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**PROTECTING AND PROMOTING THE RIGHTS OF  
CHILD INFLUENCERS IN THE DIGITAL AGE**

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***Abstract***

Parents are giving their children an online presence from an increasingly young age. Of these children, some achieve worldwide fame on social media. This paper is concerned with children who become revenue-earning child influencers by their parents' design and doing. Unique conflicts arise between the rights and interests of child influencers and their parents. But, despite evidence of rights-based implications, States have demonstrated a reluctance to intervene in what has typically been considered a matter of private family life. This paper adds to the growing body of research on children's rights in the digital age and fills the gap in relation to the niche subset of children who are child influencers. The United Nations Convention on the Rights of the Child 1989 is used as a framework to analyse child influencers' rights to: freedom of expression; participation; privacy; and protection from economic exploitation. This paper finds that the State and relevant private organisations have a greater role to play to promote and protect child influencers' rights in the digital age.

***Key words***

child, parent, rights, influencers, digital

## *I Introduction*

In the space of a year, Charli D'Amelio has become a viral sensation and household name. At 15 years old Charli created a TikTok account to which she posts videos of herself dancing and lip-syncing.<sup>1</sup> That account now has over 91.5 million followers.<sup>2</sup> Her popularity has led fans to her other social media platforms; she has a growing audience of 30.5 million followers on Instagram<sup>3</sup> and 7.53 million subscribers on YouTube.<sup>4</sup> Charli has capitalised off her fame through monetised ads, sponsorship deals (EOS cosmetics, Super Bowl commercial for Sabra hummus), partnerships (Dunkin' Donuts) and branded merchandise.<sup>5</sup> Her net worth, earned directly and indirectly from her online presence, is estimated to be USD 4 million.<sup>6</sup>

Charli is the quintessential influencer or, more technically, child influencer.<sup>7</sup> Influencers are “every day, ordinary Internet users who accumulate a relatively large following on... social media through the textual and visual narration of their personal lives and lifestyles”.<sup>8</sup> Influencers can be further distinguished from ordinary internet users because they view their online presence as “not merely a hobby or supplementary income but an established career with its own ecology and economy”.<sup>9</sup>

In the digital age, Charli's story is not so unusual. Children much younger than Charli are achieving worldwide fame on the internet but not necessarily of their own volition.

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<sup>1</sup> Abram Brown “TikTok's 7 Highest-Earning Stars: New Forbes List Led By Teen Queens Addison Rae And Charli D'Amelio” (6 August 2020) Forbes <[www.forbes.com](http://www.forbes.com)>

<sup>2</sup> Charli D'Amelio (@charlidamelio) <[www.tiktok.com](http://www.tiktok.com)>

<sup>3</sup> Charli D'Amelio (@charlidamelio) <[www.instagram.com](http://www.instagram.com)>

<sup>4</sup> Charli D'Amelio (@charli d'amelio) <[www.youtube.com](http://www.youtube.com)>

<sup>5</sup> Above n 1.

<sup>6</sup> Above n 1.

<sup>7</sup> United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 1.

<sup>8</sup> Crystal Abidin “Micro-microcelebrity: Branding Babies on the Internet” (2015) 18(5) M/C Journal.

<sup>9</sup> Crystal Abidin “#familygoals: Family Influencers, Calibrated Amateurism, and Justifying Young Digital Labor” (2017) 3 Soc Media Soc 1 at 1.

Sharenting, the “habitual use of social media to share news, images, etc of one’s children”, means parents are giving their children an online presence from an increasingly young age.<sup>10</sup> An estimated 81 per cent of children globally, and 92 per cent of children in the United States, have an online presence before the age of two.<sup>11</sup> The average parent shares “almost 1,500 images of their children before their fifth birthday”<sup>12</sup> and almost 40 per cent of mothers aged 18 to 34 have created independent social media accounts for their children.<sup>13</sup> Of these children, a subset will become child influencers — typically because a video or image of them has gone viral or because their parents are influencers themselves.

Because the internet is “age blind” it “treats adults and children as equals”, failing to recognise that children may not be aware of, or consent to, their online presence when created by their parents.<sup>14</sup> Although there are rights-based implications for children generally, this paper focuses specifically on children who have become revenue-earning child influencers by their parents’ design and doing.

Many rights under the United Nations Convention on the Rights of the Child 1989 (UN CRC or the Convention) will be relevant to child influencers in the digital age. Such rights include: to have their best interests respected as a primary consideration (art 3); to life, survival and development (art 6), to non-discrimination (art 2), to be heard (art 12), to identity (art 8), to education (arts 28 and 29), to play (art 31), to privacy (art 16), to freedom of expression, thought (art 13) and association (art 15), and to protection from violence (art 19), sexual exploitation (art 34) and economic exploitation (art 32).

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<sup>10</sup> John Hartley, Jean Burgess and Axel Bruns *A Companion to New Media Dynamics* (Wiley-Blackwell, West Sussex, 2013) at 7.

<sup>11</sup> Shannon Sorenson “Protecting Children’s Right to Privacy in the Digital Age: Parents as Trustees of Children’s Rights” (2016) 36 *Child Leg Rts J* 156 at 158.

<sup>12</sup> Claire Bessant “Expert Comment: Too much information? More than 80% of children have an online presence by the age of two” (25 September 2017) Northumbria University <[www.northumbria.ac.uk](http://www.northumbria.ac.uk)>

<sup>13</sup> Above n 11, at 159.

<sup>14</sup> Muhammad Bello Nawaila, Sezer Kanbul and Fezile Ozdamli “A review on the rights of children in the digital age” (2018) 94 *Child Youth Serv Rev* 390 at 392.

The scope of this paper is limited to freedom of expression, participation, privacy and protection from economic exploitation. These are seen to be areas where child influencers' rights are most likely to come into conflict with the rights and interests of their parents, necessitating State intervention.

This paper adds to the growing body of research on children's rights in the digital age and fills the gap in relation to the niche subset of children who are child influencers. Part II outlines the UN CRC as a general framework to analyse child influencers' rights in the digital age. Part III specifically addresses child influencers' rights to freedom of expression and participation, Part IV the right to privacy and Part V the right to protection from economic exploitation. This paper takes a global perspective but considers the law as it applies in New Zealand. It is found that the State and relevant private organisations have a greater role to play to promote and protect child influencers' rights in the digital age.

## *II UN Convention on the Rights of the Child*

### *A The Framework*

The UN CRC provides an authoritative rights-based framework against which to assess children's rights in the digital age. All children are affirmed as independent rights holders.<sup>15</sup> Children are defined by the Convention, and for the purposes of this paper, as persons below the age of 18 years old.<sup>16</sup>

The UN CRC is the most widely ratified international treaty on human rights.<sup>17</sup> It has been ratified by 196 countries, including by New Zealand in 1993.<sup>18</sup> As a Member State, New Zealand is bound to uphold the obligations within the Convention and periodically report on its progress to the Committee on the Rights of the Child (the Committee).<sup>19</sup>

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<sup>15</sup> Tijana Milosevic *Protecting children online? Cyberbullying Policies of Social Media Companies* (The MIT Press, Cambridge (Mass), 2017) at 41.

<sup>16</sup> Article 1.

<sup>17</sup> Beeban Kidron "Are children more than 'clickbait' in the 21st century?" (2018) 23 *Comms L* 8 at 9.

<sup>18</sup> United Nations "Convention on the Rights of the Child" (27 September 2019) United Nations Treaty Collection <[www.treaties.un.org](http://www.treaties.un.org)>

<sup>19</sup> Article 44.

The Convention sets out the “civil, political, economic, social and cultural rights of children”<sup>20</sup> which are “universal, indivisible, interdependent and interrelated”.<sup>21</sup> These rights are underpinned by four general principles — non-discrimination (art 2), best interests of the child (art 3), participation (art 12) and life, survival and development (art 6).

### ***B Key Principles and Concepts***

The most relevant principles and concepts to this paper are children’s best interests and participation in the digital environment in light of their evolving capacities.

#### *1 Evolving capacities*

The UN CRC recognises children as “both being, and becoming, rights holders”.<sup>22</sup> While children should be granted needs-based rights from birth, autonomy rights should be granted in accordance with children’s evolving capacities.<sup>23</sup> The right to life<sup>24</sup> is an example of the former and the right to participation<sup>25</sup> is an example of the latter.

Evolving capacities is not set out in its own provision or defined in the Convention.<sup>26</sup> The term is, however, directly incorporated into arts 5 and 14 which require parental direction and guidance to be provided in a “manner consistent with the evolving capacities of the child”.<sup>27</sup> Although evolving capacities is not one of the four general principles, the concept

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<sup>20</sup> UNICEF *Children’s Rights and the Internet: From Guidelines to Practice* (UNICEF, 2016) at 7.

<sup>21</sup> Committee on the Rights of the Child *General comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)* UN Doc CRC/C/GC/14 (29 May 2013) at [15].

<sup>22</sup> Marion Oswald and others *Have ‘Generation Tagged’ Lost Their Privacy?* (British and Irish Law Education and Technology Association, 9 August 2017) at 16.

<sup>23</sup> Benjamin Shmueli and Ayelet Blecher-Prigat “Privacy for Children” (2011) 42 *Colum Hum Rts L Rev* 759 at 770.

<sup>24</sup> Convention on the Rights of the Child, art 27.

<sup>25</sup> Article 12.

<sup>26</sup> Elaine E Sutherland “The Enigma of Article 5 of the United Nations Convention on the Rights of The Child: Central or Peripheral?” (2020) 28 *Int J Child Rights* 447 at 455.

<sup>27</sup> Committee on the Rights of the Child *General comment No 20 (2016) on the implementation of the rights of the child during adolescence* UN Doc CRC/C/GC/20 (6 December 2016) at [18].



is a “cross-cutting standard”<sup>28</sup> with “pervasive”<sup>29</sup> impact, so it nevertheless applies across many of the UN CRC rights.

General Comment 20 explains evolving capacities as the concept that children should be granted rights progressively, in parallel to their “competencies, understanding and increasing levels of agency to take responsibility and exercise their rights”.<sup>30</sup> The process of evolving capacities is gradual and individual to each child because it is influenced by internal and external factors.<sup>31</sup> As children’s capacities develop, their parents’ role diminishes from exercising rights on their behalf to offering direction, guidance and reminders to, eventually, “an exchange on equal footing”.<sup>32</sup> In this sense, parents are not “owners or even solely protectors” of children’s rights but, instead, “holders in trust”.<sup>33</sup>

The concept of evolving capacities is relevant to this paper because child influencers span the full age range from newborn to 17 years old, and will be at widely varying stages of evolving capacities. The laws, policies and remedies chosen to promote and protect children’s rights in the digital age will, therefore, need to “reflect an appropriate balance between protection and emerging autonomy”.<sup>34</sup> But, even once children’s capacities have fully evolved, States are still obligated to protect their best interests.<sup>35</sup>

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<sup>28</sup> Mark Henaghan “New Zealand Case Studies to Test the Meaning and Use of Article 5 of the 1989 United Nations Convention on the Rights of the Child” (2020) 28 Int J Child Rights 588 at 590.

<sup>29</sup> Sutherland, above n 26, at 450.

<sup>30</sup> Committee on the Rights of the Child, above n 27, at [18].

<sup>31</sup> Sutherland, above n 26, at 466.

<sup>32</sup> Committee on the Rights of the Child, above n 27, at [18]; Gerison Lansdown *The evolving capacities of the child* (UNICEF, Florence, 2005) at 5.

<sup>33</sup> Aoife Daly “Assessing Children’s Capacity: Reconceptualising our Understanding through the UN Convention on the Rights of the Child” (2020) 28 Int J Child Rights 471 at 479.

<sup>34</sup> Committee on the Rights of the Child *Draft General Comment No 25 (202x) Children’s rights in relation to the digital environment* UN Doc CRC/C/GC (13 August 2020) at [21].

<sup>35</sup> Committee on the Rights of the Child, above n 27, at [19].

## 2 *Best interests*

Best interests is a threefold concept; a substantive right, an interpretive legal principle and a rule of procedure.<sup>36</sup> As a substantive right, children’s best interests “shall be a primary consideration” in all decisions and actions concerning them.<sup>37</sup> As an interpretive legal principle, where provisions are open to different interpretations the one “which most effectively serves the child’s best interests should be chosen”.<sup>38</sup> As a rule of procedure, States must justify decisions and actions concerning children by showing that children’s best interests have been “explicitly taken into account”.<sup>39</sup>

Best interests is both individual and collective.<sup>40</sup> In the digital environment, an individual assessment of every child’s best interests may be impractical given the widespread use of the internet.<sup>41</sup> Where that is so, art 3 can be applied to children “as a group or in general”, for example, in State policy-making and legislative action.<sup>42</sup>

General Comment 14 clarifies that children’s best interests are relevant in the private, as well as public, sphere.<sup>43</sup> By implication, the obligation to take account of children’s best interests extends to “technology companies or platform providers... when their products and services are being used by [children]”.<sup>44</sup>

## 3 *Participation*

Meaningful participation develops children’s autonomy and facilitates the identification of their best interests.<sup>45</sup> A decision or action made or taken without children’s participation

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<sup>36</sup> Eva Lievens and others “Children’s Rights and Digital Technologies” Ursula Kilkelly and Ton Liefaard (eds) *International Human Rights of Children* (Springer, Singapore, 2019) 487 at 492; Committee on the Rights of the Child, above n 21, at [6].

<sup>37</sup> Convention on the Rights of the Child, art 3(1); Committee on the Rights of the Child, above n 21, at [6].

<sup>38</sup> Committee on the Rights of the Child, above n 21, at [6].

<sup>39</sup> At [6].

<sup>40</sup> At [23].

<sup>41</sup> Lievens and others, above n 36, at 492.

<sup>42</sup> At 492; Committee on the Rights of the Child, above n 21, at [23].

<sup>43</sup> Committee on the Rights of the Child, above n 21, at [14].

<sup>44</sup> Lievens and others, above n 36, at 492.

<sup>45</sup> Committee on the Rights of the Child, above n 21, at [89].

deprives them of the opportunity to grow their decision-making capabilities and ignores children’s potential to “influence the determination of their best interests”.<sup>46</sup>

Despite the term “participation” not being used in art 12, the right to be heard is commonly referred to as such.<sup>47</sup> Article 12 assures to children, who are capable of forming their own views, the right to express their views in all matters affecting them.<sup>48</sup> States must give due weight to children’s views, in accordance with their age and maturity.<sup>49</sup>

Part III analyses the right to participation as it relates individually and collectively<sup>50</sup> to child influencers. Here, it suffices to note that participation is also a general principle to be considered in the “interpretation and implementation of all other rights”.<sup>51</sup>

### ***C Relevance in the Digital Age***

The Convention was adopted in 1989, the same year that the code for the internet was released.<sup>52</sup> This coincidence means that the UN CRC makes no direct reference to the online environment.<sup>53</sup> Despite this, the rights captured in the Convention are still “very much applicable” in the digital age.<sup>54</sup> There is no separate set of so-called “digital rights”.<sup>55</sup>

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<sup>46</sup> Committee on the Rights of the Child, above n 21, at [53]; Milda Macenaite “From universal towards child-specific protection of the right to privacy online: Dilemmas in the EU General Data Protection Regulation” (2017) 19 *New Media Soc* 765 at 767.

<sup>47</sup> Committee on the Rights of the Child *General Comment No 12 (2009) The right of the child to be heard* UN Doc CRC/C/GC/12 (1 July 2009) at [3].

<sup>48</sup> Convention on the Rights of the Child, art 12(1).

<sup>49</sup> Article 12(1).

<sup>50</sup> Above n 47, at [10]; Gerison Lansdown *Every Child’s Right to Be Heard: A Resource Guide on the UN Committee on the Rights of the Child General Comment No 12* (Save the Children UK, London, 2011) at 20.

<sup>51</sup> Above n 47, at [2].

<sup>52</sup> Sonia Livingstone and Amanda Third “Children and young people’s rights in the digital age: An emerging agenda” (2017) 19 *New Media Soc* 657 at 658.

<sup>53</sup> Children’s Commissioner *Growing Up Digital: A report of the Growing Up Digital Taskforce* (Children’s Commissioner, January 2017) at 16.

<sup>54</sup> Milosevic, above n 15, at 41; Committee on the Rights of the Child *Report of the 2014 Day of General Discussion: ‘Digital media and children’s rights’* (Committee on the Rights of the Child, 2014) at [46].

<sup>55</sup> Sonia Livingstone, Gerison Lansdown and Amanda Third *The Case for a UNCRC General Comment on Children’s Rights and Digital Media* (Children’s Commissioner, April 2017) at 11.

Instead, offline rights apply in the online context.<sup>56</sup> But, because the Convention predates the invention of the internet and social media, “it is important to apply a digital-age specific interpretation of every article, adapted to today’s realities”.<sup>57</sup>

In 2014, the UN held a Day of General Discussion (DGD) on digital media and children’s rights. The purpose of the DGD was to:<sup>58</sup>

...better understand the impact on and role of children’s rights in [the digital age], and develop rights-based strategies to maximize the online opportunities for children while protecting them from risks and possible harm without restricting any benefits.

The outcome of the DGD was a report providing recommendations on how Member States can give effect to children’s UN CRC rights in the digital age. The DGD focused primarily on children’s equal and safe access to, and empowerment and engagement through, digital media and ICT.<sup>59</sup> Apart from drawing attention to the wider topic, the DGD and subsequent report do not directly assist with the issues explored in this paper. The closest recognition of child influencing was an acknowledgement that “parents should not publish too detailed [sic] information about their own children”.<sup>60</sup>

In 2016, the General Comment on the implementation of the rights of the child during adolescence was published, with “18 references to the distinct challenges of the digital environment for children’s rights”.<sup>61</sup>

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<sup>56</sup> See Livingstone and Third, above n 52, at 667; General Assembly *Resolution adopted by the General Assembly on 18 December 2013* UN Doc A/RES/68/167 (21 January 2014) at [3].

<sup>57</sup> Committee on the Rights of the Child, above n 54, at [46].

<sup>58</sup> At [2].

<sup>59</sup> At [3]; Nawaila, Kanbul and Ozdamli, above n 14, at 394.

<sup>60</sup> Committee on the Rights of the Child, above n 54, at [74].

<sup>61</sup> Sonia Livingstone “An updated UNCRC for the digital age” (19 January 2017) LSE <[www.blogs.lse.ac.uk](http://www.blogs.lse.ac.uk)>; Committee on the Rights of the Child, above n 27.

In 2017, respected children’s rights academic Professor Sonia Livingstone reviewed and adapted the UN CRC to be specific to the digital age.<sup>62</sup> This undertaking was supported by the Children’s Commissioner for England. A child-friendly version is available in the Growing Up Digital report.<sup>63</sup>

By 2019, advocates were calling for the UN to draft a General Comment on children’s rights in relation to the digital environment.<sup>64</sup> The UN complied and the first draft was made available in August 2020.<sup>65</sup> The introduction includes the verbatim statement, obtained during consultation, “I want [my parents] to ask permission before they upload a photo of me”.<sup>66</sup> Despite this, the General Comment does not fully consider the rights-based implications of parents giving their children an online presence in general — let alone if the child reaches influencer status in particular.

This paper aims to mitigate the lack of guidance by analysing the role of the State and relevant private organisations in promoting and protecting child influencers’ rights under the UN CRC. Part III begins by addressing the rights to freedom of expression and participation.

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<sup>62</sup> Children’s Commissioner, above n 53, at 17–19.

<sup>63</sup> At 17–19.

<sup>64</sup> Livingstone, Lansdown and Third, above n 55.

<sup>65</sup> Committee on the Rights of the Child, above n 34.

<sup>66</sup> At [1].

### *III Rights to Freedom of Expression and Participation*

#### *A Introduction*

To the extent that children's rights are considered in the digital age, it tends to be from a presumption of harm perspective.<sup>67</sup> Public policy and regulation usually fixate on the right to protection without acknowledging the equally valuable rights to provision and participation.<sup>68</sup> Because of this, efforts to protect child influencers in the online environment may have the unintended consequence of infringing their participatory rights.<sup>69</sup>

In particular, the internet and social media have become fundamental spaces for children's "exploration of identity",<sup>70</sup> "exercise of freedom of expression"<sup>71</sup> and "public participation".<sup>72</sup> Identity,<sup>73</sup> freedom of expression and participation are recognised rights in the UN CRC.

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<sup>67</sup> Oswald and others, above n 22, at 23.

<sup>68</sup> Milosevic, above n 15, at 40; Livingstone and Third, above n 52, at 662.

<sup>69</sup> Livingstone and Third, above n 52, at 663; See Macenaite, above n 46, at 767.

<sup>70</sup> Committee on the Rights of the Child, above n 27, at [75].

<sup>71</sup> Macenaite, above n 46, at 773.

<sup>72</sup> At 773.

<sup>73</sup> This paper does not have word capacity to undertake a complete analysis of the right to identity in art 8 of the UN CRC. However, the right is pertinent to child influencers whose online identity becomes their personal brand, which can be commercialised. The notion of identity goes beyond nationality, name and family relations to encompass other aspects of an individual including their sexuality, culture, personal characteristics and social relationships. Child influencers' online activities may plausibly form part of their identity, as research has established that "online and offline identities are fluidly intertwined rather than dichotomous". Adriana M Manago "Media and the Development of Identity" in Robert Scott and Stephen Kosslyn (eds) *Emerging Trends in the Social and Behavioral Sciences* (John Wiley & Sons Inc, New York, 2015) 1 at 3. See generally: George A Stewart "Interpreting the Child's Right to Identity in the UN Convention on the Rights of the Child" (1992) 26 Fam L Q 221; Rachel Hodgkin and Peter Newell *Implementation Handbook for the Convention on the Rights of the Child* (3rd ed, United Nations Publications, Switzerland, 2007); Ugur Gunduz "The Effect of Social Media on Identity Construction" (2017) 8 MJSS 85; Alice E Marwick "Online Identity" in John Hartley, Jean Burgess and Axel Bruns (eds) *A Companion to New Media Dynamics* (Wiley-Blackwell, West Sussex, 2013) 355.

## ***B Freedom of Expression***

### *1 International law*

The right to freedom of expression is enshrined in art 13 of the UN CRC:

The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

The right is not absolute.<sup>74</sup> Freedom of expression can be restricted as provided by law and where necessary for the respect of others' rights or reputations, or protection of national security, public order, public health or morals.<sup>75</sup>

Children's right to freedom of expression is also reinforced as a right afforded to all humans in art 19 of the Universal Declaration of Human Rights 1948 (UDHR), art 19 of the International Covenant on Civil and Political Rights 1976 (ICCPR) and art 10 of the European Convention on Human Rights 1950 (ECHR).

### *2 Domestic law*

Within New Zealand, freedom of expression is protected in s 14 of the New Zealand Bill of Rights Act 1990 (NZ BORA). The right is expressed in similar terms, but less detail, than in the UN CRC as "everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form".<sup>76</sup>

The right to freedom of expression is not absolute in domestic law either. Freedom of expression is subject to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".<sup>77</sup>

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<sup>74</sup> Lievens and others, above n 36, at 494.

<sup>75</sup> Convention on the Rights of the Child, art 13(2).

<sup>76</sup> New Zealand Bill of Rights Act 1990, s 14.

<sup>77</sup> Section 5.

### 3 *Application to child influencers*

In both international and domestic law, the right to freedom of expression is articulated in broad terms. The catch-alls of “or any other media of the child’s choice” in the UN CRC and “in any form” in NZ BORA extend to “traditional but also new and even future media”.<sup>78</sup> Digital and audio-visual media are, therefore, a protected means of expression.<sup>79</sup> The internet and social media are legitimate platforms for this expression. This paper focuses on children who become child influencers by their parents’ design and doing. However, regardless of whether a child’s online presence is parent- or self-initiated, the child will be engaging their right to freedom of expression.

It is accepted that “almost every act online is an act of expression”.<sup>80</sup> In the digital environment, children are no longer “mere receptacles of content but are also creators and distributors”.<sup>81</sup> Child influencers participating in online content can impart information, ideas and opinions with others, as they are entitled to under international and domestic law. Arguably, child influencers exercise their right to freedom of expression online more so than ordinary children, as the nature of influencing involves frequent and regular activity.<sup>82</sup>

The right to freedom of expression “is not affected by the fact that children may not have the same capacities as adults”.<sup>83</sup> but younger children may require parental assistance to exercise their right. For example, children under 13 years old cannot (according to company policy) have a Facebook, YouTube, Instagram or TikTok account in their own name.<sup>84</sup> To exercise their right to freedom of expression online, these children would require a parent to upload content to their own account, a family account or, alternatively, an account for the child that is run by the parent. Therefore, assuming it is done with the

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<sup>78</sup> Lievens and others, above n 36, at 494.

<sup>79</sup> Committee on the Rights of the Child, above n 27, at [42].

<sup>80</sup> Henriette H Fore “From Privacy to Power: Children’s Rights in a Digital Age” (2020) 5Rights Foundation <[www.5rightsfoundation.com](http://www.5rightsfoundation.com)>

<sup>81</sup> Lievens and others, above n 36, at 495.

<sup>82</sup> Valerie Verdoodt, Simone van der Hof and Mark Leiser “Child labour and online protection in a world of influencers” in Catalina Goanta and Sofia Ranchordas (eds) *The Regulation of Social Media Influencers* (Edward Elgar Publishing, United Kingdom, 2020) 98 at 106.

<sup>83</sup> Lievens and others, above n 36, at 494.

<sup>84</sup> Sapna Maheshwari “Online and Making Thousands, at Age 4: Meet the Kidfluencers” (1 March 2019) The New York Times <[www.nytimes.com](http://www.nytimes.com)>



child's consent, parents may in fact be promoting a child influencer's right to freedom of expression by giving them an online presence.

When put in the context of children's evolving capacities and best interests, it is evident that "parents, public authorities and media companies rightfully play a part in determining the content that children can create, access and disseminate".<sup>85</sup> A child influencer's freedom of expression may be restricted but such restrictions must be "legitimate, predictable, transparent, necessary and proportionate".<sup>86</sup> There is a risk that "some measures taken in the name of child protection may disproportionately restrict children's participation in the digital world".<sup>87</sup>

## ***C Participation***

### *1 International law*

The right to participation is linked to, but different from, the right to freedom of expression.<sup>88</sup> Participation is the right to express views "specifically about matters which affect the child and the right to be involved in actions and decisions that impact on her or his life".<sup>89</sup> Per art 12 of the UN CRC:

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

The right to participation does not have a minimum age requirement.<sup>90</sup> Any child capable of forming their own views is entitled to express their views. A child does not need to prove capacity, the presumption is in their favour.<sup>91</sup> Research shows that even preverbal children

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<sup>85</sup> Carly Nyst *Discussion Paper Series: Children's Rights and Business in a Digital World- Freedom of Expression, Association, Access to Information and Participation* (UNICEF, June 2017) at 8.

<sup>86</sup> At 8; Frank La Rue *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* UN Doc A/HRC/17/27 (16 May 2011) at [24].

<sup>87</sup> Above n 85, at 4; Carly Nyst, Amaya Gorostiaga and Patrick Geary *Industry Toolkit: Children's Online Privacy and Freedom of Expression* (UNICEF, May 2018) at 9.

<sup>88</sup> Committee on the Rights of the Child, above n 47, at [81].

<sup>89</sup> At [81].

<sup>90</sup> At [21]; Daly, above n 33, at 482–483.

<sup>91</sup> Lansdown, above n 50, at 20.

are capable of forming views.<sup>92</sup> Therefore, nonverbal forms of communication such as “play, body language, facial expressions, drawing and painting” may be appropriate mediums “through which very young children demonstrate understanding, choice and preferences”.<sup>93</sup>

The qualification of age and maturity goes to the weight to be accorded to a child’s views.<sup>94</sup> Adults must do more than listen or take notice. Article 12 requires children’s views to be “seriously considered” on an ongoing basis,<sup>95</sup> or else participation is merely tokenistic.<sup>96</sup>

## 2 *Domestic law*

New Zealand has some legislation that incorporates the right to participation by directly and indirectly enabling children’s views to be heard.<sup>97</sup> That legislation is not relevant to this paper.

## 3 *Application to child influencers*

Participation is relevant in the national setting.<sup>98</sup> Regulation of privacy, child labour and entitlement to income in the online environment (discussed in Parts IV and V) are all matters that affect child influencers. Child influencers who are capable of forming views can “add relevant perspectives and experience,” so their participation should be actively sought by the State in “decision-making, policymaking and preparation of laws” on these matters.<sup>99</sup>

Participation is also relevant in the family setting<sup>100</sup> as it can “promote individual development, enhance family relations and support children’s socialization and plays a

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<sup>92</sup> Committee on the Rights of the Child, above n 47, at [21].

<sup>93</sup> At [21].

<sup>94</sup> At [28].

<sup>95</sup> At [28].

<sup>96</sup> At [132].

<sup>97</sup> See Care of Children Act 2004, s 6 and Oranga Tamariki Act 1989, s 11.

<sup>98</sup> Committee on the Rights of the Child, above n 47, at [127].

<sup>99</sup> At [12].

<sup>100</sup> At [90].

preventive role against all forms of violence in the home and family”.<sup>101</sup> A child influencer who has been raised in an environment where they are encouraged to express their views, and these views are taken seriously by the family, is less likely to have their rights breached by their parents. Nevertheless, participation alone does not wholly eliminate the risk of conflict between child influencers’ and parents’ rights.

#### ***D Conflict with Parents’ Rights***

Children are not the only rights holders in this scenario. Recognising children’s rights “will have implications for other family members, particularly parents”.<sup>102</sup> Parents, too, have rights — most relevantly, rights to freedom of expression<sup>103</sup> and to work.<sup>104</sup> It is likely that parents’ rights will come into conflict with children’s rights, especially when the parents and children are influencers. The Saccone Joly family will be used to illustrate.

The Saccone Joly family run a YouTube channel with more than 1.83 million subscribers.<sup>105</sup> The parents, Jonathan and Anna, became established influencers prior to having children. Their four children, aged between two and seven years old, have had an online presence since before birth. Each child’s pregnancy announcement and birth video are available online and the children feature regularly in family vlogs, which attract millions of views.<sup>106</sup>

A conflict will arise if one (or more) of the children does not want to be involved in their parents’ social media.<sup>107</sup> Children’s rights to freedom of expression and participation

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<sup>101</sup> Committee on the Rights of the Child, above n 47, at [90].

<sup>102</sup> Sutherland, above n 26, at 448.

<sup>103</sup> Universal Declaration of Human Rights GA Res 217A (1948), art 19; International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 19; Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953), art 10 [European Convention on Human Rights]; New Zealand Bill of Rights Act, s 14.

<sup>104</sup> Universal Declaration of Human Rights, art 23.

<sup>105</sup> Jonathan Saccone Joly and Anna Saccone Joly (@SACCONJOLYS) <[www.youtube.com](http://www.youtube.com)>

<sup>106</sup> Above n 105.

<sup>107</sup> Claire Bessant “Sharenting: balancing the conflicting rights of parents and children” (2018) 23 Comms L 7 at 7; Lievens and others, above n 36, at 493.

include the right not to express or participate.<sup>108</sup> That is, expression and participation are a “choice, not an obligation”.<sup>109</sup>

When the Saccone Joly children were born, the parents would have had difficulty interpreting the babies’ “complex” nonverbal “language”.<sup>110</sup> Once the children learnt to speak, their views on participation and expression would have become easier to understand. But, even if children can express their views and parents can decipher them, the conflict remains pronounced. In general, parents are an authority figure so children may find it “difficult to contradict an adult’s suggestion to participate”.<sup>111</sup> In particular, there is a risk that child influencers’ views might be deliberately ignored by parents where it would threaten the commercial viability of the influencing lifestyle.

A complicating factor is that parents and children will often have a right to freedom of expression in respect of the same matter. For example, the narration of the children’s birth and of their daily lives is a story that belongs to both the children and the parents. This overlap can lead to parents inadvertently infringing their children’s rights. Even if the Saccone Joly parents respect their children’s (hypothetical) choice not to express or participate, it does not prevent the parents exercising their own rights to expression. The parents’ account will likely disclose some detail that relates to shared aspects of family life.

The matter is made more complex because social media appears to be the Saccone Joly’s primary source of work and income. The children are a main storyline and participate in much of the online content. If a child’s refusal to participate impacts the parents’ ability to work, there may be complications for the parents’ right to “free choice of employment”.<sup>112</sup> Such arguments are unconvincing. Although it might be more difficult for the parents to generate content that excludes the child, that does not justify total denial of the child’s right to non-expression and non-participation.

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<sup>108</sup> Lansdown, above n 50, at 22.

<sup>109</sup> Committee on the Rights of the Child, above n 47, at [16].

<sup>110</sup> Lansdown, above n 50, at 20.

<sup>111</sup> Ofcom *Guidance Notes: Section One- Protecting the under 18s* (Ofcom, Issue Six, 30 March 2015) at 16.

<sup>112</sup> Universal Declaration of Human Rights, art 23.

### ***E Role of the State***

The role of the State is relatively uncontroversial as it relates to children's rights to freedom of expression and participation. The State is bound to uphold the obligations set out in arts 12 and 13 but, in the digital age, there is more the State could do to promote these rights.

### ***F Recommendations for the State***

#### *1 Collaborative participation in policy and legislation making*

In the national setting, child influencers' views should be actively sought, seriously considered and given due weight in all policy-making and legislative action on matters that affect them. Participation should follow the collaborative model. Collaborative participation involves a "greater degree of partnership between adults and children" in terms of the process and outcomes.<sup>113</sup> Children's participation will result in superior "Internet protection and promotion strategies... especially given that children and young persons tend to be more in touch with the latest technologies".<sup>114</sup>

#### *2 Provide education for parents*

States must "render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities".<sup>115</sup> In the context of parents' and child influencers' conflicting rights in the digital age, appropriate assistance necessitates education.<sup>116</sup> The State should develop educational materials for parents. These materials should advise parents of children's right to participation, suggest ways parents can involve children in decision-making in accordance with their evolving capacities, explain the "implications of giving due weight to the views of every family member, including children" and provide recommendations on how to deal with conflicting views.<sup>117</sup> Ideally,

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<sup>113</sup> Lansdown, above n 50, at 148.

<sup>114</sup> Frank La Rue *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* UN Doc A/69/335 (21 August 2014) at [77].

<sup>115</sup> Convention on the Rights of the Child, art 18(2).

<sup>116</sup> Lansdown, above n 50, at 82.

<sup>117</sup> At 83.

these materials will be available online for parents to access of their own initiative but also be advertised and promoted through appropriate channels.

## ***G Conclusion***

Freedom of expression and participation are examples of rights that should be promoted in the digital age. But, as child influencers exercise their rights to expression and participation in the online environment, other rights may be put at risk and require protection. Part IV addresses the right to privacy.

### *IV Right to Privacy*

#### ***A Introduction***

Even before the internet was invented, parents shared textual and visual information about their children with others.<sup>118</sup> Despite this, “family and children’s lives were generally private”.<sup>119</sup> Photos were stored in albums, videos on cassette tapes and stories handwritten in personal diaries.<sup>120</sup> Dissemination was, for the most part, restricted to face to face interactions.

The evolution of the internet and social media has progressively invaded people’s privacy in general and children’s privacy in particular.<sup>121</sup> This has caused some to speculate that privacy is “dead” in the digital age.<sup>122</sup> Instead of being stored in physical albums, cassette tapes and diaries, textual and visual information is uploaded online. Dissemination is potentially limitless.

The perception of children as vulnerable becomings, rather than beings, situates their rights to privacy in jeopardy more so than the typical individual.<sup>123</sup> But children do not exist in a

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<sup>118</sup> Monika Sziron and Elisabeth Hildt “Digital Media, the Right to an Open Future, and Children 0-5” (2018) 9 *Front Psychol* 1 at 1.

<sup>119</sup> Sorenson, above n 11, at 157.

<sup>120</sup> At 157.

<sup>121</sup> At 159.

<sup>122</sup> At 163.

<sup>123</sup> Lievens and others, above n 36, at 496.

silo. Most children are part of a family. As such, parents' and families' right to privacy will have implications for children's right to privacy and vice versa.<sup>124</sup> The courts have begun to recognise a distinction between children's individual right and the familial right as against third parties.<sup>125</sup> But, ironically, the greatest threat to children's right to privacy in the online context comes from their own parents — who are presumed to be the best guardians of their rights.<sup>126</sup> This is no more true than for children who become influencers by their parents' design and doing.

## ***B Privacy***

### *1 Definition*

Privacy is an ambiguous concept, with many facets to fit different contexts.<sup>127</sup> There is no universally accepted definition. Leading textbooks and authoritative reports dedicate whole sections to reviewing and critiquing the literary conceptualisations of privacy.<sup>128</sup> This paper will not repeat that analysis or attempt to provide the first comprehensive definition of privacy. For the purposes of this paper, the approach put forth in the Law Commission's review of the law of privacy and near identical conception by Professor Nicole Moreham will be applied.

The right to privacy is summarised by these parties as “protection against unwanted access”.<sup>129</sup> In more detail, a person will be in a state of privacy if:<sup>130</sup>

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<sup>124</sup> See Sutherland, above n 26, at 448.

<sup>125</sup> *Murray v Express Newspapers plc* [2008] EWCA Civ 446; [2009] Ch 481.

<sup>126</sup> Stacey B Steinberg “Sharenting: Children's Privacy in the Age of Social Media” (2017) 66 Emory LJ 840 at 862; Emma Nottingham “‘Dad! Cut that part out!’” in Jane Murray, Beth Blue Swadener and Kylie Smith (eds) *The Routledge International Handbook of Young Children's Rights* (Routledge, New York, 2019) 183 at 186; See Lievens and others, above n 36, at 497.

<sup>127</sup> Nicole Moreham and Mark Warby (eds) *Tugendhat and Christie: The Law of Privacy and the Media* (3rd ed, Oxford University Press, United Kingdom, 2016) at 42.

<sup>128</sup> At 42; Law Commission *Privacy: Concepts and Issues* (NZLC SP19, 2008) at 31.

<sup>129</sup> Law Commission, above n 128, at 56; Above n 127, at 43.

<sup>130</sup> Nicole Moreham “Privacy in the Common Law: A Doctrinal and Theoretical Analysis” (2005) 121 LQR 628 at 636.

... he or she is only seen, heard, touched or found out about if, and to the extent that, he or she wants to be seen, heard, touched or found out about.

Privacy rights are divided into two main categories — restricting access to private information (informational privacy) and restricting access to the physical self (local or spatial privacy).<sup>131</sup> The former is about preventing “unwanted dissemination of intimate information about their health, sexual activities, fantasies, financial position, home life and relationships”.<sup>132</sup> The latter is about preventing “unwanted watching, listening, recording, photographing, and filming of one’s private activities”.<sup>133</sup> Both categories are relevant to child influencers’ privacy in the digital age.

Within these categories sit further subsets of privacy. For example, informational privacy subsumes data privacy. Data privacy is pertinent to children in the online environment but is beyond the scope of this paper. This paper discusses privacy in a more general sense, as it relates to child influencers restricting unwanted access to their private information and physical self.

## *2 Risk of breach by parents*

Child influencers’ right to privacy is at risk. By taking photos or videos of the child’s private activities, parents may breach the child’s privacy of the physical self.<sup>134</sup> By uploading the photos or videos online, parents may breach the child’s privacy of information by intentionally or inadvertently revealing intimate details.<sup>135</sup>

Warren and Brandeis identify the ability to “be let alone; to live quietly, to be free from unwarranted intrusion, [and] to protect his name and personality from commercialization” as key attributes of privacy.<sup>136</sup>

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<sup>131</sup> Law Commission, above n 128, at 10; Moreham and Warby, above n 127, at 43;

<sup>132</sup> Moreham and Warby, above n 127, at 47.

<sup>133</sup> At 53–54.

<sup>134</sup> At 53–54.

<sup>135</sup> At 47.

<sup>136</sup> Sorenson, above n 11, at 162.



Children are not let alone, to live quietly and free from unwarranted intrusion by their parents. Limited privacy is, to a degree, a feature of childhood as children will be “under parental surveillance most of the time”.<sup>137</sup> In the digital context, giving children an online presence may constitute unwarranted intrusion, particularly where it occurs without the child’s knowledge and consent.

It is here that child influencers can be distinguished from children in general. Child influencers are unique because further unwarranted intrusion by media outlets and fan bases is likely to follow the parents’ initial intrusion. The popularity and fame that accompanies influencer status will make it near impossible for a child influencer to live quietly or be “let alone” by the public as they develop to adulthood, and even beyond.

Further, unlike ordinary children, child influencers’ names and personalities are not protected from commercialisation. Part V discusses in more detail how parents can deliberately monetise their child’s online presence. Common forms of commercialisation include brand deals, sponsored content, revenue-earning advertisements and related opportunities such as selling merchandise or meet-and-greet tickets. The financial benefits of commercialising a child’s online presence come at a cost to the child’s privacy.

### *3 Harm caused by breach*

A breach of the right to privacy causes harm. Privacy implies choice<sup>138</sup> but young children are often deprived of choice in the online environment. The right to an open future recognises that children “who are not yet autonomous... are expected to become so.”<sup>139</sup> Because of this, children should not have “important life choices determined by others before [they have] the ability to make them for [them]self”.<sup>140</sup> In creating an online presence for the child, parents deny the child the opportunity to have no online presence at

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<sup>137</sup> Law Commission, above n 128, at 16.

<sup>138</sup> Moreham and Warby, above n 127, at 45.

<sup>139</sup> Joseph Millum “The Foundation of the Child’s Right to an Open Future” (2014) 45 J Soc Philos 522 at 524; Sziron and Hildt, above n 118, at 1.

<sup>140</sup> Millum, above n 139, at 522.

all. The denial of choice, in itself, is an example of harm caused by breach of privacy. This harm is irreversible and is amplified for child influencers because:<sup>141</sup>

...followers store, republish and recirculate information in fan networks, resulting in digital footprints with persistence, replicability, scalability, searchability and extended longevity in public circulation which can be attributed back to the child indefinitely.

Another harm caused by breach of privacy is interference with dignity.<sup>142</sup> Dignity is a key rationale for the right to privacy and is defined as the idea that there is “inherent value in all human beings”.<sup>143</sup> Immanuel Kant furthers this concept by asserting that humans are an end in themselves, not merely a means.<sup>144</sup> If child influencers’ privacy is being breached by parents as a means of achieving income and fame, that is inconsistent with children’s inherent dignity.

In light of the harm that can be caused by a breach, the following sections consider the international and domestic law that may be invoked to protect child influencers’ right to privacy.

## ***C Regulation of Privacy in New Zealand***

### *1 International law*

Children’s right to privacy is enshrined in the UN CRC. Article 16 provides that:

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

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<sup>141</sup> Abidin, above n 8.

<sup>142</sup> Moreham and Warby, above n 127, at 65; Committee on the Rights of the Child, above n 34, at [69]; *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [239].

<sup>143</sup> Moreham and Warby, above n 127, at 66.

<sup>144</sup> Immanuel Kant *Groundwork of the Metaphysics of Morals* (Cambridge University Press, Cambridge, 1997) at 4:438.

Children's right to privacy is also reinforced as a right afforded to all humans in art 12 of the UDHR, art 17 of the ICCPR and art 8 of the ECHR. Other than substitution of the word "child" for "person", identical wording is used to construe the right to privacy in the UN CRC, UDHR and ICCPR. This means that art 16 in the UN CRC has not been tailored to reflect the unique characteristics of children, such as their evolving capacities or the need to protect their best interests. A tailored provision is probably unnecessary as these aspects are incorporated into arts 3 and 5, which should colour the application of art 16 in practice. The UN CRC describes "only a broad principle of privacy".<sup>145</sup> Apart from requiring the right to be legally enforceable, there is no guidance for Member States on what children's right to privacy may look like in practice.<sup>146</sup> At this point in time, no General Comment on art 16 has been issued but elements of privacy are considered in the forthcoming General Comment on children's rights in relation to the digital age.<sup>147</sup>

## 2 *Domestic law*

In domestic law, NZ BORA does not contain an express right to privacy.<sup>148</sup> But, as per s 28:

...an existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is only included in part.

This means that the basis for, and remedies for breach of, the right to privacy found at common law are valid. But the right is not absolute.<sup>149</sup> The right to privacy must be reconciled and balanced against other rights, of which it is most often in competition with the right to freedom of expression (discussed in Part III).<sup>150</sup>

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<sup>145</sup> Peter Highton "Protection of children's privacy in the media" (2006) 5 NZFLJ 147 at 147.

<sup>146</sup> At 147.

<sup>147</sup> Committee on the Rights of the Child, above n 34.

<sup>148</sup> Todd Stephen (ed) *The law of torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) at 1000; Law Commission, above n 128, at 15.

<sup>149</sup> Law Commission, above n 128, at 11.

<sup>150</sup> At 11.

As a party to the UN CRC, New Zealand must fulfil its obligations under the treaty. In its most recent periodic report to the Committee, New Zealand submitted that art 16 is incorporated into domestic legislation and complied with under the Privacy Act 1993 (soon to be Privacy Act 2020).<sup>151</sup> However, that Act only concerns data privacy. The Committee's corresponding Concluding Observations did not consider a broader sense of privacy either.<sup>152</sup>

Article 16(2) of the Convention mandates that children's right to privacy must be legally enforceable. The following section will briefly raise, and dismiss as ineffective, the possible private law remedies a child influencer may have against their parents for breach of privacy in domestic law.

(a) Non-legal remedies

Presumably, a child's first recourse will be to ask their parent to delete the offending material or social media account.<sup>153</sup> This remedy relies on the parent's goodwill. Even if the parent complies, this solution ignores the characteristics of the internet which make it virtually impossible to retract a digital footprint once created.<sup>154</sup> If the parent refuses to comply, the child will need to rely on legal avenues.

(b) Legal remedies

There are no legal causes of action specifically related to "online wrongdoing".<sup>155</sup> The child must turn to broad privacy claims (breach of confidence and wrongful publication of private facts) or emerging remedies (the right to be forgotten). No cases are known to have been brought by a child against their parent under these causes of action in New Zealand for online behaviour. As will be explained, this is unsurprising.

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<sup>151</sup> *United Nations Convention on the Rights of the Child: Fifth Periodic Report by the Government of New Zealand 2015* (United Nations, 5 May 2015) at 20.

<sup>152</sup> Committee on the Rights of the Child *Concluding observations on the fifth periodic report of New Zealand* UN Doc CRC/C/NZL/CO/5 (21 October 2016).

<sup>153</sup> Bessant, above n 107, at 8; Moreham and Warby, above n 127, at 765.

<sup>154</sup> Abidin, above n 8.

<sup>155</sup> Moreham and Warby, above n 127, at 763.

There are significant barriers to children obtaining legal remedies. The child must be old enough to understand their rights, be *Gillick* competent to invoke legal action and have access to the resources required to bring a claim.<sup>156</sup> Young, preverbal children are “entirely reliant on an interested third party to act on their behalf” but it would be rare for any child to bring legal proceedings, let alone against their parents, without support from an adult.<sup>157</sup>

Even assuming these conditions are met, the following paragraphs explain why the legal remedies for breach of confidence, wrongful publication of private facts and the right to be forgotten are of little utility to child influencers whose privacy has been breached by their parents.

(i) Breach of confidence

A successful claim for breach of confidence would require the child to demonstrate that the relevant information was:<sup>158</sup>

1. of a confidential nature;
2. imparted to their parents “in circumstances importing an obligation of confidence or that it was otherwise clear to the parents that the information was to be kept confidential”; and
3. shared by the parent without their consent and to their detriment.

A child influencer’s claim is unlikely to make it past the first limb. First, breach of confidence can only be invoked to protect confidential information. It will not help a child whose grievance is with their presence online more generally. Second, even confidential information will lose its quality of confidence once it becomes “known to a substantial number of people”.<sup>159</sup> Where “a parent has shared... information with the world at large

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<sup>156</sup> Nottingham, above n 126, at 184.

<sup>157</sup> At 185.

<sup>158</sup> Claire Bessant “Parental rights to publish family photographs versus children’s rights to a private life” (2017) 28 Ent LR 43 at 44.

<sup>159</sup> Bessant, above n 107, at 11.

or has a substantial media following” the child will “struggle to establish that such information is not in the public domain”.<sup>160</sup>

(ii) Wrongful publication of private facts

Wrongful publication of private facts is wider than confidentiality. The tort protects “the right to control dissemination of information about one’s private life”.<sup>161</sup> That information does not necessarily need to be confidential. A successful claim requires:<sup>162</sup>

1. The existence of facts in respect of which there is a reasonable expectation of privacy; and
2. publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

Even if both elements are established, an individual’s right to privacy may be overridden if the defendant can prove the subject matter is of legitimate public concern.<sup>163</sup>

Child influencers are public figures whose reasonable expectation of privacy reduces correspondingly as their profile grows.<sup>164</sup> If a child does not have capacity to hold their own expectations, the parent’s reasonable expectations will be used in proxy. The effect of this in practice is that parents’ conduct in “courting publicity”<sup>165</sup> on their own or the child influencer’s behalf weakens, and in some cases waives, the child’s reasonable expectations of privacy — cannibalising the claim.<sup>166</sup> This “highly problematic”<sup>167</sup> and

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<sup>160</sup> Bessant, above n 107, at 11.

<sup>161</sup> At 11.

<sup>162</sup> *Hosking v Runting*, above n 142, at [117].

<sup>163</sup> Stephen, above n 148, at 998.

<sup>164</sup> At 991.

<sup>165</sup> At 991; Oswald and others, above n 22, at 10.

<sup>166</sup> Marion Oswald, Helen James and Emma Nottingham “The not-so-secret life of five-year-olds: legal and ethical issues relating to disclosure of information and the depiction of children on broadcast and social media” (2016) 8 JML 198 at 213; Bessant, above n 107, at 13.

<sup>167</sup> Oswald, James and Nottingham, above n 166, at 214.

“controversial”<sup>168</sup> issue also arises in the equivalent tort of misuse of private information in England and Wales. I agree with Professor Joan Loughrey who is of the view that:<sup>169</sup>

It seems wrong to hold that parental actions, which are themselves an invasion of a child’s privacy, can modify the child’s expectation of privacy and so limit the degree of protection he can expect from the law.

The likelihood of a child influencer’s claim getting beyond the first hurdle is further diminished as Tipping J in *Hosking v Runting* considered that “what expectations of privacy are reasonable will be a reflection of contemporary societal values”.<sup>170</sup> In the digital age, disclosure, rather than privacy, is becoming the social norm so children’s reasonable expectations of privacy will continue to be eroded.<sup>171</sup>

### (iii) Right to be forgotten

A child influencer might be able to protect their right to privacy by engaging the right to be forgotten. Unlike the first two causes of action, the right to be forgotten is tailored to the online environment as it enables a person to change their digital footprint. Because of this, it “may prove to be the most promising legal solution available to remedy the harm caused by online disclosure of a child’s personal information”.<sup>172</sup> Nonetheless, it is a very limited and specific remedy.<sup>173</sup>

The right was established in a 2014 ruling of the Court of Justice of the European Union.<sup>174</sup> The effect of the judgment is that Google is required to break search result links “based on an individual’s name when those results are ‘*inadequate, irrelevant or no longer relevant, or excessive*’”.<sup>175</sup> The nature, source and age of the information will be considered as part

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<sup>168</sup> Oswald and others, above n 22, at 10; Bessant, above n 107, at 13.

<sup>169</sup> Oswald, James and Nottingham, above n 166, at 219.

<sup>170</sup> *Hosking v Runting*, above n 142, at [250].

<sup>171</sup> Nottingham, above n 126, at 184.

<sup>172</sup> Steinberg, above n 126, at 876.

<sup>173</sup> Joy Liddicoat *The Right to Be Forgotten* (Office of the Privacy Commissioner, May 2015) at 6.

<sup>174</sup> C-131/12 *Google Spain and Google Inc v Agencia Espanola de Proteccion de Datos (AEP) and M C* ECLI:EU:C:2014:317.

<sup>175</sup> Above n 173, at 6.

of this determination.<sup>176</sup> But the right is not absolute. The right to be forgotten can be overridden by, among other things, public interest in the information and “the exercise of freedoms of expression and information”.<sup>177</sup>

The right to be forgotten is not yet an established right under New Zealand law and is unlikely to become so any time soon.<sup>178</sup> The Office of the Privacy Commissioner has expressed the view that there is no “pressing need” to consider its application in New Zealand.<sup>179</sup>

### (c) Defence of consent

Consent, express or implied, is a general defence to the legal remedies outlined above.<sup>180</sup> A child who has consented to publication cannot later rely on their right to privacy to sustain a claim.<sup>181</sup> This means that if, despite the analysis above, a child successfully brings a private law claim against their parents for breach of privacy, the claim will fail if the parents can establish that the child consented to publication.

The test for a child’s capacity to consent was developed in the medical context but has since been applied more broadly.<sup>182</sup> Children under the age of 16 years old are presumed to not have capacity to consent.<sup>183</sup> This presumption can be rebutted if a child meets the test for *Gillick* competency. A child will be *Gillick* competent if they have “sufficient understanding and intelligence to understand the nature and implications of [what is] proposed”.<sup>184</sup> If a child is not *Gillick* competent, their parents can provide consent on their

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<sup>176</sup> Liddicoat, above n 173, at 11.

<sup>177</sup> Macenaite, above n 46, at 770.

<sup>178</sup> *Hammond v Credit Union Baywide* (In-Court Media Application) [2014] NZHRRT 56 (2 December 2014) at [7.5].

<sup>179</sup> Livingstone, Lansdown and Third, above n 55, at 6.

<sup>180</sup> Moreham and Warby, above n 127, at 472–473.

<sup>181</sup> Stephen, above n 148, at 1001.

<sup>182</sup> Daly, above n 33, at 474; Nottingham, above n 126, at 184.

<sup>183</sup> Tim Grimwood “*Gillick* and the Consent of Minors: Contraceptive Advice and Treatment in New Zealand” (2009) 40 VUWLR 743 at 754.

<sup>184</sup> Nottingham, above n 126, at 184.



behalf. The substitution of parental consent and its deference to a child with capacity reflects the evolving capacities of the child.

But even children deemed not to be *Gillick* competent may be able to signal consent. There is a growing body of literature on the ability for young children to communicate through nonverbal cues long before they are able to speak or write.<sup>185</sup> For example, a young child who does not consent to being filmed or photographed may go quiet or curl into themselves.<sup>186</sup> Uninformed or unaware parents may consent on their child's behalf despite behaviours indicating dissent by the child. Because of this, and because online material endures "beyond the age that the child would gain capacity," there are concerns that "relying on parental consent may not be a fair and ethical way of protecting the best interests of the child".<sup>187</sup>

(i) Consent in broadcasting standards

This concern has been reflected in the Broadcasting Act 1989 and Broadcasting Standards Authority (BSA) guidelines which regulate New Zealand media. Even parental or guardian consent to the broadcasting of a child's private matters does not displace a broadcaster's duty to exercise its own judgment as to the child's best interests.<sup>188</sup> These standards are enforced through a formal complaints process and BSA decisions may be appealed to the High Court.<sup>189</sup>

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<sup>185</sup> Sue Dockett and Bob Perry "Researching with Young Children: Seeking Assent" (2011) 4 *Child Indic Res* 231 at 233 and 242; Committee on the Rights of the Child *General Comment No 7 (2005) Implementing child rights in early childhood* UN Doc CRC/C/GC/7/Rev1 (20 September 2006) at [14]; Glenda MacNaughton, Patrick Hughes and Kylie Smith "Young Children's Rights and Public Policy: Practices and Possibilities for Citizenship in the Early Years" (2007) 21 *Child Soc* 458 at 463.

<sup>186</sup> Amelia Tait "Is it safe to turn your children into YouTube stars?" (16 September 2015) *The Guardian* <[www.theguardian.com](http://www.theguardian.com)>

<sup>187</sup> Oswald, James and Nottingham, above n 166, at 218.

<sup>188</sup> Law Commission, above n 128, at 203; Broadcasting Standards Authority "Privacy Standard and Guidance" (2020) Broadcasting Standards Authority <[www.bsa.govt.nz](http://www.bsa.govt.nz)>

<sup>189</sup> Broadcasting Standards Authority "The Complaints Process" (2020) Broadcasting Standards Authority <[www.bsa.govt.nz](http://www.bsa.govt.nz)>

While the complainant must typically be the individual whose privacy is alleged to have been breached, the BSA retains the discretion to accept complaints from others on an individual's behalf.<sup>190</sup> At least three complaints have been brought by parents alleging breach of privacy on their child's behalf despite the second parent's consent to the broadcast.<sup>191</sup> Two of these three complaints were upheld with the BSA finding that the broadcasters breached the duty to exercise their own judgment as to the children's best interests.<sup>192</sup> While the Broadcasting Standards do not apply to social media, the duty of care on broadcasters suggests that parental consent alone may be insufficient to protect a child's privacy and best interests in the entertainment industry.

(ii) Consent in other jurisdictions

In France, consent to publication is taken very seriously. The penalty for a conviction of distributing intimate images of children "taken in private, without consent" is a fine of EUR 45,000 and up to one year imprisonment.<sup>193</sup> Children can seek removal of information that has been posted about them online via the French Data Protection Agency.<sup>194</sup> National police go so far as to urge parents to stop posting photographs of their children to social media altogether, primarily because of the risks of sexual predation and violation of privacy.<sup>195</sup>

The European Network of Ombudspersons for Children (ENOC) also takes a strong stance. ENOC argues that children's consent should be proactively sought "before private content about them is published online by others and before their private information is used for commercial purposes".<sup>196</sup>

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<sup>190</sup> Broadcasting Standards Authority, above n 189.

<sup>191</sup> *Parlane v Radio New Zealand Ltd* BSA 2017-023, 16 June 2017; *NS v Sky Network Television Ltd* BSA 2015-032, 10 November 2015; *JB v Television New Zealand Ltd* BSA 2006-090, 22 February 2007.

<sup>192</sup> *NS v Sky Network Television Ltd*, above n 191; *JB v Television New Zealand Ltd*, above n 191.

<sup>193</sup> Bessant, above n 158, at 2.

<sup>194</sup> At 2.

<sup>195</sup> At 2.

<sup>196</sup> European Network of Ombudspersons for Children *Position Statement on "Children's Rights in the Digital Environment"* (European Network of Ombudspersons for Children, September 2019) at 3.

(iii) Standards for consent

Ideally, consent would involve “preliminary permission to film, and then secondary permission to use” the footage.<sup>197</sup> This two-stage process goes beyond the minimum legal requirements for obtaining consent,<sup>198</sup> recognising that “consent to participate... may not necessarily involve consent to publish everything that happens in the course of filming”.<sup>199</sup> At a minimum, consent should be voluntary and informed. There is a risk that child influencers’ consent may not meet either standard.

Child influencers’ consent may not be informed. Assuming it is the child influencer’s parent who is producing the content, informed consent would require the parent to explain to the child the full implications of their participation, both positive and negative.<sup>200</sup> The information would need to be provided “in terms appropriate to the child’s age, maturity and circumstances”.<sup>201</sup>

Child influencers’ consent may also be involuntary. Children “may find it difficult to contradict an adult’s suggestion to participate” because they are an authority figure.<sup>202</sup> An example of this is found in the video “DAD! CUT THAT PART OUT!” available on the Shaytard family’s YouTube channel.<sup>203</sup> The video, which has been viewed over 4.48 million times, features a nine year old begging her father to edit out footage that inadvertently captured her talking about flirting with a classmate.<sup>204</sup> She eventually gives in after her father follows her around the house, films her hiding under a bed and argues “but this is good footage!” While the daughter ends up providing explicit, verbal consent

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<sup>197</sup> Judith Townend “Layers of consent” (2014) 11 *International Journal of Communication Ethics* 25 at 26.

<sup>198</sup> Oswald, James and Nottingham, above n 166, at 228.

<sup>199</sup> Stephen, above n 148, at 1001.

<sup>200</sup> *Children in programmes: An independent research report for Ofcom by Sherbert Research* (Ofcom, 12 December 2007) at 6.

<sup>201</sup> At 6; Council of Europe *Guide to Human Rights for Internet Users* (Council of Europe, CM/Rec(2014)6, 16 April 2014) at 5.

<sup>202</sup> Ofcom, above n 111, at 16.

<sup>203</sup> Shaytards (@SHAYTARDS) “DAD! CUT THAT PART OUT!” (3 April 2014) <[www.youtube.com](http://www.youtube.com)>

<sup>204</sup> Above n 203.

to publication her body language, the surrounding context and, arguably, authoritative influence of the father imply that the consent was not free and voluntary.

For these reasons, it is assumed that the majority of parents who “share information about their children online... do so without their children’s consent”..<sup>205</sup>

## ***D Conceptual Tensions***

### *1 Parents as a source of harm?*

Despite examples such as the one above, the law does not entertain the idea of parents as a “potential source of harmful disclosure”..<sup>206</sup> The private law remedies for breach of privacy were developed to protect against disclosure of children’s private information “primarily in school and healthcare settings”..<sup>207</sup> These actions are ill-suited to, and outdated in, the digital age — not least because they assume that children’s and parents’ interests align and parents will always act in their child’s best interests..<sup>208</sup> The conflict of interest between parents’ rights to work and to freedom of expression (discussed in Part III) and a child’s right to privacy in respect of the same matter..<sup>209</sup> is ignored.

### *2 Individual or familial right?*

Because the law does not contemplate that children might need protection against their own parents, the prevailing judicial position is that it is undesirable to “pit the rights of family members against one another”..<sup>210</sup> This means that familial privacy rights are often bundled together..<sup>211</sup> and, when in conflict with a child’s individual right to privacy, greater weight is afforded to parental and familial rights..<sup>212</sup>

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<sup>205</sup> Steinberg, above n 126, at 839; Sorenson, above n 11, at 156; Keltie Haley “Sharenting and the (Potential) Right to Be Forgotten” (2020) 95 Ind LJ 1005 at 1005.

<sup>206</sup> Steinberg, above n 126, at 862.

<sup>207</sup> At 862.

<sup>208</sup> Shmueli and Blecher-Prigat, above n 23, at 763; Steinberg, above n 126, at 862.

<sup>209</sup> Sorenson, above n 11, at 157.

<sup>210</sup> At 166.

<sup>211</sup> At 166.

<sup>212</sup> Shmueli and Blecher-Prigat, above n 23, at 763; Steinberg, above n 126, at 856.

*Murray v Express Newspapers* represented somewhat of a turning point for the recognition of children's individual right to privacy.<sup>213</sup> The case is about the infant child of the famous author, JK Rowling. The child was covertly photographed while being pushed in a buggy on a public street.<sup>214</sup> After the photograph was published in a magazine, the parents brought an action for breach of confidence in the child's name. The Court of Appeal was prepared to protect the child's privacy from exposure against the parent's wishes, despite JK Rowling's fame.<sup>215</sup> In doing so, the judgment implicitly recognised children's right to privacy as distinct from that of their parents where the source of harmful disclosure is a third party.<sup>216</sup>

In comparison to that case, children's and parent's interests do not always align. A child influencer's interest in privacy may conflict with their parent's interest in publication and, as such, the parent can become a source of harmful disclosure. If the law is willing to recognise children's individual right to privacy against a third party, it is not too far a stretch to recognise children as also having an individual right to privacy against their parents. This would be a natural and necessary extension of the law to protect child influencers' right to privacy in digital age.

Theoretically, it is possible, although outside the scope of this paper, to conceive that this would have a reciprocal effect. That is, a parent would also be able to enforce their individual right to privacy against a child who breaches that privacy, for example, by posting information or images about the parent or family home.

Whether or not children's and parents' interests are aligned, children are vulnerable to breach of privacy. Where interests are misaligned, as in the case of child influencers, children require greater protection. A breach of child influencers' privacy by their parents

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<sup>213</sup> *Murray v Express Newspapers*, above n 125.

<sup>214</sup> At [1].

<sup>215</sup> At [61].

<sup>216</sup> At [16]; *Oswald and others*, above n 22, at 9 and 11.

is currently without effective remedy<sup>217</sup> so is not deterred by law. Against this background, the role of the State becomes even more important.

### *E Role of the State*

A triangular relationship exists between children, their parents and the State.<sup>218</sup> The general assumption is that parental autonomy is in a child's best interests and the State will only intervene where absolutely necessary to protect the child.<sup>219</sup> Per art 5 of the UN CRC:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

But is children's right to privacy in the online environment a public or private issue? While some view "sharenting" as a societal problem requiring action by the State<sup>220</sup> there is an absence of State level protection of children's right to privacy in this context. This implies that the State views children's online presence as a private matter of family life in which it would be inappropriate to intervene.

A hands off role by the State may be defensible if there were adequate private law remedies to protect child influencers' right to privacy against invasion by their parents. But, as described in the previous sections, this is not the case. There is an established need for State intervention. The following section provides recommendations on the possible forms this may take.

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<sup>217</sup> Steinberg, above n 126, at 861.

<sup>218</sup> Sutherland, above n 26, at 448.

<sup>219</sup> Sorenson, above n 11, at 164.

<sup>220</sup> Nottingham, above n 126, at 189.

## ***F Recommendations for the State***

### *1 Unbundle privacy as a familial right*

So long as children’s right to privacy is subsumed by and bundled into the family’s right to privacy, children are not truly independent rights holders with enforceable rights. This outdated sentiment needs to be unequivocally replaced with the “modern view of [children as] individuals with rights that deserve protection — even from their own parents”.<sup>221</sup>

Jurisprudence has already begun to recognise children as having a right to privacy independent of their parents and family that will be protected against third parties, even if the parent is famous.<sup>222</sup> The conception of privacy as an individual, not familial, right should be extended to recognise that parents are a source of harmful disclosure in the digital age and, as such, children need remedy against their parents for breach of privacy.

### *2 Provide education for parents*

Children’s right to privacy in the digital age will “only truly be achieved by preventing publication in the first place” but it is unrealistic to expect parents to stop posting about their child entirely.<sup>223</sup> A more targeted approach must be taken to discourage excessive, inappropriate and embarrassing disclosure that could cause the greatest harm in the short and long term.<sup>224</sup> The role of education has been emphasised by numerous children’s rights scholars and bodies.<sup>225</sup>

## ***G Recommendations for the UN***

### *1 Issue further guidance*

The draft General Comment on children’s rights in relation to the digital environment does not go far enough to provide assistance in this context.<sup>226</sup> While General Comment 25

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<sup>221</sup> Sorenson, above n 11, at 157.

<sup>222</sup> *Murray v Express Newspapers*, above n 125.

<sup>223</sup> Moreham and Warby, above n 127, at 801; Sorenson, above n 11, at 173.

<sup>224</sup> Bessant, above n 107, at 8; Nottingham, above n 126, at 184.

<sup>225</sup> Bessant, above n 107, at 19; Nottingham, above n 126, at 189; Oswald and others, above n 22, at 8; European Network of Ombudspersons for Children, above n 196, at 6.

<sup>226</sup> Committee on the Rights of the Child, above n 34.

recognises parents as a potential threat to children's privacy,<sup>227</sup> it goes on to consider privacy only in the sense of personal data protection.<sup>228</sup> The privacy implications that arise from parents creating an online presence for their child are not further explored. It is recommended that the UN recognise the multiple facets of privacy and provide Member States with guidance that covers children's rights to informational, local and spatial privacy in the digital age.

### ***H Conclusion***

Child influencers are caught in a bind. Their parents are supposedly the guardians of their rights, yet they repeatedly infringe their children's right to privacy by filming, photographing, documenting and uploading their private lives online without voluntary and informed consent. Up until now, the State has failed to intervene in what has been considered a private family matter. It is time for the State to evaluate its role in protecting child influencers' right to privacy in the digital age. Part V undertakes a similar analysis for child influencers' right to protection from economic exploitation.

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<sup>227</sup> Committee on the Rights of the Child, above n 34, at [69].

<sup>228</sup> At [72]-[79].



## *V Right to Protection from Economic Exploitation*

### *A Introduction*

Social media is different to traditional broadcast media, such as television and film.<sup>229</sup> Instead of having to follow scripts and strict schedules in a studio, content can be created ad hoc, in any location and at any time of the day or night.<sup>230</sup> The content itself is user-generated<sup>231</sup> and can be uploaded instantaneously,<sup>232</sup> while traditional media is typically produced by a third party and undergoes lengthy post-production processes.<sup>233</sup> But there are also similarities. Both types of media can reach a wide audience<sup>234</sup> and both social media influencers and traditional actors are under pressure to perform and meet contractual deadlines.<sup>235</sup>

Children have long been involved in traditional media, but the past decade has seen the first generation of children emerge as social media influencers. According to Verdoodt, van der Hof and Leiser, the question of whether child influencing amounts to economic exploitation is “underexplored” and a “potential regulatory gap in the child protection framework”.<sup>236</sup>

This paper argues that, when monetised, children’s online presence constitutes child labour, not play. Because it is labour, child influencers should be entitled to income generated from their online presence. The regulatory position in New Zealand is compared to that in the

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<sup>229</sup> Jessica Lawlor “5 major differences between traditional media and social media” (1 August 2018) Muck Rack <[www.muckrack.com](http://www.muckrack.com)>

<sup>230</sup> Harper Lambert “Why Kidfluencers Need a Coogan Law” (20 August 2019) The Hollywood Reporter <[www.hollywoodreporter.com](http://www.hollywoodreporter.com)>

<sup>231</sup> Christina Newberry “A Marketer’s Guide to Using User-Generated Content on Social Media” (12 March 2019) Hootsuite <[www.blog.hootsuite.com](http://www.blog.hootsuite.com)>

<sup>232</sup> Maheshwari, above n 84.

<sup>233</sup> Alyssa Maio “What is Post-Production? A Quick Rundown & Why Trust Matters” (21 November 2019) Studio Binder <[www.studiobinder.com](http://www.studiobinder.com)>

<sup>234</sup> Lawlor, above n 229.

<sup>235</sup> Emily Dean Hund “The Influencer Industry: Constructing And Commodifying Authenticity On Social Media” (PhD Dissertation, University of Pennsylvania, 2019) at 88.

<sup>236</sup> Verdoodt, van der Hof and Leiser above n 82, at 124.

United States (primarily, Californian State law). It is concluded that current international and domestic law fail to adequately protect child influencers from economic exploitation by their parents. The State and relevant private organisations need to play a more active role.

### ***B Child Labour, Not Play***

The invention of technology, the internet and social media have changed what play looks like in the digital age. Children can now play (alone or with others) by socialising, gaming, watching, listening, creating and posting online.<sup>237</sup> Even in a digital form, play has an “important function in a child’s development”.<sup>238</sup> Children have a right to play. Article 31 of the UN CRC affirms:

...the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

The concept of play envisioned in art 31 is “any behaviour, activity or process initiated, controlled and structured by children themselves”.<sup>239</sup> A behaviour, activity or process will not be play if it was initiated, controlled and structured by someone other than the child, such as their parent. While parents “may contribute to the creation of environments in which play takes place,” play must be “non-compulsory, driven by intrinsic motivation and undertaken for its own sake, rather than as a means to an end”.<sup>240</sup> To reiterate the point that play is not driven by commerce or profit, one of the key characteristics of play identified by the Committee on the Rights of the Child is non-productivity.<sup>241</sup>

The content of many child influencer videos — acting in skits, singing, dancing, telling stories and playing with toys — are examples of play as it is traditionally understood.<sup>242</sup>

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<sup>237</sup> Committee on the Rights of the Child *General comment No 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts* UN Doc CRC/C/GC/17 (17 April 2013) at [45].

<sup>238</sup> Verdoodt, van der Hof and Leiser above n 82, at 104.

<sup>239</sup> Committee on the Rights of the Child, above n 237, at [14].

<sup>240</sup> At [14].

<sup>241</sup> At [14].

<sup>242</sup> At [12].

The act of children planning, performing, filming and even uploading content to online platforms can also constitute play if it is a self-initiated, unstructured, informal activity. Something that is considered play offline does not lose that quality simply because it is done online.

This paper argues that, once monetised, these activities no longer fit the concept of play intended in art 31.<sup>243</sup> The example of Ryan's World will be used to illustrate.<sup>244</sup> When Ryan's YouTube channel was first established, it may have met the art 31 definition of play. But now Ryan's online presence has been commercialised, it would be difficult to refute that his influencing has become a form of child labour.

Ryan's World is a YouTube channel in which nine year old Ryan unboxes, plays with and reviews toys.<sup>245</sup> The channel was created by Ryan's parents when he was three years old, purportedly at his request.<sup>246</sup> As Ryan's popularity grew, his parents entered into brand deals and sponsorship agreements on his behalf with companies including Nickelodeon, Colgate and Walmart.<sup>247</sup> Play is meant to be non-compulsory but contracts such as these compel Ryan to create content in fulfilment of legal obligations.

Most influencer contracts for marketing dictate the scope of work, content delivery format, review and approval process, and deliverables.<sup>248</sup> When the content of videos is controlled to that extent, the videos can no longer be said to be controlled or structured by Ryan.

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<sup>243</sup> Verdoodt, van der Hof and Leiser above n 82, at 104.

<sup>244</sup> Ryan Kaji (@Ryan's World) <[www.youtube.com](http://www.youtube.com)>

<sup>245</sup> Ben Popper "YouTube's Biggest Star is a 5-Year-Old That Makes Millions Opening Toys" (22 December 2016) The Verge <[www.theverge.com](http://www.theverge.com)>

<sup>246</sup> Above n 245.

<sup>247</sup> Travis Clark and Amanda Perelli "An 8-year-old boy is making \$26 million a year on YouTube reviewing toys" (19 December 2019) Business Insider Australia <[www.businessinsider.com.au](http://www.businessinsider.com.au)>

<sup>248</sup> Daniel Troesch "5 Influencer Deliverables to Know While Writing Your Campaign Brief" (26 February 2020) Medium <[www.medium.com](http://www.medium.com)>

Because Ryan’s online activities earn revenue, they are not undertaken for their own sake or non-productive. Ryan is “lending his image” and “doing something to sell a product”.<sup>249</sup> There is commercial intent for creating the videos that “bears more resemblance to work” than play.<sup>250</sup>

Based on this analysis, using Ryan’s World as an example, the point at which child influencers’ play is monetised it becomes child labour. This accords with the common understanding of work as the exercise of physical and mental effort as a means of earning income.<sup>251</sup>

In media interviews, the parents of child influencers often rebut this analysis by arguing they are the ones doing the work while the child plays.<sup>252</sup> For example, Ryan is simply unboxing, playing and reviewing toys while his parents plan, stage, film, professionally edit and upload the videos. This is a “thin assertion when one considers the [child is] appearing in hundreds of posts per year and that corporate sponsors specifically contract for the child to appear in the video”.<sup>253</sup>

### ***C Entitlement to Income***

There are several ways that income can be generated directly or indirectly from a child influencer’s online presence. First, child influencers can enter brand deals with, and post sponsored content for, companies in exchange for remuneration. Second, child influencers’ social media platforms can be monetised through Google AdSense.<sup>254</sup> Google AdSense is an “advertising program that allows Google to run ads on influencers’ YouTube accounts and pays the influencer on a per-click basis”.<sup>255</sup> Third, the most successful child

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<sup>249</sup> Lambert, above n 230, at 81.

<sup>250</sup> At 105.

<sup>251</sup> Tony Deverson and Graeme Kennedy *The New Zealand Oxford Dictionary* (Oxford University Press, England, 2005).

<sup>252</sup> Marina A Masterson “When Play Becomes Work: Child Labor Laws in the Era of ‘Kidfluencers’” (2020) 168 U Pa L Rev (forthcoming). Currently available at: Marina A Masterson “When Play Becomes Work: Child Labor Laws in the Era of ‘Kidfluencers’” (14 August 2020) Social Science Research Network <www.ssrn.com> at 15.

<sup>253</sup> At 15.

<sup>254</sup> Maheshwari, above n 84.

<sup>255</sup> Above n 252, at 7.

influencers can generate income through other related avenues and business ventures, such as by selling merchandise and meet-and-greet tickets.

Who is legally entitled to this income? The Ryan's World example will be continued to illustrate the complexities of this question in practice. It has already been established that Ryan's influencing is child labour. Should Ryan be entitled to all or some of the earnings generated from his labour? Ryan's mother quit her job to manage his career full time.<sup>256</sup> Should Ryan's mother be entitled to all or some of the earnings based on her contribution? Because Ryan is younger than 13 he cannot, according to YouTube policy, own an account.<sup>257</sup> Should Ryan's parents be entitled to all or some of the earnings based on the fact the social media account is technically in their name?

The issue of entitlement to income is not negligible. Ryan was named the highest paid YouTuber in 2018 and 2019, earning USD 22 million and USD 26 million respectively.<sup>258</sup> While at one extreme of the spectrum, Ryan is only one of many child influencers who earn revenue from their online presence. The influencer market is estimated to grow to \$24 billion over the next few years.<sup>259</sup>

#### ***D Regulation of Child Labour in New Zealand***

The following section canvasses the relevant international and domestic child labour law. It will become clear that child labour in New Zealand is relatively unregulated and falls short of international standards.

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<sup>256</sup> Popper, above n 245.

<sup>257</sup> Maheshwari, above n 84.

<sup>258</sup> "Eight-year-old is highest paid YouTuber, earned \$35 million in 2019" (19 December 2019) The Straits Times <[www.straitstimes.com](http://www.straitstimes.com)>

<sup>259</sup> Miriama Kamo "Sunday - Child's Play" (podcast, 3 May 2020) TVNZ <[www.tvnz.co.nz](http://www.tvnz.co.nz)>

## 1 *International law*

### (a) Minimum Age Convention 1973

In 1973 the ILO adopted Convention (No 138) concerning the minimum age for admission to employment (Minimum Age Convention).<sup>260</sup> The purpose of the Minimum Age Convention is to achieve the effective abolition of child labour.<sup>261</sup> Child labour is defined as work that is “hazardous to children’s health, safety or morals, work that interferes with compulsory education or for which they are simply too young”.<sup>262</sup>

Member States are required to establish a minimum working age and national policies for the elimination of child labour. The minimum working age should be aligned with the age children complete compulsory education and, “in any case, shall not be less than 15 years”.<sup>263</sup> Exceptions can be made for light work<sup>264</sup> and participation in artistic performances.<sup>265</sup>

Member States can permit children between age 13 and 15 to engage in light work which is “not likely to be harmful to their health or development” and is “not such as to prejudice their attendance at school”.<sup>266</sup> Examples of light work include occasional work in family businesses,<sup>267</sup> babysitting<sup>268</sup> and newspaper routes.<sup>269</sup> Social media influencing is unlikely to be considered light work because, “to remain popular”, an influencer must “continuously

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<sup>260</sup> Convention (No 138) concerning minimum age for admission to employment 1015 UNTS 297 (adopted 6 June 1973, entered into force 19 June 1976 [Minimum Age Convention]).

<sup>261</sup> Article 1.

<sup>262</sup> International Labour Organisation *ILO Convention No 138 at a Glance* (International Labour Organisation, June 2018) at 1.

<sup>263</sup> Minimum Age Convention, art 2(3).

<sup>264</sup> Article 7.

<sup>265</sup> Article 8.

<sup>266</sup> Article 7.

<sup>267</sup> International Labour Office *Decent Work Country Profile: Austria* (International Labour Office, 2009) at 25.

<sup>268</sup> International Labour Organisation “Direct Request (CEACR) – adopted 2004, published 93rd ILC session (2005)” (2017) International Labour Organisation <[www.ilo.org](http://www.ilo.org)>

<sup>269</sup> “BC introduces legislation to raise working age from 12 to 16, except for ‘light work’ at age 14” (29 April 2019) CHEK News <[www.cheknews.ca](http://www.cheknews.ca)>

publish... high quality and entertaining content on a weekly or even daily basis”.<sup>270</sup> Influencing is a full time career for many adults, so would be time and labour intensive for a child to balance alongside education and play.

Member States can also permit children below the minimum working age to work “for such purposes as participation in artistic performances”.<sup>271</sup> This exception only applies to children who have been granted individual permits that limit working hours and prescribe working conditions.<sup>272</sup> Because the Minimum Age Convention predates the internet, it is unlikely that amateur, user-generated content created in one’s home was contemplated at the time. However, it is open to Member States to define the activities that fall within the category of artistic performance so a broad conception may capture child influencing.<sup>273</sup>

The Minimum Age Convention has been ratified by 173 countries, but New Zealand is not one of them.<sup>274</sup> It is the practice of the New Zealand government to not become bound by international treaty obligations that domestic law does not fully comply with.<sup>275</sup> Based on this policy, New Zealand would first need to legislate a statutory minimum working age (see subsection 2) before ratifying the Minimum Age Convention.<sup>276</sup>

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<sup>270</sup> Verdoodt, van der Hof and Leiser above n 82, at 106.

<sup>271</sup> Minimum Age Convention, art 8(1).

<sup>272</sup> Article 8(2).

<sup>273</sup> David Tajgman *Child Labour: Modern Policy and Legislative Responses to Child Labour* (International Labour Office, 2007) at 36.

<sup>274</sup> “Ratifications of C138 – Minimum Age Convention, 1973 (No 138)” (2017) International Labour Organisation <[www.ilo.org](http://www.ilo.org)>

<sup>275</sup> Ministry of Foreign Affairs and Trade *International Treaty Making: Guidance for government agencies on practice and procedures for concluding international treaties and arrangements* (Ministry of Foreign Affairs and Trade, September 2020) at 10; Alberto Costi “New Zealand Treaty-making Process” in David Depp, Kerrie Kubisch and Rachel Marr (eds) *The Laws of New Zealand* (LexisNexis, Wellington, 2020) [55] at [59].

<sup>276</sup> Danae Anderson “Safe Enough? The Working Lives of New Zealand Children” (PhD Dissertation, Auckland University of Technology, 2010) at 26.

## (b) United Nations Convention on the Rights of the Child 1989

Article 32 of the UN CRC also contains a provision on child labour:

1. States Parties recognize the right of the child to be protected from economic exploitation...
2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:
  - (a) Provide for a minimum age or minimum ages for admission to employment;
  - (b) Provide for appropriate regulation of the hours and conditions of employment;
  - (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

When New Zealand ratified the Convention in 1993 it reserved the right to “not legislate further or to take additional measures as may be envisaged in article 32(2).”<sup>277</sup> This is because New Zealand “considers the rights of the child provided for in art 32(1) are adequately protected by... existing law”.<sup>278</sup>

New Zealand has been criticised by the Committee on the Rights of the Child for its nonconformity with international standards on child labour law.<sup>279</sup> In its Concluding Observations published in 2003, the Committee expressed its disappointment at New Zealand’s “slow pace” in withdrawing its reservation to art 32(2).<sup>280</sup> This comment was reiterated in the most recent Concluding Observations published in 2016.<sup>281</sup>

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<sup>277</sup> “Convention on the Rights of the Child” (27 September 2020) United Nations Treaty Collection <[www.treaties.un.org](http://www.treaties.un.org)>

<sup>278</sup> “Convention on the Rights of the Child”, above n 277.

<sup>279</sup> Anderson, above n 276, at 22.

<sup>280</sup> *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding observations- New Zealand* UN Doc CRC/C/15/Add216 (27 October 2003) at 2.

<sup>281</sup> Committee on the Rights of the Child, above n 152, at [5].



## 2 *Domestic law*

Child labour in New Zealand is “loosely regulated”<sup>282</sup> and “principally [so] by a combination of education and health and safety legislation”.<sup>283</sup>

### (a) Regulation of child labour

There is no explicit minimum working age in New Zealand.<sup>284</sup> The Employment Relations Act 2000 defines an employee as a person “of any age” so does not exclude children from working.<sup>285</sup>

There is a de facto minimum working age of 16 (the age at which compulsory education is completed) but that only prevents admission to full time work, not part-time work outside of school hours.<sup>286</sup> Indeed, the Education Act 1989 foresees the employment of school age children younger than 16 but prohibits their employment during school hours or when it would interfere with school attendance.<sup>287</sup> This means that child influencers are not prohibited, by virtue of their age alone, from engaging in child labour.

While there are minimum wage protections for workers aged 16 and older, there “is no legislation specifically covering the [working] conditions of children under the age of 16”.<sup>288</sup> There are some general regulations to protect children in the Health and Safety at Work Act 2015 but none are particularly relevant to child influencing.<sup>289</sup>

### (b) Regulation of child acting

Although not identical, child influencing is analogous to child acting. Because of this, it is helpful to consider how child acting is regulated and whether child acting regulations apply to child influencers.

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<sup>282</sup> Anderson, above n 276, at 6.

<sup>283</sup> Paul Roth “Child Labour in New Zealand: A job for the nanny state?” (2010) 12 Otago LR 245 at 251.

<sup>284</sup> Anderson, above n 276, at 2.

<sup>285</sup> Employment Relations Act 2000, s 6.

<sup>286</sup> Above n 283, at 258.

<sup>287</sup> Education Act 1989, s 30.

<sup>288</sup> Anderson, above n 276, at 2.

<sup>289</sup> ScreenSafe *Working with children* (ScreenSafe, November 2018) at 3.

In preparation for the Health and Safety at Work Act 2015 coming into force, an organisation called ScreenSafe was set up to interpret the Act as it applies to the New Zealand screen production industry. The screen production industry is defined broadly to include “organisations that supply studios, locations, materials, plant and equipment, production companies, agencies, funders, individual contractors and associations”.<sup>290</sup> ScreenSafe replaced the existing Code of Practice for Health and Safety in the Film and Television Production Industry with the New Zealand Screen Sector Health and Safety Guidelines (Guidelines).<sup>291</sup>

The new Guidelines impose additional obligations on production companies and PCBUs during pre-production, production and post-production when children are involved.<sup>292</sup> The obligations are based on industry best practice and children are defined as persons under 16 years old.<sup>293</sup> The Guidelines cover a wide range of topics including scheduling (maximum working hours, consecutive days and days per calendar week), welfare, special requirements for infants, chaperones and house parents, reporting and resolving concerns, and traumatic content.<sup>294</sup>

Despite similarities in the type of work being performed, child influencers fall outside the scope of these Guidelines because they are not in the traditional screen production industry. This means that child influencing in New Zealand is unregulated. Child influencers are not legally entitled to their earnings and have no legal minimum standards for working conditions, putting them at risk of economic exploitation.

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<sup>290</sup> ScreenSafe “Promoting Health and Safety in the New Zealand Screen Sector” (2016) ScreenSafe <[www.screensafe.co.nz](http://www.screensafe.co.nz)>

<sup>291</sup> Above n 290.

<sup>292</sup> ScreenSafe *New Zealand Screen Sector: Health and Safety Guidelines* (ScreenSafe, 4 April 2016) at 31.

<sup>293</sup> ScreenSafe, above n 289, at 2.

<sup>294</sup> At 5-12.

## ***E Regulation of Child Labour in the United States***

This next section provides a comparative perspective on how child acting is regulated in the United States.

### *1 Regulation of child acting*

At a federal level, the Fair Labor Standards Act 1938 (FLSA) bans “oppressive child labour” in the United States.<sup>295</sup> Child acting was exempted from the FLSA for two reasons. First, acting was seen to be an “opportunity for children to develop their talents” as opposed to a form of oppression.<sup>296</sup> Second, at the time the Act was drafted and passed, child actress Shirley Temple was rising to fame. To prohibit child acting would have barred Temple from performing — a situation Congress wished to avoid.<sup>297</sup>

Although not explicit, child influencing is also likely to be exempt from the FLSA. Child influencing is a form of entertainment analogous to acting, so presumably would also be “viewed as non-oppressive labour that actually benefits the child more than harming them”.<sup>298</sup>

Because child acting is exempt from the FLSA, legal protection for child actors varies by state. The following section looks primarily at California’s laws on labour and entitlement to income for child actors. California has some of the most comprehensive laws of any jurisdiction to protect children in the entertainment industry.<sup>299</sup> These laws may be useful to inform the type of regulatory framework that could be introduced or extended to protect child influencers.

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<sup>295</sup> Masterson, above n 252, at 9.

<sup>296</sup> At 10.

<sup>297</sup> At 10.

<sup>298</sup> At 11.

<sup>299</sup> Masterson, above n 252, at 11.

(a) Labour

The California Labour Code defines the entertainment industry as:<sup>300</sup>

...any organization, or individual, using the services of any minor in: motion pictures of any type (film, videotape, etc.), using any format (theatrical, film, commercial documentary, television program, etc.), by any medium (theater, television, videocassette, etc.); photography; recording; modeling; theatrical productions; publicity; rodeos; circuses; musical performances; and any other performances; and any other performances where minors perform to entertain the public.

To legally work in the entertainment industry, minors between 15 days and 18 years old need to obtain a permit to work and employers must obtain a permit to employ from the Labour Commissioner's Office.<sup>301</sup> The purpose of the permit is to protect the wellbeing and safety of child performers by imposing "strict work, schooling and rest hour quotas".<sup>302</sup>

The definition of the entertainment industry is broad in scope and appears wide enough to capture child influencers on social media. However, influencing was "not contemplated by the statutes of any state, and states are not assuming social media production is covered".<sup>303</sup>

Even if social media production fell within the definition of the entertainment industry, many child influencers would not need to obtain a permit to work legally. This is because the child's parents are likely to be considered their employer and many US state child labour laws exempt children working for their parents.<sup>304</sup>

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<sup>300</sup> State of California Department of Industrial Relations, Division of Labor Standards Enforcement "California Child Labor Laws" (2013) State of California Department of Industrial Relations <[www.dir.ca.gov](http://www.dir.ca.gov)> at 36.

<sup>301</sup> At 36.

<sup>302</sup> Abidin, above n 8.

<sup>303</sup> Masterson, above n 252, at 13.

<sup>304</sup> Erin E O'Neill "Influencing the Future: Compensating Children in the Age of Social-Media Influencer Marketing" (2019) 72 Stan L Rev 42 at 45.

(b) Income

Child actors formerly had no legal entitlement to, or protection of, their earnings. This position began to change in 1939 with the first iteration of what is colloquially termed Coogan's Law.

Jackie Coogan was a child actor who rose to fame starring opposite Charlie Chaplin in the 1921 film – *The Kid*. By age nine, Coogan was “one of the highest paid actors in Hollywood”.<sup>305</sup> When Coogan turned 21 years old he discovered that his mother and stepfather had squandered his earnings and sued in an attempt to recover. The ensuing litigation “prompted the enactment of what is referred to as Coogan Law: The California state legislature’s attempt to help protect child entertainers’ earnings from their parents”.<sup>306</sup>

Under the California Child Actor’s Bill 1939, a portion of a child actor’s earnings had to be set aside in trust until the child reached the age of majority.<sup>307</sup> But the Bill had significant limitations. First, Coogan Law only applied to court approved contracts.<sup>308</sup> Only 5 per cent of contracts with child actors sought court approval, so 95 per cent of child actors did not benefit from protection under Coogan’s Law.<sup>309</sup> Second, the percentage of earnings to be set aside was a “discretionary’ percentage determined by judicial discretion rather than by a fixed proportion”.<sup>310</sup> Third, the narrow conception of a child actor excluded other “child celebrities that need[ed] their earnings protected”.<sup>311</sup> Fourth, at common law, a parent still legally owned their child’s earnings until the child turned 18 years old.<sup>312</sup> Coogan’s Law did not clearly negate this position or “clarify ownership of the child’s earnings”.<sup>313</sup>

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<sup>305</sup> Danielle Ayalon “Minor Changes: Altering Current Coogan Law to Better Protect Children Working in Entertainment” (2013) 35 *Hastings Comm&EntLJ* 353 at 355.

<sup>306</sup> At 356.

<sup>307</sup> Shayne J Heller “The Price of Celebrity: When a Child’s Star-Studded Career Amounts to Nothing” (1999) 10 *JATIP* 161 at 161.

<sup>308</sup> Above n 305, at 357.

<sup>309</sup> Masterson, above n 252, at 12.

<sup>310</sup> Ayalon, above n 305, at 357.

<sup>311</sup> Heller, above n 307, at 161.

<sup>312</sup> At 161.

<sup>313</sup> Ayalon, above n 305, at 358.

The Bill was updated in 1999 to remedy these shortcomings. Court approval is no longer required for the law to apply to a contract.<sup>314</sup> The discretionary percentage of earnings to be set aside in trust has been replaced with a fixed minimum of 15 per cent of the child's gross earnings.<sup>315</sup> The scope of the Act was extended to minors in "artistic or creative services" which includes, but is not limited to, acting, dancing, music, comedy, singing and other forms of performing and entertaining.<sup>316</sup> Finally, the Act affirms that all earnings are legally the child's property, not just the portion set aside in trust.<sup>317</sup>

New York, New Mexico and Louisiana have adopted versions of Coogan's Law. The law only applies to contracts with gross earnings of more than USD 1,000 in New Mexico and more than USD 500 in Louisiana.<sup>318</sup>

Child influencers do not benefit from Coogan's Law. Work permits and Coogan Law protections are a "package deal" so if a parent:<sup>319</sup>

...doesn't provide the studio with a Coogan account number, his or her child's work permit is voided. And if work permits aren't mandatory for kidfluencers, their parents have no legal obligation to open a Coogan account.

This means that, as in New Zealand, child influencing is unregulated in the United States.

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<sup>314</sup> Masterson, above n 252, at 12.

<sup>315</sup> California Family Code, § 6752.

<sup>316</sup> Section 6750.

<sup>317</sup> Ayalon, above n 305, at 358.

<sup>318</sup> Masterson, above n 252, at 21.

<sup>319</sup> Lambert, above n 230, at 81.

## *2 Failed attempt to regulate child influencing*

In 2018 Kansen Chu, a California Assembly member, introduced a Bill that attempted to extend work permit requirements and Coogan’s Law protections for child actors to child influencers.<sup>320</sup>

The proposed Bill added “social media advertising” to the definition of employment in child labour law<sup>321</sup> but, by the time the Bill passed, any mention of social media had been removed.<sup>322</sup> The failed attempt was attributed to the novel characteristics of social media which make it difficult to enforce the same regulations that apply to traditional media.<sup>323</sup>

In terms of income, child influencers do not receive compensation solely in monetary form but also in the form of “tickets and toys and clothes and other little things”.<sup>324</sup> Coogan’s Law is not designed to capture, and trusts are not designed to protect, non-monetary compensation.

In terms of labour, it would be impractical to indiscriminately transplant existing protections for children in traditional media to children in social media. At least some of the child acting laws are inappropriate in, or inapplicable to, child influencing. Legislators would need to tailor a regulatory solution to the unique characteristics of child influencing. For example, the filming of child influencers can take place anywhere and at any time instead of in studios subject to strict schedules.<sup>325</sup> It would be too much of an intrusion into a parent’s art 5 right for a regulator to enter the family home to monitor a child’s work hours, especially when those hours are ad hoc and unpredictable.<sup>326</sup>

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<sup>320</sup> Lambert, above n 230, at 81.

<sup>321</sup> Assembly Committee on Arts, Entertainment, Sports, Tourism, and Internet Media “AB 2388 (Chu) – As Introduced February 14, 2018) (4 April 2018) California State Assembly Committee on Arts, Entertainment, Sports, Tourism, and Internet Media <aart.assembly.ca.gov>

<sup>322</sup> Masterson, above n 252, at 4.

<sup>323</sup> Lambert, above n 230, at 81.

<sup>324</sup> Masterson, above n 252, at 4.

<sup>325</sup> Lambert, above n 230, at 81.

<sup>326</sup> Convention on the Rights of the Child, art 5.

### ***F Risk of Exploitation by Parents***

As has been established, child influencing is:<sup>327</sup>

...not formally recognized as labor, is not regulated by any governing body, and falls outside the jurisdiction of child labor laws that have thus far only governed mainstream industry child stars.

Child influencers are left in a vulnerable position. Because child influencers have no legal entitlement to their earnings and no legal minimum standards for working conditions, the risk of economic exploitation<sup>328</sup> is “extreme and immediate”.<sup>329</sup> The Committee has flagged that children’s rights are particularly at risk from “business activities that take place outside of the legal and institutional frameworks that regulate and protect rights”.<sup>330</sup> Currently, child influencing is such an activity.

In the absence of regulation, the only “financial [and] personal protection” for child influencers is the “good will of their parents”.<sup>331</sup> While this may be a feature of family life generally, the parents of child influencers are acting under a unique conflict of interest.<sup>332</sup> These parents are the sole arbiter’s of the child’s work schedule, content, conditions and entitlement to income but they are also the legal beneficiary of the child’s labour. According to Roth, the “worst forms of exploitation... take place in the home” and “often occur with parental acquiescence if not initiation”.<sup>333</sup>

Legally, a child influencer’s earnings belong to their parents until they turn 18 years old. The Ryan’s World example illustrates that child influencers have the potential to earn significant sums that are at least comparable to child actors. Some parents “stand to gain

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<sup>327</sup> Abidin, above n 9, at 11; Masterson, above n 252, at 2.

<sup>328</sup> Committee on the Rights of the Child, above n 34, at 19.

<sup>329</sup> Masterson, above n 252, at 1.

<sup>330</sup> Committee on the Rights of the Child *General comment No 16 (2013) On State obligations regarding the impact of business on children’s rights* UN Doc CRC/C/GC/16 (7 February 2013) at [35].

<sup>331</sup> Masterson, above n 252, at 26.

<sup>332</sup> At 4.

<sup>333</sup> Roth, above n 283, at 247.



millions [from] their child’s social media content”<sup>334</sup> Child influencers with a monetised online presence are therefore at risk of economic exploitation by their parents.

While the “majority of families do not intentionally exploit their children”<sup>335</sup> there is a real risk that “parents seeking fame or money will exploit their children at the expense of education and welfare”<sup>336</sup> An extreme example is that of Machel Hobson, an Arizona mother who ran a YouTube channel called Fantastic Adventures. The channel featured Hobson’s children performing orchestrated skits.

Hobson was arrested and charged in March 2019 after being reported for abusing her adopted children, five of whom were between age six and 15 years old.<sup>337</sup> She had pulled the children out of school years prior so they could spend more time filming the series. The children were allegedly molested, starved and assaulted in punishment for forgetting their lines or not performing to standard.<sup>338</sup>

Pinal County Attorney, Kent Volkmer, described the case as unlike any other “in that the abuses these children suffered were in furtherance of the YouTube channel and in furtherance of... making money”<sup>339</sup> After Hobson’s arrest, YouTube shut down the channel. By that point, Fantastic Adventures already had more than 800,000 subscribers, hundreds of millions of views and reportedly generated hundreds of thousands of dollars in advertising revenue.<sup>340</sup>

In this example, truancy and child abuse laws acted as a backstop for protecting the children. Nevertheless, the lack of regulation of child influencing failed to protect the

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<sup>334</sup> Masterson, above n 252, at 20.

<sup>335</sup> Neyza Guzman “The Children of YouTube: How an Entertainment Industry Goes Around Child Labor Laws” (2020) 8 CFLJ 85 at 115.

<sup>336</sup> Masterson, above n 252, at 8.

<sup>337</sup> Katie Mettler “This ‘YouTube Mom’ was accused of torturing the show’s stars — her own kids: She died before standing trial” (14 November 2019) *The Washington Post* <[www.washingtonpost.com](http://www.washingtonpost.com)>

<sup>338</sup> Brian Wright “‘YouTube Mom’ Hobson declared incompetent but ‘restorable’” (28 August 2019) *Maricopa Monitor* <[www.pinalcentral.com](http://www.pinalcentral.com)>

<sup>339</sup> Above n 338.

<sup>340</sup> Wright, above n 338.

children from economic exploitation. The child influencers had no legal entitlement to any income generated from their labour and did not have legal recourse against their mother for poor working conditions or invasion of their privacy.

### ***G Role of the State***

New Zealand is not alone in taking a hands off approach to the regulation of child influencing. But that does not mean non-regulation is satisfactory, especially from a child's rights perspective.

While Member States must respect parents' right to raise their children free from unwarranted interference, they reserve the right to intervene where necessary to protect children's wellbeing.<sup>341</sup> This paper draws the conclusion that proactive State intervention is justified for children with a monetised online presence — that is, child influencers. This is because there is a risk of economic exploitation by the child's parents that is without legal protection or remedy. It would be undesirable for the State to wait to intervene until individual situations escalate to a matter of care and protection.

The difference between ordinary children and child influencers is that the parents' actions in giving the child an online presence are financially rewarded. Confining regulation to monetised child influencing prevents the State straying too far into families' lives where the risk of economic exploitation is insufficient to justify intervention. This distinction strikes a balance that permits "genuine freedom of expression with no financial motive"<sup>342</sup> by the majority of parents but restricts profit-seeking parents from doing so without additional safeguards for children's wellbeing.

The next section provides high-level recommendations on the State's role in regulating child influencers' labour and entitlement to income in New Zealand.

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<sup>341</sup> Convention on the Rights of the Child, arts 3 and 5.

<sup>342</sup> Guzman, above n 335, at 111-112 and 115.

## ***H Recommendations for the State***

### *1 Reconceptualising the parent-child relationship*

The State's reluctance to intervene in family life illustrates the sacrosanct nature of the parent-child relationship. It is evidence of the State's trust in parents to act in their child's best interests in almost all circumstances.

The State needs to reconceptualise the parent-child relationship to appropriately reflect the fact that monetising a child's online presence is more analogous to a business partnership than a parent-child relationship. If the parent-child relationship were reconceptualised as fiduciary it would emphasise the duty for parents to act in the child's best interests in all matters relating to the child's online presence — including where it conflicts with the interests of the parents or family.<sup>343</sup>

### *2 Designing a new regime*

Best interests alone is insufficient to guarantee protection of child influencers' rights. The State should also consider introducing a regime to protect and provide remedy for breaches of child influencers' rights.

New Zealand does not have an established, comprehensive regime for child actors that could ostensibly be extended to cover child influencers. Any new regime would need to cover children in traditional and social media.

Some aspects of the regime could be modelled on other jurisdictions. For example, while not without its limitations,<sup>344</sup> Coogan's Law is generally fit for purpose for protecting child entertainers' entitlement to income. An equivalent system could be set up in New Zealand, with necessary modifications for child influencers, such as introducing an earnings threshold before the regulation applied.<sup>345</sup> Other aspects, such as minimum age

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<sup>343</sup> Sorenson, above n 11, at 172; See Shmueli and Blecher-Prigat, above n 23, at 791.

<sup>344</sup> Ayalon, above n 305.

<sup>345</sup> O'Neill, above n 304, at 51; Masterson, above n 252, at 21.

requirements, maximum hours and working conditions, would require tailored legislation that takes into account the practical differences between traditional and social media.

### *I Role of Private Organisations*

The Committee on the Rights of the Child has recognised that “duties and responsibilities to respect the rights of children extend in practice beyond the State... and apply to private actors and business enterprises”.<sup>346</sup>

In 2012, the UN Global Compact, Save the Children and UNICEF developed a set of Children’s Rights and Business Principles. Principles one and four are the most relevant to private organisations’ role in protecting child influencers from the risk of economic exploitation. Principle one requires all businesses to “meet their responsibility to respect children’s rights and commit to supporting the human rights of children”. Principle four requires all businesses to “ensure the protection and safety of children in all business activities and facilities”.<sup>347</sup>

For the purposes of this paper, relevant private organisations include brands and sponsors who engage child influencers for marketing and social media platforms that facilitate child influencers’ online activities. The next section considers the possible protections that these private organisations already have in place before providing recommendations.

#### *1 Brands and sponsors*

Under a strict analysis, child influencers are more likely to be classified as contractors than employees of the brands and sponsors that engage their services for marketing.<sup>348</sup> This means that, as well as not being protected under specific regulation, child influencers do not benefit from broader employment law protections.<sup>349</sup> It is possible that brands and

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<sup>346</sup> Committee on the Rights of the Child, above n 330, at [8].

<sup>347</sup> UNICEF “The Children’s Rights and Business Principles” (9 February 2005) UNICEF <[www.unicef.org](http://www.unicef.org)>

<sup>348</sup> David Mangan “Influencer marketing as labour: between the public and private divide” in Catalina Goanta and Sofia Ranchordas (eds) *The Regulation of Social Media Influencers* (Edward Elgar Publishing, United Kingdom, 2020) 185 at 190.

<sup>349</sup> Mangan, above n 348, at 193.

sponsors have internal corporate policies for working with minors, but this information is not publicly available.

## *2 Social media platforms*

YouTube, one of the most popular social media platforms used by influencers, has an incentive to not over-regulate child influencing. Because YouTube receives a proportion of income generated from Google AdSense, it does very little to voluntarily protect child influencers who earn through their platform.<sup>350</sup>

YouTube imposes a minimum age requirement of 13 years old but this is ineffective in practice.<sup>351</sup> A child younger than 13 can fraudulently create an account and YouTube permits accounts to be created and run by parents on children's behalf.<sup>352</sup> Where this occurs, YouTube expressly disclaims liability in their Terms of Service.<sup>353</sup> Protection of children is left "in the hands of people creating the content that is being uploaded to the website".<sup>354</sup>

YouTube does, however, claim to make educational material available to families "to make sure creators are aware of our policies and applicable labor laws when featuring minors in their videos".<sup>355</sup> Arguably, YouTube has "more of an obligation to its child stars than just informing their parents that labor laws exist".<sup>356</sup>

### *J Recommendations for Brands and Sponsors*

Before engaging a child influencer's services, it is recommended that brands and sponsors complete a child rights impact assessment.<sup>357</sup> The impact assessment should be presented to parents at the time contractual negotiations are entered into. The purpose of the impact

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<sup>350</sup> Maheshwari, above n 84.

<sup>351</sup> Maheshwari, above n 84.

<sup>352</sup> Macenaite, above n 46, at 775.

<sup>353</sup> Guzman, above n 335, at 114.

<sup>354</sup> At 115.

<sup>355</sup> Julie Carrie Wong "It's not play if you're making money': how Instagram and YouTube disrupt child labor laws" (24 April 2019) The Guardian <[www.theguardian.com](http://www.theguardian.com)>

<sup>356</sup> Above n 355.

<sup>357</sup> Verdoodt, van der Hof and Leiser above n 82, at 123.

assessment is to ensure that parents, when giving consent on their child’s behalf, are fully informed of the rights-based implications of child influencing in the immediate and foreseeable future. As well as assessing the potential rights at risk (for example, privacy) the impact assessment can also present to parents the potential benefits for the child’s exercise of rights (for example, participation and freedom of expression).<sup>358</sup>

Once the services of a child influencer are engaged, the brand or sponsor should take “reasonable measures to prevent harm to their influencers”<sup>359</sup> — a duty of care analogous to that of employer and employee. The duty should be “expressed in terms of a desired outcome (i.e. the prevention of harm) ... rather than necessarily regulating the process that gets there”.<sup>360</sup> Such a duty is necessary to “redress the inherent inequality of power between a child influencer and a brand or advertiser”.<sup>361</sup>

### ***K Recommendations for Social Media Platforms***

The Committee has emphasised that “voluntary actions and initiatives are not a substitute for State action and regulation of businesses in line with obligations under the Convention”.<sup>362</sup> Preferably, the State would set up a system analogous to Coogan’s Law to affirm and protect child influencers’ entitlement to income. In the event that the State does not, it is recommended that social media platforms establish corporate policies to the effect that children “featured in monetised videos are entitled to a share of generated income from the account owner”.<sup>363</sup>

This recommendation does not conflict with YouTube’s incentive for child influencers to succeed and generate income. It does, however, provide child influencers some entitlement to income from their labour and, in a sense, some compensation for the invasion of their privacy.

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<sup>358</sup> Verdoodt, van der Hof and Leiser above n 82, at 123.

<sup>359</sup> At 122.

<sup>360</sup> At 122.

<sup>361</sup> At 122.

<sup>362</sup> Committee on the Rights of the Child, above n 330, at [9].

<sup>363</sup> Wong, above n 355.

An anticipated rebuttal is that it would be difficult for social media platforms to enforce such a policy, “especially considering the rate at which videos are constantly uploaded”.<sup>364</sup> That is why it would be preferable for regulation to come from State level intervention. However, difficulty of enforcement alone is not a sufficient excuse to disclaim responsibility. YouTube, for example, already has policies and systems in place to monitor channels for abuse, so it would:<sup>365</sup>

...not cost YouTube an unreasonable expansion of effort to simply add the task of monitoring for channels that devote a substantial portion of the monetized content to the videos of minor children.

### ***L Conclusion***

Child influencers fall outside the labour laws that regulate traditional child actors, so have no legal right to their earnings or minimum working standards. These conditions are ripe for economic exploitation. Up until now, a child’s online presence has been viewed as a private family matter in which the State and private organisations have been reluctant to intervene. That position ignores the fluidity of the online/offline environment and children’s rights within it. States’ and private organisations’ role is to promote and protect child influencers’ rights in the online environment, where the public/private divide is less distinct.<sup>366</sup> This may necessitate intervention in what was previously considered a matter of private family life.

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<sup>364</sup> Guzman, above n 335, at 113.

<sup>365</sup> At 113-114.

<sup>366</sup> Sorenson, above n 11, at 161.

## *VI Conclusion*

In the digital age, people are increasingly putting their lives, and the lives of others, online. It has become a social norm for parents to freely share photos, videos and information of their children on the internet. The first generation of children are growing up with an online presence. Despite evidence of rights-based implications, States have demonstrated a reluctance to intervene.

The concern is for children whose online presence, created by their parents, is monetised. These so-called child influencers are a new phenomenon. This paper finds that the digital environment can facilitate the positive exercise of these children's rights to freedom of expression and participation. However, it also finds a worrying trade-off for their rights to privacy and protection from economic exploitation. The State and relevant private organisations need to play a greater role in promoting and protecting child influencers' rights in the digital age.



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