

Date of Hearing: April 30, 2019

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Ed Chau, Chair

AB 1665 (Chau) – As Introduced February 22, 2019

SUBJECT: The Parent’s Accountability and Child Protection Act

SUMMARY: This bill would prohibit a person or business that conducts business in California, that operates an internet website or application that seeks to use a minor’s name, picture, or any information about the minor in connection with third party advertising, as specified, from doing so without obtaining prior parental consent. Specifically, **this bill would:**

- 1) Prohibit a person or business that conducts business in California, that operates an internet website or application that seeks to use a minor’s name, picture, or any information about the minor on a social media internet website or application pursuant to an arrangement in which the person or business is paid by a third party to display the minor’s name, picture, or information that could reasonably identify the minor from doing so without obtaining prior parental consent, which must be separate from the social media internet website or the application’s general terms and conditions.
- 2) Provide that the failure of a parent to provide the parental consent to the use of the minor’s name, picture, or information shall not result in any minor being denied access to the social media internet website or application.
- 3) Prohibit parental consent from being obtained through the minor.

EXISTING LAW:

- 1) Provides that, among other rights, all people have an inalienable right to pursue and obtain privacy. (Cal. Const., art. I, Sec. 1.)
- 2) Requires, pursuant to the federal Children’s Online Privacy Protection Act (COPPA), that an operator of an internet website or online service directed to a child, as defined, or an operator of an internet website or online service that has actual knowledge that it is collecting personal information (PI) from a child to provide notice of what information is being collected and how that information is being used, and to give the parents of the child the opportunity to refuse to permit the operator’s further collection of information from the child. (15 U.S.C. Sec. 6502.)
- 3) Prohibits, pursuant to the Privacy Rights for Minors in the Digital World, the operator of an internet website, online service, online application, or mobile application from:
 - marketing or advertising a product or service to a minor, if the minor cannot legally purchase the product or participate in the service in the State of California; or,
 - using, disclosing, or compiling, or knowingly allowing a third party to use, disclose, or compile, the PI of a minor for the purpose of marketing goods or services that minors cannot legally purchase or engage in in the State of California. (Bus. & Prof. Code Sec. 22580.)

- 4) Requires an operator of an internet website, online service, online application, or mobile application to do all of the following:
 - permit a minor who is a user of the operator’s internet website, service, or application to remove content or information submitted to or posted on the operator’s website, service or application by the user;
 - provide notice to a minor who is the user of the operator’s internet website, service, or application that the minor may remove content or information submitted to or posted on the operator’s website, service, or application by the user; and,
 - provide notice to a minor who is the user of the operator’s internet website, service, or application that the removal described above does not ensure complete or comprehensive removal of the content or information. (Bus. & Prof. Code Sec. 22581.)
- 5) Establishes the California Consumer Privacy Act of 2018 (CCPA) and provides various rights to consumers pursuant to the act. Subject to various general exemptions, a consumer has, among other things:
 - the right to know what PI a business collects about consumers, as specified, including the categories of third parties with whom the business shares PI;
 - the right to know what PI a business sells about consumers, as specified, including the categories of PI that the business sold about the consumer and the categories of third parties to whom the PI was sold, by category or categories of PI for each third party to whom the PI was sold;
 - the right to access the specific pieces of information a business has collected about the consumer;
 - the right to delete information that a business has collected from the consumer; and,
 - the right to opt-out of the sale of the consumer’s PI if over 16 years of age, and the right to opt-in if the consumer is a minor (as exercised by the parent if the minor is under 13, or as exercised by the minor if the minor is between ages 13 and 16); and,
 - the right to equal service and price, despite exercising any of these rights. (Civ. Code Sec. 1798.100 et seq.)
- 6) Authorizes, subject to certain exceptions, a minor to make a contract in the same manner as an adult, subject to disaffirmance. (Fam. Code Sec. 6700.)
- 7) Provides that a contract entered into by a minor may not be disaffirmed if all of the following are satisfied:
 - The contract is to pay the reasonable value of things necessary for the support of the minor or the minor’s family.

- These things have been actually furnished to the minor or to the minor's family.
- The contract is entered into by the minor when not under the care of a parent or guardian able to provide for the minor or the minor's family. (Fam. Code Sec. 6712.)

FISCAL EFFECT: None. This bill has been keyed nonfiscal by the Legislative Counsel.

COMMENTS:

1) **Purpose of the bill:** This bill seeks to protect children by ensuring that minors using social media platforms cannot agree to a business' general terms and conditions and cannot consent on behalf of their parents or legal guardians. This bill is sponsored by the Children's Advocacy Institute.

2) **Author's statement:** According to the author:

In recent years, it has become common for companies to seek out young, influential individuals, within social groups, to encourage them to endorse brands and share that endorsement with their friends. The rise in this practice led to a class action lawsuit being filed against a social media company. The lawsuit alleged that it was unlawful to use people's names and photos for advertising without their consent. The company operated a program where it could use the "liked" content of a user to create an advertisement that could then be sent to the user's friends.

To authorize such programs, some social media companies seek to obtain consent from users – including children -- "to use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us," they do it in language aimed identically at children and adults, buried in the company's boilerplate terms and conditions.

AB 1665 prohibits a person or business that conducts business in California, that operates an internet website or application that seeks to use a minor's name, picture, or any information about the minor on a social media internet website or application pursuant to an arrangement in which the person or business is paid by a third party to display the minor's name, picture, or information that could reasonably identify the minor, from doing so without obtaining prior parental consent. The parental consent must be separate from the social media internet website or the application's general terms and conditions. The bill further prohibits the failure of a parent to provide the parental consent to the use of the minor's name, picture, or information from resulting in any minor being denied access to the social media internet website or application. Finally, AB 1665 prohibits parental consent from being obtained through the minor.

3) **The federal Child's Online Privacy Protection Act protects the online privacy of children under 13 years of age:** Enacted in 1998, the federal Child's Online Privacy Protection Act of 1998 (COPPA), requires the Federal Trade Commission (FTC) to issue and enforce a rule (the Rule) concerning children's online privacy. The FTC notes that:

The primary goal of COPPA and the Rule is to place parents in control over what information is collected from their young children online. The Rule was designed to

protect children under age 13 while accounting for the dynamic nature of the internet. The Rule applies to operators of commercial websites and online services directed to children under 13 that collect, use, or disclose personal information from children, and operators of general audience websites or online services with actual knowledge that they are collecting, using, or disclosing personal information from children under 13. (FTC: Frequently Asked Questions about the Children’s Online Privacy Protection Rule <<http://www.ftc.gov/privacy/coppafaqs.shtm>> [as of Apr. 21, 2019].)

On December 19, 2012, the FTC announced final amendments to the COPPA rule in order to strengthen privacy protections for children and to give parents greater control over personal information that online services may collect from children. The New York Times’ December 19, 2012, article entitled “New Online Privacy Rules for Children” reported:

In an era of widespread photo sharing, video chatting and location-based apps, the revised children’s privacy rule makes clear that companies must obtain parental consent before collecting certain details that could be used to identify, contact or locate a child. These include photos, video and audio as well as the location of a child’s mobile device.

While the new rule strengthens such safeguards, it could also disrupt online advertising. websites and online advertising networks often use persistent identification systems — like a cookie in a person’s browser, the unique serial number on a mobile phone, or the I.P. address of a computer — to collect information about a user’s online activities and tailor ads for that person.

The new rule expands the definition of personal information to include persistent IDs if they are used to show a child behavior-based ads. It also requires third parties like ad networks and social networks that know they are operating on children’s sites to notify and obtain consent from parents before collecting such personal information. And it makes children’s sites responsible for notifying parents about data collection by third parties integrated into their services. (Singer, *New Online Privacy Rules for Children*, New York Times (Dec. 19, 2012) <<https://www.nytimes.com/2012/12/20/technology/ftc-broadens-rules-for-online-privacy-of-children.html>> [as of Apr. 21, 2019].)

- 4) **Privacy Rights for Minors in the Digital World places restrictions on certain websites, online applications, and mobile applications with regard to minors’ personal information and marketing:** In an effort to further protect minors online, the Legislature subsequently passed SB 568 (Steinberg, Ch. 336, Stats. 2013), known as Privacy Rights for California Minors in the Digital World, which prohibits the operator of an internet website or other online service or mobile application from marketing or advertising a product or service to a minor if the minor cannot legally purchase the product or participate in the service in California, or, compiling PI to market those products or services. This prohibition only applies to operators that have actual knowledge that a minor is using its online service or whose site service is directed to minor. That bill also permits a minor to remove content or information posted to a website or service, as specified.

SB 568 was opposed by the Center for Democracy and Technology who took issue with the bill’s limitation that a website must be directed to minors for the provisions of the bill to apply. SB 568, now codified beginning at Business and Professions Code Sec. 22580,

provided that a site or service is “directed to minors” if it is “created for the purpose of reaching an audience that is *predominantly* composed of minors, and is not intended for a more general audience comprised of adults.” (Emphasis added.) The definition adds that a site or service would not be deemed to be “directed at minors” merely because it contained links to sites or services that were directed to minors. This bill seeks to now address websites directed at the general public, which may also be used by minors.

- 5) **Committee has previously approved the policy of this bill:** As approved by this Committee last year, AB 2511 (Chau, Ch. 55, Stats. 2018), had two primary aims: (1) to expressly prohibit the unlawful selling of certain products to minors through online marketplaces; and, (2) to prohibit the use of specified language in boilerplate terms and conditions as a way for social media platforms to evade parental consent. The language regarding parental consent was ultimately removed from AB 25, after Facebook and the author reached an agreement relating to their terms and conditions.

Describing the need for this bill, the sponsor, Children’s Advocacy Institute of California, writes:

Last year after the bill left this Committee, in exchange for [the author] agreeing to remove the language of this bill from AB 2511 on the floor, Facebook in writing promised by January 1, 2019 to reform the way it obtains parental consent so it is, at minimum, like every other way parental consent is meaningfully obtained; namely, directed at the parent. Facebook promised about that parental consent[:]

- The parental consent will be obtained through a method that is clear and prominent for parents and users.
- The clear and prominent method shall be distinct and separate from Facebook’s terms of service, privacy policy, or similar generally applicable permission or document.
- The means shall clearly and prominently affirmatively indicate consent to the child’s participation in the program. [...]

Facebook has not implemented parental consent that is “clear and prominent.” It is still buried in boilerplate.

Facebook did not make it “distinct and separate from its other terms and conditions.” It is still in generally applicable legalese.

Facebook did not do anything even to try to obtain actual consent from an actual parent. Instead, and most brazenly, it kept the identical language that was the main target of [AB 2511] bill: “if you are under the age of 18...” [...]

That Facebook broke its word underscores more than ever that only legislation will prompt Facebook to obey just the simplest, most obvious precept of what it means to ask for a parent’s permission; namely, actually trying to ask the parent.

Indeed, at the time of this writing, Facebook's terms and conditions contain the parental consent boilerplate language that was the impetus for AB 2511 last year:

Permission to use your name, profile picture, and information about your actions with ads and sponsored content: You give us permission to use your name and profile picture and information about actions you have taken on Facebook next to or in connection with ads, offers, and other sponsored content that we display across our Products, without any compensation to you. For example, we may show your friends that you are interested in an advertised event or have liked a Page created by a brand that has paid us to display its ads on Facebook. Ads like this can be seen only by people who have your permission to see the actions you've taken on Facebook. You can learn more about your ad settings and preferences.

If you are under the age of eighteen (18), you represent that a parent or legal guardian also agrees to this section on your behalf. (This language is included pursuant to a court-approved legal settlement.) (See FB, *Terms of Service*, <https://www.facebook.com/legal/terms> [as of Apr. 21, 2019]; emphasis added.)

This bill now seeks to ensure that parental consent cannot be obtained in this manner.

- 6) **The CCPA prohibits the selling of certain minors' PI absent consent:** Further protecting the rights of minors, last year the Legislature enacted the CCPA which provides various rights to consumers related to the sale of their PI, as defined. Relevant to this bill, the CCPA prohibits any business, as defined, from selling the PI of minors 16 years of age and under, without the prior opt-in consent to the sale of the information. For minors between the ages of 13 and 16, the minor can opt-in to the sale of their PI on their own. For minors under 13 years of age, only a parent or guardian may opt-in to the sale of the minor's information. (Civ. Code Sec. 1798.120.)

Under the CCPA, the definitions of both "sale" and "PI" are broad, intentionally designed to cover many types of information sharing for monetary benefit or other valuable consideration. Of relevance to this bill, the CCPA defines PI to include the following if it identifies, relates to, describes, is capable of being associated with, or could be reasonably linked, directly or indirectly, with a particular consumer: (1) identifiers such as real name, unique personal identifier, alias, online identifier, email address, account name, internet protocol (IP) address, or other similar identifiers; (2) biometric information, including imagery of the face and voice recordings, keystroke patterns or rhythms, and sleep, health, or exercise data that contains identifying information; (3) geolocation data; (4) inferences drawn from any of the information identified in the definition of PI to "create a profiles about a consumer reflecting the consumer's preferences, characteristics, psychological trends, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes." (Civ. Code Sec. 1798.140(o).) Clearly, much of the information individuals post on social media websites and applications is covered under the CCPA's definition of PI, including photos, location, and audio and visual recordings. But so too is information about the individual's habits on the online platform.

The CCPA's definition of sale includes selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating a consumer's PI by the business to another business or third party for monetary or other valuable consideration. (Civ. Code Sec. 1798.140(t).)

Facebook's practice of sharing consumer information such as a name and profile picture and information about actions consumers have taken on the platform in connection with ads, offers, and other sponsored content, would clearly be covered under the CCPA's definitions of "PI" and "sale" so long as the information shared "identifies, relates to, describes, is capable of being associated with, or could be reasonably linked, directly or indirectly, with a particular consumer." Further, meeting the threshold for "sale" of a consumer's PI under the CCPA, Facebook further provides, that they "may show your friends that you are interested in an advertised event or have liked a Page created by a brand *that has paid us to display its ads on Facebook.*" (See FB, *Terms of Service*, <https://www.facebook.com/legal/terms> [as of Apr. 21, 2019]; emphasis added.) Accordingly, even absent this bill, Facebook's practice of selling minors' PI in connection with third party advertising is be subject to the CCPA, which will be enforceable on January 1, 2021.

That being said, the treatment of the sale of a consumer's PI under the CCPA varies based upon the individual's age. For children under the age of 13, parents must opt-in to the sale of their PI. For minors over 13 and under 16 years of age, the minor can opt-in to the sale of the minors' PI themselves. By contrast, individuals over 16 years of age have the right to opt-out of the sale of their PI. This tiered approach to the protection of minors' PI reflects the fact that children enjoy many rights, including the right to privacy, the right to contract, and the right (in California) to make certain mental health and reproductive health decisions for themselves. Indeed, rights do not magically manifest themselves at age 18, but slowly accumulate based on a child's age and maturity, until they reach the age of majority. Consistent with federal law and other state policies, the CCPA acknowledges that younger children, especially minors under the age of 13, may not be as capable as older adolescents to make responsible decisions about the use of their PI.

Acknowledging that the CCPA was enacted after this Committee approved AB 2511 last year, the author offers the following amendment to harmonize this bill with the protections offered to minors under that act. Given that the CCPA applies to the specific practice of selling minor's PI in connection with third party advertising, the following amendment would strike the parental consent requirement from the current bill and would instead more generally prohibit businesses, as provided, from obtaining parental consent through boilerplate language in their terms and conditions of service. This should ensure that minors are able to exercise age-appropriate management of their PI online, while at the same time putting the onus on social media companies to find more effective methods of obtaining parental consent.

Author's amendment:

Section 1798.99.2 is added to the Civil Code, immediately following Section 1798.99.1, to read:

1798.99.2. (a) A person or business that conducts business in California, that operates a social media internet website or application that *requires opt-in consent pursuant to Title 1.81.5 (Commencing with Section 1798.100) of Part 4 of Division 3 of the Civil Code, prior to selling* ~~seeks to use a minor's personal information as defined in Section 1798.140 of the Civil Code, name, picture, or any information about the minor on a social media internet website or application pursuant to an arrangement in which the person or business is paid by a third party to display the minor's name, picture, or information that~~

could reasonably identify the minor shall not do so without obtaining prior parental consent, ~~which~~ **shall obtain consent in a manner that is** be separate from the social media internet website or the application's general terms and conditions.

(b) The failure of a parent to provide the parental consent to the ~~use~~ **sale, as defined in Section 1798.140 of the Civil Code**, of the minor's ~~name, picture, or~~ **personal** information shall not result in any minor being denied access to the social media internet website or application.

(c) Parental consent shall not be obtained through the minor.

- 7) **Related legislation:** AB 1138 (Gallagher) seeks to prohibit a person or business that conducts business in California, and that operates a social media website or application, from allowing a person under 16 years of age to create an account with the website or application unless the website or application obtains the consent of the person's parent or guardian before creating the account.
- 8) **Prior legislation:** AB 375 (Chau, Ch. 55, Stats. 2018) enacted the California Consumer Privacy Protection Act (CCPA), which gives consumers certain rights regarding their PI, including: (1) the right to know what PI that is collected and sold about them; (2) the right to request the categories and specific pieces of PI the business collects about them; and (3) the right to opt-out of the sale of their PI, or opt-in in the case of minors under 16 years of age.

AB 2511 (Chau, Ch. 872, Stats. 2018) *See* Comment 5.

SB 568 (Steinberg, Ch. 336, Stats. 2013) *See* Comment 4.

REGISTERED SUPPORT / OPPOSITION:

Support

Children's Advocacy Institute (sponsor)
 California Coalition for Children's Safety & Health
 Children Now
 Children's Law Center of California
 Common Sense Kids Action
 Consumer Attorneys of California

Opposition

None on file

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