

2020

The Kids Are Alright? The Need for Kidfluencer Protections

Ana Saragoza

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/jgspl>



Part of the [Entertainment, Arts, and Sports Law Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Saragoza, Ana (2020) "The Kids Are Alright? The Need for Kidfluencer Protections," *American University Journal of Gender, Social Policy & the Law*. Vol. 28 : Iss. 4 , Article 3.

Available at: <https://digitalcommons.wcl.american.edu/jgspl/vol28/iss4/3>

This Comment is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Journal of Gender, Social Policy & the Law by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

THE KIDS ARE ALRIGHT? THE NEED FOR KIDFLUENCER PROTECTIONS

ANA SARAGOZA*

I.Introduction	576
II.Background	578
A. The Squandering of Child Actor Earnings	579
1. History	579
B. Brief Introduction to California's Coogan Law	581
1. Blocked Trust Accounts.....	581
2. Attempt to evolve California's Coogan Law	583
C. Minors' Right of Publicity and COPPA.....	584
1. Minors' Right of Publicity.....	584
2. FTC's Presence in Social Media Regulation	585
III. Analysis	586
A. Current Coogan Laws fail to provide kidfluencers with adequate protection, leaving them at the mercy of their parents voluntarily putting money into blocked trust accounts.	586
B. The Work Kidfluencers Perform Resembles the Work Child Performers Engage in and Falls Under the Scope of Protection that California's Coogan Law and Child Labor Laws were Intended to Encompass.	589
C. The FTC's current failure to prosecute deceptive practices in influencer marketing will leave kidfluencers increasingly vulnerable to financial manipulation and COPPA infractions.	594
IV.Policy Recommendation.....	598
A. Amend Current Coogan Laws to expand their scope of protection to include kidfluencers and require the creation of blocked trust accounts.	599

* Ana Saragoza is a Juris Doctor candidate at American University Washington College of Law. She received her B.A. in Foreign Affairs and Spanish from the University of Virginia in 2014. Ana would like to thank her fiancé, Chris, for providing a voice of reason throughout law school. She would also like to thank Professor J. Jonas Anderson, Professor Fernando Laguarda, and all staffers for their guidance and support.

B. Require disclosures on sponsored posts that signal to consumers that a kidfluencer is being adequately compensated for their participation in sponsored content on social media platforms.....	600
V.Conclusion	601

I. INTRODUCTION

“Maybe guys have your hand on the toy but remember the camera. Leah, I can’t see your face babe, we gotta [sic] see it a little bit.”¹ Nine-year-old identical twins Leah and Ava Clements are comparatively new to influencing, having started at the age of seven.² Now at age nine, the twins have over one million followers on Instagram.³ The twins can earn upwards of ten thousand dollars per sponsored post.⁴ The Instagram influencer marketing business is estimated to be valued between five and ten billion dollars.⁵ Just as successful are minors who secure equally lucrative sponsorships for product placement in photographs for social media, known as being a “kidfluencer.”⁶

Leah and Ava Clements are not alone in their revenue generating power.⁷

1. CBSN Originals Documentary, *Kid Influencers: Few Rules, Big Money*, CBS NEWS, <https://www.cbsnews.com/video/kid-influencers-few-rules-big-money/#x>. (last visited Jan. 19, 2020) (showing the twins’ mother directing the twins in a photo shoot) [hereinafter *Few Rules, Big Money*]

2. See Ines Novacic, “It’s Kinda Crazy”: *Kid influencers Make Big Money on Social Media, and Few Rules Apply* (Aug. 23, 2019), <https://www.cbsnews.com/news/kid-influencers-instagram-youtube-few-rules-big-money-cbsn-originals/> (comparing the Clements twins to the three-year old Fisher twins and six-year old McClure twins to show the Clements late start into kidfluencing).

3. See Clements Twins (@clementstwins), INSTAGRAM, <https://www.instagram.com/clementstwins/?hl=en> (last visited Mar. 9, 2020).

4. See *Few Rules, Big Money*, supra note 1 (comparing the Clements’ earning power to the Fishers’, who are projected to earn upwards of \$200,000 per month).

5. See *The Influencer Marketing Industry Global Ad Spend: A \$5-\$10 Billion Market by 2020*, MEDIKIX (MAR. 6 2018), <https://mediakix.com/blog/influencer-marketing-industry-ad-spend-chart/#gs.ibuM4hc> basing its predictions on advertisers spending \$1.6 billion in 2018 on Instagram alone).

6. See Katharine Schwab, *The 2-year-old Instagram Influencers That Make More Than You*, FAST COMPANY (Dec. 17, 2018), <https://www.fastcompany.com/90278778/the-2-year-old-instagram-influencers-who-make-more-than-you-do> (stating that a child with 500,000 followers can earn up to five thousand dollars for a single image).

7. See Sapna Maheshwari, *Online and Making Thousands at Age 4: Meet the Kidfluencers*, THE NEW YORK TIMES (Mar. 1, 2019), <https://www.nytimes.com>

Another way to get started as a successful kidfluencer is to be born to an established influencer.⁸ Amber Fillerup Clark, of Barefoot Blonde, with over one million followers on Instagram, has three children, Atticus, Rosie, and Frankie.⁹ Rachel Parcell, of Pink Peonies, also with over one million followers on Instagram, has two children, Isla and Jackson.¹⁰ Influencers are known to use various combinations of their burgeoning kidfluencers in sponsored posts.¹¹

Despite all the money in this business and however they got their start, whether kidfluencers are adequately compensated for participating in sponsored posts remains unclear because their parents are not obligated to set aside their children's earnings.¹² Kidfluencers are at risk of having their earnings squandered like child actors of the 1900s, such as Macaulay Culkin, Shirley Temple, and Gary Coleman.¹³ California's Coogan Law, nicknamed after swindled child actor Jimmy Coogan, is the closest kidfluencers have been able to get to protection from mismanaging parents.¹⁴ In 2018,

/2019/03/01/business/media/social-media-influencers-kids.html (featuring Ryan ToysReview, who earned twenty-two million dollars in one year).

8. Arielle Charnas (@ariellecharnas), INSTAGRAM, <https://www.instagram.com/ariellecharnas/?hl=en> (last visited Mar. 9, 2020) (showing pictures of Arielle's daughters throughout her homepage).

9. Amber Fillerup Clark (@amberfillerup), INSTAGRAM, <https://www.instagram.com/amberfillerup/?hl=en> (last visited Mar. 9, 2020) (showcasing her three children throughout her homepage).

10. Rachel Parcell (@rachparcell), INSTAGRAM, <https://www.instagram.com/rachparcell/?hl=en> (last visited Mar. 9, 2020) (highlighting her children throughout her homepage).

11. See Arielle Charnas (@ariellecharnas), INSTAGRAM, <https://www.instagram.com/p/B6Jr4WCgbIy/> (last visited Dec. 6, 2019) (showing Arielle and Ruby in a sponsored advertisement for Amazon); Amber Fillerup Clark (@amberfillerup) INSTAGRAM (Dec. 6, 2019) <https://www.instagram.com/p/B5wKlZuJ9K0/> (boasting the entire Clark family in a paid partnership for Lands' End); Rachel Parcell (@rachparcell) INSTAGRAM, (Dec. 6., 2019), <https://www.instagram.com/p/B5vaQrlJQUC/> (featuring the entire Parcell family in a paid social media post for Jack Black skincare).

12. See Maheshwari, *supra* note 7 (noting that it is a voluntary decision by parents to set aside their child's earnings).

13. See Destiny Lopez, *7 Celebs Whose Parents Decimated Their Fortunes*, BUSINESS INSIDER (April 2, 2014), <https://www.businessinsider.com/7-celebs-whose-parents-decimated-their-fortunes-2014-4> (contrasting the legal disputes over Culkin's trust account, Temple's stolen earnings, and Coleman's lawsuit against his parents) [hereinafter *7 Celebs*]

14. See Shayne J. Heller, *The Price of Celebrity: When a Child's Star-Studded Career Amounts to Nothing*, 10 DEPAUL J. ART, TECH. & INTELL. PROP. L. 161, 166 (1999) (demonstrating how Coogan was able to achieve enhanced legal protections for child actors).

California attempted and failed to pass further protections that kidfluencers needed, such as setting up trust accounts for earnings in sponsored posts.¹⁵ This comment will examine the need for a stronger Coogan Law and explore the role that the Federal Trade Commission (“FTC”) can play in regulating kidfluencing.¹⁶ As children continue to be monetized, child labor laws need to evolve to enhance protections for the earnings that children generate.¹⁷ Ultimately, the lack of kidfluencer laws place children at serious risk of exploitation.¹⁸

Part II explains the history of the enactment of California’s Coogan Law, whether minors have a right of publicity, and the rise of the FTC’s policing in influencing and social media marketing.¹⁹ Part III compares protections for kidfluencers and Californian child laborers and scrutinizes the FTC’s role in policing endorsements.²⁰ Part IV recommends how Coogan Laws should be amended and what the FTC can do to monitor social media posts.²¹ Part V recommends that companies should perform their due diligence when contracting with parents of kidfluencers.²²

II. BACKGROUND

The squandering of child actor earnings has a fraught legislative history in California.²³ To protect children, laws like California’s Coogan Law were

15. See Julia Carrie Wong, ‘It’s Not Play if You’re Making Money’: How Instagram and YouTube Disrupted Child Labor Laws, THE GUARDIAN (Apr. Apr. 29, 2019), <https://www.theguardian.com/media/2019/apr/24/its-not-play-if-youre-making-money-how-instagram-and-youtube-disrupted-child-labor-laws> (highlighting Assemblymember Chu’s struggle to incorporate non-monetary income like tickets, toys, and clothes that kidfluencers also receive as payment).

16. See *infra* Part II (demonstrating the FTC’s jurisdiction in social media advertising).

17. See *infra* Part IV (suggesting that parent managers should deposit earnings into blocked trust accounts and that the FTC should require disclosures on social media posts).

18. See *id.* (concluding that kidfluencers will remain unprotected without changes to existing laws).

19. See *infra* Part II (providing information of minors’ rights).

20. See *infra* Part III (arguing that kidfluencers should receive similar protections afforded to those already in existence for child performers and lobbying for the FTC to regulate sponsored posts).

21. See *infra* Part IV (suggesting revisions to current Coogan laws and disclosure hashtags for sponsored content).

22. See *infra* Part V (concluding that kidfluencing is an emerging field of law that the law should account for).

23. See Heller, *supra* note 14, at 167-69 (1999) (comparing the difference in

also enacted in Louisiana, New Mexico, and New York, to ensure the earnings of child actors would be safeguarded from their parents or unscrupulous managers.²⁴ Whether kidfluencers can consent to the use of their image or likeness in advertisements or use the Coogan Law as a recourse still remains unsettled.²⁵ In the constantly evolving social media age, federal law has recognized the need to protect minors, as shown through the Children's Online Privacy Protection Act ("COPPA") that was passed in 1998.²⁶

A. *The Squandering of Child Actor Earnings*

1. *History*

At the dawn of the motion picture age, child actors in California were vulnerable to their parents spending most of their earnings before they reached the age of majority.²⁷ After a successful career, best known for roles in Charlie Chaplin films, Jackie Coogan reached the age of majority and learned that his parents had spent most of his earnings from his child acting career.²⁸ Coogan sued his parents but was unable to prevail because at the time, the money that a child earned belonged to his parents.²⁹ Until 1939, child actors had no recourse against their parents.³⁰

In *Phillips v. Bank of America*, California's Court of Appeal helpfully

protections for children with long-term and short-term contracts and the lack of substantive changes in the law since 1939).

24. See LA. STAT. ANN. § 51:21332133 (2005) (requiring fifteen percent of a minor's gross earnings to be placed into a trust account); N.M. STAT. ANN. § 50-6-19 (West 2007) (designating fifteen percent of a minor's gross earnings to be deposited into a trust account); N.Y. EST. POWERS & TRUSTS § 7-7.1 (McKinney 2004) (demanding that fifteen percent of a minor's gross earnings be transferred into a trust account).

25. See *Few Rules, Big Money*, *supra* note 1 (demonstrating how kidfluencer parents sign their children up for marketing campaigns with companies).

26. See 16 C.F.R. § 312.6 (2013) (giving parents control over what information websites can collect from their children).

27. See Heller, *supra* note 14, at 166 (explaining that any money earned by children belonged to their parents).

28. See *id.* at 166 (revealing that Coogan had earned his money by acting in silent films).

29. See Thom Hardin, *The Regulation of Minors' Entertainment Contracts: Effective California Law or Hollywood Grandeur*, 19 J. JUV. L. 376, 380 (1998) (showing that while Coogan's mother might not have thought the earnings belonged to her, she was nonetheless entitled to the money Coogan earned).

30. See CAL. CIV. CODE § 36.1 (West 1939) (enacting the original protections for child actors).

analyzed the legislative intent behind California's Coogan law, which is to preserve a portion of the minor's earnings for the minor's use when the minor reaches the age of majority.³¹ Specifically, the court adds that the purpose of Coogan Trust Accounts is to preserve the minor's *gross* [emphasis added] earnings until the minor reaches the age of majority, preventing anyone, even banks, from withdrawing deductions for taxes or fees of any kind without court approval.³² However, the case does recognize that despite these protections, the aforementioned child actors still received a small percentage of what they truly earned during their child actor careers.³³

Jackie Coogan is still not alone in having his parents abuse his child actor earnings; contemporary stars have continued to suffer financially at the hands of their parents.³⁴ In 2011, Leighton Meester of *Gossip Girl* fame and a former child actor, sued her mother for misappropriating financial assistance funds that Meester was providing to her mother.³⁵ Instead of using the funds for Meester's younger brother's medical care, the complaint alleged that Meester's mother was using the funds for cosmetic procedures, including plastic surgery, Botox injections, fillers, and hair extensions.³⁶ In 2012, Meester was able to secure a default judgment in the case against her mother when her mother refused to appear in court to deny the allegations that she misappropriated the funds Meester voluntarily provided.³⁷ Meester was one of many child stars subject to parent extortion; her contemporaries include Ariel Winter of *Modern Family*, Mischa Barton of *The O.C.*, and Chris Warren of *High School Musical*.³⁸

31. See *Phillips v. Bank of Am., N.A.*, 186 Cal. Rptr. 3d 434, 438 (2015) (detailing the evolution of the Coogan Law since its enactment).

32. See *id.* at 440 (denying Bank of America's argument that banks could charge blocked trust accounts administrative fees, thereby withdrawing money from the accounts).

33. See *id.* at 438 (showing how Coogan law protections still failed to prevent financial abuse for child actors).

34. See Lopez, *supra* note 13 (noting how Coogan Law still allows for parents to use eighty-five percent of their child actor's earnings).

35. See *Meester v. Meester*, No. BC466072, 2011 WL 2941537, at *33 (Cal. Unrep. July 22, 2011) (detailing how Meester voluntarily sent her mother approximately \$7,500 per month for her brother's medical expenses).

36. See *id.* (suggesting that Meester's mother was using the funds provided to her inappropriately and not for the agreed upon purpose).

37. See *id.* (dismissing the claim for failure to litigate the action).

38. See Katherine Webb, *All the Child Stars Who Sued Their Parents*, Showbiz CheatSheet (June 6, 2018), <https://www.cheatsheet.com/entertainment/child-stars-who-sued-their-parents.html/> (revealing that Winter successfully won her emancipation case, Barton claimed her mother stole millions from her over two decades, and Warren secured

B. Brief Introduction to California's Coogan Law

1. Blocked Trust Accounts

Section 6750 of California's Family Code states that an employment contract with a minor includes but is not limited to, services as an actor, performer, or entertainer.³⁹ Thus, Section 6753 requires trustees to establish trust accounts (also known as a "Coogan Trust Account") for the purpose of preserving a minor's gross earnings.⁴⁰ The trustees are required to establish the trust within seven business days of the minor signing the contract.⁴¹ Further, until the beneficiary of the trust turns eighteen years old or becomes an emancipated minor, funds cannot be withdrawn from the trust account without an order from California's Superior Court.⁴² Once the beneficiary turns eighteen years old, the beneficiary must still provide a certified copy of their birth certificate to the trust's bank.⁴³ Section 6753 further states that the trustees must provide the minor's employer with the trust's routing information so that the minor's employer can deposit funds into the account.⁴⁴ The Section also includes obligations that apply to the financial institution or company where the trust is held.⁴⁵

Section 6752 of California's Family Code states that fifteen percent of a minor's gross earnings must be set aside by the minor's employer and deposited into a trust or other savings plan.⁴⁶ However, California courts can always order that more than fifteen percent be deposited into a minor's

a \$330,000 judgment against his parents).

39. *See* CAL. FAM. CODE § 6750(1) (West 2020) (including contracts where a minor is employed or agrees to render artistic or creative services).

40. *See* CAL. FAM. CODE § 6753(a) (West 2020) (requiring that the trust account be established at a bank, savings and loan institution, credit union, brokerage firm, or company).

41. *See id.* (mandating that the trustee must attach a written statement from the financial institution confirming the creation of the account).

42. *See* CAL. FAM. CODE § 6753(b) (West 2004) (allowing beneficiaries to withdraw the funds on deposit when they turn eighteen).

43. *See id.* (cross-referencing to § 6752(c)(5), which states that the court can at any time, with good cause shown, order that the trust be amended or terminated).

44. *See* CAL. FAM. CODE § 6753(c) (West 2004) (subjecting the written statement with the account's information under the penalty of perjury).

45. *See generally* CAL. FAM. CODE § 6753(d-e) (West 2004) (requiring that the trust remain insured at all times by the Federal Deposit Insurance Corporation and properly handled by financial institutions).

46. *See* CAL. FAM. CODE § 6752(b)(1) (West 2020) (preserving the earnings for the benefit of the minor).

trust.⁴⁷ Section 6752 also absolves the minor's employer of any responsibility after the employer receives confirmation from the financial institution where the trust is located that the minor's earnings have been deposited into the account.⁴⁸ If a trustee fails to provide the minor's employer with the required information, the employer can forward fifteen percent of the minor's gross earnings to The Actors' Fund of America, which will then become the trustee of the minor child's earnings.⁴⁹ Lastly, trustees must manage Coogan Trust Accounts in accordance with Sections 16062 and 16063 of California's Probate Code.⁵⁰

When parents fail to uphold their fiduciary duties with respect to their child's acting earnings, they can be found guilty of negligence and fined in damages.⁵¹ In *Watson v. Watson*, Angela Watson, a child actress on *Step by Step*, sued her parents for mismanaging her trust account and misappropriating her income.⁵² Twenty-five percent of Angela's *Step by Step* earnings were deposited into a trust account while any earnings above twenty-five percent were deposited into an "in trust for" ("ITF") checking account that her mother opened on Angela's behalf.⁵³ The court found that Angela's parents had a fiduciary duty in regard to Angela's blocked trust account, and that her parents had failed that duty by mishandling her tax returns, using her earnings for their own purposes out of Angela's ITF account, and failing to invest trust assets for her benefit.⁵⁴

47. See *Watson v. Watson*, No. B158189, 2003 WL 21546062, at *1 (Cal. Ct. App. July 10, 2003) (ordering Angela Watson's parents to deposit twenty-five percent of her *Step by Step* salary into her trust, an amount exceeding the statutory minimum of fifteen percent).

48. See CAL. FAM. CODE § 6752(b) (5-6) (West 2020) (divesting financial responsibility from the employer back to the trustee of the minor, who must then complete an annual accounting of the funds held in the trust).

49. See CAL. FAM. CODE § 6752(b)(9) (A-C) (West 2020) (protecting the minor's earnings until the minor turns eighteen or is emancipated).

50. See *id.* at (b)(6), (c)(4) (cross referencing to CAL. PROB. CODE § 16062-3 (West 2017), which dictates how trustees should manage trust accounts).

51. See *Watson*, 2003 WL 21546062, at *3, *7 (holding that Angela's parents made false representations and used her earnings for their own benefit).

52. See *id.* at *1, *3 (finding that Angela's parents failed to maintain adequate financial records and ignored IRS inquiries, burdening Angela with improperly filed tax returns).

53. See *id.* at *1 (stating that Angela's parents improperly commingled their own funds into the ITF and joint checking accounts and paid family expenses from these accounts).

54. See *id.* at *3 (upholding a judgment from California's Superior Court of Los Angeles County).

2. *Attempt to evolve California's Coogan Law*

Since its enactment, California's Coogan Law has undergone several revisions to enhance protections for child performers.⁵⁵ California's Coogan Law is also cross referenced in California's Labor Code.⁵⁶ In 2018, California Assemblyman Kansen Chu attempted to amend Section 1310 of California's Labor Code to regulate the employment of a minor in social media advertising.⁵⁷ Assemblyman Chu's proposed amendment attempted to expand the existing requirement of applying for work permits on behalf of minors to minors that participate in social media advertisements.⁵⁸ Under the proposal, "social media advertising" was defined as the "use, demonstration, or placement of a product through a social media communication pursuant to a contract . . ."⁵⁹ The final version of the bill failed to add "social media advertising" to the definition of employment under child entertainment law, exempting minors participating in social media advertisement from the work permit requirement.⁶⁰ Opponents of the bill argued that it would be difficult to oversee kidfluencers because unlike traditional child actors, who work under strict schedules and oversight, social media advertisements can be filmed at any time.⁶¹ Further, the bill's opponents contended that it would be difficult to impose current schooling requirements that apply to child actors on kidfluencers because kidfluencers

55. See Danielle Ayalon, *Minor Changes: Altering Current Coogan Law to Better Protect Children Working in Entertainment*, 35 HASTINGS COMM. & ENT. L.J. 351, 358358 (2013) (explaining the history of Coogan Law changes in 1992, 2000, and 2004).

56. See CAL. LAB. CODE § 1308.9 (West 2004) (reinforcing the requirement that the Labor Commissioner must provide written consent, explaining the effect of failing to timely establish a Coogan Trust Account, and detailing how to apply for written consent to employ a minor for more than once in a six-month period).

57. See Harper Lambert, *Why Child Social Media Stars Need a Coogan Law to Protect Them From Parents*, HOLLYWOOD REPORTER (Aug. 20, 2019), <https://www.hollywoodreporter.com/news/why-child-social-media-stars-need-a-coogan-law-protect-parents-1230968> (comparing kidfluencers to child actors who must obtain work permits).

58. See 2017 Cal. Assemb. B. No. 2388, Cal. 2017-2018 Reg. Sess. (proposed May 21, 2018) (clarifying the amendment to include contracts involving social media advertising).

59. See *id.* (stating that the contract can be any form of employment of a minor, either through a parent or third party).

60. See CAL. LAB. CODE § 1310 (West 2019); *Protecting Your Child Star's Earnings*, MORGAN STANLEY (Oct. 14, 2019), <https://www.morganstanley.com/articles/protecting-child-stars-earnings> (exempting kidfluencers if their social media performances are unpaid and shorter than an hour).

61. See Lambert, *supra* note 57 (arguing that enforcing work permits on kidfluencers would be difficult because kidfluencers have more flexibility around their work schedules than child actors).

typically work outside of school hours.⁶²

C. *Minors' Right of Publicity and COPPA*

1. *Minors' Right of Publicity*

The right of publicity includes the right to control the commercial use of one's identity, and the protection is state based.⁶³ In particular, California recognizes a statutory and common law right of publicity.⁶⁴ Yet, minors' ability to use the right of publicity as a possible legal protection is limited in California.⁶⁵ Under Section 3344 of California's Civil Code, a person cannot knowingly use another's name, voice, signature, photograph, or likeness, without the consent of a minor's parent or legal guardian.⁶⁶ With parental consent, a person can use the minor's image for the purposes of advertising, selling, or soliciting purchases of products, merchandise, goods, or services.⁶⁷

In *Faloon v. Hustler Magazine*, the Fifth Circuit's Court of Appeals used California law to determine whether a parent signed away her minor children's right to privacy.⁶⁸ The parent had signed photographic release forms on behalf of her children.⁶⁹ The court held that California recognizes the authority of a parent to consent to the photographing of their children, and that children cannot consent.⁷⁰ The court rejected the parent's argument that a minor can void a contract, further upholding the validity of Section 3344, stating that the parent knowingly consented to the use of her children's

62. *See id.* (stating that it would be unreasonable to send an on-set educator to a kidfluencer's home while they film YouTube videos in their basement).

63. *See* Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 226 (2005-2006) (explaining that the right of publicity has historically focused on a person's economic value of their identity and that the laws differ from state to state).

64. *See* CAL. CIV. CODE § 3344 (g) (West 2010) (providing remedies through the statute in addition to any other remedies provided for by law).

65. *See* CAL. CIV. CODE § 3344(a) (West 2010) (failing to recognize a right of publicity for minors autonomously).

66. *See id.* at § 3344(a) (creating liabilities for unauthorized use of someone's name, voice, signature, photograph, or likeness).

67. *See id.* (placing the burden of proof on an injured party that claims their right of publicity was violated).

68. *See* 799 F.2d 1000, 1003 (5th Cir. 1986) (determining that the contract had been executed in California).

69. *See id.* at 1002 (agreeing to have her children photographed for a textbook).

70. *See id.* at 1005 (finding that while the California statute is not dispositive, it applies directly to instances of alleged commercial misappropriation).

photographs.⁷¹ Ultimately, *Faloona* establishes a standard that relies on Section 3344, recognizing the authority of parents to consent to the photographing of their children.⁷²

2. FTC's Presence in Social Media Regulation

In 1998, Congress enacted the Children's Online Privacy Protection Act ("COPPA") to regulate unfair and deceptive acts and practices in connection with the collection and use of personal information from and about children on the Internet.⁷³ COPPA violations are subject to the FTC's jurisdiction because the FTC regulates acts or practices that are unfair or deceptive and affect commerce.⁷⁴ Specifically, COPPA attempts to protect children under the age of thirteen from exploitative marketing practices that collect personal information from children.⁷⁵ COPPA prohibits commercial websites and online services from collecting "identifiers" such as: name, address, username, telephone number, any information that can be used to recognize a user over time and across different websites, photographs, or geolocation.⁷⁶

Collaborations, partnerships, and affiliate links on social media platforms are subject to FTC regulation.⁷⁷ The FTC advises influencers to clearly and conspicuously disclose when they are posting an advertisement.⁷⁸ *Native Advertising: A Guide For Businesses*, an FTC Guidance document, suggests

71. See *id.* (failing to find case law allowing minors to void contracts, requiring judicial approval of minors' claims, or voiding parental consent).

72. See *id.* (augmenting California's codification of common law relating to right of publicity).

73. See 15 U.S.C. § 6501 (9) (West 1998) (requiring "verifiable parental consent" when collecting information from a child).

74. See 15 U.S.C.A. § 57a1)(A) (West 2019) (allowing the FTC to prescribe interpretative rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce).

75. See generally *Complying with COPPA: Frequently Asked Questions*, FED. TRADE COMM'N (Mar. 20, 2015), <https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions-0> (recognizing that children may not understand the safety and privacy issues created by the online collection of personal information).

76. See *id.* (requiring websites to obtain parental consent before collecting identifying information from children).

77. See 15 U.S.C. § 45 (West 2020) (explaining that partnerships and collaborations are considered endorsements that the FTC is empowered to regulate under section 5 of the FTC Act).

78. See Lauryn Harris, Comment, *Too Little, Too Late: FTC Guidelines on "Deceptive and Misleading" Endorsements by Social Media Influencers*, 62 HOW. L.J. 947, 969 (2019) (suggesting that the disclosures can be hard to find, tough to understand, fleeting, or buried in unrelated details).

that the disclosures should be in clear and conspicuous language, as close as possible to the native advertisements to which they relate, in a font and color that is easy to read, and in a shade that stands out against the background, to name a few.⁷⁹ The FTC is starting to expand its jurisdiction concerning the disclosures that influencers should make on social media posts, suggesting that influencers might be more closely regulated in the future.⁸⁰

III. ANALYSIS

A. Current Coogan Laws fail to provide kidfluencers with adequate protection, leaving them at the mercy of their parents voluntarily putting money into blocked trust accounts.

Without similar protections afforded to child actors, kidfluencers run the risk of turning eighteen and learning that their parents squandered or misappropriated millions of dollars in earnings.⁸¹ Kidfluencers will face the same problems Jackie Coogan faced, given the inadequate protections they currently receive.⁸² Like their child actor counterparts, the only legal recourse kidfluencers have to regain their earnings is to sue their parents once they turn eighteen.⁸³ However, like Jackie Coogan, no law currently exists to protect kidfluencers.⁸⁴

Despite California's Coogan Law being enacted in 1939, contemporary child actors still fall victim to their parent's financial manipulation of child actor earnings, suggesting that kidfluencers might also see identical outcomes.⁸⁵ In a candid interview of kidfluencer parents, *Fast Company*

79. See *Native Advertising: A Guide for Businesses*, FED. TRADE COMM'N (Dec. 2015), <https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf> (setting the standard for clear and conspicuous as whether the consumer can perceive and understand the disclosure within the context of the entire advertisement).

80. See Harris, *supra* note 78, at 971 (illustrating how the FTC had an influencer-specific session on Twitter in 2017 to answer questions regarding disclosures that influencers must make).

81. See Wong, *supra* note 15 (noting that the strongest child labor laws do not protect kidfluencers).

82. See *id.* (concluding that Coogan had no claim to his \$4,000,000 in child actor earnings).

83. See *id.* (finding that the only recourse Coogan had was to sue his parents when he reached the age of majority).

84. See CAL. LAB. CODE § 1308.9 (West 2019) (excluding kidfluencers and social media advertisement as child labor in the final version of the statute).

85. See CAL. CIV. CODE § 36.1 (1939); see also Lopez, *supra* note 13 (explaining that despite protections, eighty-five percent of a child star's earning can be spent by

asked the parents how they spent their kidfluencers' earnings.⁸⁶ One parent pays herself 15-20% of her child's earnings, as if she was a manager and the rest goes towards business expenses, a trust fund, and charitable giving.⁸⁷ If the parent is indeed contributing to a trust fund for her child, this would align with the legislative purpose established in *Phillips*, to protect a minor's gross earnings.⁸⁸ However, *Phillips* also establishes that the purpose behind Coogan Trust Accounts is to prevent anyone, even banks, from making unauthorized deductions for expenses such as taxes or fees without court approval.⁸⁹ Contrary to the legislative intent explained in *Phillips v. Bank of America*, this parent is also paying herself, performing unlimited and unregulated deductions from her child's earnings that do not require court approval.⁹⁰ Nothing stops this parent from paying herself more than 15-20% of her child's earnings, and in fact, she can pay herself 100% of her child's earnings.⁹¹ Another parent, who is an influencer herself, places her child's earnings into a college fund, an IRA, a trust fund, charity, and allows her daughter access to her earnings on demand.⁹²

The various approaches parents take to manage their children's money is a voluntary decision-making process so long as the law does not require parents to set aside money for their children at all.⁹³ The continued lack of regulation creates the risk for labor abuse and financial exploitation.⁹⁴

parents).

86. See Pavithra Mohan, *My Kid is an Instagram Influencer. Here's What I do With Her Money*, FAST COMPANY (May 8, 2019), <https://www.fastcompany.com/90343690/my-kid-is-an-instagram-influencer-heres-what-i-do-with-her-money> (describing how three parents spend their kidfluencer's earnings and their attempt to manage their kidfluencer's expectations concerning money).

87. See *id.* (justifying the salary that the parent pays herself by noting her investment in her child's career and the labor she provides for her daughter).

88. See *Phillips v. Bank of Am., N.A.*, 186 Cal. Rptr. 3d 434, 438 (2015) (explaining that the legislative purpose behind the Coogan law is to preserve a portion of the minor's earnings).

89. See *id.* at 440 (barring banks from charging account service fees to Coogan Trust Accounts because they are statutorily prohibited).

90. See *id.* (requiring court approval before executing deductions from Coogan Trust Accounts).

91. See Mohan, *supra* note 86 (detailing the various ways kidfluencer parents compensate themselves).

92. See *id.* (explaining that the family's expenses are taken care of through the mother's work as a freelance social media consultant and the father's work as a sales associate).

93. See *id.* (explaining that parents are tasked with managing their kidfluencer's earnings).

94. See Wong, *supra* note 15 (comparing the lack of oversight in kidfluencing to

Further, some parents do not see their children as the primary beneficiaries of the kidfluencing earnings.⁹⁵ The general basis for entitling parents to their child's earnings was the perceived reciprocal obligations of parents to support their children.⁹⁶ Taytum and Oakley Fisher's parent, Kyler Fisher, suggests that parents are the ones performing all the labor behind the scenes while his children merely appear in the picture.⁹⁷ In the *CBSN Originals* documentary, *Kid Influencers: Few Rules, Big Money*, Kyler and his wife, Madison, can both be seen sporting Gucci's Ace sneakers, valued at over \$500 per pair.⁹⁸ This image shares a likeness with Leighton Meester's mother's misappropriated use of Leighton's funds for superfluous expenditures like Botox injections and hair extensions.⁹⁹ The three-year-old Fisher twins earn upwards of \$200,000 per month and stand to make \$2.4 million a year, totaling a potential \$36 million dollars by the time they turn eighteen.¹⁰⁰ However, unlike Leighton Meester, there is no guarantee that the Fisher twins will be able to secure a default judgment because Coogan law protections, such as the establishment of trust accounts outlined in *Phillips*, do not apply to kidfluencers.¹⁰¹

Kidfluencing seems harmless, but the repercussions include the difficulty of disaffirming contracts through court approval later on in life.¹⁰² Indeed, parents understand the importance of their kidfluencer completing their

Uber and how labor law in the industry was previously unregulated).

95. See *Few Rules, Big Money*, *supra* note 1 (implying that some kidfluencer parents see themselves as performing the significant labor in securing paid advertisements).

96. See CAL. CIV. CODE § 197 (West 1982) *repealed by* A.B. No. 2650, 1992 Reg. Sess. (Cal. 1994) (providing the basis for entitling parents to their children's earnings).

97. See *Few Rules, Big Money*, *supra* note 1, at 16:55 (quoting Kyler Fisher in an interview saying, "My kids are in a picture, and that's work? I'm not so sure.").

98. See *Few Rules, Big Money*, *supra* note 1, at 8:38 (showing the Fisher family's day to day life); GUCCI, <https://www.gucci.com/us/en/pr/men/shoes-for-men/sneakers-for-men/mens-ace-leather-sneaker-p-386750A38309071?position=56&listName=ProductGrid&categoryPath=Men/Shoes-for-Men/Sneakers-for-Men> (last visited Feb. 10, 2020) (selling men's Gucci Ace leather sneakers for \$590).

99. See *Meester v. Meester*, No. BC466072, 2011 WL 2941537, at *33 (Cal. Unrep. July 22, 2011) (alleging Meester's mother spent money she received to pay for her own cosmetic procedures).

100. See *Few Rules, Big Money*, *supra* note 1 (stating that the Fisher twins can earn \$150,000 from brand deals in one month alone).

101. See *Phillips v. Bank of Am., N.A.*, 186 Cal. Rptr. 3d 434, 438 (2015) (explaining how the Coogan Law was enacted in response to the plight of childhood stars).

102. See CAL. FAM. CODE § 6751 (a)-(b) West (2000) (stating minors must petition to California's courts for approval to disaffirm a contract).

contracts because it is paid work.¹⁰³ One family acknowledges that on days their kidfluencer does not want to work it does not matter because their kidfluencer, “. . . [has] to be there,” and that they, “always have lollipops on those days.”¹⁰⁴ Bribing kidfluencers with lollipops seems like an infinitesimal price to pay when compared to the lucrative brand deals, toy lines, and cookbooks that are at stake.¹⁰⁵

B. The Work Kidfluencers Perform Resembles the Work Child Performers Engage in and Falls Under the Scope of Protection that California’s Coogan Law and Child Labor Laws were Intended to Encompass.

Blocked trust accounts are a necessary component of ensuring the earnings of child laborers are preserved.¹⁰⁶ Yet, California’s current Coogan Law and child labor laws ensure that kidfluencers will not be considered as child laborers, and thus, not protected by blocked trust accounts.¹⁰⁷

California’s child labor laws currently apply to actors, performers, artists, and models.¹⁰⁸ More specifically, the child labor law extends to “any minor as an advertising or photographic model.”¹⁰⁹ Because minors do not have a right of publicity, California’s child labor laws covering child models becomes critically important.¹¹⁰

In *Faloona v. Hustler Magazine*, the court found that parents can sign away a minor’s right of publicity, preventing the minor from disaffirming any contracts when they reach the age of majority.¹¹¹ *Faloona* suggests that

103. See Wong, *supra* note 15 (implying that kidfluencers must work when they are contracted to produce content).

104. See *id.* (quoting a kidfluencer parent that claims her children do not have to work every day unless they have paid work to complete).

105. See *id.* (describing the different platforms parents and kidfluencers can monetize for profit).

106. See CAL. FAM. CODE § 6753(a) (West 2019) (mandating that trustees must establish the trust within seven business days after the minor’s contract is signed).

107. See generally CAL. FAM. CODE § 6750(a)(1) (West 2020) (excluding kidfluencing from the list of “artistic or creative services”); CAL. LAB. CODE § 1308.9 (West 2019) (failing to include social media performers).

108. See generally CAL. FAM. CODE § 6750(a)(1) (West 2020) (listing what kind of labor qualifies as “artistic or creative services”).

109. See CAL. LAB. CODE § 1308.5 (a)(7) (West 2012) (applying to all minors under the age of sixteen and requiring a written consent from the Labor Commissioner for a work permit).

110. See CAL. LAB. CODE § 3344 (a) (West 2010) (stating that use of a minor’s photograph or likeness only requires prior consent of his parent or legal guardian).

111. See *Faloona v. Hustler Magazine, Inc.*, 799 F.2d 1000, 1003 (5th Cir. 1986) (finding that parents in California have the power to act on their minor’s behalf).

parents of kidfluencers can also continue to sign away their kidfluencer's right of publicity.¹¹² *Faloon* reinforced Section 6751 by stating that minors could not void contracts their parents signed and executed during their minority; likewise, kidfluencers will not be able to void contracts their parents signed and executed during their minority.¹¹³ Like the minors in *Faloon* who learned their parent signed away their right of publicity to *Hustler Magazine*, kidfluencers will reach the age of majority and learn that their parents signed away their right of publicity for profit to companies for sponsored social media posts.¹¹⁴

Strengthening the case for why kidfluencers deserve the protections afforded to child performers by California's Coogan law and child laborer statutes, in a recent partnership with Disney, the Clements twins are photographed holding *Frozen 2* toys with the hashtags "#ad," "#modelkids," and "#photoshoot" captioning the post.¹¹⁵ Like the children in *Faloon*, the Clements twins will learn that their parents signed away their right of publicity to Disney and that they cannot void the contracts their parents signed.¹¹⁶ The Clements twins will have a litany of Instagram posts captioned "#modelkids," "#lamodels," and "#childmodel" to choose from to argue that they were unprotected child laborers under the meaning of California's Coogan Law.¹¹⁷ Unless California's Coogan law and child laborer statutes are interpreted differently or until they can be amended to include kidfluencers, the Clements twins have lost their right of publicity in all sponsored posts on social media platforms for which their parents have signed contracts.¹¹⁸

Further threatening kidfluencers' ability to recoup earnings is Instagram's

112. See *id.* at 1005 (stating there was a valid photographic release when signed by a parent).

113. See *id.* (refusing the plaintiff's argument that California allows minors to void contracts, finding no case law to support the argument); see also CAL. FAM. CODE § 6751 (a) (West 2000) (stating that contracts entered during minority cannot be disaffirmed on that ground).

114. See *Faloon*, 799 F.2d at 1005 (stating that California law does not require judicial approval of photographic releases for use of minors' photographs).

115. See Clements Twins (@clementstwins), INSTAGRAM (Oct. 8, 2019), <https://www.instagram.com/p/B3XWSLoB62D/> (showing the Clements twins holding Frozen 2 paraphernalia).

116. See *Faloon*, 799 F.2d at 1005 (finding that minors cannot disaffirm contracts that their parents signed on their behalf).

117. See Clements Twins, *supra* note 115 (showing all the hashtags that the Clements' parents typically use on Instagram posts that feature sponsored content).

118. See *Faloon*, at 1003 (recognizing that parents can sign photographic release forms on behalf of their children).

Terms of Use policy, where influencer marketing occurs, and which requires that its users to be thirteen-years-old.¹¹⁹ Some parents have recognized this limitation imposed by Instagram; the Clements Instagram account even states that the account is run by @jaqi_m_clements and @kevin_r_clements, the twins' parents.¹²⁰ In effect, kidfluencers under the age of thirteen will have no right to Instagram accounts established in their name because they have no right to use the platform.¹²¹ Accordingly, using the *Faloona* holding where the parent signed away her children's publicity rights to *Hustler* magazine, the Clements twins will also learn their parents signed away their publicity rights for revenue from sponsored posts.¹²²

Section 1308.5 suggests that the labor law should apply to kidfluencers because their parents use their children as models or actors in sponsored posts, or in other words, advertisements.¹²³ Section 1286 even defines "entertainment industry" as "advertising; and any other performances where a minor performs to entertain the public" and that it is not limited to "any medium."¹²⁴ Under this definition, the plain meaning of California's labor law would seem to include kidfluencers under the same protected category because they participate in advertising, and many do in fact have lucrative YouTube channels.¹²⁵ In one sponsored Instagram post for *Barbie*, the McClure twins are seen playing with the new Barbie Color Reveal dolls and the post has the mandatory "#Ad" designation.¹²⁶ This Instagram post would satisfy the labor code's definition of "advertising" and that the medium,

119. See *Terms of Use*, INSTAGRAM, <https://help.instagram.com/581066165581870> (last visited Mar. 11, 2020) (explaining that the platform wants to be "safe, secure, and in accordance with the law").

120. See Clements Twins, *supra* note 115 (stating that the Instagram is run by the Clements' parents, who their manager is, and an email address for any business inquiries).

121. See *Terms of Use*, INSTAGRAM, *supra* note 119 (failing to say whether minors under the age of thirteen can assume control over Instagram accounts established in their name once they turn thirteen years old).

122. See *generally Faloona*, at 1002 (noting that the mother was paid one hundred dollars for her children's photographs).

123. See Wong, *supra* note 15 (comparing the Olsen twins and Macaulay Culkin to the McClure twins and Ryan Kaji).

124. See CAL. LAB. CODE § 1286 (f) (West 2020) (suggesting that the statute could be interpreted to include social media platforms).

125. See Wong, *supra* note 15 (illustrating how Ryan Kaji can earn millions through YouTube).

126. See McClure Twins (@mccluretwins), INSTAGRAM (Dec. 12, 2019), <https://www.instagram.com/p/B5-u4fZpITZ/> (showing a video of the McClure family testing out the gifted products as an advertisement for Barbie).

Instagram, is irrelevant to the advertisement analysis.¹²⁷ Some may also say that the McClure twins are playing with the toys and that it is not work, but as former child star Sheila James Kuehl has pointed out, “It is not play if you’re making money off it.”¹²⁸

Nonetheless, the proposed amendments to Section 1310 to the California Labor Code make it clear that the labor laws are not currently interpreted to apply to kidfluencers.¹²⁹ Assembly member Chu’s attempt to amend Section 1310 shows an awareness that there is an existing gap in the law, leaving kidfluencers vulnerable.¹³⁰ When Assembly member Chu proffered the bill before the California legislature, the bill cited kidfluencer concerns about finances, education, and physical safety.¹³¹ Specifically, Assembly member Chu recognized the need for kidfluencers to have the same protections as professional child performers.¹³²

Assembly member Chu also recognized that California’s Labor Code should extend to social media influencers, regardless of how the bill is interpreted today.¹³³ In his bill proposal, Assembly member Chu notes that the existing laws should apply to kidfluencers because the law seemingly covers earnings generated through the use of a person’s likeness, voice recording or performance.¹³⁴ Accordingly, the McClure twins’ advertisement for Barbie is covered by the statute.¹³⁵ First, the twins are in

127. See CAL. LAB. CODE § 1286 (f) (West 2020) (expanding mediums to include “any other performances where a minor performs to entertain the public”).

128. See Wong, *supra* note 15 (disagreeing with parents that kidfluencing is not labor just because they are posing for photographs and playing with free toys).

129. See *id.* (explaining that advocates for child workers’ rights see a gap in protection for kidfluencers under the current Coogan law).

130. See *id.* (learning from BizParentz, a nonprofit that advocates for children in entertainment, that some parents can quit their full-time jobs if their kidfluencer is successful).

131. See California Bill Analysis, A.B. No. 2388 Assem. (2018) (analysis prepared by Dana Mitchell) A.B. No. (citing concerns about a kidfluencer that enabled their parent to quit their job, the rise of homeschooling for kidfluencers, and the murder of a social media star).

132. See *id.* (attempting to expand “social media advertising” as a work venue, like a set for a child actor).

133. See *id.* (comparing children who have their lives documented on social media to children who participate in reality television programming and are covered under child labor laws).

134. See *id.* (emphasizing that this includes story of or incidents in a person’s life for the purpose of including kidfluencer’s income under the Coogan Act).

135. See McClure Twins, *supra* note 126 (showing the twins participating in a sponsored post).

the video, making use of their likeness.¹³⁶ Second, the twins make statements in the video about the dolls they are playing with, qualified as a voice recording.¹³⁷ Third, the twins are only filming the video for the purposes of the advertisement, or in other words, a performance.¹³⁸

In a later debate of the bill, one important expansion that Assembly member Chu sought to implement was to interpret the Coogan Law's legislative intent as including minors that are parties to a contract that provides social media advertising.¹³⁹ This expansion would have required fifteen percent of any earnings to be placed into a trust.¹⁴⁰ In effect, parents of kidfluencers would only be expected to set aside fifteen percent of earnings, as opposed to the zero percent that they are legally obligated to set aside now.¹⁴¹ Under current Coogan law, parents can still use the remaining eighty-five percent of earnings, for any purposes that they see fit, including paying themselves a salary to manage their child's career.¹⁴² Kidfluencer parents could similarly take advantage of eighty-five percent of their children's earnings as long as they set aside the preliminary fifteen percent according to Chu's bill proposal.¹⁴³ Such small concessions would go a long way towards alleviating concerns that parents are not taking advantage of their kidfluencer's earnings and could prevent possible litigation by a kidfluencer that reaches the age of majority.¹⁴⁴

136. *See id.* (utilizing the McClure twins in the advertisement to show that the Barbies are a product geared towards children).

137. *See id.* (emphasizing the feelings that the McClure twins have about the Barbies to promote sales).

138. *See id.* (failing to show that the McClure twins would not have participated in the video had they not received payment for the sponsored post).

139. *See California Bill Analysis, A.B. No. 2388 Assem. (2018)* (analysis prepared by Dana Mitchell) 2017 Cal. (attempting to include kidfluencers within the scope of parties that engage in contracts, subjecting the parties to automatically abide by Coogan Law protections).

140. *See id.* (applying the same minimum protections to kidfluencers that are provided to other child laborers).

141. *See id.* (likening kidfluencers to child actors, child models, and child athletes, who are already protected by the law).

142. *See Wong, supra* note 15 (illustrating how parents can use the remaining eighty-five percent to care for the child, including purchasing a house, or paying themselves a salary to manage their kidfluencer's career).

143. *See id.* (highlighting how parents can use the remaining eighty-five percent to care for the child, including purchasing a house, or paying themselves a salary to manage their kidfluencer's career).

144. *See generally Wong, supra* note 15 (suggesting that parents of kidfluencers could stave off litigation from their children if they set aside earnings while their children are minors).

Ultimately, the final bill merely exempted child laborers from obtaining work permits if their performance is unpaid and shorter than an hour.¹⁴⁵ However, the final version of the bill is unrealistic because kidfluencers are typically paid for social media posts, effectively failing to enact any enhanced protections for kidfluencers.¹⁴⁶

C. The FTC's current failure to prosecute deceptive practices in influencer marketing will leave kidfluencers increasingly vulnerable to financial manipulation and COPPA infractions.

The FTC fails to prosecute influencers for failing to clearly and conspicuously disclose endorsements, leaving kidfluencers vulnerable because there is no requirement stating that kidfluencers must be compensated for sponsored posts.¹⁴⁷ In the past, the FTC has stated an unwillingness to prosecute influencers for violations of deceptive marketing practices unless an influencer repeatedly fails to make disclosures that have hashtags like “sponsored” or “ad.”¹⁴⁸ One reason why influencer disclosures are so important is influencers are perceived as relatable and their endorsements seem authentic to their viewers or followers.¹⁴⁹ This relatability and authenticity has translated into significant revenue for kidfluencers, showing that kidfluencers have a similar impact on commerce as their adult counterparts.¹⁵⁰

As a general policy, the FTC concentrates its enforcement efforts onto brands and advertising agencies instead of influencers.¹⁵¹ For example, in

145. See CAL. LAB. CODE § 1310 (West 2019) (allowing minors to appear in any radio or television broadcasting or digital exhibitions without a permit).

146. See Wong, *supra* note 15 (acknowledging that the final version of the bill was significantly different from the proposed version, which sought to include kidfluencer protections but was unable to account for fringe benefits that kidfluencers receive).

147. See generally 16 C.F.R. § 255.0 (2009) (failing to include kidfluencers in any of the Guide's examples that demonstrate when influencers should clearly and conspicuously disclose partnerships with companies).

148. See *The FTC's Endorsement Guides: What People Are Asking*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking> (last visited Feb. 25, 2020) (specifying that the FTC is not currently monitoring bloggers for possible violations of the FTC Act and declaring to assess violations on a case by case basis) [hereinafter *FTC's Endorsement Guides*].

149. See *Few Rules, Big Money*, *supra* note 1 at 14:06 (stating unboxing videos by children on YouTube masquerade as advertisements).

150. See Mohan, *supra* note 86 (stating that kidfluencers appeal both to young parents and children).

151. See *Tea Marketer Misled Consumers, Didn't Adequately Disclose Payments to Well-Known Influencers*, *FTC Alleges*, FED. TRADE COMM'N, <https://www.ftc.gov/news->

the McClure twins' sponsored post for *Barbie*, had the post not included the necessary hashtags that reveal the partnership, like “#Ad,” the FTC would have pursued actions against *Barbie* and not the McClure family.¹⁵² Further, the FTC will find advertising agencies that pay influencers responsible when influencers have inadequate and nonexistent disclosures.¹⁵³ This shift in responsibility suggests that the FTC sees brands and advertising agencies as significant role players in deceptive marketing practices and will thus shift the disclosure burden onto the brands and advertising agencies instead of influencers or kidfluencers.¹⁵⁴

However, the FTC uses COPPA to issue violations and fine social media platforms.¹⁵⁵ In 2019, Google L.L.C. and its subsidiary, YouTube L.L.C. settled a lawsuit by the FTC and the New York Attorney General, agreeing to pay \$170 million for alleged COPPA violations.¹⁵⁶ Specifically, the FTC pointed towards YouTube touting its popularity with children to prospective corporate clients, failing to comply with COPPA when the platform continued to collect personal information from viewers of child-directed channels.¹⁵⁷ The complaint filed by the FTC and the New York Attorney General explains how YouTube channel owners can choose to monetize their channel by allowing YouTube to stream targeted advertisements, generating

events/press-releases/2020/03/tea-marketer-misled-consumers-didnt-adequately-disclose-payments (Mar. 6, 2020) (filing an action against a tea company but sending warning letters to ten influencers alleged in the FTC's complaint to have made inadequate disclosures).

152. See McClure Twins, *supra* note 126 (demonstrating the twins clearly, and conspicuously, using the hashtags “ad” and “Barbie” to comply with the FTC's guidelines).

153. See generally *The FTC's Endorsement Guides*, *supra* note 148 (explaining that brands have a responsibility to educate influencers on adequate disclosures).

154. See generally *The FTC's Endorsement Guides: What People Are Asking*, *supra* note 148 (stating that the FTC is generally not monitoring bloggers for violations of the FTC Act unless instances are reported to the agency).

155. See *Google and YouTube Will Pay Record \$170 Million for Alleged Violations of Children's Privacy Law*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations> (Sept. 4, 2019) (alleging that YouTube violated COPPA by collecting personal information from viewers of child-directed channels without obtaining consent from parents).

156. See *id.* (representing the largest penalty pursued and obtained by the FTC in a COPPA case since Congress enacted the law in 1998).

157. See *id.* (using cookies to deliver targeted advertisements to viewers of child-directed channels without first notifying parents and obtaining consent like the law requires).

revenue for the channel owner and YouTube.¹⁵⁸

In the complaint, the FTC specifically mentions the YouTube channel, *EvanTubeHD*, where a thirteen-year-old named Evan reviews toys and video games, like Ryan Kaji.¹⁵⁹ This shows that the FTC is aware of social media platforms using kidfluencers as a tool to conduct behavioral advertising and target child-directed content on YouTube.¹⁶⁰ YouTube and Google are also keenly aware that channels like *EvanTubeHD* pointedly appeal to children under thirteen years old.¹⁶¹ Despite Google and YouTube's indiscretion, part of the settlement with YouTube shifted responsibility to channel owners, who must now designate when the videos they upload to YouTube are directed to children.¹⁶² This means that instead of YouTube determining whether *EvanTubeHD* is directed towards children, the onus is on Evan as the content creator (or his parents as presumed owners of the channel) to make the designation.¹⁶³

COPPA attempts to control information that is collected from children, recognizing that some websites produce child-directed content to collect such information.¹⁶⁴ Under COPPA, the FTC considers some of the following factors to determine whether a content-creator's channel is child-directed: the subject matter, the age of models, the presence of child celebrities or celebrities, whether advertising that promotes or appears on the site is directed to children, and competent and reliable empirical evidence

158. See Fed. Trade Comm'n v. Google L.L.C., No. 1:19-cv-2642, (D.D.C. filed Sept. 4, 2019) (enumerating YouTube's most popular channels owned by companies and kidfluencers that are "directed to children" in the Complaint).

159. See *id.* at 13. (referencing one video on *EvanTubeHD* that was one of the most popular videos on YouTube Kids during a 90-day period in 2016).

160. See *id.* at 14 (stating that Google and YouTube earned close to \$50 million from behavioral advertising on child-directed channels on YouTube).

161. See *YouTube Channel Owners: Is Your Content Directed to Children?*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/blogs/business-blog/2019/11/youtu-be-channel-owners-your-content-directed-children> (Nov. 22, 2019) (describing how channel owners can determine if their content is directed to children) [hereinafter *YouTube Channel Owners*].

162. See *id.* (absolving companies like Google and YouTube from future liability and litigation and requiring channel owners to closely follow FTC guidelines).

163. See *Terms of Use*, YOUTUBE, <https://www.youtube.com/static?gl=GB&template=terms> (last visited Feb. 26, 2020) (requiring YouTube users to be at least thirteen years old and requiring permission from a parent or legal guardian to use YouTube).

164. See *generally Complying with COPPA: Frequently Asked Questions*, *supra* note 75 (applying COPPA to websites or online series that have actual knowledge that they are collecting personal information from children).

about the age of the audience.¹⁶⁵ Kidfluencer YouTube channels can fall under FTC scrutiny; for example, Ryan Kaji of *Ryan's World* on YouTube satisfies the factors the FTC has listed as child-directed content.¹⁶⁶ First, *Ryan's World* is about pretend play, science experiments, music videos, skits, and do it yourself ("DIY") crafts, so the subject matter is child-directed.¹⁶⁷ Second, the FTC considers the age of the model, and Ryan is eight years old.¹⁶⁸ Third, Ryan is the main performer on *Ryan's World*; Ryan is a kidfluencer and arguably a child celebrity with millions subscribers to his channel.¹⁶⁹ Fourth, Ryan reviews and promotes toys directed to children.¹⁷⁰ Fifth, Ryan's sponsored content is based on reliable empirical evidence about the age of his audience, having translated into millions of dollars in sales and revenue to both Ryan and YouTube.¹⁷¹

The FTC's increasing attention to violations leaves kidfluencers and their parents vulnerable to civil penalties, further jeopardizing their speculative earnings.¹⁷² The FTC has stated that COPPA violators can be liable for civil penalties of up to \$43,280 per violation.¹⁷³ When the FTC does take action against channel owners that violate COPPA, the FTC is likely to target

165. See *YouTube Channel Owners*, *supra* note 161 (listing factors for content that is child-directed, providing examples of child-directed content, explaining the penalty for not abiding by COPPA rules).

166. See *Kidfluencer Legal Considerations: What Every Parent and Manager Needs to Know*, GORDON LAW, <https://gordonlawltd.com/kidfluencer-legal-considerations-what-every-parent-manager-needs-know/> (last visited Feb. 26, 2020) (suggesting that kidfluencers might run into COPPA issues if they have branded websites that use tracking cookies or sell merchandise) [hereinafter *Kidfluencer Legal Considerations*].

167. See Ryan Kaji, *Ryan's World*, YOUTUBE https://www.youtube.com/channel/UChGJGhZ9SOOHvBB0Y4DOO_w/about (last visited Feb. 26, 2020) (describing the content that is usually featured in Ryan's vides).

168. See Wong, *supra* note 15 (contrasting Ryan's youth against his millions earned on YouTube).

169. See *id.* (stating that Ryan was the highest-paid YouTube star in 2018).

170. See Kaji, *supra* note 167 (transforming from a toy review YouTube channel to a global children's play and entertainment brand through toys and consumer products).

171. See Mohan, *supra* note 86 (describing kidfluencers with an audience in the millions can generate \$15,000 or more for a single post).

172. See FTC Seeks Comments on COPPA Rule Review, 84 Fed. Reg. 2019-15754 (proposed July 25, 2019) (to be codified at 16 C.F.R. pt. 312) (explaining that while the FTC usually reviews its rules every ten years and that issues like general audience platforms that host third-party child directed content needs to be reexamined earlier than 2023).

173. See *Complying with COPPA: Frequently Asked Questions*, *supra* note 75 (stating that fines for violating COPPA turns on several factors, for example, the amount and type of personal information collected).

popular channels, like *Ryan's World*.¹⁷⁴ Furthermore, the FTC allows any consumer to file consumer complaints if they see any fraudulent, deceptive, or unfair business practices.¹⁷⁵ Unlike Instagram, where many kidfluencer accounts state that they are managed by the kidfluencer's parent, YouTube's channels do not state who owns the channel.¹⁷⁶

Once the FTC decides to pursue lawsuits against parents as channel owners and account managers on social media platforms that use tracking cookies, the civil penalties are high enough to make parents consider using their kidfluencer's earnings to pay any fines levied for COPPA violations, further impacting a kidfluencer's ability to recoup earnings.¹⁷⁷ Because kidfluencers are prohibited by many platforms' terms of service from owning accounts and they have no control over how their image is used, nothing stops their parents from unintentionally helping companies place tracking cookies on child-directed sponsored media posts to collect information from children.¹⁷⁸ Additionally, because current Coogan law protections do not safeguard fifteen percent of earnings for kidfluencers, this leaves parents with no choice but to use all their kidfluencer's earnings to foot the bill for any COPPA law violations.¹⁷⁹

IV. POLICY RECOMMENDATION

Kidfluencers can be protected on the state and federal level by amending existing Coogan laws and engaging the FTC in a watchdog role regarding enforcement in kidfluencer marketing disclosures.¹⁸⁰

174. See Fed. Trade Comm'n at 10 (targeting YouTube channels that have content directed towards children).

175. See *The FTC's Endorsement Guides: What People Are Asking*, *supra* note 148 (explaining that the FTC enters consumer complaints into the Consumer Sentinel Network, a tool used by civil and criminal law enforcement agencies).

176. See *Ryan's World* (@ryansworld), INSTAGRAM (Feb. 27, 2020), <https://www.instagram.com/ryansworld/> (stating on the homepage that the account is managed by Ryan's parents); Kaji, *supra* note 167.

177. See *Kidfluencer Legal Considerations*, *supra* note 166 (noting that while kidfluencers are not likely to run into COPPA issues now, if their platforms use tracking cookies or sell merchandise, the FTC has the authority to levy COPPA fines).

178. See *Terms of Use*, INSTAGRAM, *supra* note 119 (requiring users to be thirteen years old); *Terms of Service*, YOUTUBE, <https://www.youtube.com/static?gl=GB&template=terms> (last visited Feb. 26, 2020) (requiring YouTube users to be at least thirteen years old).

179. See *Phillips v. Bank of Am., N.A.*, 186 Cal. Rptr. 3d 434, 440 (2015) (prohibiting banks from deducting administrative fees from Coogan Trust Accounts, showing that lawful withdrawals from these accounts are difficult to perform).

180. See Alexandra Whyte, *Why Aren't There Laws Protecting Kid Influencers?*,

A. Amend Current Coogan Laws to expand their scope of protection to include kidfluencers and require the creation of blocked trust accounts.

First, states should revise their current Coogan laws to include kidfluencers and require the establishment of blocked trust accounts.¹⁸¹ The first step to revise laws in favor of kidfluencers is to recognize their labor under current child labor laws.¹⁸² Assembly member Chu's proposed revision to California Labor Code Section 1308.5 consisted of "The employment of a minor in social media advertising . . . " and defining "social media advertising" as the use, demonstration, or placement of a product through a social media communication in an attempt to include kidfluencers.¹⁸³ Similar language would cover much of what kidfluencers do, for example, contractually obligated product placement of Barbies while kidfluencers play with them in an Instagram post.¹⁸⁴

The second step towards revising current Coogan laws is to require the establishment of blocked trust accounts for kidfluencers, either by parents or companies withholding payments until the accounts are established.¹⁸⁵ In California, Assembly member Chu sought to revise the Section 6750.1 of the Family Code to read, "It is the intent of the Legislature . . . to apply to unemancipated minors who are parties to a contract to provide social media advertising, as defined in Section 1308.5 of the Labor Code."¹⁸⁶ Such language reinforces that the scope of California's Family Code would be

KIDSCREEN (Aug. 12, 2019), <https://kidscreen.com/2019/08/12/why-arent-there-laws-protecting-kid-influencers/> (recognizing that a lot of Coogan type bills enacted in the 1900s have not been updated significantly since their introduction.); *see generally The FTC's Endorsement Guides: What People Are Asking*, *supra* note 144 (suggesting that the FTC will only engage with influencers in limited circumstances and that advocacy groups are welcome to file complaints).

181. *See* Wong, *supra* note 15 (showing Assemblymember Chu's failed effort to pass a bill that included an amendment for kidfluencer protections).

182. *See* CAL. LAB. CODE § 1308.5 (West 201220192019) (failing to expressly include kidfluencing labor as child labor).

183. *See* A.B. No. 2388, 2017-2018 Reg. Sess. (Cal. 2018) (acknowledging that influencers are ultimately advertisers, who should disclose when they are being paid for posts on social media).

184. *See* McClure Twins, *supra* note 126 (referring to the McClure twins playing with Barbies because of the paid sponsorship).

185. *See* CAL. FAM. CODE § 6752(b)(1) (West 2020) (stating that existing law already requires employers of minors to disburse fifteen percent of the minor's gross earnings into the account designated by the minor's trustee).

186. *See* A.B. No. 2388, 2017-2018 Reg. Sess. (Cal. Regular Session (2018) (expanding existing law to require permission of the Labor Commissioner for employment of minors engaged in social media advertising).

expanded to include kidfluencers under “artistic or creative services.”¹⁸⁷

Current California law requires that fifteen percent of a child actor’s gross earnings pursuant to a contract be set aside, placed in a trust, and preserved for the benefit of the minor.¹⁸⁸ However, if a parent fails to provide the minor’s employer with the information for the minor’s trust account, current law states that the employer must forward fifteen percent of the minor’s gross earnings to The Actors’ Fund of America, who will become the trustee of the funds.¹⁸⁹ By revising Section 6750.1 of the Family Code, the requirements that already exist for other child laborers would also apply to kidfluencers under Section 6752(b)(1).¹⁹⁰ While contracts with employers could always stipulate that more than fifteen percent of a minor’s gross earnings should be deposited into the blocked trust account, fifteen percent is the current industry standard.¹⁹¹ For context, fifteen percent of the Fisher twins purported earnings in a given month would amount to \$30,000, or \$360,000 a year, culminating in \$5,400,000 by the time the twins turn eighteen.¹⁹²

B. Require disclosures on sponsored posts that signal to consumers that a kidfluencer is being adequately compensated for their participation in sponsored content on social media platforms.

To further protect kidfluencers, the FTC should require parents of kidfluencers to make disclosures on sponsored posts that signal to consumers that the kidfluencer has been properly compensated.¹⁹³ A hashtag designation on sponsored posts like “#CooganKid” would signify that the kidfluencer has or will have fifteen percent of earnings placed into a blocked

187. See CAL. FAM. CODE § 6750(a)(1) (West 2020) (defining “artistic or creative services” but stating that the list is not exhaustive or limited to the professions currently covered).

188. See CAL. FAM. CODE § 6752(b)(1) (West 2020) (mandating that the trust be held in accordance with the requirements listed in CAL. FAM. CODE § 6753).

189. See CAL. FAM. CODE § 6752(9)(A) (West 2020) (entrusting The Actors’ Fund of America with the responsibility to notify the parent until information of the trust’s account is provided, or else holding the funds until the minor turns eighteen).

190. See CAL. FAM. CODE § 6752(b)(1) (West 2020) (mandating that parents hold the amounts earned in a trust and preserving the funds for the benefit of the minor).

191. See § 6752(b)(1) (stating that fifteen percent must be set aside unless the minor was performing services as an extra, background performer, or in a similar capacity).

192. See Novacic, *supra* note 2 (explaining the Fisher twins can earn upwards of \$200,000 a month from brand deals and advertising revenue).

193. See generally *The FTC’s Endorsement Guides: What People Are Asking*, *supra* note 148 (discussing how the FTC requires influencers to disclose material connections between themselves and a brand that consumers might not reasonably expect).

trust account.¹⁹⁴ Any time sponsored content does not have the disclosure, the lack of disclosure could be reported to the FTC, who would then decide whether to fine parents.¹⁹⁵ The FTC has already rejected the argument that it might be common knowledge that influencers (or kidfluencers) receive payment for posting sponsored content.¹⁹⁶ Likewise, without a disclosure like “#CooganKid”, it is not common knowledge that kidfluencers are properly compensated for sponsored content.¹⁹⁷ Additionally, a #CooganKid disclosure would need to appear on each and every social media post.¹⁹⁸

Like the clear and conspicuous disclosures that influencers are already required to make, such as “#ad” or “#sponsored,” kidfluencer disclosures would also show that they are participating in the sponsored posts as part of revenue generating content in their capacity as child laborers and not “just for fun.”¹⁹⁹ Adding such a prominent disclosure would have the added benefit of assuaging any fears that kidfluencers or their parents are engaging in COPPA violations because the disclosure simultaneously symbolizes that the content was produced under a preexisting financial relationship.²⁰⁰

V. CONCLUSION

Ultimately, the presumption under California law is that a parent is competent to manage the finances of their children.²⁰¹ This presumption is

194. See Wong, *supra* note 15 (honoring Jackie Coogan, the actor that originally inspired the creation of Coogan Laws).

195. See 15 U.S.C. § 45(a)(1-2) (2012) (enabling the FTC to regulate disclosures of sponsored content); see also *The FTC’s Endorsement Guides: What People Are Asking*, *supra* note 148 (inviting Americans to file a complaint, which are then entered into the Consumer Sentinel Network, a database that is used by the agency to enforce the law).

196. See generally *The FTC’s Endorsement Guides: What People Are Asking*, *supra* note 148 (stating that any omissions of disclosures are deceptive to consumers).

197. Marshall Bright, “Kidfluencers” Earn Their Families Millions — But Who is Protecting the Kids?, *SHE KNOWS* (Aug. 27, 2019), <https://www.sheknows.com/parenting/articles/2092003/kidfluencer-child-labor-laws-regulations/> (recognizing that kidfluencers are as lucrative as influencers).

198. See Letter from Richard A. Quaresima, Acting Assoc. Dir. Associate Associate Director, Fed. Trade Comm’n, to Jordin Sparks (Mar. 5, 2020) (stating that influencers cannot assume that consumers see and associate multiple sponsored posts together to conclude that the posts were made under a paid partnership).

199. See 16 C.F.R. § 255.5 (2009) (listing examples of when disclosure of material connections needs to be placed on a sponsored post).

200. See Letter from Richard A. Quaresima, *supra* note 197, at 1 (warning the influencer that if she does not abide by truth-in-advertising laws and standards that she will be prosecuted).

201. See *Suleman v. Superior Court*, 103 Cal. Rptr. 3d 651, 654 (2010) (finding that a stranger could not engage in an unprecedented and meritless effort to seek appointment

dictated by settled law in California, which states that unless it can be shown that a parent is unfit to perform their duties, care, custody, and control of minor children is entrusted to the parent.²⁰² In fact, some influencers do recognize this responsibility by voluntarily incorporating financial safeguards for their kidfluencers.²⁰³ Lastly, the right of a parent to raise their children as they see fit is a matter of federal due process.²⁰⁴

Yet, just because the state does not presume that a parent will mismanage their child's funds, it does not mean that protections cannot be set in place to prevent any bad actors from mismanaging funds or taking advantage of child labor.²⁰⁵ Until the law catches up, companies can perform their own due diligence and set boundaries with parents of kidfluencers, promising to engage in contracts only when they know parents have instituted safeguards for their kidfluencer's earnings.²⁰⁶ Parents, the FTC, and large companies can work together to protect kidfluencers in the new era of social media advertising.

as a guardian of the infamous "Octomom's" eight children).

202. *See id.* (explaining how courts consider the right of a parent to care for and have custody of their children).

203. *See* Mackenzie Horan, *Friday Q&A: Getting Back to Work*, DESIGN DARLING (Nov. 8, 2019), <https://www.mackenziehoran.com/2019/11/08/friday-qa-getting-back-to-work-how-teddy-will-be-incorporated-into-the-blog-postpartum-self-care-and-more/> (describing how one influencer has created an account so that her son receives a portion of all sponsored income).

204. *See* Suleman, 103 Cal. Rptr. 3d at 658 (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)) (stating that the state cannot enter the private realm of family life).

205. *See* Bright, *supra* note 196 (explaining child labor laws exist to guarantee pay and hour maximums).

206. *See* Lambert, *supra* note 57 (using Manager Byron Austen Ashley of Settebello Entertainment as an example of someone who requires parents to save their kidfluencer's earnings and refusing to work with families if the kidfluencers do not have Coogan accounts).