke-Pearson, *Clinical Report—The Impact of Social Media on Children, Adolescents, and Families*, 127 PEDIATRICS 800 (2011).

121. *Id.* at 801.

media in young adults and college-aged people.¹²² The negative effects of social media use might come from excessive scrolling, communicating with others, and being a viewing third party to the seemingly attractive lives of others.¹²³

However, many children in family vlogs might not themselves use social media in the same way that young adults do. Oftentimes, a child's influencer parents run their child's Instagram accounts and largely control their child's appearance in vlogs and in Instagram posts.¹²⁴ Therefore, the effects of social media exposure on a child's mental well-being depend on differing types and levels of exposure.

When a child is present on social media without being an independent user, their privacy and online footprint are still at stake. Children have already been subjected to dangerous data breaches and cyber threats through growing education technologies like EdTech, where their online information has been stolen.¹²⁵ In 2017, school systems nationwide in the U.S. were hacked, compromising and publicizing millions of students' "contact information, education plans, homework assignments, medical records, and counselor reports."¹²⁶ Information exploited in data breaches such as these is often factual and somewhat impersonal; it includes information such as biometric data, IP addresses, browsing histories, and geolocations.¹²⁷

While this kind of information is susceptible to hackers, only one with a certain level of technological literacy can compromise the information. It is easier to acquire information that parents share about their children openly on social media; the information they choose to share is as personal and acquirable as the parent influencer desires it to be. Most vloggers and social media influencer parents looking to grow their online

122. Lauren A. Jelenchick, Jens C. Eickhoff & Megan A. Moreno, "Facebook Depression?" *Social Networking Site Use and Depression in Older Adolescents*, 52 J. ADOLESCENT HEALTH 128 (2013). See generally Pritta Chasombat & Warut Karuchit, *Digitally Depressed: The Effects of Digital Media Usage in Regard to Depression and Approaches for Alleviation for Individuals and the Society*, 3 COMM'N & MEDIA ASIA PAC. 13 (2020).

123. See Alice G. Walton, *6 Ways Social Media Affects Our Mental Health*, FORBES (June 30, 2017), <https://www.forbes.com/sites/alicegwalton/2017/06/30/a-run-down-of-social-medias-effects-on-our-mental-health/#3a15dc82e5af> [https://perma.cc/8JBH-SWP5].

124. Allie Volpe, *How Parents of Child Influencers Package Their Kids' Lives for Instagram*, THE ATLANTIC (Feb. 28, 2019), <https://www.theatlantic.com/family/archive/2019/02/inside-lives-child-instagram-influencers/583675/> [https://perma.cc/G78Y-8ASD].

125. Jessica Baron, *Posting About Your Kids Online Could Damage Their Futures*, FORBES (Dec. 16, 2018), <https://www.forbes.com/sites/jessicabaron/2018/12/16/parents-who-post-about-their-kids-online-could-be-damaging-their-futures/#65bb97ac27b7> [https://perma.cc/G4JR-LF7R].

126. *Id.*

127. *Id.*

following have their accounts set to “public.”¹²⁸ As a result, their accounts are accessible to anyone who happens to click on their profiles.

Parents also have no concept of what their infants and children might consider public or private information about themselves; newborn babies have no autonomy to say “no” to having their births vlogged and publicized only days later. This is not to say that every child would be against their personal lives becoming public when they grow older and become more aware of these types of social media practices. Yet, parents take it upon themselves to risk whatever consequences their online choices might have on their children’s futures. The dangers to children in vlogging families who are not explicitly or illegally exploited on camera is not yet fully knowable because most of these children have not yet become adults. However, what *is* known is that the personal details of their lives are being shared with thousands and sometimes millions of people without their true knowledge, consent, or control. These known and unknown concerns about the safety and well-being of children in vlogging families are the reasons child entertainment labor laws that protect child actors should also extend to children vloggers.

III. INCORPORATING FAMILY VLOGGERS INTO CHILD ENTERTAINMENT LAWS

Child participants in family vlogs currently fall into a “legal gray area,” similar to participants in reality television series who are unrepresented by traditional unions like the Screen Actors Guild or the American Federation of Television and Radio Artists.¹²⁹ Participants of any form of entertainment, especially with social media on the rise, should not be denied protections simply because they do not qualify as professional child actors or performers working in traditional media.

The lack of legislation around this issue is not necessarily due to legislators’ specific intent to not extend protections; rather the legislatures (both state and federal) just have yet to prioritize an expansion. Moreover, the lack of legislation governing social media content, vlogs, and YouTube videos might not have been intentional; although we know of the significant similarities between social media and other traditional

128. See, e.g., Cole LaBrant (@cole.labrant), INSTAGRAM, <https://www.instagram.com/cole.labrant/> (last visited Jan. 2, 2020); Savannah Rose LaBrant (@sav.labrant), INSTAGRAM, <https://www.instagram.com/sav.labrant> (last visited Jan. 2, 2020); Austin McBroom (@austinmcbroom), INSTAGRAM, <https://www.instagram.com/austinmcbroom/> (last visited Jan. 2, 2020); Catherine Piaz (@catherinemcbroom), INSTAGRAM, <https://www.instagram.com/catherinemcbroom/> (last visited Jan. 2, 2020).

129. Adam P. Greenberg, Note, *Reality’s Kids: Are Children Who Participate on Reality Television Shows Covered Under the Fair Labor Standards Act?*, 82 S. CALIF. L. REV. 595, 597 (2009).

entertainment media, key differences exist that legislators could consider important distinctions in the eyes of the law. For example, unlike television and movies, the contents of YouTube vlogs are relatively real, genuine life occurrences and circumstances (although sometimes embellished). The home movie analogy is especially helpful here; legislators are not compelled to regulate how a parent chooses to document their own child's life when the documentation stays relatively unpublicized. When a parent films their child on a camera or cell phone, those memories are often reserved for close family and friends to enjoy, and the motivation for capturing those memories is not business or popularity focused. However, the publicity, time spent filming, and monetary gain that become relevant when a parent uploads that content for the world to see are some of the factors that should give family vlogging a place in entertainment labor laws.

Altering current state child-entertainment-labor laws and implementing federal child-entertainment-labor laws that would cover social media entertainment can remedy current privacy concerns stemming from family vlogs. The future of evolving entertainment media can be better guided and regulated in a way that prioritizes the safety and well-being of children.

A. Implementing Federal Legislation

The current lack of federal legislation creates an overarching issue about protecting children participating in YouTube videos and family vlogs. Of course, California and New York, two entertainment hubs in the United States, have their own sets of regulations protecting child entertainers (at least those involved in more traditional forms of entertainment media).¹³⁰ Although YouTube's headquarters is located in California,¹³¹ creators on the platform are scattered throughout the world; consequently, YouTube cannot directly control the working conditions of the children appearing in content.

To introduce federal legislation protecting child labor on YouTube and other social media platforms, Congress should make an amendment to the FLSA or enact a new law altogether. While merely amending the FLSA would bring children on YouTube into the eye of federal regulation, it might not do enough to anticipate the future of children's involvement in social media. Instead, a new body of federal law would provide a better basis for bringing these issues to the forefront of child labor laws. Because of some key differences between YouTube and other traditional forms of

130. See CAL. CODE REGS. tit. 8, § 11751 (2020); N.Y. LAB. § 150-54 (McKinney 2020).

131. See *Contact Us*, YOUTUBE, https://www.youtube.com/t/contact_us [<https://perma.cc/U723-QJ89>].

media, the more sensible option would be to adopt an entirely new piece of legislation that specifically addresses social media platforms and the involvement of children in monetized content and paid advertisements. Because vlogs and other YouTube videos are not always produced, scripted, staged, or otherwise rehearsed in the same way movies and television series are, defining children subject to family vlogging under a different label than “performers” makes more sense. Enacting new laws, rather than amending old ones, would also provide a more descriptive and specific foundation for children who grow up and decide to challenge their parents’ decision to include them in monetized content as minors. As a result, a new body of federal law would more specifically address their interests.

In either scenario, legislators should be leery to adopt the exact language of the current statute in California and should instead adopt even more inclusive definitions of child laborers that explicitly expand its reach to social media content. To avoid misinterpretations and more clearly explain regulations, a subsection of the law should separately address sponsored social media video content. The goals of these laws should include: (1) protecting the psychological health of children heavily involved in creating social media content; (2) establishing guidelines for creating separate financial accounts for children to access when they reach the age of eighteen based on the income they generate in advertisements; and (3) outlining instructions about allocating what percentage of profits from sponsored social media content is the product of the child’s work. These goals should be central to the federal legislation while still leaving certain areas of regulation to individual states.¹³² However, areas of state control should be limited to account for the commonality that most family vloggers and other video content creators are uploading to the same platforms, such as YouTube and TikTok. For example, areas better suited for state, rather than federal, control include applications for employment or performance licenses and other state-specific filming conditions.¹³³

B. Expanding Definitions in States

Current state child entertainment laws do not explicitly include user-generated content—especially YouTube videos and other social media content—in any definitions of the entertainment industry. Any attempt to

132. See Jessica Krieg, Comment, *There’s No Business Like Show Business: Child Entertainers and the Law*, 6 U. PA. J. LAB. & EMP. L. 429, 443 (2004) (proposing federal legislation requiring each state to enact a Child Entertainer Welfare Plan) (“The legislation would set general parameters as to what areas each Plan must address (i.e. financial, educational, psychological), while at the same time recognizing that individual states will continue to have the autonomy to regulate child actors within their borders as they see fit as long as a Plan is developed for each child entertainer.”).

133. See discussion *infra* Section III.D for potential concerns about discretionary licensing.

include this kind of language, such as more general words like “videotape” and “recording,” are far too ambiguous to provide any tangible protection to children in family vlogging situations. As explained in Part II, California’s child entertainment labor laws are the most in-depth and expansive because most of the U.S. entertainment industry is located in California.¹³⁴ The California Code of Regulations specifically regulates the services of a minor in “motion pictures of any type.”¹³⁵ The statute lists “film” and “videotape” as possible forms of motion pictures but fails to expand on what those terms might entail.¹³⁶ The statute goes more in depth—even going as far as including rodeos and circuses among the types of child entertainment that fall within the statute’s dictates¹³⁷—which suggests that legislators may have been attempting to make this statute as wide and all-encompassing as possible. While the statute includes the language “any other performances where minors perform to entertain the public,” the statute does not include any language that acknowledges the Internet, YouTube, or any other form of social media and whether those mediums qualify as “motion pictures” or any other type of performance.¹³⁸

Because of the unregulated and irregular nature of family vlogging, statutes need to define explicitly the kind of child-inclusive content they regulate. User-generated content and family vlogging are traditionally much more casual, informal, and sometimes inconsistent forms of viewer entertainment. Parents do not need to *hire* and contract with their own children, they do not necessarily require their children to “*perform*,” and the settings and circumstances surrounding filming times, locations, and contents change constantly according to the desire of the influencer parent. All of these characteristics are the reasons why social media video content and vlogs are not necessarily obvious areas to include in even the most expansive child entertainment labor statute.

Despite the nonobvious necessity of creating a broader child entertainment labor statute, social media entertainment has been on the rise, changing the nature of the entertainment industry and only continuing to grow in dominance.¹³⁹ Revenue from “traditional channels” such as film and television fell one percent last year, mobile and Internet consumption

134. See L.A. CNTY. ECON. DEV. CORP., THE ENTERTAINMENT INDUSTRY AND THE LOS ANGELES COUNTY ECONOMY 9 (2012), <https://laedc.org/reports/EntertainmentinLA.pdf> [https://perma.cc/KQ4M-A3KZ].

135. CAL. CODE REGS. tit. 8, § 11751 (2020).

136. *Id.*

137. *Id.*

138. *Id.*

139. Nelson Granados, *Digital Video and Social Media Will Drive Entertainment Industry Growth in 2019*, FORBES (Dec. 18, 2018), <https://www.forbes.com/sites/nelsongranados/2018/12/18/digital-video-and-social-media-will-drive-entertainment-industry-growth-in-2019/#141351714661> [https://perma.cc/T8B7-JJF].

of entertainment grew by 18% last year, and social media revenues grew at an annual rate of 37% between 2013 and 2017.¹⁴⁰ Traditional entertainment companies like Disney have clearly taken notice of this change of pace, launching their online streaming service Disney Plus in 2019.¹⁴¹ While larger companies are making changes to increase the online presence of their content, YouTube as a platform remains unique in that the majority of its content is user-generated.

Expanding the definitions in child entertainment labor laws to include specific social media platforms and user-generated content is one of the most important changes that must be made to these laws. Clarification of who is subject to these regulations is also crucial. California's regulation specifies that "any organization, or individual, using the services of any minor" is required to conform to the child entertainment labor regulations.¹⁴² While YouTube is an organization and a parent is an individual, these terms still do not make clear any potential regulation of online user-generated content. For example, important distinctions that do not clearly fall within the purview of current legislation include: whether YouTube would need to obtain a license in order to monetize a family vlogger's videos via Google AdSense;¹⁴³ whether parents would need to obtain a license to include their child in a video; or even whether a brand or company looking to sponsor a family vlogging channel would need to obtain a license.

Obtaining a work permit to include minors in monetized video content is the first step in ensuring that the child is subject to fair terms and schedules. For example, the work permit should include the minor's hours and work schedule, and authorization from the child's school that the schedule meets the requirements for school attendance (if applicable). California's statute, though written rather generally, has not clearly anticipated a scenario like this. With the lack of uniformity across all user-generated content, especially family vlogging, implementing changes that would adequately regulate the future of the Internet may seem daunting to states.

140. *Id.*

141. DISNEY+, <https://www.disneyplus.com/> [<https://perma.cc/7QDX-7GM7>]; *Disney+: What to Know About Price, Release Date, Shows and More*, ABC 7 NEWS (Nov. 12, 2019), <https://abc7news.com/disney-plus-star-wars-episode-9-streaming-service-the-mandalorian/5244792/> [<https://perma.cc/X4LZ-C65G>].

142. CAL. CODE REGS. tit. 8, § 11751 (2020).

143. Google AdSense is a program that matches ads to a website, or YouTube video, based on a creator's content and visitors *Google AdSense Home*, GOOGLE, <https://www.google.com/adsense/start/> [<https://perma.cc/VX98-7WMC>].

C. Time Regulations

A child actor's time spent working is one of the main things that child labor laws have aimed to regulate and limit.¹⁴⁴ Current state child entertainment labor laws include some form of regulation on the specific time and number of hours that an organization may use a child's services for each day or each week.¹⁴⁵ At least one reason for limiting a child's time on set is to avoid impeding their completion and achievement of a basic education.¹⁴⁶ For example, infants younger than six months are only permitted to work between 9:30 a.m. and 11:30 a.m. or between 2:30 p.m. and 4:30 p.m.¹⁴⁷ Furthermore, they are only permitted to remain at the place of employment for no more than two hours per day, may not work longer than twenty minutes in one day and have special limitations regarding their exposure to light that could be harmful to their development.¹⁴⁸

Hour limits change as a child gets older; children between the ages of six and nine years are permitted to be at the place of employment for eight hours and may not work for more than four hours when school is in session.¹⁴⁹ Additionally, three of the eight hours must be spent doing schoolwork and one must be reserved for "rest and recreation."¹⁵⁰ Any "emergency" that requires a minor to work beyond their permissible hours must be handled by submitting a request to the Labor Commissioner forty-eight hours in advance.¹⁵¹ The entertainment industry encompasses different forms of entertainment, like films, television series, live drama entertainment, and modeling. Each form possesses unique characteristics and requires employed minors to perform differing roles or activities; therefore, what it means for a child to "work" is somewhat ambiguous.

Vlogging does not inherently interrupt a child's education or time spent on schoolwork in the way that a formal role in a movie or television show does. Some parents may not mention their child's education at all in their vlogs, or they might even vlog themselves picking up their kids from school. In any scenario, vlogging as an activity and form of entertainment does not necessarily interrupt a child's schooling, because vlogging activity can happen at any time of the day for an unspecified duration and

144. See U.S. DEP'T OF LAB., *supra* note 51.

145. *Id.*

146. See CAL. CODE REGS. tit. 8, § 11760 (2020). Depending on the age of the child, many of the hour limitations are structured in a way that ensures that the child meets their education requirements. See *id.*

147. CAL. CODE REGS. tit. 8, § 11764 (2020).

148. CAL. CODE REGS. tit. 8, § 11760(a)(1) (2020).

149. *Id.* § 11760(d).

150. *Id.*

151. *Id.* § 11760(g).

does not necessarily need to involve the child during school hours. For this reason, these children do not face the same challenges or risks as children in traditional entertainment settings because their educational needs are not necessarily hindered. However, the lack of regulation of children's time spent working exposes children in family vlog situations to possible schedules that hinder their well-being in ways that are unrelated to their education. In the same regard, the lack of regulations protecting infants and toddlers subject to family vlogging potentially exposes them to conditions they would not otherwise face in the traditional entertainment industry until they were older children or teenagers.

D. Licensing

Acquiring licenses to include children in film productions is commonplace in the film industry,¹⁵² yet this requirement does not apply to user-generated content like YouTube videos. Implementing stricter requirements on parent vloggers to obtain licenses in order to include their children in YouTube videos is one way that the legislature can work towards a serious shift in protections for child actors outside the traditional realm of film and television. Requiring a parent to acquire a license before publicizing their children is a logical first step that may lead to better definitions and time regulations as explained above.¹⁵³

Though it is not as common as in the film industry, some parents in Britain have started to seek licenses from their local authorities in order to film their children.¹⁵⁴ Britain's "biggest vlogging family," the Saccone-Jolys family, represents one example: they are represented by the Gleam agency¹⁵⁵ and stay in regular communication with their local authorities to ensure the health and safety of their children.¹⁵⁶

152. See, e.g., *Entertainment Work Permit for Minors*, CAL. DEP'T OF INDUS. RELS. (Aug. 2020), <https://www.dir.ca.gov/dlse/entertainment-work-permit.htm> [<https://perma.cc/3QUT-WUWV>]; *Permit-to-Hire (Minors in the Entertainment Industry)*, FLA. DEP'T OF BUS. & PRO. REGUL. (Oct. 5, 2020), https://www.myfloridalicense.com/CheckListDetail.asp?SID=&xactCode=1030&clientCode=7603&XACT_DEFN_ID=11047 [<https://perma.cc/A54P-RG78>]; *Child Labor and Minors in Entertainment*, GA. DEP'T OF LAB., <https://dol.georgia.gov/employers/child-labor-and-minors-entertainment> [<https://perma.cc/DEU5-D38C>].

153. See *supra* Sections III.B, III.C.

154. Amelia Tait, *Are We Failing to Protect the Child Stars of YouTube?*, NEWSTATESMAN (Nov. 10, 2017), <https://www.newstatesman.com/science-tech/internet/2017/11/are-we-failing-protect-child-stars-youtube> [<https://perma.cc/LL3U-BLM8>].

155. *Id.*; *About*, GLEAMFUTURES, <https://www.gleamfutures.com/about> [<https://perma.cc/DRP5-4TYK>] ("Gleam Futures is a talent-led media and entertainment business" that helps creators on digital platforms establish credibility by "aligning talent commercially with some of the most recognisable brands in the world.").

156. Tait, *supra* note 154 (Jonathan Saccone-Joly said, "[W]e are aware and adhere to all guidelines set out in relation to children working in entertainment. We remain in close contact with

However, the chairman of the National Network for Children in Employment and Entertainment (NNCEE), Gareth Lewis, has warned that obtaining a license for user-generated content as the Saccone-Jolys family has done becomes more complicated depending on the type of content being created.¹⁵⁷ Every vlogging family has the ability to decide independently how their channel will function and how they will involve their children. Parents who work off of a script and direct their children what to say and do may need to comply with licensing regulations, while families who “film in their own home doing their own every day-to-day activities” may be less likely to fall into that category.¹⁵⁸

However, Lewis also explains that channels with a “commercial backer” may be seen as more official because the children are sponsored by brands to create advertisements.¹⁵⁹ This extra level of professionalism is exactly the kind of monetized content that *should* be regulated by licensing requirements in the United States regardless of whether the majority of the creator’s content is scripted or not. Lewis also warns that a great difficulty in regulating YouTube videos is the varying discretion of each local authority; what may be appropriate in one jurisdiction to issue a performance license may not be acceptable in another jurisdiction (as evidenced by Britain, which regulates licensure on a case-by-case basis).¹⁶⁰

Aside from the regular content of family vlogs, brands require various content in their advertisements as well. Some brands encourage influencers to include certain buzz words or follow a script, which becomes obvious when several different influencers are sponsored by the same company and include the same scripts in their videos.¹⁶¹ On the other hand, other brands require certain amount of time in a video be spent focusing on their product or campaign or a certain amount of posts on

our local authority and the NSPCC and we will continue to support campaigns and causes that fight for the health and wellbeing of children”).

157. *See id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *See, e.g.,* NikkiPhillippi, *3 Easy & Healthy Dinner Ideas*, YOUTUBE (Jan. 16, 2016), <https://www.youtube.com/watch?v=spHmQb5mA5E> [<https://perma.cc/JV6Q-ARJ3>]; Kristee Vetter, *What I Eat in a Day: Working 9-5 in New York City!*, YOUTUBE (Nov. 15, 2019), <https://www.youtube.com/watch?v=EkEOqWjPc3o> [<https://perma.cc/GCE7-GESC>]; Parker Ferris, *Aspyn + Parker Cooking Show! Episode 4!*, YOUTUBE (Apr. 28, 2018), <https://www.youtube.com/watch?v=YW5FzUpZsMo> [<https://perma.cc/DYX3-X3H9>]. Each of these videos contain an ad for a company called HelloFresh, and each YouTuber begins the sponsored portion of the video with a common phrase along the lines of “HelloFresh is a meal kit delivery service that delivers pre-portioned ingredients straight to your door.”

various social media platforms.¹⁶² These varying requirements differ according to the nature of the influencer’s relationship with and role within the brand (such as an affiliate, an ambassador, a seasonal advertiser, or a one-time sponsorship), the culture of the brand itself, and the following of the influencer (mega-influencers, macro-influencers, micro-influencers, nano-influencers).¹⁶³ Regardless of whether an ad is scripted or not, the influencer is profiting from that advertisement. When their child is in any way involved with that advertisement, regardless of the details, a license requirement should apply uniformly under the state’s jurisdiction.

E. An Alternative to Legislation: YouTube Rules and Guidelines

Social media sites currently act as platforms rather than publishers, giving them a lesser responsibility and stake in the content released by creators who use their platforms.¹⁶⁴ The Communications Decency Act (CDA) of 1996 immunizes computer service providers from liability when their service allows third-party users to upload content because the providers themselves are not publishers: “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”¹⁶⁵ The CDA justifies this immunity from liability with the assertion that “[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.”¹⁶⁶ Though the CDA has exceptions for criminal cases¹⁶⁷ (e.g., sex trafficking), Section 230 is still overly broad for today’s social media culture.¹⁶⁸ Congress’s claim that a lack of government regulation around Internet service providers has benefitted all Americans

162. See, e.g., Sierra & Stephen IRL, *The Truth About How Brand Deals Work*, YOUTUBE (July 23, 2020), <https://www.youtube.com/watch?v=8pkHiIToEr0> [<https://perma.cc/8Q9Q-A6AB>] (explaining how brands will send e-mail via her manager that include a list of “deliverables” the brand would like included in a campaign, e.g., TikTok post, Instagram stories, etc.).

163. See *80 Influencer Marketing Statistics for 2020*, INFLUENCER MKTG. HUB (June 15, 2020), <https://influencermarketinghub.com/influencer-marketing-statistics/> [<https://perma.cc/B6P2-R9TD>].

164. Alexis C. Madrigal, *The ‘Platform’ Excuse Is Dying*, THE ATLANTIC (June 11, 2019), <https://www.theatlantic.com/technology/archive/2019/06/facebook-and-youtubes-platform-excuse-dying/591466/> [<https://perma.cc/X7PV-EJSX>].

165. 47 U.S.C. § 230(e)(1).

166. *Id.* § 230(a)(4).

167. *Id.* § 230(e)(1); see also 18 U.S.C. § 2421A.

168. See KATHLEEN ANN RUANE, CONG. RSCH. SERV., LSB10082, HOW BROAD A SHIELD? A BRIEF OVERVIEW OF SECTION 230 OF THE COMMUNICATIONS DECENCY ACT 2–3 (2018) (discussing arguments that “Section 230’s shield may be too broad,” and original sponsors’ counter-arguments that “Section 230 is an important tool to preserve and promote free expression on the Internet”); see also Anshu Siripurapu, *Trump’s Executive Order: What to Know About Section 230*, COUNCIL ON FOREIGN RELS. (June 4, 2020), <https://www.cfr.org/in-brief/trumps-executive-order-what-know-about-section-230> [<https://perma.cc/V3QB-8EJD>].

is overly generalized and ignores the consequences associated with liability-free platforms.

With or without legislation modifying the CDA or child entertainment labor laws, YouTube as a platform has the ability to modify its own guidelines to more carefully consider the well-being and financial interests of children.¹⁶⁹ YouTube's current rules and guidelines are not doing enough to protect the futures of children who are placed on the platform early in life by their parents. Currently, YouTube "doesn't allow content that endangers the emotional and physical wellbeing of minors."¹⁷⁰ Content that would violate this rule might contain "sexualization of minors, harmful or dangerous acts involving minors," "infliction of emotional distress on minors," "misleading family content," and "cyberbullying or harassment involving minors."¹⁷¹ YouTube also provides guidelines for content that "features minors."¹⁷² YouTube explains that for content featuring minors, certain features, such as "[c]omments[,] [l]ive chat[,] [l]ive streaming[,] and [v]ideo recommendations," may be disabled on the channel or video.¹⁷³

The guidelines for content featuring minors also suggests ways for creators to "protect minors," such as ensuring that the minor is supervised by an adult, is "performing age-appropriate activities such as demonstrating hobbies, educational content or public performances," ensuring that their attire is "age-appropriate," and using privacy settings to limit who can view their videos.¹⁷⁴ These guidelines also instructs users: "Don't post content on YouTube that features minors and meets one or more of the following" scenarios.¹⁷⁵ The scenarios include filming in "private spaces" like a bedroom or bathroom, having minors solicit contact from strangers, dares or challenges, having minors discuss adult topics, having minors show activities that could draw "undesired attention," and revealing personal details about a minor.¹⁷⁶

169. See, e.g., Aja Romano, *YouTube Just Made Sweeping Positive Changes to Its Harassment Policy. So Why All the Backlash?*, VOX (Dec. 13, 2019), <https://www.vox.com/culture/2019/12/13/21012611/youtube-coppa-changes-harassment-policy-backlash> [<https://perma.cc/ZSW6-QE4T>]. "YouTube made a major change to its community guidelines, announcing that it will now penalize videos that 'maliciously insult' users based on identities like race, gender, or orientation." *Id.* This is one example of how YouTube is able to change its own guidelines regarding content and consequences for creators who violate those guidelines.

170. *Child Safety on YouTube*, *supra* note 29.

171. *Id.*

172. *Id.* (Content Featuring Minors).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

These guidelines clearly address concern for the relatively immediate safety of children on YouTube but are silent on issues such as filming conditions, time regulations, and licensing requirements. Additionally, YouTube states that its intention with these guidelines is to “protect uploaders as well as viewers” and advises creators to “think carefully about whether [the content] may put anyone at risk of negative attention.”¹⁷⁷ These guidelines contain the essence of some protections for minors but fail to clarify important terms like “personal details about a child” and prioritize avoidance of “negative attention” without specifically protecting children working in the filming conditions and the economic contributions they make to their family’s vlogging channel. The future of children is not relevant in these guidelines.

As a platform, YouTube has made clear that it allows users to freely express themselves, even in ways that are harmful or offensive, so long as the content does not explicitly violate YouTube’s policies.¹⁷⁸ And because it is a platform and not a publisher, YouTube does not necessarily endorse the content that exists on the site.¹⁷⁹ YouTube’s role as a platform is of course part of the reason why it has become such a mainstream form of media: *anybody* can post virtually *anything* without major corporate review or responsibility as long as community guidelines are not violated. As it exists now, there is a very low entry barrier to become a content creator on YouTube, which can be both a blessing and a curse. Existing as a platform makes it easier for users to create the content they want and for YouTube to avoid responsibility and liability for that content. While this model fosters creativity and an abundance of content, it has also made it much easier for both creators and YouTube to turn a blind eye to harmful dynamics in family vlogs.

With Section 230 of the CDA as it currently exists, it is unrealistic to suggest that YouTube or any other platform will be able to adopt a publishing model any time soon. Thus, an alternative to legislative changes in child labor laws or in the CDA is for YouTube to mandate additional requirements and guidelines for users who upload content involving minors. These rules would ideally include guidelines similar to the previously suggested legislative terms, such as requiring parents to obtain a film license and implementing and time regulations for the number of hours children are able to participate in videos.

These rules might reflect the *goals* of a publishing model without actually imposing liability on YouTube. Guidelines for content that is

177. *Id.*

178. Team YouTube (@TeamYouTube), TWITTER (June 4, 2019, 4:43 PM), <https://twitter.com/TeamYouTube/status/1136055805545857024>.

179. *Id.*

monetized and includes children would also not conflict with Congress's findings that "[t]he Internet . . . offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."¹⁸⁰ Instead, it would allow YouTube to review content that could potentially put the safety, privacy, and future interests of children at risk, thus reflecting the ideals of a publishing model by "protect[ing] the public's interest in the quality and lawfulness of media content."¹⁸¹ Rather than reviewing content for monetization qualification or adherence to guidelines after content has already been published, proactively increasing community guidelines and rules would allow YouTube to have a hand in reviewing the content prior to publication, just as a publisher would.

Content involving minors (family vlogs, birth vlogs, birthday parties, advertisements for baby or child clothing or products) should be first uploaded without any monetization from YouTube (i.e., default demonetization¹⁸²). Then, users who have uploaded this qualified content should have the option to apply for monetization through YouTube. This application might include completing licensing requirements or signing a contract agreeing to terms that address the circumstances surrounding a child's involvement in the video. This policy would employ barriers on content averse to a child's interests and would maintain YouTube's originally intended role as a platform and not a publisher.

So long as YouTube is disassociated from any liability arising from its users' content, the company does not have a strong incentive to make changes to its policies and guidelines on a corporate level. Therefore, legislation is likely the most practical way to gain protections for children featured on social media, along with binding judicial precedent as these specific issues are litigated. If the tough feat of transitioning from a platform to a publisher never occurs, YouTube community guidelines concerned with child safety should be dramatically expanded and increased to lower incentives for parents to financially profit from their families.

F. First Amendment Concerns

One anticipated concern of implementing and enforcing regulations on social media content is the possibility of violating creators' First

180. 47 U.S.C. § 230(a)(3).

181. Peggy Valcke & Marieke Lenaerts, *Who's Author, Editor and Publisher in the User-Generated Content: Applying Traditional Media Concepts to UGC Providers*, 24 INT'L REV. L., COMPUT. & TECH. 119, 121 (2010).

182. Demonetization is the process YouTube can use to deny paid advertisements in content creators' videos. See Piper Thomson, *Understanding YouTube Demonetization and the Adpocalypse*, G2 (June 14, 2019), <https://learn.g2.com/youtube-demonetization> [<https://perma.cc/83WY-8KJ3>].

Amendment¹⁸³ rights. Social media in general is regarded by the public as a platform where they can choose what to say while simultaneously reaching large audiences—thus expanding their own self-expression while influencing their audience of followers. The CEO of Twitter, Jack Dorsey, has repeatedly described Twitter as a “digital public square” where users can freely and openly exchange communication.¹⁸⁴ While some members of the public carry the opinion that social media platforms limit too much “legitimate content,” others believe that they do not do enough to remedy the “harmful, offensive, or false content” that exists on the platforms.¹⁸⁵ In either scenario, the decision regarding what kind of content should or should not be removed from a platform is largely a question that social media executives have not yet answered.

First Amendment concerns may be especially high considering current legal barriers that bar private lawsuits against social media providers: the state action requirement¹⁸⁶ and the broad immunity of “interactive computer service” providers under the Communications Decency Act’s (CDA) Section 230.¹⁸⁷ Because Section 230(c)(1)¹⁸⁸ may prevent lawsuits against private social media companies that make content publication decisions, there are virtually no federal or state laws that “expressly govern social media sites’ decisions about whether and how to present users’ content.”¹⁸⁹ Therefore, users’ freedom to post on social media is governed by the companies’ own moderation policies.¹⁹⁰

Whether federal, state, or private regulation of social media content infringes on creators’ First Amendment rights depends on a variety of factors, such as whether the speech or content is being regulated, the nature of the regulation itself, and the type of medium being regulated.¹⁹¹ With these factors in mind, regulations may be carefully formulated in a way that lowers the risk of infringing on First Amendment rights. Valerie

183. The First Amendment of the Constitution reads, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

184. VALERIE C. BRANNON, CONG. RSCH. SERV., R45650, FREE SPEECH AND THE REGULATION OF SOCIAL MEDIA CONTENT 2, 5 (2019) (“Government action regulating internet content would constitute state action that may implicate the First Amendment. In particular, social media providers may argue that government regulations impermissibly infringe on the providers’ own constitutional free speech rights.”).

185. *Id.* at 2–3.

186. “Constitutional guarantees[] generally appl[y] only against *government* action.” *Id.* at 5.

187. 47 U.S.C. § 230(c); BRANNON, *supra* note 184, at 3–4.

188. “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1).

189. BRANNON, *supra* note 184, at 16.

190. *Id.*

191. *Id.* at 19–20.

Brannon, a legislative attorney, suggests three different possible models: (1) social media as “company towns” (thus being treated as state actors); (2) social media sites as “common carriers or broadcast media” (which the Court has allowed to be more substantially regulated to secure public access); and (3) social media as “news editors” (thus receiving the “full protection of the First Amendment when making editorial decisions”).¹⁹²

Any of the three models could make an impact in combatting First Amendment violations; however, the strongest argument is that social media, particularly YouTube, possesses substantially similar characteristics to cable television providers and should be regulated as such. Treating YouTube as a newspaper editor would not be such a stretch from the platform’s current operating procedures, as the platform often demonetizes content that it feels does not align with its company narrative.¹⁹³ However, YouTube specifically mirrors cable television in many ways, especially in the context of child employment. According to Brannon, “[i]f a court believed that the internet in general, or social media in particular, shared relevant characteristics with either traditional broadcast media or with cable providers, then it would be more likely to allow the types of regulations that have traditionally been permitted in those contexts.”¹⁹⁴ Additionally, a lower level of scrutiny may apply to content-neutral laws that regulate only “the time, place, or manner of protected speech” if it is “narrowly tailored to serve a significant government interest.”¹⁹⁵

Congress’s best shot at creating a law that could regulate social media sites without infringing First Amendment rights would include content-neutral regulations that only have an incidental effect on speech. In this scenario, a subset of that law would include a provision focused on child safety by: (1) limiting the amount of time a child spends working for monetary gain under their parents’ YouTube channels; (2) imposing licensing requirements for parents (or YouTube) if they wish to feature a child in monetized content; and (3) determining the fate of the child’s earnings made through monetized content.

A law regulating YouTube and other social media platforms would create a domino effect that would require YouTube to impose regulations on its users or else fail to comply with the federal regulations imposed on the company itself. To have a better chance at receiving a lower level of

192. *Id.* at 22–23.

193. *See, e.g.,* Thomson, *supra* note 182.

194. BRANNON, *supra* note 184, at 32.

195. *Id.* at 40–41. *See generally* Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622 (1994). This case includes more extensive discussion of courts using levels of scrutiny to determine whether Congressional action was consistent with the First Amendment. *See Turner Broad. Sys., Inc.*, 512 U.S. at 626–69.

scrutiny from courts (and thus creating a friendlier court for social media platforms regulating user content), the new policies could be written in a way that is also *result*-focused rather than solely *content*-focused.¹⁹⁶ The result should be an increased standard of safety and well-being for children involved in monetized social media content. The emphasis should be on the well-being and protection of the children rather than on how much an influencer parent is allowed to speak about their child or permitted to film and publicize their significant life events. Additionally, a truly progressive licensing requirement would include a consent form for children to sign who are above a certain age and would be considered competent enough to choose their level of involvement in their family's channel.

CONCLUSION

The current lack of federal and state legislation or regulations on child entertainment labor law is a bigger problem today than it has ever been due to the prevalence of new social media platforms. The nature of the entertainment industry has exponentially grown, evolved, and developed throughout the most recent decade. Even the most thorough state regulations are not keeping up with the newest ways that children are becoming involved in everyday entertainment media. More and more people are finding ways to monetize their social media content and with monetization and an audience comes responsibility—the same type of responsibility that is carried by executives in traditional entertainment industries. Family vloggers are currently free to film their children's lives without significant interference, starting from the moment they are born. The content of these vlogs is scarcely regulated: the children's work is not subject to time constraints, their involvement in advertised content is not regulated by license requirements, and anything that might be considered their "earnings" is indefinitely in the hands of their parents. State child entertainment labor legislation, though broad in its definitions, currently give no mention of the Internet or social media platforms like YouTube, Instagram, or TikTok.

The current lack of regulation exposes children on the Internet to a myriad of potentially harmful events, including exploitation and deprivation of compensation for their labor. The choice to start a vlogging channel based around a certain family dynamic is not a short-lived trend. Rather, it is a completely new genre of entertainment that is being watched by millions of people on a daily basis.¹⁹⁷ The amount of

196. See BRANNON, *supra* note 184, at 41.

197. OMNICORE, *supra* note 14.

user-generated content will only continue to increase on the Internet,¹⁹⁸ and regulations would safeguard against this phenomenon becoming detrimental to minors.

Influencer parents and social media platforms like YouTube should be held to the same standards as individuals and organizations in traditional entertainment fields. By expanding definitions, introducing license requirements and time regulations, and implementing uniform legislation across states, family vloggers who include their children in monetized social media content would be subject to certain requirements to protect the future, safety, and well-being of their children.

198. See J. Clement, *Hours of Video Uploaded to YouTube Every Minute as of May 2019*, STATISTA (Aug. 25, 2020), <https://www.statista.com/statistics/259477/hours-of-video-uploaded-to-youtube-every-minute/> [<https://perma.cc/3NQT-W7TX>] (showing exponential growth of video content added each day).