

October 2023

“Take Your Pictures, Leave Your (Digital) Footprints”: Increasing Privacy Protections for Children on Social Media

Kodie McGinley

Follow this and additional works at: <https://digitalcommons.law.ggu.edu/ggulrev>



Part of the [Consumer Protection Law Commons](#), [Internet Law Commons](#), [Juvenile Law Commons](#), and the [Privacy Law Commons](#)

Recommended Citation

Kodie McGinley, *“Take Your Pictures, Leave Your (Digital) Footprints”: Increasing Privacy Protections for Children on Social Media*, 53 Golden Gate U. L. Rev. (2023).
<https://digitalcommons.law.ggu.edu/ggulrev/vol53/iss2/5>

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized editor of GGU Law Digital Commons.

COMMENT

“TAKE YOUR PICTURES, LEAVE YOUR
(DIGITAL) FOOTPRINTS”: INCREASING
PRIVACY PROTECTIONS FOR
CHILDREN ON SOCIAL MEDIA

KODIE MCGINLEY*

INTRODUCTION	200
I. THE CURRENT STATE OF COPPA	202
II. CONCERNS ABOUT THIRD-PARTY SHARING	204
A. SHARENTING: BRINGING FAMILY LIFE ONLINE	204
B. LIVING IN THEIR PARENTS’ SHADOWS: THE TENSION BETWEEN CHILDREN’S AUTONOMY AND HYPER- ONLINE PARENTS	205
C. CONCERNS ABOUT DATA COLLECTION	207
III. CURRENT PROPOSED REMEDIES	209
A. THE RIGHT TO BE FORGOTTEN VERSUS THE RIGHT TO REMEMBER: THE FEASIBILITY OF ADOPTING THE “RIGHT TO BE FORGOTTEN” DOCTRINE	210
B. CHILDREN AND TEENS’ ONLINE PRIVACY PROTECTION ACT OF 2021	212
IV. ANALYSIS	213
A. A WALK IN THEIR SHOES: EXPANDING COPPA TO GIVE MINORS CONTROL OVER THEIR DIGITAL FOOTPRINTS	214
1. <i>Scope</i>	215
2. <i>Balancing Free Speech Concerns</i>	215
B. FEASIBILITY CONCERNS	216

*Kodie McGinley is a J.D. candidate at Golden Gate University School of Law expecting to graduate in May 2023. They received their Bachelor of Arts Degree in Justice, Community, and Leadership from Saint Mary’s College of California in 2020.

INTRODUCTION

“What’s all this?” asked Roshelle.¹ Roshelle was a fourth grader who discovered for the first time that her mother wrote about her for a living.² Roshelle discovered several of her baby photos on the internet, each accompanied by essays written by her mother about parenting.³ For her mother, Christie Tate, these essays were a way to explore her motherhood through writing.⁴ But when Roshelle became aware of her mother’s blog, she wanted her to take the essays and pictures off the internet.⁵ As the children of the first wave of parenting bloggers grow up, children’s rights to control what information is shared about them online has become a pressing issue.⁶ Children face collateral risks as a result of third-party sharing,⁷ from feeling a lack of control in how their identities are shaped,⁸ to having their information appropriated by identity thieves, child predators, and data brokers.⁹

As the digital sphere becomes more prevalent in people’s lives, Congress has tried to keep up.¹⁰ First created in 1998, the Children’s Online Privacy Protection Act (COPPA) requires operators of websites directed

¹ Christie Tate, *My Daughter Asked Me to Stop Writing About Motherhood. Here’s Why I Can’t Do That*, WASH. POST (Jan. 3, 2019), <https://www.washingtonpost.com/lifestyle/2019/01/03/my-daughter-asked-me-stop-writing-about-motherhood-heres-why-i-cant-do-that/>. (Roshelle is a self-selected pseudonym used to preserve the child’s privacy.)

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See Stacey Steinberg, *Why Parents Should Pause Before Oversharing Online*, NEW YORK TIMES (Aug. 4, 2020), <https://www.nytimes.com/2020/08/04/well/family/parents-social-media-privacy.html> [hereinafter Steinberg I].

⁷ In this Comment, the term “third-party sharing” refers to information shared about children online by third parties, such as parents, friends, or caregivers. This Comment focuses primarily on third-party sharing by parents, but the risks of third-party sharing are present whether the sharer is a parent, caregiver, or someone who is the same age as the child.

⁸ See Andra Siibak & Keily Traks, *The Dark Sides of Sharenting*, CATALAN J. COMM’N & CULTURAL STUDS. 115, 117 (2019), https://www.researchgate.net/profile/Andra-Siibak/publication/333607170_The_dark_sides_of_sharenting/links/6090fd02a6fdccaebd07829d/The-dark-sides-of-sharenting.pdf.

⁹ Tehila Minkus et al., *Children Seen but Not Heard: When Parents Compromise Children’s Online Privacy*, in WWW ’15: PROCEEDINGS OF THE 24TH INTERNATIONAL CONFERENCE ON WORLD WIDE WEB 776, 776-77 (International World Wide Web Conference Steering Committee, Republic and Canton of Geneva, Switzerland 2015), <https://archives.iw3c2.org/www2015/documents/proceedings/proceedings/p776.pdf>.

¹⁰ Tianna Gadbow, *Legislative Update: Children’s Online Privacy Protection Act of 1998*, 36 CHILD.’S LEGAL RTS. J. 228, 228-30 (2016), https://www.childrenslegalrightsjournal.com/childrenslegalrightsjournal/volume_36_issue_3?pg=78#pg78 (noting that COPPA was enacted in 1998 and amended for the first time in 2012 to strengthen its security of children’s personal information).

at children to obtain consent from parents before collecting any personal information from children.¹¹ COPPA also requires that operators take reasonable measures to protect the confidentiality of any personal information collected about children.¹²

COPPA has helped regulate online spaces and prevent children from disclosing too much personal information about themselves online.¹³ COPPA's focus is on regulating websites that collect personal information directly from children.¹⁴ However, this leaves a gap in the law which ignores personal data shared on social media by third parties such as parents and family members.¹⁵

While Congress has tried to catch up to the changing nature of social media, the current standard of COPPA does not account for the ways in which family members disclose information about their children online.¹⁶ For instance, Facebook was dubbed a "modern-day baby book" in recognition of how frequently people posted photos of their children on the social media platform.¹⁷ While there are many benefits to this type of sharing,¹⁸ COPPA must be revised to address third-party sharing of children's personal information.

This Comment argues that Congress should amend COPPA to provide protections for children whose information is shared online before they are able to consent. Part I of this Comment begins with background information on the history of COPPA and its primary purposes. Next, Part II addresses the unique concerns that third-party sharing poses. It begins with a discussion of what has come to be known as "sharenting"¹⁹ and addresses various ethical concerns of third-party sharing. Part III

¹¹ 15 U.S.C. § 6502(b)(1)(A); See Tianna Gadbow, *Legislative Update: Children's Online Privacy Protection Act of 1998*, 36 CHILD.'S LEGAL RTS. J. 228, 228-30 (2016), https://www.childrenslegalrightsjournal.com/childrenslegalrightsjournal/volume_36_issue_3?pg=78#pg78.

¹² 15 U.S.C. § 6502(b)(1)(D).

¹³ See *Children's Privacy*, ELEC. PRIV. INFO. CTR., <https://epic.org/issues/data-protection/childrens-privacy/#introduction> (last visited Jul. 31, 2023).

¹⁴ See *id.* (identifying Congress's intent in passing COPPA to "ensure children's safety during their participation in online activities").

¹⁵ Minkus, *supra* note 9 at 776.

¹⁶ See *Complying with COPPA: Frequently Asked Questions*, FED. TRADE COMM'N, <https://www.ftc.gov/business-guidance/resources/complying-coppa-frequently-asked-questions#F.%20Photos> (July 2020) [hereinafter *Complying with COPPA*].

¹⁷ See generally Priya Kumar & Sarita Schoenebeck, *The Modern Day Baby Book: Enacting Good Mothering and Stewarding Privacy on Facebook*, in CSCW '15: PROCEEDINGS OF THE 18TH ACM CONFERENCE ON COMPUTER SUPPORTED COOPERATIVE WORK & SOCIAL COMPUTING 1302 (Feb. 28, 2015), http://yardi.people.si.umich.edu/pubs/Schoenebeck_MothersFacebook15.pdf.

¹⁸ See Kate Hamming, *A Dangerous Inheritance: A Child's Digital Identity*, 43 SEATTLE U. L. REV. 1033, 1035 (2020), (noting that nearly seventy-five percent of parents using social media do so to seek parenting-related information, advice, and support).

¹⁹ See Allison Lichter, *Oversharenting: Parents Juggle Their Kids' Lives Online*, WALL ST. J. (May 16, 2012, 4:43 PM), <https://www.wsj.com/articles/BL-JB-15164>.

considers the proposed legal remedies for children who wish to have greater control over information shared about them online.²⁰ Finally, Part IV argues that Congress should amend COPPA to allow minors to request the deletion of personal data shared about them by third parties and the scope of such an amendment.²¹

I. THE CURRENT STATE OF COPPA

Congress first enacted COPPA in 1998 in response to growing concerns about the ways in which advertisers could use children's personal information for marketing purposes.²² It requires operators of websites that are either primarily directed at children, or whose operators have actual knowledge that children are using the website, to obtain consent from the children's parents before collecting children's personal information.²³ COPPA's definition of "personal information" includes first or last names; physical addresses, including the names of streets and cities or towns; email addresses; telephone numbers; Social Security numbers; any other identifier that the Federal Trade Commission (FTC) determines permits the physical or online contacting of a specific individual; or information concerning the child or the child's parents that a website collects online from the child and combines with any of the other identifiers listed.²⁴

Through the years, COPPA has been amended to reflect increasing concerns regarding the sharing of personal information online.²⁵ First, as the internet emerged into a regular feature of society, Congress's goals in passing COPPA included protecting the security of children's personal information online while adapting to the quickly developing internet.²⁶ Adaptability continues to be at the forefront of COPPA's mission as the landscape of the internet is constantly changing.²⁷ Additionally, COPPA

²⁰ See generally *Senators Markey and Cassidy Propose Bipartisan Bill to Update Children's Online Privacy Rules*, ED MARKEY: U.S. SENATOR FOR MASS. (Jun. 24, 2021), <https://www.markey.senate.gov/news/press-releases/senators-markey-and-cassidy-propose-bipartisan-bill-to-update-childrens-online-privacy-rules>.

²¹ See 15 U.S.C. § 6502.

²² *Children's Privacy*, ELEC. PRIV. INFO. CTR., <https://epic.org/issues/data-protection/childrens-privacy/#introduction> (last visited Mar. 3, 2023).

²³ 15 U.S.C. § 6502(b)(1)(A).

²⁴ 15 U.S.C. § 6501(8).

²⁵ See Gadbow, *supra* note 10 at 229.

²⁶ *An Examination of Children's Privacy: New Technologies and the Children's Online Privacy Protection Act: Hearing on S. 968 Before the Subcomm. on Consumer Prot., Prod. Safety, & Ins. of the S. Comm. on Com., Sci., & Transp.*, 111th Cong., at 35 (2010); *Complying with COPPA: Frequently Asked Questions*, FED. TRADE COMM'N, <https://www.ftc.gov/business-guidance/resources/complying-coppa-frequently-asked-questions#K.%20Parental%20Access> (July 2020).

²⁷ See *Complying with COPPA*, *supra* note 16.

has a particular focus toward young children, as the FTC cites protecting children under the age of 13 as one of the purposes of the rule.²⁸ Thus, “the primary goal of COPPA is to place parents in control over what information is collected from their young children online.”²⁹ At a Senate Hearing to amend COPPA in 2010, the FTC announced that one of the “critical goals” of COPPA is to “enhance parental involvement in children’s online activities” to more effectively safeguard their privacy.³⁰

Congress amended COPPA significantly in 2012 to adapt to technological and social developments.³¹ The 2012 amendment is COPPA’s first—and only—since its enactment.³² The amendment broadened several key definitions in COPPA.³³ For example, the definition of “personal information” now includes “persistent identifiers” such as IP addresses, that could be used to identify a user, as well as a user’s geolocation information, photos, videos, and audio files containing a child’s voice.³⁴ Including photos and videos in the expansion of “personal information” was particularly important as use of smartphones and social media had become more prevalent among young people by that time.³⁵

Further, the 2012 amendment broadened the scope of websites bound by COPPA to include websites with a “target audience” of children, as opposed to previously only including websites with a “primary audience” of children.³⁶ The amendment also extended to applications that are directed at children, in recognition that minors now more frequently have access to smartphones and tablets.³⁷ The amendment also expanded the ways in which parents could consent to websites collecting information about their children.³⁸ Finally, the amendment strengthened data protection requirements for children’s personal information.³⁹

As the landscape of the internet continues to change, social media has created spaces for more interactive parent and child online dynam-

²⁸ *Id.*

²⁹ *Id.*

³⁰ *An Examination of Children’s Privacy: New Technologies and the Children’s Online Privacy Protection Act: Hearing on S. 968 Before the Subcomm. on Consumer Prot., Prod. Safety, & Ins. of the S. Comm. on Com., Sci., & Transp.*, 111th Cong., at 9 (2010) (statement of Jessica Rich, Deputy Dir., Bureau of Consumer Prot., Fed. Trade Comm’n) [hereinafter *Examination*].

³¹ Sara M. Grimes, *Revisiting the Children’s Online Privacy Protection Act*, THE JOAN CLOONEY CTR. (Mar. 25, 2013), <http://www.joanzcooneycenter.org/2013/03/25/revisiting-the-childrens-online-privacy-protection-act/>.

³² *Id.*

³³ *See id.*

³⁴ *Id.*; Gadbow, *supra* note 10 at 229.

³⁵ Grimes, *supra* note 31.

³⁶ Gadbow, *supra* note 10 at 229.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Grimes, *supra* note 31.

ics.⁴⁰ Earlier, the legislature had envisioned the relationship between parent and child online as one in which the parent was a steward over the child's independent online activities.⁴¹ However, when parents post personal information about their children online, they act not only as stewards of their children's personal information, but also as curators of this information: they have a distinct choice of when to disclose their children's personal information.⁴² This decision is often disconnected from their children's own online activities.⁴³ For COPPA to truly adapt to the current role social media plays in people's lives, it needs amendments that give children agency to consent to third-party sharing, rather than solely requiring parental consent.⁴⁴

II. CONCERNS ABOUT THIRD-PARTY SHARING

While many parents utilize social media as a tool for finding resources about parenting,⁴⁵ many parents have not considered the significance of their children's digital footprints.⁴⁶ However, while social media has provided a space for parents to support one another and document their lives, third-party sharing still prompts ethical considerations about children's autonomy and right to privacy over their personal data.⁴⁷

A. SHARENTING: BRINGING FAMILY LIFE ONLINE

"Sharenting," a term first coined in 2012 as "oversharenting" and subsequently shortened, refers to the ways in which parents overshare information about their children online.⁴⁸ Sharenting has become a routine part of many parents' lives.⁴⁹ On Facebook, for instance, 66% to

⁴⁰ See Kathryn Jezer-Morton, *Did Moms Exist Before Social Media?*, NEW YORK TIMES (Apr. 16, 2020), <https://www.nytimes.com/2020/04/16/parenting/mommy-influencers.html>.

⁴¹ See *Examination*, *supra* note 30.

⁴² See Tate, *supra* note 1.

⁴³ Siibak & Traks, *supra* note 8.

⁴⁴ See *Complying with COPPA*, *supra* note 16 (noting that COPPA does not apply to information about children collected online from parents).

⁴⁵ MAEVE DUGGAN ET AL., PEW RSCH. CTR., PARENTS AND SOCIAL MEDIA 4 (2015), <https://www.pewresearch.org/wp-content/uploads/sites/9/2015/07/Parents-and-Social-Media-FIN-DRAFT-071515.pdf> (study showing that 59 percent of parents who use social media indicated that within the past 30 days they had come across useful information about parenting while looking at social media).

⁴⁶ See Steinberg I, *supra* note 6.

⁴⁷ See *id.*

⁴⁸ Allison Lichter, *Oversharenting: Parents Juggle Their Kids' Lives Online*, THE WALL STREET JOURNAL (May 16, 2012 4:43 PM), <https://www.wsj.com/articles/BL-JB-15164>.

⁴⁹ See Minkus, *supra* note 9 at 776-81.

98% of parents post pictures of their children.⁵⁰ Many parents post information about their children online to document and share important life moments with loved ones.⁵¹ Sharenting also helps foster a sense of online community for parents as they find others who have similar experiences.⁵² Sharenting includes not only casual Facebook posts about children, but also parenting blogs, YouTube channels, and other forms of online information-sharing.⁵³ Although sharenting was originally intended to describe the ways in which parents share information about their children online, the phenomenon now extends to *any* adult posting about a child, including comments by relatives, caregivers, or teachers.⁵⁴

Sharenting, although often done with good intentions, poses new challenges for children's autonomy.⁵⁵ When, if ever, can children meaningfully consent to having information about them posted online?⁵⁶ What are the long-term effects of parents disclosing information about their children, often before their children are online in their own capacities?⁵⁷ Parents and children have met these questions with increasing concern as the first generation raised online are now grown and have started speaking about their experiences.⁵⁸ Posting about children without their consent raises concerns not only about children's autonomy in shaping their own online narratives, but also about the possible far-reaching consequences of the ways in which their personal data is used in the future.⁵⁹

B. LIVING IN THEIR PARENTS' SHADOWS: THE TENSION BETWEEN CHILDREN'S AUTONOMY AND HYPER-ONLINE PARENTS

Sharenting often begins early in a child's life.⁶⁰ Ninety-two percent of two-year-olds in the United States have an online presence, and nearly

⁵⁰ *Id.* at 776.

⁵¹ Siibak & Traks, *supra* note 8 at 115-16 (2019).

⁵² DUGGAN, *supra* note 45.

⁵³ See *Sharent*, MACMILLAN DICTIONARY, <https://www.collinsdictionary.com/us/dictionary/english/sharenting> (last visited Mar. 28, 2022).

⁵⁴ *Id.*

⁵⁵ See Stacey B. Steinberg, *Sharenting: Children's Privacy in the Age of Social Media*, 66 EMORY L.J. 839, 843 (2017), <https://scholarlycommons.law.emory.edu/cgi/viewcontent.cgi?article=1094&context=elj> [hereinafter Steinberg II].

⁵⁶ See *id.* at 876 (noting children's evolving ability to consent as they age).

⁵⁷ See Tate, *supra* note 1.

⁵⁸ Pip Lincolne, "My Mum Is an Influencer. I Am Sick of Being a Part of It," BABYOLOGY (Feb. 5, 2020), <https://babyology.com.au/health/family-health/my-mum-is-an-influencer-i-am-sick-of-being-a-part-of-it/>.

⁵⁹ See Siibak & Traks, *supra* note 8 at 116.

⁶⁰ See American Academy of Pediatrics, *Researchers Caution About Potential Harms of Parents' Online Posts About Children*, PSYPOST (Oct. 23, 2016), <https://www.psypost.org/2016/10/researchers-caution-potential-harms-parents-online-posts-children-45554>.

one-third of two-year-olds have content about them posted online within their first twenty-four hours of life.⁶¹ Some parents even create social media accounts using their children's identity: nearly 40% of mothers aged 18–34 create social media accounts for their babies before their first birthdays, and even post ultrasounds before their birth.⁶²

Referred to as “digital shadows,” these digital footprints position parents as the foundation of their children's online presence, so that by the time the children are old enough to share their own information online, there is already a backlog of information shared by their parents or potentially other caretakers.⁶³ For instance, when Roshelle began to use the internet in her own capacity as a fourth-grader, she soon discovered that the internet was already filled with artifacts of her life, including photos and stories from her childhood.⁶⁴ Parents often have benign intentions in posting about their children online, such as communicating with loved ones and connecting with other parents about the challenges of parenting.⁶⁵ However, their posting habits can harm their children over time.⁶⁶

For instance, the child of parenting blogger Heather Armstrong recalled in an interview how embarrassed she was to discover one day that her mother had written about her when she was sick.⁶⁷ While her mother's blogging has made them closer, her mother's career also has downsides, such as when Armstrong scheduled for both of them a trip that her daughter did not want to take just so Armstrong could take pictures for a blog post.⁶⁸ Armstrong and her child seem to have an amicable negotiation between Armstrong's writing and her daughter's boundaries.⁶⁹ Others' experiences with third-party sharing have been more fraught.⁷⁰ One mother recalls a time when she filmed herself disci-

⁶¹ *Id.*

⁶² Alesandra Dubin, *Have a Social Media Account for Your Baby? 40 Percent of Millennial Moms Do*, TODAY (Oct. 18, 2014, 5:15 AM), <https://www.today.com/parents/have-social-media-account-your-baby-40-percent-millennial-moms-1d80224937>; Andra Siibak & Keily Traks, *The Dark Sides of Sharenting*, CATALAN J. COMMUN & CULTURAL STUDS. 115, 116 (2019), https://www.researchgate.net/profile/Andra-Siibak/publication/333607170_The_dark_sides_of_sharenting/links/6090fd02a6fdccaebd07829d/The-dark-sides-of-sharenting.pdf.

⁶³ See Siibak & Traks, *supra* note 8 at 116 (2019).

⁶⁴ Tate, *supra* note 1.

⁶⁵ Hamming, *supra* note 18 at 1044-.

⁶⁶ Siibak & Traks, *supra* note 8.

⁶⁷ Rachel Hampton, *When Your Mom Is “Mommy Blogger” Heather Armstrong a.k.a. Dooce*, SLATE (June 11, 2018, 7:37 AM), <https://slate.com/human-interest/2018/06/my-parents-work-life-balance-when-your-mom-is-mommy-blogger-heather-armstrong-aka-dooce.html>.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See Kristi Pahr, *Daughter of Mom Influencer Was So Tired of Having Her Picture Taken, She Put ‘No Pictures’ on Her Sweatshirt*, PARENTS (Nov. 17, 2022), <https://www.parents.com/news/>

plining her three-year-old son because she thought that his reaction was funny, but she had not considered the implications of her actions until she had already uploaded the film to Instagram.⁷¹

Children's boundaries for parents' sharing online may vary with the type of content their parents post.⁷² Notably, one study revealed that 71.3% of teenagers do not feel that their parents respect the teenagers' privacy online.⁷³ Over one-third of participants in the study experienced their parents sharing embarrassing photos of them.⁷⁴ A separate study found that many children disapprove of their parents sharing information that would reflect negatively on the child's self-presentation or that is too revealing.⁷⁵ This experience underscores the importance of the need of parents to consider their children's feelings or even decide against posting anything that they suspect will embarrass their children in the future.

C. CONCERNS ABOUT DATA COLLECTION

Beyond embarrassment, children whose parents share their personal information online face online surveillance concerns as they grow up.⁷⁶ Data brokers pose a particularly salient online surveillance concern.⁷⁷ Data brokers create and sell informational profiles of people online.⁷⁸ These profiles are made up of data about people collected and used to predict their traits, such as their favorite activities or favorite brands.⁷⁹ Data brokers sell profile data to "spammers, malware distributors, employment agencies, and college admissions offices."⁸⁰

Furthermore, as data collectors refine their uses for personal data, personal data may have farther reaching consequences than everyday

daughter-of-mom-influencer-was-so-tired-of-having-her-picture-taken-she-put-no-pictures-on-her-sweatshirt/.

⁷¹ Benzinga Staff, Society's New Addiction: Getting a "Like" over Having a Life, BENZINGA (Mar. 12, 2015, 9:30 AM), <https://www.benzinga.com/pressreleases/15/03/m5321188/societys-new-addiction-getting-a-like-over-having-a-life>.

⁷² See Siibak & Traks, *supra* note 8.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Minkus, *supra* note 9 at 777.

⁷⁷ See Steinberg I, *supra* note 6.

⁷⁸ Minkus, *supra* note 9 at 777.

⁷⁹ *Know Your Users: The Difference Between Profile Data and Behavioral Data*, UPLAND (last visited Mar. 3, 2023), <https://uplandsoftware.com/localytics/resources/blog/know-your-users-what-is-the-difference-between-profile-data-and-behavioral-data/#:~:text=profile%20data%3A%20shows%20who%20they,an%20in%2Dstore%20loyalty%20card>.

⁸⁰ Minkus, *supra* note 9 at 777.

people can anticipate today.⁸¹ Targeted advertising uses people's data to gather ideas of people's preferences and interests, sometimes before they are aware of those preferences and interests themselves.⁸² For instance, targeted advertising has even given advertisements for maternity products to people who did not even know about their own pregnancies yet.⁸³ Troublingly, companies do not just use this strategy to sell products—it is also an effective method for selling ideologies.⁸⁴

While parents may set their accounts to private—viewable only by friends—to protect their families' privacy, they still run the risk of having their information collected by data brokers.⁸⁵ There are many ways data brokers collect and store information about people through their online activity.⁸⁶ Since using social media is another type of online activity that can be used to collect data about people, it remains a reliable source of data profiles that can be used to advertise to people.⁸⁷

Data collection poses a unique set of challenges when posting about children online.⁸⁸ With increasingly sophisticated technology, facial recognition software can be used to collect data through pictures posted online and to create profiles of children before they are posting online in their own capacities.⁸⁹ The information that data brokers can glean from social media posts goes beyond the surface level content of the photo and caption itself.⁹⁰ In a 2015 study that analyzed the posts of a sample size of Facebook and Instagram users, researchers used automated software to filter through posts to identify pictures of children.⁹¹ From there, researchers were able to find more identifying features of the children, often including their full names and birthdates.⁹² By connecting each child's parents' names to voter registration records, researchers were able to create more detailed profiles of the children.⁹³ These profiles included

⁸¹ See Jacob Ward, *Why Data, Not Privacy, Is the Real Danger*, NBC NEWS (Feb. 4, 2019, 11:49 AM), <https://www.nbcnews.com/business/business-news/why-data-not-privacy-real-danger-n966621>.

⁸² *Id.*

⁸³ Charles Duhigg, *How Companies Learn Your Secrets*, NEW YORK TIMES (Feb. 16, 2012), https://www.nytimes.com/2012/02/19/magazine/shopping-habits.html?pagewanted=6&_r=1&hp.

⁸⁴ Ward, *supra* note 81.

⁸⁵ See *The Now: What Is Targeted Advertising?*, GCF GLOB., <https://edu.gcfglobal.org/en/thenow/what-is-targeted-advertising/1/> (last visited Feb. 24, 2023).

⁸⁶ *Id.*

⁸⁷ See *id.*

⁸⁸ See Emine Saner, *The “Sharent” Trap - Should You Ever Put Your Children on Social Media?*, THE GUARDIAN (May 24, 2018, 2:00 PM), <https://www.theguardian.com/lifeandstyle/2018/may/24/sharent-trap-should-parents-put-their-children-on-social-media-instagram>.

⁸⁹ See *id.*

⁹⁰ Minkus, *supra* note 9 at 776-79, 782-83.

⁹¹ *Id.*

⁹² *Id.* at 776-79, 782.

⁹³ *Id.* at 776-79, 782-83.

children's home addresses, parents' birthdays, and parents' political affiliations.⁹⁴ Data brokers, government surveillance agencies, or Facebook itself can then continually enhance these types of profiles throughout a child's life.⁹⁵

Once an adult shares a post about a child online, the child has no control over where the post ends up.⁹⁶ Children's lack of autonomy over posts made about them has far-reaching consequences as they grow up and begin to enter adulthood, college, and the workforce.⁹⁷ Children have the right to dictate how their lives are shared online, and to choose not to have any part of their lives shared online at all.⁹⁸ In addition to safeguarding children's right to tell their own stories, there is also the need to protect their right to prevent being monitored through online surveillance.⁹⁹ This side effect of sharenting has been referred to as the "emergence of the datafied child."¹⁰⁰ This term describes the ways in which sharenting inadvertently increases the ways in which early childhood is already a "critical site of datafication and . . . surveillance practices aimed at collecting data."¹⁰¹

This use of data, while still new, will advance over time and become more sophisticated.¹⁰² In light of this, children should be able to make an informed decision whether to have a social media presence someday, rather than living in their own digital shadows before they are online.¹⁰³

III. CURRENT PROPOSED REMEDIES

Over the years, many people have grown concerned about finding solutions for issues related to third-party sharing.¹⁰⁴ Addressing these concerns has proven to be a challenge, as legal solutions such as tort remedies are often not feasible due to exceptions such as the parent-child immunity doctrine.¹⁰⁵ This section explores two potential solutions: the

⁹⁴ *Id.* at 776-77, 779-80.

⁹⁵ *Id.* at 777.

⁹⁶ University of Michigan Health System, "Sharenting" Trends: Do Parents Share Too Much About Kids on Social Media?, PHYS.ORG (Mar. 16, 2015), <https://phys.org/news/2015-03-sharenting-trends-parents-kids-social.html>.

⁹⁷ American Academy of Pediatrics, *Researchers Caution About Potential Harms of Parents' Online Posts About Children*, PSYPOST (Oct. 23, 2016), <https://www.psypost.org/2016/10/researchers-caution-potential-harms-parents-online-posts-children-45554>.

⁹⁸ Steinberg II, *supra* note 55 at 877.

⁹⁹ *See* Siibak & Traks, *supra* note 8 at 116.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *See* Ward, *supra* note 81.

¹⁰³ *See* Siibak & Traks, *supra* note 8.

¹⁰⁴ *See generally* Hamming, *supra* note 18; Steinberg I, *supra* note 6.

¹⁰⁵ *See Immunity*, BLACK'S LAW DICTIONARY (11th ed. 2019).

European Union's doctrine of the right to be forgotten and the Children's and Teen's Online Privacy Protection Act of 2021 (COPPA).

A. THE RIGHT TO BE FORGOTTEN VERSUS THE RIGHT TO REMEMBER:
THE FEASIBILITY OF ADOPTING THE "RIGHT TO BE
FORGOTTEN" DOCTRINE

One legislative option for minors seeking to control what information is shared about them online is the adoption of the "right to be forgotten" doctrine.¹⁰⁶ The doctrine, used in the European Union, gives people the right to request that their personal data be deleted, under certain circumstances, without undue delay.¹⁰⁷ One such instance occurs when the personal data is no longer necessary for the original purpose for which an organization collected it.¹⁰⁸ The doctrine may also be invoked when an individual objects to an organization's justification for processing the data, when there is no overriding legitimate interest for the organization to keep the information.¹⁰⁹

For instance, in *Google Spain SL v. Agencia Española de Protección de Datos*, the landmark case that established the right to be forgotten doctrine, the court held that Mr. Costeja González, a Spanish resident, had a right to have his personal information deleted or concealed from search engine results because his personal right to privacy outweighed the value that information has to the general public.¹¹⁰ Costeja González sought to delete or conceal the results that appeared when a search for his name on Google showed two newspaper articles detailing a real-estate auction connected with attachment proceedings to recover his social security debts.¹¹¹ The court found that while website operators have a right to process personal information, this right does not extend to "incompatible" data, defined as "inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed."¹¹² Because the newspaper articles contained sensitive information about Costeja González's private life, had been published 16 years earlier, and did not seem to exhibit a "preponderant interest of the

¹⁰⁶ Commission Regulation 2016/679, art. 17, 2016 O.J. (L 119).

¹⁰⁷ *Id.*

¹⁰⁸ Ben Wolford, *Everything You Need to Know About the "Right to Be Forgotten,"* GDPR.EU, <https://gdpr.eu/right-to-be-forgotten/> (last visited Apr. 2, 2023).

¹⁰⁹ *Id.*

¹¹⁰ Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, ECLI:EU:C:2014:317 (May 13, 2014) [hereinafter *Google Spain*].

¹¹¹ *Id.* at ¶¶ 14-15.

¹¹² *Id.* at ¶ 93.

public," Costeja González was able to establish a right to have the information removed.¹¹³

If the United States adopted the "right to be forgotten" doctrine, legal scholar Stacey Steinberg posits that children could potentially take legal action to remove content posted about them by their parents as soon as they reached adulthood.¹¹⁴ Under a "right to be forgotten" claim, children could argue that the information shared about them online was no longer necessary and harmed their well-being, which would warrant the deletion of such content.¹¹⁵ While this strategy could be effective at providing a prima facie case for someone petitioning to have third-party posts about them deleted, the petitioner would likely have difficulty establishing that there is not a "preponderant interest" in the public continuing to have access to this information.¹¹⁶

Although the court in *Google Spain* noted that it was not necessary to find that the information the individual wishes to have removed "cause[d] prejudice" to the individual, the sensitivity of the information involved in *Google Spain* was a factor in the court's balancing test.¹¹⁷ Many grown children may eventually want to delete information shared about them by third parties, even if the information was not specifically prejudicial or sensitive.¹¹⁸ For instance, if Roshelle wishes for her mother to erase all information shared about her online when she grows up, it will be difficult for her to argue that there is anything prejudicial about pictures of her as a baby that appear when she types her mother's name into a search engine.¹¹⁹ Moreover, in the context of parents who write about their children online as a way to express themselves and make their livings as writers,¹²⁰ a petitioner would have difficulty arguing that the public interest in this information does not override the child's right to privacy.¹²¹ On its own, the adoption of the right to be forgotten in the United States cannot solve the issues that arise through sharenting.¹²²

¹¹³ *Id.* at ¶ 98.

¹¹⁴ Steinberg II, *supra* note 55 at 866.

¹¹⁵ *Id.*

¹¹⁶ *Google Spain* at ¶ 98.

¹¹⁷ *Id.* at ¶¶ 98-99.

¹¹⁸ See Steinberg II, *supra* note 55 at 843-844.

¹¹⁹ Tate, *supra* note 1.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See Steinberg II, *supra* note 55 at 865.

B. CHILDREN AND TEENS' ONLINE PRIVACY PROTECTION ACT OF 2021

Since its inception in 1998, the legislature has amended COPPA to reflect the changing nature of the internet.¹²³ The most recent proposed amendment, the Children and Teens' Online Privacy Protection Act of 2021 (the "Bill") suggests several key changes to COPPA's current standards.¹²⁴ First, it would expand COPPA's protections to minors between the ages of thirteen and fifteen by prohibiting websites from collecting personal information from users in that age range without the users' consent.¹²⁵ Next, it would ban targeted advertising directed at children entirely.¹²⁶ It would also mandate the creation of an "Eraser Button" that allows users to delete personal information of a child or teen when technologically feasible.¹²⁷ Finally, regarding the required knowledge that a website collects personal information, the Bill proposes applying a "constructive knowledge"¹²⁸ standard in place of the "actual knowledge"¹²⁹ standard.¹³⁰ These proposals mark starting points for how to effectively address minors' rights to privacy in a social media-driven world.¹³¹

This proposal is notable because it affords more agency to minors between the ages of thirteen and fifteen than previously available to minors under COPPA.¹³² By requiring the user's, rather than the parent's, consent before collecting personal information of thirteen- to fifteen-year-olds, the bill recognizes teenagers' rights to decide for themselves what information they would like to share online.¹³³ It creates a distinction between children under thirteen and children between the ages of thirteen and fifteen, asserting a legally recognized maturity in making decisions about their data.¹³⁴ Additionally, the creation of an "Eraser

¹²³ See Gadbow, *supra* note 10 at 229.

¹²⁴ Children and Teens' Online Privacy Protection Act, S. 1628, 117th Cong. (2021).

¹²⁵ *Senators Markey and Cassidy Propose Bipartisan Bill to Update Children's Online Privacy Rules*, ED MARKEY: U.S. SENATOR FOR MASS. (Jun. 24, 2021), <https://www.markey.senate.gov/news/press-releases/senators-markey-and-cassidy-propose-bipartisan-bill-to-update-childrens-online-privacy-rules> [hereinafter, *Markey and Cassidy*]

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See *Knowledge*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining constructive knowledge as "knowledge that one using reasonable care or diligence should have").

¹²⁹ BLACK'S LAW DICTIONARY, *supra* note 128 (defining actual knowledge as "direct and clear knowledge").

¹³⁰ *Markey and Cassidy, supra* note 125.

¹³¹ *See id.*

¹³² See *Senate Bill Would Expand Federal Children's Privacy Protections*, HUNTON PRIV. BLOG (May 12, 2021), <https://www.huntonprivacyblog.com/2021/05/12/senate-bill-would-expand-federal-childrens-privacy-protections/#more-20457> [hereinafter *Senate Bill*].

¹³³ *See id.*

¹³⁴ *See id.*

Button" for websites, which would allow users to delete personal information collected about children or teenagers, advances rights for minors online by providing an accessible solution to the problem of unwanted online personal information.¹³⁵

Although this proposal is a step in the right direction, it still operates under a framework that assumes minors' personal information is only ever disclosed by minors themselves.¹³⁶ In a press release for the amendment, Senator Edward Markey commented, "Over the past year, parents have seen their children and teens spend more and more time online and they're realizing that the internet simply is not safe for kids and adolescents."¹³⁷ Senator Bill Cassidy also commented, "Parents don't want internet companies targeting their children online."¹³⁸ While these concerns are well-founded, both assume that children are the only ones who will share personal information about themselves without fully understanding the consequences.¹³⁹ It still ignores the reality that others, including peers and parents, will also share information about children online.¹⁴⁰

Despite the Bill's failure to adequately reflect all of the ways in which minors' personal information is shared online, it does provide a useful starting point for how the legislature can amend COPPA to provide solutions for instances in which third parties share children's personal information.¹⁴¹

IV. ANALYSIS

COPPA has come a long way since its enactment.¹⁴² Yet, its subsequent amendment in 2012 did not go far enough to address concerns about minors' right to privacy online.¹⁴³ The 2012 amendment addressed emergent issues with the increasing popularity of smartphones and social media.¹⁴⁴ Today, it still falls short in recognizing the ways in which parents and children alike have changed their online activities since

¹³⁵ *See id.*

¹³⁶ *See id.*

¹³⁷ *Markey and Cassidy, supra* note 125.

¹³⁸ *Id.*

¹³⁹ *See id.*

¹⁴⁰ *See* Siibak & Traks, *supra* note 8.

¹⁴¹ *Markey and Cassidy, supra* note 125.

¹⁴² *See* Gadbow, *supra* note 10.

¹⁴³ *See id.*

¹⁴⁴ *Id.*

COPPA's enactment.¹⁴⁵ As a result, the legislature should amend COPPA to give minors the ability to request that companies delete personal information that third parties shared about minors.¹⁴⁶

This Comment argues that Congress should expand COPPA's protections to allow minors to request deletion of any personal information shared about the minors by third parties.¹⁴⁷ This proposed amendment would use COPPA's existing definition of "personal information"¹⁴⁸ and limit the decision to delete such personal information to minors over the age of thirteen, when they can make more informed decisions about the collection of their data.¹⁴⁹

A. A WALK IN THEIR SHOES: EXPANDING COPPA TO GIVE MINORS CONTROL OVER THEIR DIGITAL FOOTPRINTS

The most effective way to address the issue of children's lack of control over third parties posting their personal information online is to amend COPPA so that minors can request the deletion of their personal information posted by third parties.¹⁵⁰ This amendment would function in a similar way to the proposed "Eraser Button," meaning that websites would be required to have a method for minors to request the deletion of their personal information from a site.¹⁵¹ However, unlike the "Eraser Button," this option would be available even if the children themselves are not users of the website.¹⁵² For instance, children who want to request removal of personal information posted to their parents' YouTube accounts would not have to be users on YouTube themselves to make this request.¹⁵³ Additionally, this amendment would apply to minors over the age of thirteen, reflecting the current Bill's standards of recognizing sufficient maturity in minors over that age.¹⁵⁴

¹⁴⁵ See *The State of Play – Issue Brief: COPPA 101*, FUTURE OF PRIVACY FORUM (Feb. 2, 2022), <https://fpf.org/blog/the-state-of-play-issue-brief-coppa-101/#:~:text=critics%20argue%20that%20COPPA%20%E2%80%93%20which,its%20use%20of%20age%2013.>

¹⁴⁶ See 15 U.S.C. § 6501.

¹⁴⁷ See *id.*

¹⁴⁸ 15 U.S.C. § 6501(8).

¹⁴⁹ See *Senate Bill*, *supra* note 132.

¹⁵⁰ See 15 U.S.C. § 6501.

¹⁵¹ See *Markey and Cassidy*, *supra* note 125.

¹⁵² See *id.*

¹⁵³ See *id.*

¹⁵⁴ See *Senate Bill*, *supra* note 132.

1. Scope

The proposed amendment would broaden the scope of COPPA beyond the websites to which it currently applies.¹⁵⁵ COPPA currently applies to websites or online services that are directed at children and that collect personal information from children, as well as to those that have actual knowledge that they are collecting personal information from children.¹⁵⁶ The proposed amendment would have limited efficacy if it were restricted to websites with "actual knowledge" that they collect personal information from children, as not all websites require their users to specify what types of content they will post or to what age group information therein may belong.¹⁵⁷ COPPA would be more effective if it included in its scope websites that have "constructive knowledge" that they are collecting personal information from children.¹⁵⁸ Such a provision would include, for instance, most social media platforms, given the high percentages of parents who post information about their children online.

Additionally, the amendment would keep the current definition of "personal information" used in COPPA, which limits in scope the types of information of which minors could request deletion.¹⁵⁹ Although this would not solve the issue of minors' inability to control what information is shared about them online, it would reduce the likelihood that data brokers inadvertently compromise minors' data. It would also maintain a balance between children's right to privacy and the general right to free speech that extends to online spaces.

2. Balancing Free Speech Concerns

Any restriction of access to information online raises concerns about freedom of speech.¹⁶⁰ After all, this right includes the rights of parents to share information about their children online.¹⁶¹ This amendment would require a balancing test similar to that used in the "right to be forgotten" doctrine, which weighs minors' right to privacy online against the rights of others to express themselves online.¹⁶² Adults, however, should re-

¹⁵⁵ See 15 U.S.C. § 6502(b)(1)(A).

¹⁵⁶ 15 U.S.C. § 6502(b)(1)(A).

¹⁵⁷ See *Markey and Cassidy*, *supra* note 125.

¹⁵⁸ See *id.*

¹⁵⁹ See 15 U.S.C. § 6501(8).

¹⁶⁰ See Steinberg II, *supra* note 55.

¹⁶¹ See Keltie Haley, *Sharenting and the (Potential) Right to Be Forgotten*, 95 IND. L.J. 1005, 1011 (2020), <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=11383&context=ilj>.

¹⁶² See *Google Spain SL v. Agencia Española de Protección de Datos*, ECLI:EU:C:2014:317 (May 13, 2014).

ceive more deference to requests to delete anything containing their personal information.

Although this balancing test may have controversial results, it would substantively preserve people's right to expression.¹⁶³ For instance, even if a child objects to her parent posting the child's first name when the parent's account shares the family's last name, the parent could still post information about the child using a pseudonym for the child.¹⁶⁴ Adults would still be able to share most anecdotes and stories since the scope of the definition of personal information under COPPA is narrow.¹⁶⁵ Crucially, posts sharing such information would not be banned; children would merely have the right to request the deletion of posts that share this information.¹⁶⁶ Courts would still need to use the balancing test to weigh these requests using factors such as what type of information was shared, in what capacity, and how much time had passed since the information was shared.¹⁶⁷

B. FEASIBILITY CONCERNS

This proposed amendment might raise feasibility concerns over the requirement of compliance by every website. Particularly, website operators may challenge the requirement of an "Eraser Button" mechanism because they may not have the capacity to create and monitor it.¹⁶⁸ However, as the internet increasingly becomes a part of everyday life, websites need to invest in safeguarding the information that people entrust to them.¹⁶⁹ Many websites already comply with COPPA's terms by mandating transparency about what types of information they collect and providing proper notice to adults before collecting information from children.¹⁷⁰

Furthermore, since the FTC is responsible for regulating COPPA, the FTC would be responsible for applying the balancing test weighing

¹⁶³ See Haley, *supra* note 161.

¹⁶⁴ See 15 U.S.C. § 6501(8).

¹⁶⁵ See *id.*

¹⁶⁶ See Commission Regulation 2016/679, art. 17, 2016 O.J. (L 119).

¹⁶⁷ See *id.*

¹⁶⁸ See Joshua Levine, *COPPA 2.0: The Costs of Layering on Liability*, AMERICAN ACTION FORUM (May 18, 2023), <https://www.americanactionforum.org/insight/coppa-2-0-the-costs-of-layering-on-liability/>, citing the expenses associated with complying with current COPPA standards.

¹⁶⁹ See *Children's Privacy*, ELEC. PRIV. INFO. CTR., <https://epic.org/issues/data-protection/childrens-privacy/> (last visited Jul. 31, 2023).

¹⁷⁰ Elliot Nesbo, *What is COPPA and Do Websites Adhere to It?*, MAKE USE OF (Jul. 25, 2021), <https://www.makeuseof.com/what-is-coppa/>.

privacy and free speech concerns.¹⁷¹ As a result, websites themselves would not apply this balancing test.¹⁷² Instead, this requirement would arise only when someone's request for the deletion of their data goes before a commission established by the FTC.¹⁷³

CONCLUSION

As the landscape of the internet changes, legislators must continually revisit privacy rights to keep up with changes in how data is collected, stored, and used.¹⁷⁴ While adults have agency in deciding what information to share online, children often lack the same agency to decide what adults may share about them.¹⁷⁵ The time is ripe for COPPA to be amended to recognize children's interests in their online autonomy.¹⁷⁶ In the future, people may increasingly desire the ability to delete their digital footprints, whether they were created by themselves or others.¹⁷⁷ This policy is a start to strengthening the rights of children online.¹⁷⁸

¹⁷¹ See Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, ECLI:EU:C:2014:317 (May 13, 2014) (applying a balancing test between the plaintiff's personal right to privacy and the value of his personal information has to the general public).

¹⁷² See *id.*

¹⁷³ 15 U.S.C. § 6505(a).

¹⁷⁴ Gadbow, *supra* note 10 at 231.

¹⁷⁵ Steinberg II, *supra* note 55 at 844.

¹⁷⁶ See *Markey and Cassidy*, *supra* note 125.

¹⁷⁷ See Steinberg II, *supra* note 55 at 855.

¹⁷⁸ See *Children's Privacy*, ELEC. PRIV. INFO. CTR., <https://epic.org/issues/data-protection/childrens-privacy> (last visited Jul. 31, 2023).

