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February 28, 2021

The Hon. Mark Stone
Chair, Assembly Judiciary Committee
Hon. Members of the Committee
1020 N Street, Room 104
Sacramento, CA 95817

RE: AB 891 (CUNNINGHAM) – SUPPORT AND SPONSORSHIP

Dear Chair Stone and Honorable Members of the Committee:

This bill containing language virtually identical to language approved with no “no” votes by the Assembly in 2019¹ is now, with the pandemic-caused explosion of children spending more time online than ever before, urgently needed to protect the rights of parents and the privacy of children. The Children’s Advocacy Institute at the University of San Diego School of Law which, for over thirty years has advanced the cause of children through academic research, legislative and regulatory advocacy, and litigation, respectfully asks that you support AB 891 (Cunningham).

The entirety of AB 891 reads as follows: Civil Code section 1568: “*Where parental consent is required by law, it shall not be obtained through the minor.*”

AB 891 simply means what it says: when parental consent is required, the consent must be obtained from the parent and not the child. One would assume that a business required to obtain parental consent would never even consider trying to obtain it by addressing only the minor.

Sadly, not so.

WHY IS IT IMPORTANT TO CLARIFY THAT OBTAINING PARENTAL CONSENT REQUIRES AN EFFORT TO ADDRESS THE PARENT, NOT THE CHILD?

Imagine if parental permission slips, instead of asking a parent to sign, asked the child to sign saying, “I promise I asked my parents and they said it was OK.”

¹https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201920200AB1665&showamends=false

The third paragraph of the short three paragraph **AB 1665** (Chau) from last year read as follows:

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

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

That is how technology giant Facebook allegedly honored the role of parents and obtained parental consent. Buried in generalized “fine print” terms and conditions was a provision that astonishingly elicited ***from children a promise that they have obtained consent from their parents*** for the child to participate in privacy-implicating, marketing behavior. The exact fine print, boilerplate language used reads:

“If you are under the age of eighteen (18), you represent that a parent or legal guardian also agrees to this section on your behalf.”

The language permitting children to consent for their parents came about in settlement to litigation. In March 2011, Facebook was sued via class action over its “Sponsored Stories” program. The lawsuit alleged that it was unlawful to use a child’s name and photos for advertising without their consent. Through Facebook’s “Sponsored Stories” program, whenever a child user clicked the “Like” button, Facebook could use that interaction to create an advertisement that is then broadcast to that child’s “Friends” on Facebook turning those child users into unwitting spokespeople for Facebook advertisers.

The plaintiff class and Facebook proposed a settlement. Under the settlement, Facebook proposed to pay an amount equal to \$10 per class member (later raised to \$15), although each person’s claim was worth \$750 under state law. Also, the parties agreed to the language quoted above.

A diverse array of public interest groups objected to the parental consent part of the settlement, including California Attorney General Kamala Harris, Public Citizen, Electronic Privacy Information Center, Center for Class Action Fairness and the Children’s Advocacy Institute. The district court approved the settlement in August 2013. Appeal was made to the Ninth Circuit.

Applying the “abuse of discretion” standard to the trial court’s approval of a settlement between private parties, in January 2016, the appellate court affirmed the trial court’s approval of the settlement, but, importantly, passed no judgment on whether the settlement was good or wise policy. The court held:

When approving a settlement, a district court should **avoid reaching the merits of the underlying dispute**. *Isby v. Bayh*, 75 F.3d 1191, 1198 (7th Cir. 1996); see also *Officers for Justice v. Civil Serv. Comm’n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). As a result, a district court abuses its discretion in approving a settlement only if the agreement sanctions “clearly illegal” conduct. *Robertson v. National Basketball Ass’n*, 556 F.2d 682, 686 (2d Cir. 1977) (emphasis added); see also *Sierra Club, Inc. v. Elec. Controls Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990).²

The settlement was so bad that The Campaign for a Commercial-Free Childhood (CCFC) ***rejected approximately \$290,000 - more than 90% percent of CCFC’s annual budget*** -- that it anticipated receiving as a beneficiary under the settlement. The group rejected this money because:

- “[T]he ***Fraley Settlement Agreement harms vulnerable teenagers and their families*** under the guise of helping them.”

² <https://assets.documentcloud.org/documents/2678209/13-16819.pdf> (emphasis added)

- “Despite the significant financial loss that this could represent, CCFC can no longer be a part of a settlement that it now understands would directly conflict with its mission.”³

CCFC’s decision was a righteous one. Online marketers seek to emphasize children and teens in their marketing. “Teens may be unknowingly conscripted into being product ambassadors, encouraged to submit their own photos and share products and content with friends, all monitored and monetized. PBS Frontline, *Generation Like* (Feb. 18, 2014), <http://www.pbs.org/wgbh/frontline/film/generation-like/>; Workgroup on Children’s Online Privacy Protection, *Report to the Maryland General Assembly on Children’s Online Privacy*, 17 (Dec. 30, 2013). “For years, companies have purposefully sought out the most influential young ‘connectors’ within their social groups and encouraged them to promote brands among their friends.” Montgomery & Chester, *Interactive Food and Beverage Marketing: Targeting Adolescents in the Digital Age*, 45 J. of Adolescent Health S21 (2009), available at <http://digitalads.org/documents/>; see Am. Acad. of Pediatrics, *Children, Adolescents, and Advertising*, 118 Pediatrics 2563, 2563 (2006) (noting marketers increasingly target the young to create brand preference); Okan Akcay, *Marketing to Teenagers: The influence of Color, Ethnicity and Gender*, 3 Int’l J. Bus. & Soc. Sci. 10, 10 (2012) (discussing the importance of targeting teens, especially Hispanics, as a growing population segment with large purchasing power). “Teens tend to be more impulsive than adults and, as a result, may voluntarily disclose more information online than they should, leaving them vulnerable to identity theft or adversely affecting potential employment or college admissions opportunities.” FTC, *Protecting Consumer Privacy in an Era of Rapid Change*, 70 (2012) (citing agency findings and academic studies on teens’ privacy attitudes).

According to a survey of 381 institutions, nearly a third of college admissions personnel check applicants’ social media presence in determining college entrance. Natasha Singer, *They Loved Your G.P.A. Then They Saw Your Tweets*, N.Y. Times, Nov. 10, 2013.

Sadly, even though Facebook ended the program for which this non parental was deployed, Facebook’s method of “obtaining” parental consent by directing an inquiry to *the child* whether the child has obtained it has spread by copycats all over the Internet, necessitating a legislative response.⁴

³<http://www.commercialfreechildhood.org/sites/default/files/CCFCAmicusLetter.pdf>

⁴ Here is just a tip-of-the-iceberg list of sites that copied Facebook’s ask-the-child-in-boilerplate supposed method of obtaining parental consent:

<https://www.virvite.com/terms-of-service.php>

<https://halloglobal.com/terms-of-service/>

<https://obstacleedge.com/terms-and-conditions/>

<https://energi.life/static/terms-and-condition>

<https://www.theloyalist.com/terms>

<https://gypsyscircuscider.com/terms-of-service/>

<https://sportamix.com/terms>

<https://likemoji.com/terms-of-service>

https://ranked.games/info_tos

<https://360fuel.net/legal>

<https://promesports.com/terms.html>

https://www.mahiber.com/index.php?option=com_content&view=article&id=105

<https://www.cartoonnetwork.com/legal/termsfuse.html>

<https://www.epicgames.com/site/en-US/tos>

<https://tos.ea.com/legalapp/WEBTERMS/US/en/PC/>

<https://legal.ubi.com/termsfuse/en-US>

<https://www.playstation.com/en-us/legal/psn-terms-of-service/>

THE EXPLOSION OF ONLINE EDUCATION PRESENTS AN UNPRECEDENTED THREAT TO CHILD PRIVACY MAKING MEANINGFUL PARENTAL CONSENT URGENTLY NEEDED.

Even prior to the pandemic, online K-12 education was expanding rapidly, nearly doubling from 1.5 million students to 2.7 million in five years, thereby expanding the risks to the privacy of minors.⁵ For example, the largest online provider of K-12 education is the publicly traded K12, Inc. Buried in its boilerplate terms and conditions is a link to its privacy policy. When you click there, you find this:

We may share personally identifiable information with certain service providers. They will use this information to process transactions you have requested, provide customer service and inform you of products or services we offer that you may find useful. Our service providers may include consultants, **vendors and companies that perform marketing services** on our behalf **to help us identify families who may benefit from the services and education offerings** Connections or its affiliates provide. We require our service providers to protect your personally identifiable information and to use or disclose it only for the work they are performing for us, **or as permitted by law.**⁶

Other learning sites use the boilerplate language that Facebook used to use; the language that would be outlawed by the bill's prohibition against obtaining consent through the minor.⁷ For example, a home schooling website's fine print, boilerplate terms include this language: "If you are under the age of eighteen (18), you represent that a parent or legal guardian also agrees to this section on your behalf."⁸

CONCLUSION

For these reasons, the bill addresses an important issue made urgent because of the impact of the pandemic. Never before in our history has protecting the integrity and efficacy of parental consent been more important.

Please support AB 891.

Sincerely,



Ed Howard
Senior Counsel, Children's Advocacy Institute

<https://www.microsoft.com/en-US/servicesagreement>

⁵ <https://www.connectionsacademy.com/news/growth-of-k-12-online-education-infographic>

⁶ <https://www.connectionsacademy.com/privacy-policy> (Emphasis supplied. The site appears to be silent on the rights of children over 13.)

⁷ <https://myhomeschoolhub.com/terms-and-conditions/> <https://www.hallo.tv/terms-of-service/>

⁸ <https://myhomeschoolhub.com/terms-and-conditions/>