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Chapter 336: Protecting Minors' Online Reputations and Preventing Exposure to Harmful Advertising on the Internet

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Business and Professions

Chapter 336: Protecting Minors' Online Reputations and Preventing Exposure to Harmful Advertising on the Internet

Brian Geremia

Code Sections Affected

Business and Professions Code §§ 22580–22581 (new).
SB 568 (Steinberg); 2013 STAT. Ch. 336.

I. INTRODUCTION

The Internet presents many risks to users, including the loss of their personal privacy and exposure to harmful or offensive content.¹ These risks especially affect minors, who “are at a greater risk than adults as they navigate through the digital world.”² As minors visit websites, generate personal profiles, and post content online, they create digital histories that may cause them harm in the future.³ A college admissions counselor or hiring manager can easily peruse an applicant’s online profile to discover evidence of improper behavior and deny the student admission or select another applicant for the job.⁴

Minors also risk exposure to harmful advertising.⁵ Junior Shooters, an online magazine dedicated to young aspiring shooters and hunters, uses banner advertisements to market handguns, rifles, and ammunition.⁶ Safesearchkids.com, a “search tool designed to help keep kids safe,” displays a full slate of sponsored

1. See Eric J. Sinrod & Barak J. Jolish, *Controlling Chaos: The Emerging Law of Privacy and Speech in Cyberspace*, 1999 STAN. TECH. L. REV. 1, 1 (1999) (surveying the primary topics of public debate in 1999).

2. FACT SHEET: SB 568—SENATOR STEINBERG (2013) (on file with the *McGeorge Law Review*).

3. See Anupam Chander, *Youthful Indiscretion in an Internet Age*, in *THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION* 124, 124 (Saul Levmore & Martha C. Nussbaum eds., 2010) (explaining how children in the twenty-first century create an internet record of their lives).

4. See Douglas Belkin & Caroline Porter, *Web Profiles Haunt Students*, WALL ST. J., October 4, 2012, at A3 (highlighting a college admission officer who denied one student’s admission after discovering a previous infraction for bullying); *Thirty-Seven Percent of Companies Use Social Networks to Research Potential Job Candidates, According to New CareerBuilder Survey*, CAREER BUILDER (Apr. 18, 2012), <http://www.careerbuilder.com/share/aboutus/press-releasesdetail.aspx?id=pr691&sd=4%2F18%2F2012&ed=4%2F18%2F2099> [hereinafter *New CareerBuilder Survey*] (on file with the *McGeorge Law Review*) (showing that hiring managers look at applicant’s web profiles).

5. FACT SHEET, *supra* note 2.

6. JUNIOR SHOOTERS, <http://www.juniorshooters.net/advertise/> (last visited Oct. 6, 2013) (on file with the *McGeorge Law Review*) (linking to <http://www.airforceairguns.com/>, a website that sells air guns and contains the statement: “The Condor pre-charged pneumatic air rifle from AirForce Airguns is an adult rifle, not a toy by any means.”).

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advertisements for searches like “buy beer” or “I want a gun.”⁷ These examples highlight the need “to ensure that children are not bombarded with inappropriate advertisements while they are learning to be responsible consumers” and citizens online.⁸ Chapter 336 addresses these problems by giving minors the ability to manage their online identities and limiting their exposure to harmful advertising.⁹

II. LEGAL BACKGROUND

In 1998, Congress passed the Children’s Online Privacy Protection Act (COPPA); pursuant to the act, the Federal Trade Commission (FTC) promulgated regulations to give parents control over what information websites collect from their children.¹⁰ In 2012, FTC amended the regulations¹¹ to improve privacy protections and “give parents greater control over the personal information that websites and online services may collect from children under 13.”¹²

COPPA requires operators of websites or online services (operators) that collect personal information from children to “provide notice . . . of what information is collected, . . . how the operator uses such information, and the operator’s disclosure practices for such information.”¹³ COPPA also requires operators to obtain “verifiable parental consent” to collect, use, or disclose information that they collect from children.¹⁴ Upon request, operators must provide parents with a description of the personal information they collect, and parents may demand that the operator cease using or maintaining the information.¹⁵ Also, operators cannot condition a child’s participation in an Internet activity on the child’s disclosure of “more personal information than is reasonably necessary.”¹⁶ COPPA defines “children” as individuals under thirteen-years-old.¹⁷

7. SAFE SEARCH FOR KIDS, <http://safesearchkids.com/> (last visited June 15, 2013) (on file with the *McGeorge Law Review*).

8. FACT SHEET, *supra* note 2.

9. CAL. BUS. & PROF. CODE §§ 22580–22581 (enacted by Chapter 336).

10. *Complying with COPPA: Frequently Asked Questions*, BUREAU CONSUMER PROT. BUS. CTR., <http://www.ftc.gov/privacy/coppafaqs.shtm> (last visited Oct. 18, 2013) (on file with the *McGeorge Law Review*); *see also* 15 U.S.C. § 6501–6508 (2006) (empowering the Federal Trade Commission to promulgate regulations).

11. *See* 16 C.F.R. § 312.2 (2012) (incorporating amendments that expanded the list of personal information that requires parental consent and changed the definition of “operator” to include third parties that collect information on websites).

12. *FTC Strengthens Kids’ Privacy, Gives Parents Greater Control over Their Information by Amending Children’s Online Privacy Protection Rule*, FED. TRADE COMM’N (Dec. 19, 2012), <http://www.ftc.gov/opa/2012/12/coppa.shtm> (on file with the *McGeorge Law Review*).

13. 15 U.S.C. § 6502(b)(1)(A)(i) (2006).

14. *Id.* § 6502(b)(1)(A)(ii).

15. *Id.* § 6502(b)(1)(B)(i)–(ii).

16. *Id.* § 6502(b)(1)(c).

17. *Id.* § 6501(1).

III. CHAPTER 336

Chapter 336 protects minors¹⁸ who use the Internet by restricting advertising and allowing minors to remove content they have posted to a website, “online service, online application, or mobile application” (online service).¹⁹

A. *Advertising to Minors*

An operator who directs an online service to minors or has actual knowledge²⁰ that a minor is using the service cannot market or advertise²¹ several prohibited products,²² including alcoholic beverages, firearms, and tobacco.²³ Similarly, an operator cannot “knowingly use, disclose, compile, or allow a third party to use, disclose, or compile, the personal information of a minor” if the operator has actual knowledge that a third party will use the information to advertise the prohibited products.²⁴

Operators who permit third parties to advertise on their online services must tell the third party that the service targets minors.²⁵ Once an operator notifies the third party, that party cannot advertise the prohibited products.²⁶

An operator is “any person or entity that owns an . . . online service,” but does not include “any third party that operates, hosts, or manages” the service for the owner.²⁷ An online service is directed to minors if the online service, or a portion of the service, “is created for the purpose of reaching an audience that is predominately comprised of minors, and is not intended for a more general

18. See CAL. BUS. & PROF. CODE § 22580(d) (enacted by Chapter 336) (defining minors as children under the age of eighteen).

19. See FACT SHEET, *supra* note 2.

20. See BUS. & PROF. § 22580(b)(2) (enacted by Chapter 336) (requiring that the visitor actually be a minor and that the advertising is specifically directed to the minor based on “information specific to that minor, including . . . the minor’s profile, activity, address, or location”).

21. See *id.* § 22580(k) (enacted by Chapter 336) (“Marketing or advertising means, in exchange for monetary compensation, to make a communication to one or more individuals, or to arrange for the dissemination to the public of a communication, about a product or service the primary purpose of which is to encourage recipients of the communication to purchase or use the product or service.”).

22. *Id.* § 22580(a)–(b) (enacted by Chapter 336).

23. *Id.* § 22580(i) (enacted by Chapter 336) (listing nineteen prohibited products: alcoholic beverages; firearms or handguns; ammunition or reloaded ammunition; handgun safety certificates; aerosol containers of paint capable of defacing property; etching cream that is capable of defacing property; any tobacco, cigarette, or cigarette papers, or blunt wraps, or any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, products prepared from tobacco, or any controlled substance; BB devices; dangerous fireworks; tanning in an ultraviolet tanning device; dietary supplement products containing ephedrine group alkaloids; tickets or shares in a lottery game; *Salvia divinorum* or *Salvinorin A*; body branding; permanent tattoos; drug paraphernalia; electronic cigarettes; obscene matter; and a less lethal weapon).

24. *Id.* § 22580(c) (enacted by Chapter 336).

25. *Id.* § 22580(h)(1) (enacted by Chapter 336).

26. *Id.* § 22580(h)(2) (enacted by Chapter 336).

27. *Id.* § 22580(f) (enacted by Chapter 336)

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audience comprised of adults.”²⁸ A service is not directed to minors if it links to another online service that is directed to minors.²⁹ Chapter 336 does not require an operator to “collect or retain age information about users.”³⁰

B. The Eraser Button: Removing Content from Online Services

An operator of an online service that is directed to minors who has “actual knowledge that a minor is using” the online service must allow minors who are registered users to “remove or . . . request and obtain removal of, content or information posted” on the online service.³¹ An operator shall also provide notice and clear instructions regarding how minors can remove or request the removal of publicly posted content.³² An operator must also indicate that removing content or information “does not ensure complete or comprehensive removal.”³³

Chapter 336 contains several exceptions to the removal requirements.³⁴ An operator does not need to remove content if a third party “stored, republished, or reposted” the content.³⁵ An operator can also avoid removing content by “anonymizing” the content so the minor “cannot be individually identified.”³⁶ An operator does not need to remove content if a “federal or state law requires the operator or third party to maintain the content,”³⁷ the minor does not follow the instructions for requesting information removal,³⁸ or the minor was paid for posting the information.³⁹ Additionally, Chapter 336 does not limit law enforcement’s ability to obtain information pursuant to a court order.⁴⁰

An operator is compliant with Chapter 336 if it prevents other users from viewing the content, even though the information still exists on the operator’s servers,⁴¹ and even if it “remains visible because a third party has copied the posting or reposted the content.”⁴²

28. *Id.* § 22580(e) (enacted by Chapter 336).

29. *Id.* § 22580(e) (enacted by Chapter 336).

30. *Id.* § 22580(g) (enacted by Chapter 336).

31. *Id.* § 22581(a)(1) (enacted by Chapter 336). Posted information is “content or information that can be accessed by a user in addition to the minor who posted the content or information . . .” *Id.* § 22581(f).

32. *Id.* § 22581(a)(2)–(3) (enacted by Chapter 336).

33. *Id.* § 22581(a)(4) (enacted by Chapter 336).

34. *Id.* § 22581(b) (enacted by Chapter 336).

35. *Id.* § 22581(b)(2) (enacted by Chapter 336).

36. *Id.* § 22581(b)(3) (enacted by Chapter 336).

37. *Id.* § 22581(b)(1) (enacted by Chapter 336).

38. *Id.* § 22581(b)(4) (enacted by Chapter 336).

39. *Id.* § 22581(b)(5) (enacted by Chapter 336).

40. *Id.* § 22581(c) (enacted by Chapter 336).

41. *Id.* § 22581(d)(1) (enacted by Chapter 336).

42. *Id.* § 22581(d)(2) (enacted by Chapter 336).

IV. ANALYSIS

Section A addresses how Chapter 336 expands existing privacy protections for children and whether the expansions will be effective.⁴³ Section B highlights the Center for Democracy & Technology's (CDT) concerns about how operators will comply with Chapter 336.⁴⁴

A. Expanding Protections for Minors on the Internet

Ninety-five percent of teens between ages twelve and seventeen access the Internet regularly,⁴⁵ up from seventy-three percent in 2000.⁴⁶ The dramatic increase in Internet use among teenagers has triggered the need to expand protections,⁴⁷ and Chapter 336 responds to this need by shielding minors from harmful advertising and allowing minors to remove content they have posted online.⁴⁸

1. Shielding Minors from Harmful Advertising

COPPA, the existing federal law that covers Internet privacy for children, protects children under thirteen-years-old by allowing parents to control the information that website operators collect.⁴⁹ Chapter 336 extends COPPA's protection by shifting the burden away from parents and placing the responsibility directly on operators.⁵⁰ Under COPPA, operators must obtain parental consent to collect personal information,⁵¹ while Chapter 336 restricts operators from collecting personal information for the purpose of advertising prohibited products directly to minors.⁵²

When the Federal Trade Commission (FTC) amended COPPA in 2012 to improve privacy protections and give parents more control of what information

43. See *infra* Part IV.A (explaining how Chapter 336 expands COPPA).

44. See *infra* Part IV.B (highlighting concerns about Chapter 336).

45. MARY MADDEN ET AL., PEW RESEARCH CTR., TEENS AND TECHNOLOGY 2013 4 (2013), available at http://www.pewinternet.org/~media/Files/Reports/2013/PIP_TeensandTechnology2013.pdf (on file with the *McGeorge Law Review*).

46. *Tech Usage Over Time*, PEW INTERNET, [http://www.pewinternet.org/Static-Pages/Trend-Data-\(Teens\)/Usage-Over-Time.aspx](http://www.pewinternet.org/Static-Pages/Trend-Data-(Teens)/Usage-Over-Time.aspx) (last visited Jan. 6, 2014) (on file with the *McGeorge Law Review*).

47. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 568, at 4 (Apr. 23, 2013).

48. See generally CAL. BUS. & PROF. CODE § 22580–22581 (enacted by Chapter 336) (prohibiting website operators who direct sites to minors from marketing specified products and requiring them to remove content posted by minors upon request).

49. *Complying with COPPA: Frequently Asked Questions*, *supra* note 10.

50. BUS. & PROF. § 22580(a) (enacted by Chapter 336).

51. 15 U.S.C. § 6502(b)(1)(A)(ii) (2006).

52. BUS. & PROF. § 22580(a) (enacted by Chapter 336).

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website operators collect from children,⁵³ FTC Chairman Jon Leibowitz recognized that operators collect personal information from children to build vast marketing profiles, which are used to target advertising to specific users.⁵⁴ Minors, who are “more susceptible to online marketing of harmful products” and are “still developing their ability to use sound judgment,” are vulnerable to targeted advertising campaigns.⁵⁵ Since minors are vulnerable to advertising, proponents of Chapter 336 assert that the state should make sure that minors are not overwhelmed by inappropriate advertisements while they are using the Internet.⁵⁶ By prohibiting operators from marketing certain products and collecting information for the purpose of marketing directly to minors, Chapter 336 helps preserve minors’ safety online.⁵⁷

Because the advertising restriction is unclear, skeptics wonder whether it will help minors or simply hinder website operators by creating questions about compliance.⁵⁸ Although facially clear, the phrases “personal information,” “advertising service,” and “specifically directing an ad to a minor” do not have precise definitions, leaving operators uncertain of their responsibility.⁵⁹ Personal information can include virtually any data related to a website visitor, and while advertising services include “ad networks like Google AdSense,” Chapter 336 does not specify whether other actors in the Internet advertising industry are affected, such as “ad serving technology providers” and ad agencies.⁶⁰ Yet despite this lack of clarity, most operators will likely make the required good faith effort⁶¹ to become compliant.⁶² Meeting the requirements of Chapter 336 is inexpensive and operators who care about their website’s reputation will not target children to sell restricted products.⁶³

Critics also suggest that Chapter 336 cannot survive a judicial challenge.⁶⁴ Because Chapter 336 restricts how operators market and advertise, operators may

53. See *supra* text accompanying note 12.

54. Statement of FTC Chairman Jon Leibowitz, *Updated FTC COPPA Rule* (Dec. 19, 2012), available at www.ftc.gov/speeches/leibowitz/121219aoppastmt.pdf (on file with the *McGeorge Law Review*).

55. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 568, at 6 (Apr. 23, 2013).

56. *Id.*

57. *Id.*

58. See generally Eric Goldman, *California’s Latest Effort to ‘Protect Kids Online’ Is Misguided and Unconstitutional*, FORBES (Aug. 30, 2013, 11:50 AM), <http://www.forbes.com/sites/ericgoldman/2013/09/30/californias-latest-effort-to-protect-kids-online-is-misguided-and-unconstitutional/> (on file with the *McGeorge Law Review*) (summarizing the problems with Chapter 336).

59. *Id.*

60. *Id.*

61. CAL BUS. & PROF. CODE § 22580(b)(2) (enacted by Chapter 568).

62. See Goldman, *supra* note 58 (explaining that even Google and Facebook did not challenge the new law, likely because they plan to comply).

63. *Id.*

64. See *id.* (suggesting that all state regulation of the Internet violates the Dormant Commerce Clause and that suppressing advertising may violate the right to free speech).

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claim that Chapter 336 violates their right to free speech,⁶⁵ which includes the right to advertise.⁶⁶ However, restricting commercial speech (including advertising) is permissible if the government has a “legitimate interest in protecting consumers from ‘commercial harms.’”⁶⁷ Under the United States Supreme Court’s four-part test to determine whether a restraint on commercial speech is valid,⁶⁸ the California Attorney General will argue that it “has a strong interest in taking steps to prevent illegal products from being sold to minors.”⁶⁹ Because the state can assert a strong interest that “rational and carefully crafted restrictions” are allowed, the operators’ claim for violation of free speech is not strong.⁷⁰

2. *Allowing Minors to Remove Content*

Chapter 336 moves beyond COPPA and allows minors to remove content they post to websites.⁷¹ The legislature created these protections because “a large part of a child’s social and emotional development occurs”⁷² online, and children have a tendency to “self-reveal before they self-reflect.”⁷³ Some revelations may be ill-advised and therefore “[c]hildren should be allowed to erase” their posts.⁷⁴ A foolish post can “follow a young person for a long time” and possibly impact important life events such as getting into college or gaining employment.⁷⁵

A Career Builder survey shows that over “[a] third (34 percent) of hiring managers who . . . research candidates via social media . . . have found information that has caused them not to hire a candidate.”⁷⁶ Hiring managers look for provocative and inappropriate information, posts showing the candidate

65. U.S. CONST. amend. I.

66. *See* *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975) (stating that the commercial nature of advertisements does not strip First Amendment rights).

67. *See* *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2672 (2011) (explaining that content-based restrictions on protected expression are permissible and apply to commercial speech).

68. *See* *Cent. Hudson Gas v. Pub. Serv. Comm’n*, 447 U.S. 559, 566 (1980) (explaining that a valid restriction “must concern lawful activity and not be misleading,” there must be a substantial government interest in limiting the speech, the regulation must “directly advanc[e] the governmental interest asserted,” and the regulation cannot be “more extensive than is necessary to serve that interest”).

69. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 568, at 6 (Apr. 23, 2013).

70. *See* *Keimer v. Buena Vista Books, Inc.*, 75 Cal. App. 4th 1220, 1230, 89 Cal. Rptr. 2d 781, 788 (1999) (acknowledging that commercial speech is protected, but allowing “rational and carefully crafted restrictions” on that speech).

71. CAL. BUS. & PROF. CODE § 22581(a)(1) (enacted by Chapter 336).

72. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 568, at 2 (Apr. 23, 2013).

73. *Statement from Common Sense Media CEO James Steyer on the California Senate’s Approval of SB 568*, COMMON SENSE MEDIA (Apr. 30, 2013), <http://www.common-sense-media.org/about-us/news/press-releases/statement-from-common-sense-media-ceo-james-steyer-on-the-california-se> (on file with the *McGeorge Law Review*).

74. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 568, at 7 (Apr. 23, 2013).

75. *Id.*

76. *New CareerBuilder Survey*, *supra* note 4.

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consuming alcohol or drugs, and discriminatory comments.⁷⁷ Similarly, a Kaplan Test Prep Survey of college admissions officers “show[s] that schools are increasingly discovering information on Facebook and Google that negatively impacts applicants’ acceptance chances.”⁷⁸ A Pew Research Center report explains that “[t]eens are cognizant of their online reputations, and take steps to curate the content and appearance of their social media presence.”⁷⁹ The Chapter 336 “eraser button”⁸⁰ will help minors prune and revise profile content to protect their online reputations.⁸¹

Critics contend that the eraser button will not be effective because it does not cover third-party posting, does not extend to adults who wish to remove content that they posted as minors,⁸² and “nearly every imaginable service [already] offers a delete button.”⁸³ One San Francisco high school student highlights that “[e]ven if you make sure not to post photos of yourself, you can’t stop your friends from doing so. If you use drugs and there are pictures of you doing that and you apply for a job, you won’t get hired.”⁸⁴ Similarly, most online posts do not exist by themselves—others interact with the posts by liking, commenting, or sharing.⁸⁵ Yet Chapter 336 does not protect third-party posting or re-posting—leaving a large amount of potentially harmful content freely available to anyone who has an Internet connection.⁸⁶ Others question the eighteen-year-old cutoff, wondering if minors actually become more careful about what they post after turning eighteen.⁸⁷

77. *Id.*

78. Russell Schaffer & Carina Wong, *Kaplan Test Prep Survey Finds That College Admissions Officers’ Discovery of Online Material Damaging to Applicants Nearly Triples Every Year*, KAPLAN TEST PREP (Oct. 4, 2012), <http://press.kaptest.com/press-releases/kaplan-test-prep-survey-finds-that-college-admissions-officers-discovery-of-online-material-damaging-to-applicants-nearly-triples-in-a-year> (on file with the *McGeorge Law Review*).

79. MARY MADDEN ET AL., *supra* note 45.

80. Kathleen Miles, *Teens Get Online ‘Eraser Button’ with New California Law*, HUFFINGTON POST (Aug. 26, 2013, 11:40 PM), http://www.huffingtonpost.com/2013/09/24/teens-online-eraser-button-california_n_3976808.html?utm_hp_ref=online-privacy (on file with the *McGeorge Law Review*).

81. MARY MADDEN ET AL., *supra* note 45, at 63.

82. Kurtis Alexander & Vivian Ho, *New Law Lets Teens Delete Digital Skeletons*, S.F. GATE (Sept. 24, 2013, 9:47 AM), <http://www.sfgate.com/news/article/New-law-lets-teens-delete-digital-skeletons-4837309.php>. (on file with the *McGeorge Law Review*).

83. Gregory Ferenstein, *On California’s Bizarre Internet Eraser Law*, TECH CRUNCH (Sept. 24, 2013), <http://techcrunch.com/2013/09/24/on-californias-bizarre-internet-eraser-law-for-teenagers/> (on file with the *McGeorge Law Review*).

84. *Id.*

85. Katy Waldman, *California’s Internet Eraser Law: Nice Idea, but It Won’t Work*, SLATE (Sept. 25, 2013, 3:07 PM), http://www.slate.com/blogs/xx_factor/2013/09/25/sb_568_california_digital_eraser_law_for_minors_is_unlikely_to_work.html (on file with the *McGeorge Law Review*).

86. CAL. BUS. & PROF. CODE § 22581(b)(2) (enacted by Chapter 336).

87. Waldman, *supra* note 85 (implying that a nineteen-year-old would be just as interested in removing damning content that he posted just one year earlier).

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Despite these concerns, Senator Steinberg notes that many young people do not know that they can delete information because it is not easy to do so.⁸⁸ Another optimist believes that despite the preexisting ability to delete information on many sites, Chapter 336 “forces companies to really incorporate privacy into their design, rather than as an afterthought.”⁸⁹ It remains to be seen whether Chapter 336 will “help protect teens from . . . embarrassment and harm to job and college applications from online posts they later regret” because California is the first state to allow minors to remove their postings.⁹⁰

3. *Protecting More Minors*

COPPA only protects children under thirteen-years-old,⁹¹ yet ninety-five percent of teens ages twelve to seventeen access the Internet regularly.⁹² Teenage Internet activities include social networking, shopping, reading the news, and sharing content such as artwork, pictures, or stories.⁹³ The type of Internet activity that merits protection also increases in the teenage years, as teens ages fourteen to seventeen are more likely to post pictures, share their relationship status, and display their cellphone number.⁹⁴ Some teens also “choose to enable . . . location information when they post,”⁹⁵ which provides information that marketers can use for targeted advertising campaigns. In light of teenagers’ widespread Internet use, COPPA’s limited protection of children under thirteen-years-old falls short;⁹⁶ Chapter 336 provides necessary expanded protection to minors under eighteen-years-old.⁹⁷

B. *Operators May Have Trouble Complying with Chapter 336*

On June 25, 2013, CDT presented criticisms of Chapter 336 to the Assembly Committee.⁹⁸ CDT, a nonprofit organization that works to keep the Internet open,

88. Emily Siner, *This Law Wants to Save Teens’ Reputations. But Probably Won’t*, NPR (Sept. 27, 2013, 10:30 AM), <http://www.npr.org/blogs/alltechconsidered/2013/09/26/226547683/this-law-wants-to-save-teens-reputations-but-probably-wont> (on file with the *McGeorge Law Review*).

89. Debra Cassens Weiss, *‘Eraser’ Law Gives California Teens the Right to Delete Online Posts*, (Sept. 25, 2013, 2:09 PM), <http://www.abajournal.com/news/article/eraser-law-gives-california-teens-the-right-to-delete-online-posts/> (on file with the *McGeorge Law Review*).

90. Miles, *supra* note 80.

91. 15 U.S.C. § 6501(1) (2006).

92. MARY MADDEN ET AL., *supra* note 45, at 8.

93. *Online Activities: What Teens Do Online*, PEW INTERNET, [http://www.pewinternet.org/Trend-Data-\(Teens\)/Online-Activites-Total.aspx](http://www.pewinternet.org/Trend-Data-(Teens)/Online-Activites-Total.aspx) (last visited July 29, 2013) (on file with the *McGeorge Law Review*).

94. MARY MADDEN ET AL., *supra* note 45, at 4.

95. *Id.* at 5.

96. See 15 U.S.C. § 6501(1) (2013) (defining children as under thirteen).

97. CAL. BUS. & PROF. CODE § 22580(d) (enacted by Chapter 336).

98. Emma J. Llanso, *Comments on SB 501: The Social Networking Privacy Act and SB 568, Regarding Privacy Rights for California Minors in the Digital World*, CTR. FOR DEMOCRACY & TECH. (June 25, 2013),

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innovative, and free argued that Chapter 336 includes language that “leaves operators uncertain of their obligations” and may actually cause operators to collect more information from minors.⁹⁹

1. Chapter 336 Is Vague and Unclear

CDT worries that the phrase “directed to minors” could “leave operators with no certainty of their obligations under the law.”¹⁰⁰ Chapter 336 defines a website directed to minors as one “created for the purpose of reaching an audience that is predominately comprised of minors, and is not intended for a more general audience comprised of adults,” yet does not provide a method for evaluating this standard.¹⁰¹ CDT notes that COPPA contains an effective “look and feel test” for determining whether a website is “directed to children,” including the subject matter and use of animated characters.¹⁰² But this test does not help define a website that is directed to minors up to the age of eighteen.¹⁰³ Since it is more challenging to determine whether content is directed to teenagers than to children, many operators will be uncertain about the classification of their online service.¹⁰⁴ The problem compounds for operators directing only portions of their websites at minors by forcing them to evaluate each portion and determine whether they can continue marketing the prohibited products.¹⁰⁵ Because operators may struggle to determine whether their sites are directed to minors, many operators may “comply with the law by prohibiting minors from registering for their sites.”¹⁰⁶

2. Operators May Actually Collect More Information

Ironically, Chapter 336 may encourage operators to collect more information from minors.¹⁰⁷ Chapter 336 states that operators are not required to collect age

<https://www.cdt.org/files/pdfs/CDT-Testimony-SB501-SB568.pdf> (on file with the *McGeorge Law Review*).

99. *Id.* at 4.

100. *Id.*

101. BUS. & PROF. §§ 22580(e) (enacted by Chapter 336).

102. 16 C.F.R. § 312.2 (2012).

103. *See* Llanso, *supra* note 98, at 5 (noting that it can be simple to identify information directed to children, but difficult to distinguish between information targeted at teenagers and adults).

104. *Id.* (noting that it is hard to delineate between content directed at sixteen-year-olds and content directed at young adults and older groups and identifying sites like Tumblr, Instagram, and apps like Angry Birds that may be uncertain).

105. *Id.* (using Hulu.com as an example of a website that is attracts a general audience, but also provides content for minors).

106. *Id.* at 8.

107. *See id.* at 7 (noting that distinguishing between minors and adults requires operators to collect information).

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information,¹⁰⁸ but in order to comply with Chapter 336, operators must have “actual knowledge” that a minor is using the online service.¹⁰⁹ Therefore, to obtain actual knowledge that a minor is visiting its online service, the operator will likely collect “information about its users to distinguish minors from adults and California residents from users elsewhere in the country and world.”¹¹⁰ Paradoxically, operators would need to “maintain richer profiles about the users of their sites” in order to comply with Chapter 336, which is designed to deter collection of personal information.¹¹¹

V. CONCLUSION

Although Chapter 336 expands upon existing privacy protections provided by COPPA, it might not have a strong impact on minors’ experience on the Internet because it does not protect against third-party posting¹¹² and does not provide a novel protection since most sites already provide an eraser button.¹¹³ Also, vague provisions such as websites “directed to minors” may leave operators uncertain of their obligations under the law.¹¹⁴ Despite its problems, the Senate passed Chapter 336 without a single no vote¹¹⁵ and even the critics “applaud the California legislature’s continued focus on issues of online privacy.”¹¹⁶

108. CAL. BUS. & PROF. CODE § 22580(g) (enacted by Chapter 336).

109. *Id.* § 22580(b)(1) (enacted by Chapter 336).

110. Llanso, *supra* note 98, at 7.

111. *Id.*

112. Alexander, *supra* note 82.

113. Ferenstein, *supra* note 83.

114. Llanso, *supra* note 98, at 4.

115. Senate Floor Vote of SB 568, Unofficial Ballot (April 29, 2013), <http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml> (last visited July 30, 2009) (on file with the *McGeorge Law Review*).

116. Llanso, *supra* note 98, at 8.