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## The Children of YouTube: How an Entertainment Industry Goes Around Child Labor Laws

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**The Children of YouTube: How an Entertainment Industry Goes Around Child Labor Laws**

*Neyza L. Guzman, J.D.\**

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\*J.D. Barry University Dwayne O. Andreas School of Law, 2019.

## I. INTRODUCTION

Throughout human history, children have been an essential part of the workforce. Children were expected to help the household by whatever means necessary, whether it be by working in the fields, factories, or completing household chores. Just as recent as “1900, [eighteen] percent of all American workers were under the age of [sixteen].”<sup>1</sup> This was because “Children were useful as laborers because their size allowed them to move in small spaces in factories or mines where adults [could not] fit, children were easier to manage and control and perhaps most importantly, children could be paid less than adults.”<sup>2</sup> Additionally, “[The children] worked not only in industrial settings but also in retail stores, on the streets, on farms, and in home-based industries.”<sup>3</sup> Children, being unable to properly advocate for themselves, have been subjected to being underpaid and long hours.

In the United States, child labor became especially prominent during the Industrial Revolution.<sup>4</sup> “Most families simply could not afford the costs of raising a child from birth to adulthood without some compensating labor” and, therefore, “[a]t an age as young as [five], a child was expected to help with farm work and other household chores.”<sup>5</sup> These societal beliefs were embedded deep in the American culture of the time, which fueled an industry that monopolized an economic opportunity to use child labor; justifying the practice as “helping [the children] avoid the sin of idleness.”<sup>6</sup> Supporters of child labor claimed that the practice would allow the children to economically benefit society “by helping [society] increase its productive capacity.”<sup>7</sup>

The idea of children as having earning potential has long been rooted in society’s beliefs, and therefore has been grounded in the laws that developed in response to this public policy. These laws reflected society’s belief that the right to benefit from one’s child

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<sup>1</sup>*Child Labor*, HISTORY, (Jan. 10, 2019), <https://www.history.com/topics/industrial-revolution/child-labor>.

<sup>2</sup>*Id.*

<sup>3</sup>Schuman, Michael, *History of child labor in the United States – part 1: little children working*, (Jan. 2017), U.S. BUREAU OF LABOR STATISTICS, <https://www.bls.gov/opub/mlr/2017/article/history-of-child-labor-in-the-united-states-part-1.htm>.

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

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

was “one of the natural privileges of parenthood.”<sup>8</sup> Courts recognized the value of the economic earning potential a child brings to a family, supporting this by calculating the value of a wrongful death claim of a child as “the probable value of the services of the deceased from the time of his death to the time he would have attained his majority, less the expense of his maintenance during the same time.”<sup>9</sup>

This principle of the child’s economic benefit to the family and the “parental ownership of the work” was further solidified in the manner in which the child was paid.<sup>10</sup> Generally, when a child was compensated, the employer would turn over the wages directly to the parents; wages usually negotiated by the parents themselves.<sup>11</sup> This situation similarly mirrors the current situation in which YouTube pays the parents of the children directly, however, this will be discussed later in the comment.<sup>12</sup>

In response to these horrible conditions in the workplace, legislators in the United States have enacted several federal laws in order to protect minor children, however, these laws do not cover children entertainers.<sup>13</sup> “Nineteenth-century reformers and labor organizers sought to restrict child labor and improve working conditions, but it took a market crash to finally sway public opinion.”<sup>14</sup> The Fair Labor Standards Act of 1938 was implemented to establish minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in federal, state, and local governments.<sup>15</sup> Section 213 of the Fair Labor Standards Act expressly states that the restrictions set forth in the child labor provisions of the Act “shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.”<sup>16</sup> Instead, the federal government has decided that the regulation of child performers should be left to the discretion of the states.

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<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

<sup>12</sup>*Infra* Section III(b)

<sup>13</sup>*See generally*, 29 U.S.C. § 213 (2020).

<sup>14</sup>Child Labor, *supra* note 1.

<sup>15</sup>*Wage and the Fair Labor Standards Act (FLSA)*, UNITED STATES DEPARTMENT OF LABOR, <https://www.dol.gov/agencies/whd/flsa> (last visited Feb. 1, 2019).

<sup>16</sup>29 U.S.C. § 213(c)(3) (2020).

Although both federal and state laws have developed to cover many areas of employment that a child may work, including the child actor, the law still has not caught up with all of modern technology. Currently, the law does not protect children who broadcast videos on YouTube in exchange for compensation, both monetarily and non-monetarily. This Comment will explore the limitations of child labor protections in relation to children who broadcast monetized videos on the social media video platform, YouTube. Namely, this Comment will explore how the Child Labor Act and current entertainment and internet laws do not apply to child actors on YouTube because the law does not recognize the children as employed actors.

## II. THE HISTORY OF CHILD ACTORS

Cinema has played an integral role in society since its inception in the early 1900s. With the development of motion picture film production, film has become a staple in society, reflecting current social and cultural attitudes of the time. The first child actor, Jackie Coogan, at the young age of seven appeared on film alongside Charlie Chaplin in *The Kid* in 1921.<sup>17</sup> Coogan's success would come to make him "the youngest person in history to earn a million dollars."<sup>18</sup> Earning roughly four million dollars during his career, Coogan would come to only receive roughly two thousand dollars after his earnings were seized and spent by his mother and stepfather.<sup>19</sup> Having realized the extent of "Jackie-mania" that had engulfed the nation and the amount of money Coogan had generated in his career, Coogan sued his mother in 1938.<sup>20</sup> Coogan alleged that when he had confronted his mother about his missing wages, his mother had stated: "No promises were ever made to give Jackie anything. Every dollar a kid earns before he is twenty-one belongs to his parents."<sup>21</sup> The court ultimately decided in Coogan's favor,

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<sup>17</sup>*Child Actors*, FILM REFERENCE, <http://www.filmreference.com/encyclopedia/Academy-Awards-Crime-Films/Child-Actors-EARLY-CHILD-STARS.html> (last visited Nov. 1, 2018).

<sup>18</sup>*Id.*

<sup>19</sup>Brad Smithfield, *Coogan Act: Stopped parents of famous child actors seizing all the child's money*, THE VINTAGE NEWS (Oct. 29, 2016), <https://www.thevintagenews.com/2016/10/29/coogan-act-stopped-parents-of-famous-child-actors-seizing-all-the-childs-money/>.

<sup>20</sup>*Coogan Law*, SAG-AFTRA, <https://www.sagaftra.org/membership-benefits/young-performers/coogan-law> (last visited Feb. 1, 2019).

<sup>21</sup>Smithfield, *supra* note 19.

however Coogan would only come to recover a relatively “small portion of his earnings.”<sup>22</sup>

In response to the atrocities experienced by Coogan, California would go on to pass the Coogan Law in 1939 in order to change California’s prior law allowing the parents sole ownership of the earnings of a minor.<sup>23</sup> “Such exploitation of child actors led to the California legislature passing the Coogan Act in 1939, which was intended to protect acting children’s assets.”<sup>24</sup> The Coogan Law, codified in the California Code, requires that a trust be established “for the purpose of preserving for the benefit of the minor the portion of the minor’s gross earnings.”<sup>25</sup> The code thereby “creates a fiduciary relationship between the parent and the child.”<sup>26</sup> Coogan’s Law mandates that the trustee “shall establish the trust pursuant to this section within seven business days after the minor’s contract is signed by the minor, the third-party individual or personal services corporation (loan-out company), and the employer.”<sup>27</sup> The Coogan Trust provides “no withdrawal by the beneficiary or any other individual, individuals, entity, or entities may be made of funds on deposit in trust without written order of the superior court.”<sup>28</sup> This provision remains in effect until the minor reaches the age of eighteen, and funds will only be released after providing “a certified copy of the beneficiary’s birth certificate to the financial institution where the trust is located.”<sup>29</sup> Although the Coogan Law aimed to prevent children’s wages from being wrongful consumed by the parents, the law only affected children performers in California and did not address any other issues besides issue of ownership of wages. The Coogan law additionally did not discuss the potential conflict of interest that could potentially arise from the parent also being the trustee of the child’s trust.

Even with the plight of Coogan, that did not stop the influx of children actors that followed in his footsteps. In the years following Coogan, Shirley Temple would break onto the Hollywood scene in the early 1930s. However, “[b]efore she made her big Hollywood debut in 1934, at the age of [five], she starred in ‘Baby Burlesks’, a very odd short film series that featured a bunch of toddlers in diapers

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<sup>22</sup>Coogan Law, *supra* note 20.

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

<sup>24</sup>Child Actors, *supra* note 17.

<sup>25</sup>Cal. Fam. Code § 6753(a) (West 2020).

<sup>26</sup>Coogan Law, *supra* note 20.

<sup>27</sup>§ 6753(a).

<sup>28</sup>Cal. Fam. Code § 6753(b).

<sup>29</sup>*Id.*

acting out creepily grown-up plots.”<sup>30</sup> In her first speaking role in *War Babies*, three-year-old Temple stars as an “exotic dancer in a bar for soldiers, where she wiggles around in a little off-the-shoulder number, ogled by shirtless toddlers playing ‘army men’ with big safety pins in their diapers,” gaining her first onscreen kiss before the age of five.<sup>31</sup> Another film in the series, *Polly Tix in Washington*, features a four-year-old Temple “wearing a little bra and filing her nails when she gets a phone call from a top-hat wearing toddler telling her to go seduce a Senator to ‘get him to work.’ She walks in and greets the senator draped in pearls saying she’s been sent to ‘entertain’ him.”<sup>32</sup> Temple garnished love from the public and politicians alike, with even President Franklin D. Roosevelt commenting on her impact on society. The President expressed that Temple’s on screen presence was a necessity during the time of the Great Depression, going on to state: “When the spirit of the people is lower than at any time during this Depression, it is a splendid thing that for just fifteen cents an American can go to a movie and look at the smiling face of a baby and forget his troubles.”<sup>33</sup> The President’s sentiments towards Temple and the cinematic industry would come to shape the implementation of the Fair Labor Standards Act.

Shirley Temple’s rise to fame occurred during the time of the Great Depression, a time where society’s stance on child labor had shifted greatly. Motivating society, however, was mostly grounded in “the desire of Americans in a period of high unemployment to open jobs held by children to adults.”<sup>34</sup> Pressured by the public, President Roosevelt “sent Congress a special message proposing federal regulation to solve the problem of child labor, as well as set minimum wages and maximum work hours.”<sup>35</sup> However, President Roosevelt did not propose a uniform, national standard to encompass all areas of child labor, and instead specifically distinguished that certain differentiations would exist between different industries; one of these industries being children performers.<sup>36</sup>

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<sup>30</sup>Charlotte Alter, *Before the Good Ship Lollipop, Shirley Temple did ‘Baby Burlesks,’* TIME (Feb. 12, 2014), <http://time.com/12851/before-the-good-ship-lollipop-shirley-temple-did-baby-burlesks/>.

<sup>31</sup>*Id.*

<sup>32</sup>*Id.*

<sup>33</sup>Nathaniel Ang, *Comment, Teenage Employment Emancipation and the Law*, 9 U. Pa. J. Lab. & Emp. L. 389 (2007).

<sup>34</sup>History, *supra* note 1.

<sup>35</sup>Ang, *supra* note 33, at 403.

<sup>36</sup>*Id.*

As a result of the message proposed by President Roosevelt, Congress would have to consider whether a total ban on child labor would be instituted or if, as the President suggested, it would be best for the federal government to regulate “oppressive” child labor and leave other areas of child labor to the discretion of the states. One Representative would come to weigh in on the matter, by introducing “the exemption on the floor of Congress.”<sup>37</sup> Representative Charles Paul Kramer stated:

The ability to perform in motion pictures requires an intellectual gift and quality, something which is born in the exceptional child. Not only the motion picture industry but the movie-going public would be denied much pleasure and enjoyment if children were barred from the screen. The old and young are delighted with the unassuming appeal of America’s little sweetheart, Shirley Temple. . . .<sup>38</sup>

These sentiments, mirroring the current public policy of the time, urged Congress to pass the so-called Shirley Temple Act.<sup>39</sup> Congress would come to determine that child acting did not rise to the level of “oppressive child labor” and that child acting had a “positive contribution to the nation’s cultural and economic life”; thereby not arising to the level needed to require federal regulation.<sup>40</sup> However, that does not mean that everyone felt that child acting should be excluded from the Act’s provisions. “Robert H. Jackson of the Justice Department condemned the negative effect of child labor on national labor standards in that one state could subvert the nation’s labor standards by allowing child labor within its borders.”<sup>41</sup> “Due to this exception from federal labor laws for child performers, states are left to draft their own statutes for regulating the treatment, protection, and experiences of child performers.”<sup>42</sup>

Shirley Temple continued her career in the spotlight until the age of twenty-two, after a decline in her popularity.<sup>43</sup> Earning an estimated three million dollars over the course of her career, Temple

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<sup>37</sup>*Id.*

<sup>38</sup>*Id.* at 405.

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

<sup>40</sup>*Id.* at 405-06.

<sup>41</sup>*Id.* at 403.

<sup>42</sup>Liana Nobile, *The Kids Are Not Alright: An Open Call for Reforming the Protections Afforded to Reality Television’s Child Participants*, 17 UC Davis J. Juv. L. & Pol’y 41, 50 (2013).

<sup>43</sup>Smith, *supra* note 19.



would retire with only 44,000 dollars after her parents spent the money she earned.<sup>44</sup>

Both Coogan and Temple rose to fame early in the development of the moving picture film industry and although both, and many others, experienced many issues, that did not stop others from following in their footsteps. The Federal Labor Standards Act, although amended several times, still exempts children performers from its protections and leaves each state to dictate the rules and regulations the performers are bound by. Additionally, when the Act was developed there were certain technologies currently available now, that were unavailable at the time the Act was considered. The biggest development since the introduction of the act is the widespread usage of the internet, where anyone can upload anything at any time. This freedom to upload has led to a development in the amount of ways entertainment can be produced and distributed, while being compensated. These areas of production are not covered by many state codes, including children actors performing on monetized social media platforms such as YouTube.

### III. THE RISE OF YOUTUBE

#### A. HISTORY OF YOUTUBE

According to Forbes, YouTube is “the second largest search engine behind Google.”<sup>45</sup> Currently, YouTube generates over three billion searches per month, raking in a larger search volume “than that of Bing, Yahoo, AOL and Ask.com combined.”<sup>46</sup> To put it in perspective, “if YouTube’s user base were a country, it would be the third-largest in the world.”<sup>47</sup>

Started in 2005 after three friends Steve Chen, Chad Hurley, and Jawed Karim realized “that there [was not] one location where videos could be shared.”<sup>48</sup> After receiving an “\$11.5 million investment from Sequoia Capital in 2005 . . . the site launched in

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

<sup>45</sup>Adam Wagner, *Are You Maximizing the Use of Video in Your Content Marketing Strategy?*, FORBES (May 15, 2017), <https://www.forbes.com/sites/forbesagencycouncil/2017/05/15/are-you-maximizing-the-use-of-video-in-your-content-marketing-strategy/#55d4719a3584>.

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

<sup>47</sup>*Id.*

<sup>48</sup>Ace X, *The History of YouTube*, ENGADGET, <https://www.engadget.com/2016/11/10/the-history-of-youtube/>.

December 2005 and a Nike commercial became the first video to receive one million views.”<sup>49</sup> In 2006, YouTube would be sold to Google for roughly 1.65 billion dollars.<sup>50</sup> By 2009, YouTube had increased to “one billion video views per day, and . . . people [were] finding different uses for the site and it was around this time when gaming and video blogging channels started to gain interest.”<sup>51</sup> In 2010, the site was generating three billion daily views along with revenue from advertisements.<sup>52</sup> These advertisements would allow “many gamers and [video bloggers to have] an opportunity to earn a living simply by posting videos onto YouTube and receiving revenue from ads and support.”<sup>53</sup>

YouTube’s success would continue to climb and by the end of 2011, the first video to reach one-billion views would appear alongside the site’s announcement that its daily traffic now staggered around four million views per day.<sup>54</sup> By 2012, YouTube would find itself gaining the title of a multi-billion-dollar company, boasting over 1.3 billion users with over five billion views a day.<sup>55</sup> With the large amount of content uploaded, at a rate of roughly three hundred hours per minute, YouTube mounted a market strategy to take full advantage of the billion-person market available to them through partnerships with various advertisers.<sup>56</sup>

## B. ADVERTISERS AND PAYMENT

Since its inception, YouTube has found various innovative ways to change the availability of user-generated content. One such advent was the introduction of advertisements, paid sponsorships, and paid partnerships. In 2007, YouTube’s expansion into nine countries and the launch of their mobile site encouraged YouTube to begin looking into ways to capitalize on its growing market.<sup>57</sup> In

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<sup>49</sup>*Id.*

<sup>50</sup>*Id.*

<sup>51</sup>*Id.*

<sup>52</sup>*Id.*

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

<sup>54</sup>Ace X, *The History of YouTube*, ENGADGET, <https://www.engadget.com/2016/11/10/the-history-of-youtube/>. The first video to hit one billion views is Psy’s Gangnam Style.

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

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

<sup>57</sup>Nicholas Jackson, *Infographic: The History of Video Advertising on YouTube*, THE ATLANTIC, <https://www.theatlantic.com/technology/archive/2011/08/infographic-the-history-of-video-advertising-on-youtube/242836/> (last visited Nov. 1, 2018).

August 2007 inVideo advertisements made their first appearance, soon followed by Partner Programs in December of the same year.<sup>58</sup> The following year YouTube began to test out pre-roll advertising, allowing advertisers to purchase advertisement time that a user would view before seeing a video on the site.<sup>59</sup> By 2009, YouTube would have seven different advertising formats available for sale and distribution.<sup>60</sup>

Currently YouTube allows users that upload their content to the social media platform to have the ability to monetize their videos and, in return, receive compensation from advertisers who wish to purchase the advertising time available before, during, or after the user generated content. “Advertisers chose ads on [either] a Cost Per Click (CPC) or a Cost Per View (CPV) model.”<sup>61</sup> A CPC model “is when an advertiser pays money based on clicks,” while a CPV model is based on the amount of views.<sup>62</sup> CPC’s usually appear at the bottom of the screen during a user-generated video and each click will cost the advertiser a certain amount of money, payable in part to YouTube and in part to the creator.<sup>63</sup> Similarly, a CPV model charges the advertiser but instead of focusing on whether the viewer clicks the advertisement, payment becomes due dependent on the engagement of the viewer.<sup>64</sup> In order for the advertiser to be charged for the placement of the advertisement, the viewer must watch the advertisement for at least thirty seconds or at least half of the time of the length of the advertisement; whichever occurs first.<sup>65</sup> Advertisers will pay different amounts depending on the length, time placement, and location of the advertisement.<sup>66</sup> Additionally, advertisers will pay more depending on the value of certain keywords that the advertisers wish to use in order to target more specific audiences.<sup>67</sup> For example, if an advertiser wishes to target a very specific market such as an individual interested in a home

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<sup>58</sup>*Id.*

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

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

<sup>61</sup>*How to Make Money on Youtube?*, VERTICALSIGHT, <https://verticalsight.com/how-many-views-do-you-need-to-make-money-on-youtube/>.

<sup>62</sup>*Id.*

<sup>63</sup>*Id.*

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

<sup>65</sup>*Id.*

<sup>66</sup>*Id.*

<sup>67</sup>*How to Make Money on Youtube?*, VERTICALSIGHT, <https://verticalsight.com/how-many-views-do-you-need-to-make-money-on-youtube/>.

mortgage, the advertiser is likely to target videos created that would lead an individual through the home mortgage process.<sup>68</sup> A very targeted niche raises the price of available advertising space.<sup>69</sup> This source of potential revenue drives many individuals to create a YouTube channel catered to a particular genre. In relation to the topic of children, advertisers wishing to market products to children and their families will pay a great deal more to receive prime advertising time in the videos of the most-watched YouTube family channels.

### C. PROBLEMS WITH YOUTUBE

Over the past couple of years, YouTube has grown at an exorbitant rate leading to the discovery of several issues with the social media giant. YouTube's biggest success is also one of its biggest shortfalls. With over three hundred hours of video uploaded per minute, YouTube has had a difficult time monitoring all of the content created.<sup>70</sup> In 2017, "YouTube was hit by advertiser boycotts over inappropriate content, including terrorism videos and content with young children targeted by pedophiles."<sup>71</sup> In response, YouTube "moved to enforce stricter ad policies" by changing various standards in the YouTube Partner Program and stated that they are "working to improve the accuracy of videos deemed advertiser-unfriendly."<sup>72</sup> However, YouTube's core focus was once again on the advertisers and the loss of revenue and not the actual content of the videos themselves.<sup>73</sup>

Chief Product Officer, Neal Mohan, and Chief Business Officer, Robert Kyncl, both stated that "[t]hese higher standards [would] also help [YouTube] prevent potentially inappropriate videos from monetizing which [could] hurt revenue for everyone." The standards referenced by Mohan and Kyncl dealt with YouTube's new requirements that channels must meet a certain threshold for minimum amount of subscribers and watch time before being eligible for monetization from advertisements; channels that

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

<sup>69</sup>*Id.*

<sup>70</sup>*The History of YouTube*, *supra* note 54.

<sup>71</sup>Todd Spangler, *YouTube Sets Stricter Requirements for Creator Partners in Response to Advertiser Concerns*, VARIETY, (Jan. 16, 2018, 3:00 PM), <https://variety.com/2018/digital/news/youtube-changes-partner-program-google-preferred-advertisers-1202665815/>.

<sup>72</sup>*Id.*

<sup>73</sup>*Id.*

do not meet these requirements will not be eligible to place advertisements on their videos.<sup>74</sup> “The changes to the YouTube Partner Program [were] designed to give YouTube more time and data to determine whether a channel adheres to the site’s community guidelines and policies.”<sup>75</sup> However, Mohan and Kyncl still acknowledge that “YouTube’s brand-safety challenges will continue,” further stating that “this change will tackle the potential abuse of a large but disparate group of smaller channels . . . [but] also know that the bad action of a single, large channel can also have an impact on the community and how advertisers view YouTube.”

It is not surprising that YouTube has a large interest in assuring that the content distributed on the platform conforms to the laws of the countries in which the media is disseminated because, in the United States for example, “[t]he nature and quality of the business’ encouragement of private individuals to spread its marketing material is essential in determining whether the business is liable for activities carried out by private individuals.”<sup>76</sup> YouTube must ensure that channels that are promoting inappropriate material, such as channels dedicated to promoting pedophilia, do not receive monetization from advertisers and that advertisers products are not displayed in connection with material that could damage the brand.<sup>77</sup> YouTube, by providing money to channels promoting inappropriate material, could be held liable for encouraging those individuals to commit those acts in return for expected compensation.<sup>78</sup> YouTube has focused its efforts to demonetize channels promoting disturbing content regarding children, however one area that does not seem to be garnishing much attention is whether these larger channels are complying with child labor law requirements in regards to the amount of time these children spend recording content and whether the children are being properly compensated for their work. Due to YouTube’s lack of monitoring channels’ compliance with child labor laws and providing compensation for channels that continue to violate those laws, YouTube is in essence, perpetuating the belief that compliance is unnecessary, thereby leaving an entire subset of work that falls just outside the scope of the protections set forth under child labor laws.

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

<sup>75</sup>*Id.*

<sup>76</sup>Jan Trzaskowski, *User-Generated Marketing - Legal Implications When Word-of-Mouth Goes Viral*, 19 INT’L J.L. & INFO. TECH. 348 (2011).

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

<sup>78</sup>Trzaskowski, *supra* note 76.

#### IV. ENTERTAINMENT LAW AND CHILD LABOR

Once upon a time, “Film director and producer Alfred Hitchcock described actors as cattle. ‘That would make child actors veal,’ said former child actor Mara Wilson, star of the movies *Matilda* [and] *Mrs. Doubtfire*. . . .”<sup>79</sup> Due to the Fair Labor Standards Act of 1938’s exemption of children actors under the so-called Shirley Temple exemption, “[s]tates that want to protect young entertainers working in movies, television shows or commercials have to pass their own child entertainment laws, and [so far] [thirty-two] states have done so.”<sup>80</sup> Meaning that eighteen states currently do not have any protections for children performers. This problem is further compounded by the new wave of compensated children actors, the child video blogger. The current legal system is still developing to catch on to the advent of the reality television series and its implications on the applicability of child labor laws of the states in which they are filmed. The issue being that if the child is being recorded in their normal every day routine, is the child actually working? This is also true of the child video bloggers that have come to dominate social media platforms such as YouTube. Are these children actually working if they are merely being recorded by, usually, their parents?

Consequently, “The phenomenon of reality television [just as the child video blogging] ‘has produced a class of people whose legal rights have yet to be clearly defined’ on a state or national level.”<sup>81</sup> “[T]he shows may depict ‘real’ people, [but] the majority of these shows are ‘set in highly contrived and controlled environments,’ blurring the distinction between what is real and what is fabricated.”<sup>82</sup> Just as reality television, video blogging on a social media platform such as YouTube “us[es] regular people as actors in what is viewed as realistic role- playing . . . [where] [t]he individual’s involvement . . . is often viewed and classified as ‘participation’ rather than as acting or performing.”<sup>83</sup> Producers, and

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<sup>79</sup>Marsha Mercer, *Few Protections for Child Performers*, USA TODAY (Aug. 29, 2013, 5:53 PM), <https://www.usatoday.com/story/news/nation/2013/08/29/child-actors-protections-laws-pew/2734035/>.

<sup>80</sup>*Id.*

<sup>81</sup>Courtney Glickman, *Jon & Kate Plus ... Child Entertainment Labor Law Complaints*, 32 WHITTIER L. REV. 147 (2010).

<sup>82</sup>*Id.*

<sup>83</sup>*Id.*

parents alike, “are able to take advantage of this murky gray area between performance and participation by using it as an ‘exception’ to circumvent the usual rules that govern television production.”<sup>84</sup> Thus, “Many ‘participants’ . . . are excluded by [the Screen Actor’s Guild] and [American Federation of Television and Radio Artists] because they are neither actors nor performers, and therefore they do not fall within traditional union qualifications.”<sup>85</sup> Participants of video blogging find “themselves unprotected and unrepresented, ‘denied employee status by producers and denied membership in the unions.’”<sup>86</sup> Sadly, “neither federal labor law nor relevant state laws sufficiently protect children” involved in the entertainment industry, participant or not.<sup>87</sup>

#### A. UNITED STATES – THE FEDERAL LEVEL

Currently, the United States has addressed the issue of child labor through the enactment of the Fair Labor Standards Act of 1938, however, that act is not all-encompassing. This is especially true regarding child actors and participants. States are left to their discretion on what protections are afforded to child actors, as well as define who exactly qualifies as a child actor to receive those protections. This lack of nationwide conformity and the disparity that exists between an actor and a participant further disrupts other departments of the government from adequately doing their jobs. For example, the Federal Communications Commission (FCC) has a difficult time regulating the entertainment industry that has emerged on the internet.<sup>88</sup> “The FCC . . . hesitates to extend its regulatory grip to Internet-based audiovisual services and struggles to implement regulation consistent with First Amendment requirements” due to the difficulty associated with having to discern what media is an opinion protected by the First Amendment and what media was calculated as a performance specifically for profit.<sup>89</sup> This means that the protections usually enforced by the FCC are not in place for media disseminated through social media, once again

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

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

<sup>86</sup>Courtney Glickman, *Jon & Kate Plus. Child Entertainment Labor Law Complaints*, 32 Whittier L. Rev. 147 (2010).

<sup>87</sup>*Id.*

<sup>88</sup>See Peter Hettich, *YouTube to Be Regulated - The FCC Sits Tight, while European Broadcast Regulators Make the Grab for the Internet*, 82 St. John’s L. Rev. 1447 (2008).

<sup>89</sup>*Id.* at 1448.

leaving children participating in the online entertainment industry behind.

#### B. FLORIDA – THE STATE LEVEL

Florida is one of the thirty-two states which have enacted specific laws to protect a child actor engaged in the entertainment industry, however, these laws have not been extended to include child video bloggers on YouTube and other similar social media providers. Governed by Florida Statute § 450.132, the Florida Legislature has expressly listed when a child qualifies for protections under the rules of children employment in the entertainment industry including: “the production of motion pictures, legitimate plays, television shows, still photography, recording, publicity, musical and live performances, circuses, and rodeos.”<sup>90</sup> The statute further requires “[a]ny entertainment industry employer and its agents employing minors . . . to notify the department, showing the date of the commencement of work, the number of days worked, the location of the work, and the date of termination.”<sup>91</sup> The number of days worked and time limits include “time spent by minors in rehearsals and in learning or practicing any of the arts.”<sup>92</sup> Additionally, the Florida Administrative Code further limits the amount of time a minor may spend working on a particular production.<sup>93</sup> For example, a minor may not work for more than six consecutive days, may not work before 7:00 am or after 11:30 pm, as well as setting a maximum time of work allowed per day in proportion to the age of the actor.<sup>94</sup> However, once again, these protections do not extend to child video bloggers.

To put it in perspective, Florida law prohibits a minor aged two to five from working more than four hours per day and may not remain in the place of employment for more than six hours per day.<sup>95</sup> For minors aged six to eight, Florida law prohibits the minor to work more than six hours per day and remain in the place of employment

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<sup>90</sup>FLA. STAT. § 450.132(1) (2019).

<sup>91</sup>FLA. STAT. § 450.132(5) (2019).

<sup>92</sup>FLA. STAT. § 450.132(6) (2019).

<sup>93</sup>FLA. ADMIN. CODE 61L-2.006(5) (1993).

<sup>94</sup>*See generally* Florida Child Labor Laws – Entertainment Industry, EMPLOYMENT LAW HANDBOOK,

<https://www.employmentlawhandbook.com/wage-and-hour-laws/state-wage-and-hour-laws/florida/child-labor-laws/entertainment-industry/> (last visited Nov. 1, 2018).

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



for no more than nine hours per day.<sup>96</sup> In the alternative scenario, a child video blogger of the same age, as will be discussed in the next section dealing with the examples of YouTube stars, are records almost all day in order for a video to be edited down to twenty or so minutes. Additionally, the child rarely leaves the place of employment because, for most YouTube stars, that place is the same place that they go to sleep every night: their own homes. In the scenario of the child blogger, the parent is the producer, the child is the actor, and YouTube is the financier film distributor providing the monetary incentive. If a child video blogger was held to the same standard as a child actor is in the state of Florida, there would be a clear violation of Florida law.

### C. CALIFORNIA – THE STATE LEVEL

Another large consumer in the entertainment industry is the state of California, one of the largest noted centers of the entertainment industry. As such, California has attempted to create a comprehensive framework of protection for child actors. One such advent was the implementation of the Coogan Law. As discussed above, the Coogan Law addressed the issues of payment regarding children involved in the entertainment industry. The enactment of the Coogan law requires “[t]he child’s parent . . . to establish a trust and provide the information about the trust to movie producers, who were then required to deposit a portion of the child’s earnings into the trust.”<sup>97</sup> The law, which now requires a minimum of fifteen percent of the child’s earnings to be deposited in the trust, only extends to children classified as actors.<sup>98</sup>

Once again, the child participant in a video blog is not afforded the same protections as the child actor, even though the work performed by the child substantially similar in scope. For a child video blogger living in California, the money earned by the child is the property of the parent and not the child.<sup>99</sup> This means that when a YouTube video blog starring a child is monetized, all the money regardless of amount, is the property of the parent and the parent is not required to maintain a separate trust account in the child’s name.

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<sup>96</sup>*Id.*

<sup>97</sup>Danielle Ayalon, *Minor Changes: Altering Current Coogan Law to Better Protect Children Working in Entertainment*, 35 *Hastings Comm. & Ent. L.J.* 353, 357 (2013).

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

<sup>99</sup>FAM. §7500(a) (2000).

Meaning that the risk of exploitation of young minors is heightened because of the large amount of potential money at stake and there being no current legal remedy available to prevent the exploitation. A parent, who may be incentivized by the potential income available on social media platform, has the ability to produce videos starring their children in a jurisdiction without regulations and keep all the income earned without consequence. Under this grey area, parents are able to spend the money earned without having to account for it, and do not have to report how long the children are being recorded, nor do they have to report the extent of the recording and how invasive the recordings may be. There is no body of law prohibiting the parent's actions nor is there any area of law to protect the child's best interests. Further, the applicability of the protection of the Coogan Law is limited by the fact that currently only five states afford the protection of a child actor's wages.<sup>100</sup>

## V. EXAMPLES OF YOUTUBE STARS

It seems the new American dream is to make it big in the world and domain of social media. Facebook, Instagram, Twitter, and YouTube now dominate the internet through the advent of social media and have changed the landscape for the way information is shared and transmitted across the world. This has opened up new opportunities for the entertainment industry, as well as opening the doors for different income opportunities. For example, a video creator on YouTube "will earn \$2,000 for every million views" on a particular video.<sup>101</sup> This means that for a video content creator producing videos for a popular YouTube channel, such as Ryan's ToysReview, can average several tens of thousands of dollars. However, in a state that does not protect the earned income of a minor, where exactly does this money go and who is held accountable for the actions of the minor?

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<sup>100</sup>*Few Protections for Child Performers, supra note 79.*

<sup>101</sup>*Yes, you can make six figures as a YouTube star... and still end up broke,* BUS. INSIDER, <https://www.businessinsider.com/how-much-money-youtube-stars-actually-make-2014-2> (last visited Nov. 1, 2018).

## A. RYAN'S TOYSREVIEW

*“Meet Ryan, the six-year-old who made US \$11 million in a year reviewing toys on YouTube.”*<sup>102</sup>

Ryan is a six-year-old boy currently producing videos for his channel, Ryan ToysReview. Ryan began his channel in 2015 with his parents following him around with a video camera. “Since he was three years old, Ryan’s parents have been capturing videos of him opening toys, playing with them and ‘reviewing’ them for videos posted on their YouTube channel, ‘Ryan ToysReview.’”<sup>103</sup> According to *Forbes*, Ryan has been recognized as one of YouTube’s highest- paid entrepreneurs, boasting over eight billion views on his channel.<sup>104</sup> By viewing the first video, it is clear that the quality of the camera is low and the parents are clearly following the child’s lead. However, day after day, video after video began to be added to Ryan’s channel. Steadily, the quality of the videos improved, the content became more organized and coercive, and the parents began leading Ryan on pre-planned trips or pre-staged toy areas. Since the channel began, Ryan has uploaded a video almost every day.<sup>105</sup> Additionally, Ryan’s last name and residence has not been disclosed, leaving it rather difficult to discover what jurisdiction is applicable to Ryan.<sup>106</sup> “For kids these days . . . some of the biggest stars are not actors at all but YouTube stars.”<sup>107</sup> However, even with over eighteen million subscribers, regular videos, and sponsorships, Ryan still does not qualify as a child actor and therefore does not have the same applicable legal protections as other children acting in a production. Ryan’s channel is considered unscripted due to the review like nature of the channel, however that does not take into account the amount of time Ryan must be recorded to have material to condense into the uploaded video. Essentially, Ryan has not taken a day off of recording since 2015. Nor does the law consider the vast amount of money that Ryan is

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<sup>102</sup>*Meet Ryan, the six-year-old who made US\$11 million in a year reviewing toys on YouTube*, S. CHINA MORNING POST, <https://www.scmp.com/news/world/article/2123939/meet-ryan-six-year-old-who-made-us11-million-year-reviewing-toys-youtube> (Nov. 1, 2018).

<sup>103</sup>*Id.*

<sup>104</sup>*Id.*

<sup>105</sup>*Ryan ToysReview*, YouTube, [https://www.youtube.com/channel/UChGJGhZ9SOOHvBB0Y4DOO\\_w](https://www.youtube.com/channel/UChGJGhZ9SOOHvBB0Y4DOO_w)

<sup>106</sup>*Meet Ryan, the six-year-old who made US\$11 million in a year reviewing toys on YouTube*, *supra* note 102.

<sup>107</sup>*Id.*

earning in advertisement revenue nor is there any applicable protection measures to hold the parent's accountable for the way Ryan's earnings are spent. Instead, Ryan is only, legally, a participant and not an actor; effected the same as a child situated in a reality television environment is.

## B. THE ENGINEERING FAMILY

The Engineering Family is a YouTube channel created by two parents and features their three children.<sup>108</sup> A majority of their videos center around their oldest daughter, whom they nicknamed and introduced as "Assistant." Assistant goes on several adventures with her father, however, these adventures are not spontaneous. The adventures are preplanned and set up by the parents in order for them to record their children doing specified activities. For example, in several videos, Assistant and her father go on an adventure searching for several characters from popular cartoon series in a park. The father hides the characters in various places and follows his daughter finding the toys. The father normally directs his daughter where to go and interacts consistently with the audience, taking on many similar features of a show directed at an audience for children. Other videos feature elaborate edits placing Assistant in a toy world where she is the size of the other toys and goes on staged adventures. Even with all the similarities between the shows created by the Engineering Family and the productions put on television by big production agencies, the children in the Engineering Family are not afforded the same protections as the children featured on television.

With over three million subscribers and an average of two million views a day, the Engineering Family is estimated to make around \$3,600 dollars a day or roughly \$1.3 million a year.<sup>109</sup> Through "Google Preferred, . . . deep-pocketed companies [are able to] target ads on the top 5% most popular content" resulting in higher than normal advertising prices.<sup>110</sup> The Engineering Family is able to benefit off of the increased advertisement prices, as well as

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<sup>108</sup>*The Engineering Family*, YouTube, [https://www.youtube.com/channel/UC44eGZ76AJLHaxPaJ\\_MW2RA](https://www.youtube.com/channel/UC44eGZ76AJLHaxPaJ_MW2RA)

<sup>109</sup>*How Much Money The Engineering Family Makes on YouTube- Net Worth*, NAILBUZZ, <https://naibuzz.com/much-money-theengineeringfamily-makes-youtube/> (last visited Nov. 1, 2018).

<sup>110</sup>*Id.*

various bonuses associated with YouTube Red Subscribers.<sup>111</sup> Just as with Ryan and the various others listed and not listed here, the income earned by the children is likely unprotected from parental misuse due to the lack of status of the children as child actors. By being categorized as passive participants, the vast accumulation of wealth is left largely unchecked. Additionally, by not qualifying as an actor, the children are not subject to the time constrictions placed on the time spent on work related production, which in most states, includes rehearsal time. Just as in Ryan's channel, the Engineering Family has posted a video almost every day. Without having to account for time spent for production, it cannot be determined how long a child is subject to being recorded and under what circumstances.

### C. DADDYO'FIVE

While a majority of the channels that have experienced great success have done so without harming their children, there have been instances where clear financial motives incentivized parental misfeasance. One such case is seen on the YouTube channel DaddyO'Five; a prime example of the atrocities that could occur when children are not protected. DaddyO'Five was the name of a channel run by Mike and Heather Marin, of Maryland, where the father of five played pranks on his children for his daily videos.<sup>112</sup> After viewers were disturbed with the treatment of the children, the authorities were called into investigate possible allegations of abuse.<sup>113</sup> The videos on the channel showed the children being pranked to the point of tears, peeing on themselves, and jumping whenever their father entered the room. "Every video on the channel amassed more than a million views but the content - depicting the parents shoving, screaming and abusing their five kids - landed them in a world of trouble."<sup>114</sup> Upon finding that the videos contained abusive content, the father and mother were charged with child neglect and two of the children were removed from their care

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

<sup>112</sup>*DaddyO'Five parents lose custody 'over YouTube pranks'*, BBC News, <https://www.bbc.com/news/technology-39783670> (last visited Nov. 1, 2018).

<sup>113</sup>*Id.*

<sup>114</sup>*YouTube channel deleted after months of backlash*, THE NORTHERN STAR, <https://www.northernstar.com.au/news/familyofive-youtube-channel-deleted-after-months-o/3472844/> (last visited Nov. 1, 2018).

and returned to the biological father.<sup>115</sup> The couple's three biological children remain in the care of the parents.

After the removal of the other children and the ordered closure of the DaddyO'Five channel, the father of the children was determined to continue his channel and opened the FamilyO'Five; replacing the two missing family members with himself and his wife.<sup>116</sup> Even with the father being prohibited from pranking his children, the FamilyO'Five channel continued to post videos showing the same type of content as the prior channel.<sup>117</sup> "FamilyO'Five returned with similar prank including footage of their youngest Alex screaming at his dad, "turn off the camera" and falling to the ground in pain after a ball hits him in the crotch."<sup>118</sup> YouTube responded by removing the channel and demonetizing all the videos, stating:

[C]ontent that endangers children is unacceptable to us . . . "[w]e have worked extensively alongside experts in child safety to make sure we have strict policies and are aggressively enforcing them. Given this channel owner's previous strikes for violating our Guidelines prohibiting child endangerment, we're removing all of his channels under our Terms of Service.

<sup>119</sup> Even with the children releasing statements assuring viewers that the pranks were staged and not real, YouTube has stood behind its decision concerning the cancellation of the channels. However, more concerning is that YouTube was unaware of the abuse that was going on the videos prior to reports from viewers, well after the videos had achieved millions of views; yet YouTube is able to successfully identify copyrighted material rather quickly.

The children of the DaddyO'Five channel, although involved in pre-planned, staged, and income-earning productions, once again fall into the category of unprotected participants. The DaddyO'Five channel was still able to rake in roughly \$300,000 dollars before its' closure, income that was earned at the expense of the participant children.<sup>120</sup>

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<sup>115</sup>*Id.*

<sup>116</sup>*Id.*

<sup>117</sup>*Id.*

<sup>118</sup>*Id.*

<sup>119</sup>*Id.*

<sup>120</sup>*How Much Money DaddyO'Five Makes On YouTube*, Nailbuzz, <https://nailbuzz.com/much-money-daddyofive-makes-youtube/>.

## VI. THE YOUTUBE PROBLEM: CHILDREN ARE NOT ACTORS

*“If you are under 13 years of age, then please do not use the Service. There are lots of other great web sites for you. Talk to your parents about what sites are appropriate for you.”*<sup>121</sup>

### A. YOUTUBE TERMS OF SERVICE

Coincidentally, YouTube has expressed in its terms of service, the site’s preference of not having users under the age of thirteen.<sup>122</sup> YouTube’s terms of service require the user to confirm that they are either eighteen or older, or older than thirteen with parental consent.<sup>123</sup> This means that the accounts of Ryan and Assistant must be registered under the name of their parents in order to be in compliance with the YouTube terms of service. The ownership of the account further supports that the revenue earned from the advertisements on the videos starring the children is the property of the parents.

YouTube additionally addresses the topic of child safety on YouTube, citing its zero-tolerance policy for channels that contain sexualization of minors; harmful or dangerous acts involving minors; infliction of emotional distress on minors; misleading family content; and cyberbullying and harassment involving minors.<sup>124</sup> YouTube does not address violations of child labor laws as grounds for termination of a channel. Instead, YouTube expressly states that it is the parent’s responsibility to ensure compliance with local labor laws and for the creator to seek a permit when “employing” a minor.<sup>125</sup> The plain text of the statement leaves a parent to wonder if a permit is required because the parent will likely not see recording their child as an employer/employee style relationship; when, however, it is. The parent is engaging the service of their own child, in exchange for compensation from advertisers. Unfortunately, with the current status of the laws surrounding

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<sup>121</sup>*Terms of Service*, YOUTUBE, <https://www.youtube.com/static?template=terms> (last visited Nov. 1, 2018).

<sup>122</sup>*Id.*

<sup>123</sup>*Id.*

<sup>124</sup>*Child Safety on YouTube*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2801999?hl=en> (last visited Nov. 1, 2018).

<sup>125</sup>*Best Practices for Content with Children*, YouTube, <https://support.google.com/youtube/answer/9229229?hl=en>.

children entertainers, the parents are not doing anything currently illegal by claiming that the children fall under the category of participants and not actors.

#### B. VIDEO BLOGGING V. ACTING

From earlier discussion, the law currently only recognizes certain categories of entertainment as falling under protection depending on the rules of a particular jurisdiction; additionally, there is no federal standard regarding child entertainers. According to Merriam-Webster, acting encompasses “the art or practice of representing a character,” while blogging usually encompasses “personal reflections . . . often in videos and photographs.”<sup>126</sup> However, both are portrayed through media and received by an audience; in the case of YouTube, both also offer compensation in exchange for material to give audiences. By categorizing the video blogs centered around children as personal reflections, the videos essentially fall outside the scope of acting, and therefore also out of the scope of applicable laws. This is true even if the videos share the same characteristics of videos produced in a commercial setting and even if the video’s revenue exceed the thousands.

The categorization of the media is crucial to understanding the legal implications associated with the content. When the content is categorized as a blog, there are no legal protections afforded to that child; provided that the state the child in has even enacted child entertainment laws. One such example is the case of Allie, another child YouTube star, generating thousands of dollars at age thirteen for her reviews on popular toys.<sup>127</sup> Not subject to protection by the her state, Allie’s “mother started pressuring her to work long hours filming and editing.”<sup>128</sup> Allie stated that her experience on YouTube and the pressure from her mother to “provide for the entire family,” caused Allie to develop an anxiety disorder.<sup>129</sup> Allie stated that her mother told her that, through Allie’s channel, “[her mother] would be able to quit her jobs; [her] dad would be able to quit his job . . . [her mother] always told [her] that she would never touch a cent,

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<sup>126</sup>*acting*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/acting> ; *blogging*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/blogging>

<sup>127</sup>*The Dark Side of YouTube Family Vlogging*, INTELLIGENCER, <http://nymag.com/intelligencer/2017/04/youtube-family-vloggings-dark-side.html> (last visited Nov. 1, 2018).

<sup>128</sup>*Id.*

<sup>129</sup>*Id.*



and then it became, ‘I want 30 percent; I want 50 percent; I’m owed this.’”<sup>130</sup> Because “YouTube’s creators are not subject to . . . regulations, . . . the only thing standing between a child and abuse is a parent,” and who stands between the child and the parent, when the parent is the one causing the abuse. “YouTube provides community guidelines for content creators and viewers, but while they specifically prohibit explicit material, violence, and copyright infringement, no mention is made of consent, or compensation for people who appear on channels they do not own.”<sup>131</sup>

### C. PARENTAL INTERFERENCE

There are several problems with the parent/child relationship when it is involved in video blogging for profit at the expense of centering the channel around the child. Aside from the common problem of parental money management for children, “[t]here is also the issue of exploitation and excessive labor and practice demands.”<sup>132</sup> However, “under the current legislation existing throughout the United States, even in those states with strict regulations, there is no way to keep a parent from forcing their child into a quest for stardom.”<sup>133</sup> This is particularly concerning because “present laws might require a child to apply for a permit” but mention nothing regarding a parent’s behavior towards their children when involving the children in the entertainment industry.<sup>134</sup> Leaving a parent’s behavior unchecked results in cases such as Coogan, Temple, and DaddyO’Five.

While states such as California have attempted to create a statutory scheme to protect children from undue influence from third parties, not much is said on whether the child has a say in whether the child wishes to partake on the path to stardom. While California does attempt to address the issue of the child’s wishes to act through the usage of studio teacher reports, a negative report does not necessarily cause automatic revocation of the child’s work permit.<sup>135</sup> Additionally, these protections are limited to California and, once again, would not extend to child bloggers. Child video

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<sup>130</sup>*Id.*

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

<sup>132</sup>Erica Siegel, *When Parental Interference Goes too Far: The Need for Adequate Protection of Child Entertainers and Athletes*, 18 *Cardozo Arts & Ent. L.J.* 427, 428 (2000).

<sup>133</sup>*Id.* at 429.

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

<sup>135</sup>*Id.* at 445.

bloggers are highly susceptible to undue influence by their parents and there are absolutely no laws regarding whether a child has the option to consent to being recorded by their parents for blogging purposes on social media; even if their personal identity is being used for monetary gain that is allocated solely to the parents.

## VII. SOLUTION

Currently, no law exists to protect minor-aged actors that participate in monetized videos on YouTube or similar platforms. Unfortunately, there is no simple solution to the problem but several do exist.

First and foremost, the first step towards uniformity would be for a change of law at the federal level to remedy the Shirley Temple exception of the Fair Labor Standards Act of 1938. Creating a uniform statute that, at the very least, created a uniform meaning of the term “actor” or “performer.” With the explosion of the internet and various social platforms, the legislative branch has been unable to amend and change laws at the same rate. A simple solution that could be applied more quickly would be to define actor in such a manner to include performers on all levels of monetized broadcasts. A federal definition of what constitutes an actor in the entertainment industry would help guide states on implementing policies that protect those involved in emerging monetized social media entertainment platforms. By establishing a definition of actor that would include the child video blogger and other similarly situated children, states could keep their current statutory schemes that they had created for the child actor and instead extend the statutes’ class of protected individuals. While this would not address the issue of the eighteen states that currently do not have child entertainment laws on their books, this would be the beginning of equalizing protections for various types of children entertainers. The ideal situation would be to take the determination of child entertainment labor laws out of the hands of the states and into one set uniform scheme that would provide protection to children no matter where the children are located in the country. A parent should not have the ability to relocate to an area that would provide a child less protection in order for the parent to gain monetarily off of the child’s personal expense.

A second alternative is for an entire section of statutory law be created with the intent to address minor aged performers uploading monetized videos to social platforms; if the statutory scheme was

not one at the federal level, each state would have to take it upon themselves to inform themselves and update their laws according to the advancements in technology that have taken place over the last several years. This body of law could address issues specifically pertaining to these types of monetized social media videos, while leaving the current children entertainment laws as is for the continued use in cinematic production. For example, this particular body of law may address certain issues that child video bloggers face when employed by their parents on monetized platforms. The statutory scheme could detail permitting requirements to obtain a license to work as a minor, limiting work hours and days, creating guardianships, financial management requirements, and content management. Additionally, the body of law may address certain issues particular to video blogging such as limiting the amount of stage time a minor has when the stage is their physical home, and the appointment of an independent trustee to oversee the child's financial interests when the parents are the sole owners of the channel according to YouTube guidelines. In order to enforce these regulations, a separate agency should be created to oversee the individuals licensed in their jurisdiction in order to ensure compliance with the requirements set forth by the statutes. Individuals claiming income from social media platforms should be required to state if a minor child substantially contributed to the family obtaining that money, and if so, the state should ensure that certain remedies exist for the child's interests to be protected from exploitation.

A third alternative deals with intervention by the judiciary. While it is not the judiciary's position to create law, the judiciary may interpret the law and its application. If the legislative branch is unable to create a statutory body of law aimed towards the protection of minor-aged social media actors, the judiciary may be able to step in to interpret the meaning and application of the terms actor and performer. Although this alternative would only be possible if a case was presented to the courts for interpretation, it may not be long before the children of YouTube realize that they may be entitled to more money than they thought.

Although completely hypothetical, it is possible that many of these young YouTube stars are entirely unaware of the amount of money their videos are bringing in or, at the very least, do not understand nor appreciate the significance behind the amount of money the children are generating in comparison to the average job. For example, take Ryan from Ryan's ToysReview who is currently

six years old and likely does not understand that he is, in fact, a rather self-made multi-millionaire. If Ryan's parents are the sole owners of the YouTube account, it is possible that all the income generated by Ryan is the legal property of the parents; even though Ryan is the face of the channel. Without having to account for the funds, Ryan's age and experience as a child, and the parents being the legal owners of the money, Ryan would likely not have access to the money, nor would Ryan likely ask his parents for it. The issue would likely arise as Ryan grows older and comes to understand just how much money he has actually generated. Following Coogan's footsteps, it is likely that stars like Ryan will begin to want a so-called 'piece of the pie' that he worked so hard for all these years. If Ryan's parents were not obligated to establish a Coogan trust or required to retain a certain portion in trust for Ryan, it is possible that the money generated by Ryan's actions will be unavailable to him later in life, and there would be nothing Ryan could do about it if the law did not define him as a child entertainer.

Aside from the money, without statutory protection the children of YouTube can literally be subject to being recorded twenty-four hours a day, seven days a week under the guise of family blogging. Being monitored consistently and having the pressure to create content for third parties can be psychologically taxing on anyone, especially minor children. Statutory protection is necessary to ensure that a child is given time to be a child, focus on education, and be given private personal time.

### **VIII. POTENTIAL ISSUES TO EXPANDING CHILD LABOR LAWS TO YOUTUBE**

Although expanding protection to minor-aged children actors would be in the best interest of the child, this would not outweigh constitutional guarantees. Constitutional issues could arise when courts or the legislative branch intervene in correcting the old statutes. For example, one of the reasons referenced by the FCC for its hesitance on expanding its reach to the internet is its concern with the constitutional implications of the First Amendment on an individual's right to free speech and its extension to an individual's right to post whatever they would like on the free internet.<sup>136</sup> However, this issue could be addressed by specifically tailoring the limitation and monitoring to videos that are created and monetized

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<sup>136</sup>Hettich, *supra* note 88, at 1448.

for the purpose of generating income, and that the income is generated, in substantial part, by a minor, who is under the control and direction of a parent; legal guardian; or employer. This would tailor the restrictions imposed onto children video bloggers and to those wishing to claim an income from advertisers, sponsorships, and partnerships; leaving those who wish to create blogs for the genuine purpose of creating in order to express the First Amendment rights, to go untouched. The family would not be prohibited from expressing their views and exercising their right to freedom of speech, instead the family would just be required to obtain a permit to continue posting their videos of their minor children if the parent wishes to monetize the content.

The ultimate goal is to protect the minor from financial exploitation from their parents. There would be no prohibition on people over the age of eighteen. Even if there were additional constitutional claims, it is likely that through specifically tailoring the needs to protect minors from exploitation on monetized video platforms, the claims could be remedied. For example, if a claim was brought that claimed restricting the uploading of content by children video bloggers is a violation of substantive due process under the Fourteenth and Fifth amendments, the claim would likely not apply to creating video blogs of minor children, as this is not a fundamental right of the people that had been long established in our nation's history. Even if a procedural due process violation was found, it is likely that the violation could be overcome through the establishment of certain procedures. For example, requiring notice that the channel will be closed in a certain amount of days due to failure to obtain a work permit and allowing for the issue to be remedied through compliance with the statute would likely satisfy such a claim. Additionally, allowing for review of channels that were forcibly closed due to noncompliance could also aid in preventing misapplication of the statute to channels that were not attempting to gain financially.

Another hurdle to consider would be if some individual or entity opposed the enactment of a new or updated law by arguing that these types of video bloggings do not qualify as performances. For example, they could argue that these videos follow the family as they proceed throughout their daily life. They would argue that the child is unscripted and that they are following the child's cues. The counterargument to this would be that the videos that are preplanned, regardless if there is a script or not, qualifies as a performance. There are many cinematic films that are unscripted

that still qualify as performance and entertainment. A script is not mandatory for a work to be classified as entertainment. However, this issue could once again be addressed by specifically aiming the law to be focused on individuals wishing to gain and benefit financially from the content created.

An opposing party could also argue that requiring work permits and monitoring is unduly burdensome on the family. However, requiring that permits be issued for minor children will assure that children are not exposed to long hours, inappropriate content, and are receiving adequate compensation. Requiring a family to get a permit for their children for video blogging for financial gain would be no more burdensome than getting a work permit for a child actor working in the cinematic world. Additionally, under a cost-benefit analysis, the cost of obtaining a work permit for monetized video blogging does not outweigh the benefit of protecting a minor from exploitation by their own family; ultimately the child's best interest should outweigh a parent's minor inconvenience of obtaining a permit.

A final argument for consideration is also the most obvious; YouTube is a social media platform that is available worldwide. It would be impossible and impractical to attempt to create regulations on the videos, especially considering the rate at which videos are constantly uploaded to the site. However, statutory law could require YouTube to comply with and administer restrictions on videos originating from the United States, and further limiting it to those videos that are receiving monetary compensation. YouTube has been able to successfully identify and remove copyrighted material quickly and effectively, there would be little room to argue that it would not be possible to easily identify content creators that receive income from YouTube that is substantially derived from the efforts of a minor; especially considering YouTube's change in monetization requirements.<sup>137</sup> YouTube expressly stated that increasing the amount of watch time and subscriber count before users would be eligible for monetization was to enable YouTube to ensure that the content uploaded to the site conformed with their guidelines.<sup>138</sup> It would not cost YouTube an unreasonable expansion of effort to simply add the task of monitoring for channels that devote a substantial portion of the monetized content to the videos of minor children when YouTube already has begun implementing

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<sup>137</sup>Spangler, *supra* note 71.

<sup>138</sup>*Id.*

a policy of monitoring the channels for abuse. YouTube could flag channels and require that the channel upload the required work permit in order to continue receiving revenue.

While the ultimate goal is to protect children worldwide, the first step would be to implement these changes nationally. By requiring accounts that do a majority of their videos in the United States to follow these regulations, children in the United States can begin to receive protection from possible exploitation from a newly emerging and lucrative entertainment industry. Statutory reform is necessary in order to ensure that a child is not overworked and that the child's financial and personal interests are fully protected.

## IX. CONCLUSION

Today, technology evolves rapidly on a daily basis. The law, on the other hand, evolves sporadically. Change can occur very rapidly, but it can also occur very slowly; as is and has been the case with the current laws on entertainment. The current body of law does not recognize children who perform on monetized videos published on social media sites as actors; even though a substantial amount of time and income is involved in the creation of the content. The disparity between technology and the law leaves an entire class of individuals unprotected from the producers of the monetized content; which unfortunately is usually the children's own parents. Parents in these situations are able to exploit their children without restriction and without government intervention. While a majority of families do not intentionally exploit their children, the issue is that exploitation still does occur, and the law must be able to provide protection for those minors. For example, an overzealous parent may over excitedly push their child to play more in order to produce more videos or as simple as a parent who excessively follow their child around with a camera, even when the child does not want to be filmed. What separates a parent from merely filming their everyday life and sharing it with others is the monetization of the videos, which is usually the underlying motivation for many of these YouTube channels. The focus of this comment is to extend protection to the new generation of children entertainers by focusing on setting restrictions, boundaries, and guidelines for individuals that wish to monetize videos that are substantially produced through the usage of minor children.

YouTube currently disclaims liability towards children in its Terms of Services and places the children's protection in the hands

of the people creating the content that is being uploaded to the website.<sup>139</sup> This could imply that YouTube has already foreseen the possible implications of child labor laws on the videos being created by its members, especially considering that YouTube's top earners generally post content on a daily basis. Although there are many arguments, such as those presented above, against extending child labor laws; these arguments do not defeat the favored public policy of protecting the interests of our minor aged children.

This comment presented three alternatives to changing the current scheme of statutory laws that govern children video bloggers that take part in monetized videos on YouTube and other similar social media sites. The first alternative involves extending the application of the terms actor and performer, as well as other key words, in order to allow current statutes to cover monetized children video bloggers on social media. The second alternative deals with an entire new body of law being created to deal with these situations, that could either be adopted nationally or by each individual state. The laws would have to include certain permitting requirements, time limits on recording, and financial management by an independent trustee. Additionally, these laws would only apply to channels focused on monetization through the usage of children video bloggers in order to limit the amount of intrusion by the government into the public's right of free speech and other constitutional protections. Finally, the third alternative involves waiting for a proper case to be tried under the judiciary in order for the judiciary to be able to interpret whether a child video blogger, who has gained revenue on YouTube and other social media sites, qualifies as an actor and whether the child will be entitled to the same protections. While there is no clear cut, bright lined solution, protecting minors from personal and financial exploitation is in the best interest of all involved, both at the federal and state level.

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<sup>139</sup>*Terms of Service*, *supra* note 121.