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SMELLS LIKE TEEN EXPLOITATION: NIRVANA'S *NEVERMIND* ALBUM LAWSUIT AND ITS RELATION TO CHILD PRIVACY RIGHTS ONLINE

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SMELLS LIKE TEEN EXPLOITATION: NIRVANA'S *NEVERMIND*
ALBUM LAWSUIT AND ITS RELATION TO CHILD PRIVACY
RIGHTS ONLINE MAIN TITLE

Erica Wilson*

INTRODUCTION

Nirvana released their wildly successful album, *Nevermind*, in 1991 and the band has been a household name¹ ever since. Today, trendy clothing stores still sell graphic T-shirts with Nirvana's classic smiling logo,² and the band continues to reach over 26 million monthly listeners on Spotify.³ The *Nevermind* album has two chart-topping songs, "Smells Like Teen Spirit" and "Come As You Are," which are two of their most popular songs overall, with over 1.5 billion and 953 million total streams, respectively, on Spotify alone.⁴

While the music on *Nevermind* accounts for most of the album's popularity, the album cover also contributes to the buzz and has recently made news.⁵ The cover depicts a naked baby in a pool, reaching for a dollar bill on a fishhook.⁶ The baby on the cover, Spencer Elden, now thirty-one

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¹ Eduardo Medina, *Judge Dismisses Suit Over Naked Baby Image on Nirvana Album Cover*, N.Y. TIMES (Sept. 4, 2022), <https://www.nytimes.com/2022/09/04/arts/music/nirvana-nevermind-baby-lawsuit.html?login=email&auth=login-email>.

² See *Nirvana Smile Pigment Dye Tee*, URBAN OUTFITTERS (Mar. 31, 2023), https://www.urbanoutfitters.com/shop/nirvana-smile-pigment-dye-tee?inventoryCountry=US&color=001&size=XL&utm_medium=cpc&utm_source=google&utm_campaign=%5BNB%20PLA%20US%5D%20-%20Smart%20Shopping%20-%20Mens%20-%20Tops&utm_content=Tops&utm_term=PRODUCT_GROUP&creative=538082328381&device=c&matchtype=&network=u&utm_kxconfid=vx6q413b6&gclid=Cj0KCQjww4-hBhCtARIsAC9gR3aeAbbNPLC4cGlswoOePUgwEapwt4zlMEVQSxRmR8SHwx0ZKilvY1caAoSyEALw_wcB&gclsrc=aw.ds&type=REGULAR&quantity=1.

³ Nirvana, *Artist Page*, SPOTIFY (Mar. 26, 2023), <https://open.spotify.com/artist/6oLE6TJLqED3rqDCT0FyPh?si=w4JRuBmPTxiemTipC6OPQA>.

⁴ *Id.*

⁵ Medina, *supra* note 1.

⁶ *Id.*

years old, sued Nirvana and other associated individuals in early 2022 on the grounds that the cover depicted child pornography.⁷

Elden originally embraced being the “Nirvana Baby” and even claimed it opened doors for him. Later, he admitted that the photo made him uncomfortable, stating that despite not remembering taking the photo, “I didn’t really have a choice.”⁸ Even though *Nevermind* was released in 1991,⁹ the problems that it created for Elden are more applicable now than ever before.

With the increase in the popularity of social media, parents are able to share photos, videos, and stories of their children on the Internet.¹⁰ Many parents even monetize this content by becoming parental or family influencers, sharing their daily lives and tips on how they handle the various aspects of childrearing.¹¹ Others allow their kids to share their own content on the Internet, creating an industry of child influencers.¹²

While social media has its benefits, such as helping people stay in touch with family and friends, there are downsides to children being so publicly visible.¹³ These downsides include being exposed to child predators, being at risk for identity theft, and even psychological damage.¹⁴ Children are sharing and being shared too much, to the point of potential exploitation, before they can even understand the impact that social media could have on them.

⁷ See *id.* See also *Elden v. Nirvana*, 2022 U.S. Dist. LEXIS 11023, 2022 WL 167453 (C.D. Cal. Jan. 3, 2022) [hereinafter *Elden I*].

⁸ Medina, *supra* note 1.

⁹ Hugh McIntyre, *Nirvana’s ‘Nevermind’ Has Now Racked Up 500 Weeks On The Albums Chart*, FORBES (Dec. 2, 2020, 12:10 PM), <https://www.forbes.com/sites/hughmcintyre/2020/12/02/nirvanas-nevermind-has-now-racked-up-500-weeks-on-the-albums-chart/?sh=3948cb04ec5e>.

¹⁰ See Beth Ann Mayer, *Why Parents Overshare on Social Media And When It Might Be Dangerous*, PARENTS (Feb. 1, 2022), <https://www.parents.com/parenting/better-parenting/sharenting-meaning-and-when-it-might-be-dangerous/>.

¹¹ *Id.*

¹² See Vanessa Cezarita Cordeiro, “*Kidfluencers*” and Social Media: The Evolution of Child Exploitation in the Digital Age, HUMANIUM (Feb. 23, 2021), <https://www.humanium.org/en/kidfluencers-and-social-media-the-evolution-of-child-exploitation-in-the-digital-age/>.

¹³ See Mayer, *supra* note 10; see also Elaine Roth, *The Real Risk of Posting Your Kids’ Pictures on Social Media*, SHEKNOWS (Aug. 2, 2022), <https://www.sheknows.com/feature/posting-kids-pictures-on-social-media-2604627/>.

¹⁴ See Kate Hamming, Comment, *A Dangerous Inheritance: A Child’s Digital Identity*, 43 SEATTLE U. L. REV. 1033, 1045 (2020).

I. DISCUSSION

A. Current Online Privacy Laws

In general, online and social media privacy rights in the United States are governed by contract law, using platforms' privacy policies as the contract.¹⁵ While some bills regarding online and social media privacy rights have been proposed in Congress,¹⁶ there are currently no federal laws in place.¹⁷ Five states, however, have enacted their own data privacy laws: California, Colorado, Connecticut, Utah, and Virginia.¹⁸ The data privacy laws in these states share many common provisions, mostly related to what companies can do with consumers' personal information.¹⁹

However, child privacy on the Internet is federally regulated by the Children's Online Privacy Protection Act, or COPPA.²⁰ COPPA imposes requirements on website operators or online services directed to children under the age of thirteen years old, and on website operators or online services that have actual knowledge that they are collecting personal information from children under the age of thirteen.²¹ In other words, "COPPA does not apply to information collected *about* children, only *from* children."²²

COPPA was originally introduced in 1998 and was most recently updated in 2013.²³ In the decade that has elapsed since COPPA's latest update, both the Internet and its usage have expanded considerably. Watson put it best:

¹⁵ Amy Loftsgordon, *Social Media and Your Privacy Rights*, NOLO, <https://www.nolo.com/legal-encyclopedia/social-media-and-your-privacy-rights.html>.

¹⁶ See, e.g., S. 1667, 117th Cong. (2021–2022).

¹⁷ Loftsgordon, *supra* note 15.

¹⁸ *State Laws Related to Digital Privacy*, NCSL (June 7, 2022), <https://www.ncsl.org/technology-and-communication/state-laws-related-to-digital-privacy#:~:text=Five%20states%E2%80%94California%2C%20Colorado%2C,of%20personal%20information%2C%20among%20others.>

¹⁹ *Id.*

²⁰ See Federal Trade Commission, *Children's Online Privacy Protection Rule ("COPPA")*, FTC, <https://www.ftc.gov/legal-library/browse/rules/childrens-online-privacy-protection-rule-coppa>; see also 15 U.S.C.S. §§ 6501–6506.

²¹ *Id.*

²² Cole F. Watson, *Protecting Children in the Frontier of Surveillance Capitalism*, 27 RICH. J.L. & TECH. 1, 4–5 (2021).

²³ *Id.*

“Though children today interact over the internet in vastly different ways than two decades ago, the privacy protections afforded to these children remain unchanged . . . [but] [a]s the most vulnerable and impressionable population in our society, children deserve the highest levels of legal protection.”²⁴

While privacy is a long-established right in our legal system, consumer protection is still a relatively new concept.²⁵ Legislatures are traditionally slow in creating laws in reaction to new technology or threats in society. When it comes to the protection of children, especially those in the entertainment industry, the laws are grossly outdated.

In addition to COPPA, another outdated law protecting the rights of children is Coogan’s Law, or the California Child Actor’s Bill, a law used to protect the rights of children in the entertainment industry.²⁶ The law was originally created in 1939 to protect child actors,²⁷ but its protections are rarely applied to influencer children, who are increasingly seen as the entertainers of today.²⁸

Coogan’s Law states that the earnings of a minor in the entertainment industry are those of the minor, and not of their parents.²⁹ When a minor child earns money in the entertainment industry, parents are required to set aside just 15% of the child’s total earnings in a blocked trust account.³⁰ Drawing inspiration from Coogan’s Law, Illinois recently became the first state to pass legislation that protects the rights of child influencers.³¹ In response to this legislation, other states have expressed their interest in passing similar legislation in the near future.³²

In addition to Coogan’s Law, minor children in the entertainment industry are protected by child labor laws.³³ However, given the more flexible working hours and the self-accountable nature of online influencing,

²⁴ *Id.*

²⁵ *Id.*

²⁶ Cordeiro, *supra* note 12.

²⁷ *Coogan Law*, SAG-AFRTA (Mar. 31, 2023), <https://www.sagaftra.org/membership-benefits/young-performers/coogan-law>.

²⁸ Cordeiro, *supra* note 12.

²⁹ *Coogan Law*, *supra* note 27.

³⁰ *Id.*

³¹ Manuela López Restrepo, *A New Illinois Law Wants to Ensure Child Influencers Get a Share of Their Earnings*, NPR (Aug. 23, 2023), <https://www.npr.org/2023/08/23/1195508847/a-new-illinois-law-wants-to-ensure-child-influencers-get-a-share-of-their-earnin>.

³² *Id.*

³³ Cordeiro, *supra* note 12.

children that participate in family channels or accounts, or even their own channels or accounts, are typically not protected under child labor laws.³⁴

B. Nirvana's Nevermind Album Information

There were other babies in the running to be on the *Nevermind* cover, and the Eldens did not know if Spencer would be chosen.³⁵ The Eldens received just \$200 for the photo³⁶ that would eventually be on the cover of Nirvana's most popular album.³⁷ Five months after the photo was taken, one-year-old Spencer received a platinum album and a teddy bear from Nirvana's record label, Geffen Records.³⁸

1. The Origin of Nevermind's Cover Art

Kurt Cobain's original idea for the cover was an image of an underwater childbirth.³⁹ Cobain came up with this idea after watching a documentary about water births and thought it would make a "cool" album cover.⁴⁰ However, the photos the cover designers found were not suitable for the album and were even described as being "too graphic."⁴¹

In order to take the actual photo, Elden's parents took turns passing him in front of the photographer, Kirk Weddle, who specialized in underwater photography.⁴² "If you look closely at the final image you can see the parent's handprint on the baby's chest where they were holding it right before they

³⁴ *Id.*

³⁵ Medina, *supra* note 1.

³⁶ *Id.*

³⁷ *Nirvana Album Sales*, BESTSELLINGALBUMS, <https://bestsellingalbums.org/artist/9600>.

³⁸ Elisha Fieldstadt & Diana Dasrath, *Man Photographed as Baby on 'Nevermind' Cover Sues Nirvana, Alleging Child Pornography*, NBC (Aug. 25, 2021), <https://www.nbcnews.com/pop-culture/pop-culture-news/man-photographed-baby-nevermind-cover-sues-nirvana-alleging-child-pornography-n1277578>.

³⁹ *Id.* See also Ollie Campbell, *The Designer of Nirvana's Nevermind Cover on Shooting Babies and Working with Kurt Cobain*, MILANOTE (Mar. 31, 2023), <https://milanote.com/the-work/the-designer-of-nirvanas-nevermind-album-cover>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* See also Jenny Desborough, *The Story Behind the Baby on Nirvana's 'Nevermind' Album Cover*, NEWSWEEK (Aug. 25, 2021), <https://www.newsweek.com/story-behind-baby-nirvana-nevermind-album-cover-spencer-elden-baby-1622775>.

passed it,” explained *Nevermind*’s cover designer Robert Fisher.⁴³ The shot took about an hour to set up, just five minutes to actually take the photo, and only fifteen frames were taken.⁴⁴ “I knew I had the shot,” Weddle said.⁴⁵ “That’s the thing about old-school photography—as a pro, you have to know that you’ve got it before you leave.”⁴⁶

Despite knowing he had secured the iconic shot, Weddle was worried about Elden’s visible genitalia and even shot photos of a baby girl as an alternative.⁴⁷ However, the label ended up loving the original shot of Elden.⁴⁸ Cobain wanted a fishhook on the cover to make the shot look more menacing.⁴⁹ The cover designers brainstormed about what object should be hanging off of the fishhook, with suggestions even including a burrito.⁵⁰ The designers and the band eventually settled on using a dollar bill,⁵¹ and the rest is history.

2. *How the Album Affected the World*

Since its release in 1991, *Nevermind* has made history, and continues to do so. It is Nirvana’s best-selling album,⁵² with 30 million sales worldwide,⁵³ making it the world’s twenty-eighth best-selling album of all time.⁵⁴ In the United States, it is the eightieth best-selling album of all time.⁵⁵ In addition, *Nevermind* is the seventh album in history to appear on the Billboard 200 for 500 total weeks.⁵⁶

Spencer Elden is an extreme example of how, even before social media, a child could essentially “go viral.” Due to the album’s popularity, Elden’s

⁴³ Campbell, *supra* note 39.

⁴⁴ Desborough, *supra* note 42.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Campbell, *supra* note 39.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Nirvana Album Sales*, *supra* note 37.

⁵³ *Id.*

⁵⁴ *Best-Selling Albums of all Time*, BESTSELLINGALBUMS, <https://bestsellingalbums.org/overall/>.

⁵⁵ *Best-Selling Albums in the United States of America*, BESTSELLINGALBUMS, <https://bestsellingalbums.org/list-of-best-selling-albums-in-united-states-of-america/>.

⁵⁶ McIntyre, *supra* note 9.

revealing baby photo has appeared all over the world.⁵⁷ In addition to appearing on the album cover itself, it also appeared on posters for Nirvana's *Nevermind* tour in 1991.⁵⁸ Due to the effect that *Nevermind* had on global commerce, Elden's exposure to the entertainment industry would have been a perfect opportunity for his parents to exploit his status as the "Nirvana Baby" to earn some money.

3. Breaking Down the Lawsuit

Elden sued Nirvana and numerous others involved in the album cover's decision-making process under child pornography laws.⁵⁹ Elden's First Amended Complaint was initially dismissed with leave to amend in January of 2022.⁶⁰ In September of 2022, the judge on the case dismissed the suit with prejudice, without leave to amend.⁶¹

Elden claimed damages under 18 U.S.C. Section 2255(a), which states that someone who suffers a personal injury from child pornography offenses may sue for civil damages, regardless of whether their injury actually occurred while they were a minor.⁶² Subsection (b) of this statute sets forth the statute of limitations for these types of claims.⁶³ The first limitation ends ten years after the plaintiff reasonably discovers either the violation or the injury that forms the basis for the claim, whichever occurs later.⁶⁴ The second limitation ends ten years after the plaintiff's eighteenth birthday.⁶⁵ Since Elden was thirty-one at the time of the complaint, his claim would have only been timely under the first limitation set forth in the statute.

Elden's lawyer, Robert Y. Lewis, acknowledged that the photograph itself was non-sexualized and, legally, did not equate to child pornography.⁶⁶

⁵⁷ *Nirvana Nevermind U.S. Tour 1991*, CONCERTS FANDOM (Mar. 31, 2023), https://concerts.fandom.com/wiki/Nirvana_Nevermind_US_Tour_1991.

⁵⁸ *Id.*

⁵⁹ *Elden I*, *supra* note 7.

⁶⁰ *Id.*

⁶¹ *Elden v. Nirvana L.L.C.*, 2022 U.S. Dist. LEXIS 159390, 2022 WL 4079271 (C.D. Cal. Sept. 2, 2022) [hereinafter *Elden II*].

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 2.

⁶⁶ Fieldstadt & Dasrath, *supra* note 38.

However, the case was based on the album cover as a whole; Lewis asserted that the dollar bill included on the fishhook made baby Elden look like a sex worker.⁶⁷ The judge on the case did not find Elden's arguments credible enough in order to permit the lawsuit to continue, and found that the claims in the suit were made past the expiration dates of the applicable statutes of limitations.⁶⁸

C. The Phenomenon of Sharenting

While Elden's parents likely did not expect their son's photograph to be distributed globally, some parents do have that exact intent in mind when posting photographs and videos of their children on the Internet.

1. What Is Sharenting?

"Sharenting" is a common phenomenon that occurs when parents post photos, videos, and stories about their children on social media.⁶⁹ It is not limited to parents; sharenting can occur with grandparents, guardians, and even teachers.⁷⁰ This can range from posting the occasional photo on their child's birthday to posting everything their child does on a daily basis.⁷¹ According to one report, 77% of parents have shared photos of their children online, and 81% of those use their children's real names.⁷² As a result, more than 80% of children have a digital presence by the age of just two years old.⁷³ Children this age have virtually no control over what is shared about them on the Internet.⁷⁴ While all children react differently to what has been

⁶⁷ *Id.*

⁶⁸ *Elden II*, *supra* note 61, at 4.

⁶⁹ Mayer, *supra* note 10.

⁷⁰ Leah Plunkett, *To Stop Sharenting & Other Children's Privacy Harms, Start Playing: A Blueprint for a New Protecting the Private Lives of Adolescents and Youth (PPLAY)*, 44 SETON HALL LEGIS. J. 457, 459 (2020).

⁷¹ Mayer, *supra* note 10.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Amanda G. Riggio, Comment, *The Small-er Screen: YouTube Vlogging and the Unequipped Child Entertainment Labor Laws*, 44 SEATTLE U. L. REV. 493, 506 (2021).

posted about them, with some being more comfortable with social sharing than others, their privacy has still been compromised in some way.⁷⁵

Many parents do not feel uncomfortable or anxious about their children's privacy when they post about them on social media.⁷⁶ In fact, many parents feel that they have the right to post about their children.⁷⁷ However, parents have no idea what their young children would consider private and are essentially making this important decision for their children.⁷⁸

Some parents have taken sharenting to a new level by becoming influencers. In these situations, the parent or parents post family content on social media that typically depicts their daily lives, children's milestones, and more, often blurring the line between their work lives and personal lives.⁷⁹ Influencers can make money from content creation, primarily by entering into contracts with companies for sponsorships and endorsements, a practice known as influencer marketing.⁸⁰ Family influencers tend to create content that people with families or young children could relate to, and end up taking on advertisements and sponsorships that relate to their family or their children.⁸¹ Because of this, children of influencer parents often wind up participating in sponsored content.⁸²

The industry of social media influencers has an incredibly significant effect on commerce and the United States' capitalistic economy. Sponsored content is meant to convince people that they need a certain good or service, and that this good or service is especially good because it is what the influencer uses. The dollars spent by companies on these types of relationships are significant and a major driver of purchases, and by extension the United States' economy. Some influencers have a global following, thus impacting the global economy. When children are included in this content, they are exposed to people all over the world and are affecting global commerce through the promotion of sponsored products. In a twisted version of a symbiotic relationship, influencer parents and the companies

⁷⁵ *Id.* at 506.

⁷⁶ *Id.*

⁷⁷ *Id.* (emphasis added).

⁷⁸ *Id.*

⁷⁹ *Id.* at 510.

⁸⁰ *Id.* at 509.

⁸¹ *Id.* at 511.

⁸² *Id.*

sponsoring their content are exploiting children and benefiting from their global exposure.

Some examples of family influencers include the ACE Family and the LaBrant Family.⁸³ The parents in these families regularly and significantly involve their children in their content.⁸⁴ These families primarily post content on YouTube, but have accounts on most social media platforms, even for the children.⁸⁵

In contrast to those families, other parents in the limelight such as Philadelphia Phillies' right fielder Bryce Harper and his wife Kayla, have decided to keep their children out of the public eye. The Harpers post photos of their two young children on social media, but they use two styles of photos: one is of the children's backs, such as if they have their father's jersey on to show his last name, and the other is of their fronts, with their faces blocked out using a sticker or an emoticon.⁸⁶

2. *Pros and Cons of Sharenting*

Some arguments in favor of "sharenting" primarily have to do with having a sense of community on social media.⁸⁷ Before social media, parents shared pictures and news of their children with extended family and friends much less frequently; instead, annual school photos and Christmas letters in the mail were typical. Now, parents are able to share family news and photos easily and frequently, thus enabling long distance family and friends to see those children growing up with just a few clicks online. But they are not the only ones. If the parents' social media profiles are set to public, predators can see those children, too.⁸⁸

⁸³ *Id.* at 496.

⁸⁴ *Id.*

⁸⁵ The LaBrant Fam (@ColeAndSav), YOUTUBE, https://www.youtube.com/channel/UC4-CH0epzZpD_ARhxCx6LaQ; The ACE Family (@TheACEFamily), YOUTUBE, <https://www.youtube.com/channel/UCWwWOFsW68TqXE-HZLC3WIA>.

⁸⁶ Meredith Nardino, *Phillies Star Bryce Harper and Kayla Harper's Sweetest Photos With 2 Kids: See Family Album*, U.S. MAGAZINE (Oct. 28, 2022), <https://www.usmagazine.com/celebrity-moms/pictures/mlb-star-bryce-harper-kayla-harpers-family-photos-with-kids/august-2020-153/> (examples of photos the Harpers post of their children).

⁸⁷ Mayer, *supra* note 10.

⁸⁸ Roth, *supra* note 13.

Some social media platforms, such as TikTok, make children more vulnerable to predators.⁸⁹ In addition to exposing children to potential predators, other harms caused by sharenting include an increased risk of identity theft, exploitation, a poor self-image, and low self-esteem.⁹⁰

Furthermore, some sharenting is done unintentionally.⁹¹ When children use smart toys, learning applications, and even digital diapers, their data is being used by companies and other third parties, including data brokers, to create a digital identity.⁹² One study found that some data brokers had marketing lists with information about children as young as two years old.⁹³ While some information sent to data brokers may seem trivial, the children's privacy rights have still been invaded, which exposes the children to certain harms and consequences.

3. A Quick Privacy Law Comparison

While the social media privacy laws in the United States are still relatively outdated, the European Union enacted the General Data Protection Regulation ("GDPR"), one of the world's strongest data privacy laws, in 2018.⁹⁴ While this regulation applies to European Union citizens, the global, borderless nature of the Internet means the impact of the GDPR reaches beyond the borders of the European Union, allowing its citizens to control their personal information online.⁹⁵ This is known as the right to erasure.⁹⁶ The right to erasure has existed in the European Union since 2014 and, since the GDPR's enactment in 2018, has included social media platforms.⁹⁷ However, the right to erasure only allows European Union citizens to be able to request that their information be removed from the Internet; internet companies do not have to comply with their request.⁹⁸ The GDPR sets out a specific subsection of personally identifiable information that is categorized

⁸⁹ Watson, *supra* note 22, at 15.

⁹⁰ Hamming, *supra* note 14, at 1037.

⁹¹ Plunkett, *supra* note 70, at 460.

⁹² *Id.* at 461.

⁹³ *Id.* at 470.

⁹⁴ Hamming, *supra* note 14, at 1037.

⁹⁵ *Id.*

⁹⁶ Riggio, *supra* note 74.

⁹⁷ *Id.*

⁹⁸ *Id.*

as sensitive personal information, such as cell phone location and biometric data.⁹⁹ France, in addition to enforcing the GDPR as a member of the European Union, also allows for children to sue their parents for posting intimate details of their early private lives without their consent.¹⁰⁰

D. The Industry of Kidfluencers

1. Who Are Kidfluencers?

“Kidfluencers” are child influencers that create content and monetize content on social media.¹⁰¹ Kidfluencers currently make up an \$8 billion social media advertising industry.¹⁰² Brands that sponsor kidfluencers make contracts with their parents, and not the children themselves.¹⁰³

Additionally, most social media platforms require users to be thirteen years old or older.¹⁰⁴ If a child younger than thirteen wishes to create an Instagram account, for example, their parents must monitor the account and post on the child’s behalf.¹⁰⁵ Thus, influencers younger than the age of thirteen are not actually posting their own content: their parents are. Since the parents have the final control over the posts, they also may feel entitled to the resulting earnings. This “easy money” could lead those parents to potentially exploit their child on social media to earn even more money.

2. Pros and Cons of Kidfluencers

There are plenty of benefits of children using social media. Social media may act as a creative outlet for children, enhance their creativity and provide them with creative ideas.¹⁰⁶ It provides a way for children to expand their

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Cordeiro, *supra* note 12.

¹⁰² *Id.*

¹⁰³ Sapna Maheshwari, *Online and Earnings Thousands, at Age 4: Meet the Kidfluencers*, N.Y. TIMES (Mar. 1, 2019), <https://www.nytimes.com/2019/03/01/business/media/social-media-influencers-kids.html>.

¹⁰⁴ Cordeiro, *supra* note 12.

¹⁰⁵ *Id.*

¹⁰⁶ Riggio, *supra* note 74.

connections and increase their socialization, and may also improve a child's sense of individual identity.¹⁰⁷

However, the benefits of social media do not come without plenty of drawbacks. Children on social media are subject to exploitation and being the target of predators or cyberbullies, which could cause psychological damage.¹⁰⁸ This psychological damage can include harm to their self-image, self-esteem, and more.¹⁰⁹

3. Coogan's Law and Child Labor Laws

Child privacy laws were historically reserved for child celebrities.¹¹⁰ In the 1940 case of *Sidis v. F-R Publishing Corp.*, the court determined that images of a child celebrity published in an article in *The New Yorker* were not subject to state privacy laws because the child's fame made his life a "matter of public concern."¹¹¹ More recently, the invasion of someone's right to privacy was recognized in the *Restatement Second of Torts*,¹¹² last updated in 1977.¹¹³ However, this was written before the Internet became what we know it as today, and largely covers invasions of privacy by the press, not the general public.¹¹⁴ The American Law Institute (ALI) has been revising the *Restatement Second of Torts* in the *Restatement Third of Torts* to include, among other things, updated privacy rights that incorporate internet-related issues.¹¹⁵ Despite ALI's efforts to recognize online privacy rights, the *Restatements* are not binding law.¹¹⁶

Kidfluencers, unlike child actors, are not seen as being involved in the entertainment industry.¹¹⁷ The casual, at-home nature of video content made

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Michael Shepherd, *Child Privacy in the Digital Age and California's Child Deletion Statute*, 23 J. TECH. L. & POL'Y 134, 135 (2018).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ RESTATEMENT (SECOND) OF TORTS § 652 (AM. L. INST. 1977).

¹¹⁴ *Id.*

¹¹⁵ American Law Institute, *Restatement of the Law Third, Torts: Defamation and Privacy*, <https://www.ali.org/projects/show/torts-defamation-and-privacy/>.

¹¹⁶ Shepherd, *supra* note 110.

¹¹⁷ Riggio, *supra* note 74.

by influencers is not developed, distributed or consumed like a movie or television show, so people involved in content creation are typically not subject to entertainment industry laws, or even child labor laws.¹¹⁸ Even though many influencers have achieved a sort of celebrity status, child influencers or children of influencers are not afforded the same protections as child celebrities.¹¹⁹

E. How New Legislation Could Help Mitigate This Problem

There are multiple recommendations to resolve the issue of child exploitation on the Internet. Some states have already begun to draft their own legislation regarding child influencers and child privacy online,¹²⁰ but there is still no federal legislation that applies.¹²¹ While the obvious solution is to update the current legal framework, it is likely much easier to start over by drafting new legislation. In drafting new legislation, legislators will be able to include regulations and limitations for the websites and social media platforms that currently exist, and those which will be created in the future. New legislation should include harsher penalties and stricter restrictions, taking ideas from the European Union's GDPR.

New legislation should be created to protect kidfluencers as well as children of family influencers. This new legislation should mimic Coogan's Law in that parents should be obligated to set aside a specified percentage of their child's money in a blocked trust account that is earned from being an influencer or participating in sponsored content with their parents. It should also ensure that child labor laws and regulations apply to influencer children so that the children do not get overworked or underpaid. These guidelines and restrictions should incentivize parents to either reduce their children's exposure on the Internet or compensate their children appropriately for work they are doing for their parents. In addition, children should be able to sue their parents for violating their privacy online.

In addition, new legislation should impose stricter restrictions on what companies can do with children's data. To start, websites and social media platforms should not be able to obtain any information about minor children

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ López Restrepo, *supra* note 31.

¹²¹ Loftsgordon, *supra* note 15.

in general, in addition to not being able to obtain any information from minor children. Legislation should also grant people the right to erasure.

New legislation should also increase the penalties for violating its laws. Large internet companies such as YouTube, which is owned by Google, can view a relatively small fine of a few hundred thousand dollars for violating COPPA as a cost of doing business.¹²² Monetary-only penalties will not act as a significant deterrent for large internet companies. Therefore, instead of just paying a monetary penalty, violators of children's online privacy laws should endure harsher punishment. Some punishment options include significantly increased monetary payments or even jail time for anyone who knew of or ratified the misconduct.

CONCLUSION

Children on social media are being subjected to potential invasions of privacy to the point of exploitation. This is not a new problem, as we have seen in the case of Spencer Elden, the naked baby on Nirvana's bestselling album *Nevermind*.¹²³ However, with the expansion of the Internet and the proliferation of social media platforms, the problem is being presented in new ways and will continue to evolve and worsen if legislators do not intervene soon.

Legislators should consider the quickly evolving nature of the Internet and social media platforms when updating online privacy laws or drafting new legislation on the subject. Children are one of the most vulnerable population groups¹²⁴ and should therefore be afforded better legal protection. Laws such as COPPA, Coogan's Law, and child labor protection laws should either be updated and adjusted to include child influencers, or legislators should draft entirely new legislation to accommodate for the speed at which the internet changes. New legislation is especially important when it comes to child influencers getting paid for content they create with their parents. With the current laws in place, child influencers are not entitled to any money they make, unlike children in the traditional entertainment industry.

The failure to regard these children as entertainers represents a failure to understand the changing nature of entertainment itself. Production of

¹²² Watson, *supra* note 22.

¹²³ *Nirvana Album Sales*, *supra* note 37.

¹²⁴ Watson, *supra* note 22.

influencer entertainment is not without potential harm in the form of reduced mental health, increased risk of identity theft, and exposure to child predators or cyberbullies. Relying on parents to shield their minor children from these potential harms is neither sufficient nor an adequate substitute for legislation that can provide the necessary protection for such a vulnerable population.