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## Does the internet eraser button for youth delete first amendment right of others?

### *O botão de apagar na internet para jovens deleta os direitos da primeira emenda de outros?*

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#### Abstract

Will Facebook and similar posting sites soon come to an end from hefty civil fines and consent decrees? Is Internet discourse at risk? That may be the case if lawmakers succeed in passing the Do Not Track Kids Act. As drafted, the law would require operators of children directed websites to include an eraser button to remove user posted content and would penalize mom and pop run sites unable to afford the financial and technological resources to comply with the mandate. This Note argues that if enacted, the law would constitute a presumptively impermissible burden on Free Speech under the First Amendment and should be subject to strict scrutiny.

**Keywords:** Social media; Do Not Track Kids Act; eraser button; First Amendment; information.

#### Resumo

*O Facebook e similares sites de posts vão logo acabar com pesadas indenizações e termos de consentimento? O discurso da internet está em risco? Pode ser o caso, se os legisladores tiverem sucesso e passarem o "Ato de não rastreamento de crianças". Como escrita, a lei requereria que os operadores de sites direcionados a crianças incluíssem um botão de 'apagar' para remover conteúdo postado por usuários e penalizaria sites gerenciados por mães e pais que não tivessem condições de arcar com os custos de recursos financeiros e tecnológicos para cumprir a lei. Este artigo argumenta que, se aprovada, a lei constituiria um óbice que se poderia presumir intransponível para o livre discurso garantido pela primeira emenda, devendo, portanto, passar por uma revisão judicial quanto à sua constitucionalidade.*

**Palavras-chave:** Mídias sociais; Ato de não rastreamento de crianças; botão de apagar; Primeira Emenda; informação.

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## 1. INTRODUCTION

"There's no fresh start in today's world [...] Any twelve-year-old with a cell phone could find out what you did [...] The changes we make in our lives will speak for themselves." Megan Phelps-Roper is the granddaughter of Westboro Baptist Church founder, Fred Phelps. The group is well-known for picketing "God Hates Gays" at soldier's funerals and for encouraging homophobic diatribes.<sup>1</sup>

As a teenager, Megan regularly used her Twitter account, to report on the group's activities, posting comments, and sending "as many as 150 tweets a day" to her Twitter followers. However, in February 2013, Megan "tweeted" or posted that she left the church group and regrets her homophobic comments.<sup>2</sup>

Social media played a critical role in Megan's decision. Her epiphany came after a Jewish blogger David Abitbol, an Israeli Web developer and founder of the blog Jewlicious.com, responded to one of her past comments on homosexuals. Abitbol wrote, "But Jesus said, 'Let he who is without sin cast the first stone.'" Abitbol pointed out that according to the Old Testament, other infractions besides homosexuality were punishable by death. Megan then realized that "if the death penalty was instituted for *any* sin, you completely cut off the opportunity to repent." She started to question Westboro's doctrine that she had been practicing all her life, coming to believe that, "The idea that only WBC had the right answer was crazy."<sup>3</sup>

Megan then 23 years old, left the church group and now regrets her posts on Twitter. Megan now realizes that although she cannot erase her past, the experience itself was part of the person she is today.<sup>4</sup>

<sup>1</sup> REESE, Diana. Escape from Westboro Baptist Church: Is Fresh Start Possible for Phelps's Granddaughters? *Washington Post*, Washington, feb. 2013. Available on: <<http://www.washingtonpost.com/blogs/she-thepeople/wp/2013/02/09/escape-from-westboro-baptist-church-is-fresh-start-possible-for-fred-phelps-granddaughters/>>.

<sup>2</sup> REESE, Diana. Escape from Westboro Baptist Church: Is Fresh Start Possible for Phelps's Granddaughters? *Washington Post*, Washington, feb. 2013. Available on: <<http://www.washingtonpost.com/blogs/she-thepeople/wp/2013/02/09/escape-from-westboro-baptist-church-is-fresh-start-possible-for-fred-phelps-granddaughters/>>.

<sup>3</sup> REESE, Diana. Escape from Westboro Baptist Church: Is Fresh Start Possible for Phelps's Granddaughters? *Washington Post*, Washington, feb. 2013. Available on: <<http://www.washingtonpost.com/blogs/she-thepeople/wp/2013/02/09/escape-from-westboro-baptist-church-is-fresh-start-possible-for-fred-phelps-granddaughters/>>.

<sup>4</sup> REESE, Diana. Escape from Westboro Baptist Church: Is Fresh Start Possible for Phelps's Granddaughters? *Washington Post*, Washington, feb. 2013. Available on: <<http://www.washingtonpost.com/blogs/she-thepeople/wp/2013/02/09/escape-from-westboro-baptist-church-is-fresh-start-possible-for-fred-phelps-granddaughters/>>.

Studies show that many teens, like Megan, at one-time or another disclosed information on public websites that they later regretted posting.<sup>5</sup> There are many websites available on the Internet that enable users the post words or pictures of themselves in real time.<sup>6</sup> Users can create their own websites to post information or post content on social media platforms.<sup>7</sup> Companies too have recognized the promotional and financial benefits of social networking.<sup>8</sup>

Since 2009, the number of people and companies using social media exploded from some 452,000 users to well over a billion, many of them teens.<sup>9</sup> Although social networking is an unparalleled medium for social expression, in terms of the opportunities and ease for communication and education, it has some pitfalls. Specifically, younger users (college age and below) are posting embarrassing information about themselves online. Because social networking easily enables third-parties, including the users's friends or strangers to re-publish the self-posted content, removing such information can be very difficult and the chances of doing so, slim.<sup>10</sup> Thus an ill-advised post can have life altering effects, with academic ramifications and impacts upon employment opportunities.<sup>20</sup> In fact, the Pew study found that 19% of teens regretted sharing comments, photos, or videos that they had posted.<sup>11</sup>

Facebook, the largest social media website with more than a billion users, currently exercises several tools to prevent such disastrous consequences. These tools allow users to delete self-posted content and set guidelines on who can view the content.<sup>12</sup> Nonetheless, the deletion feature has not impressed some Federal legislators, who want to mandate the removal requirement on all websites targeting child audiences—those who are under the age of 16.<sup>13</sup> The bill is called the Do Not Track Kids Act

<sup>5</sup> WANG, Yang; LEON, Pedro Giovanni; CHEN, Xiaoxuan; KOMANDURI, Saranga; NORCIE, Gregory. From Facebook Regrets to Facebook Privacy Nudges. **Ohio State Law Journal**, Columbus, vol. 74, n. 6, p. 1307-1334, nov./dec. 2013.

<sup>6</sup> LENHART, Amanda. Teen, Social Media & Technology Overview. **Pew Research Center**, Washington, apr. 2015. Available at: <<http://www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/>>.

<sup>7</sup> TEAM CAFFEINE. 10 Remarkable Twitter Statistics for 2015. **Social Caffeine**. Available at <<http://loritaylor.com/twitter-statistics-2015/>>. Access on: July 5, 2015.

<sup>8</sup> TEAM CAFFEINE. 10 Remarkable Twitter Statistics for 2015. **Social Caffeine**. Available at <<http://loritaylor.com/twitter-statistics-2015/>>. Access on: July 5, 2015.

<sup>9</sup> BUMP, Philhip. Finally, We Know How Many Bloggers Live in Their Parents' Basement. **Washington Post**, Washington D.C, mar. 2015. Available at: <<http://www.washingtonpost.com/blogs/wonkblog/wp/2015/03/25/finally-we-know-how-many-bloggers-live-in-their-parents-basement/>>. Access on: July. 15, 2016; WANG, Yang; LEON, Pedro Giovanni; CHEN, Xiaoxuan; KOMANDURI, Saranga; NORCIE, Gregory. From Facebook Regrets to Facebook Privacy Nudges. **Ohio State Law Journal**, Columbus, vol. 74, n. 6, p. 1307-1334, nov./dec. 2013. p. 1309.

<sup>10</sup> WANG, Yang; LEON, Pedro Giovanni; CHEN, Xiaoxuan; KOMANDURI, Saranga; NORCIE, Gregory. From Facebook Regrets to Facebook Privacy Nudges. **Ohio State Law Journal**, Columbus, vol. 74, n. 6, p. 1307-1334, nov./dec. 2013.

<sup>11</sup> MADDEN, Mary, et al. Teens Social Media, & Privacy. **Pew Research Center**, Washington, may 2013. Available at: <<http://www.pewinternet.org/2013/05/21/teens-social-media-and-privacy/>>.

<sup>12</sup> MADDEN, Mary, et al. Teens Social Media, & Privacy. **Pew Research Center**, Washington, may 2013. Available at: <<http://www.pewinternet.org/2013/05/21/teens-social-media-and-privacy/>>.

<sup>13</sup> UNITED STATES OF AMERICA. Bill S. 1563, 114th Cong. Do Not Track Kids Act of 2015. § 6(a)(2)(A) 2014.

(DNTKA), also referred to as “The Eraser Button,” is primarily based off a similar statute California enacted on January 1, 2015.<sup>14</sup>

This Note argues that if the DNTKA were enacted, the government action would constitute a content-based restriction under the First Amendment and should be subject to strict scrutiny. In Part I, I review facts on social media that has influenced the DNKTA bill. I then proceed to describe the bill and the relevant provisions affecting the legal analysis. Next in Part II, I briefly review legal doctrine for content-based determination. Then in Part III, I apply the language of the bill and relevant legislative record to demonstrate that the DNTKA constitute content-based action. Finally, I conclude this Note by offering a less restrictive solution for remedying the problem legislators are trying to address.

## 2. BACKGROUND

### 2.1. Children Posting Content on Social Media Websites

Social media websites allow users to post material and also then make that material available to others.<sup>15</sup> Teens are constant and enthusiastic users of social media sites. An estimated 76% of teens use social media; 81% of older teens and 68% of teens aged 13 to 14. Approximately 70% of Facebook users, including teens, access the site on a daily basis.<sup>16</sup>

Social media sites constitute an obvious means for teenagers to interact with friends by sharing personal information about themselves and their experiences. Teens are generally active on multiple social media platforms. When asked about seven specific sites (Facebook, Twitter, Instagram, Snapchat, Tumblr, Google+, and Vine), 89% of teens said they used at least one of the sites and 71% reported using two or more sites. Among the 18% of teens who only use one site, 66% use Facebook, 13% use Google+ and 13% use Instagram. Additionally, 57% of teens describe their networks as having some overlap across several sites, and 29% report that their networks are composed of the same people on every social site they visit.<sup>17</sup> Given this data on the use of multiple sites and the overlap of networks, it means that teens’ posts very likely to become available on multiple sites for viewing, copying and reusing.

<sup>14</sup> UNITED STATES OF AMERICA. Bill S. 1563, 114th Cong. Do Not Track Kids Act of 2015, § 2, 2015, S. 1563; with CALIFORNIA. California Legislative Service Chapter 336 (Senate Bill 568 – West), 2013.

<sup>15</sup> LENHART, Amanda. Teen, Social Media & Technology Overview. **Pew Research Center**, Washington, apr. 2015. Available at: <<http://www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/>>.

<sup>16</sup> LENHART, Amanda. Teen, Social Media & Technology Overview. **Pew Research Center**, Washington, apr. 2015. Available at: <<http://www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/>>.

<sup>17</sup> LENHART, Amanda. Teen, Social Media & Technology Overview. **Pew Research Center**, Washington, apr. 2015. Available at: <<http://www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/>>.

Social media networking is not restricted to the frivolous. In fact studies show that social media networking has become the forum where younger users develop their civic identities and become engaged in civic activities.<sup>18</sup> From a public policy point of view, this seems like an important benefit to society. But among the issues raised by social media is how the users' gain in exploring their civic interests is weighted relative to the risk, i.e., concerns of disclosing content about themselves in the process.<sup>19</sup>

More attention on harmful posting and distribution on social media has probably been focused on the distribution of embarrassing content rather than the potential hazards of pursuing civic participation. A Syracuse University research study sought to understand why young adults post content they later regret and whether such behavior could be reduced without diminishing the perceived value of using social networking. Users generally admitted that they posted much of the regrettable content "while in a highly emotional state," or while under the "influence of alcohol or drugs." They also reported that they felt that the posting was appropriate because many of their friends had posted similar content, pointing to the common idea of peer pressure familiar in teen social relationships.<sup>20</sup>

There is a common perception that children and teens are less able than adults to appreciate the possible consequences and implications of having items they post online available to others.<sup>21</sup> According to a Pew/Berkman Center poll, 69 % of parents of teens who engage in online activity are concerned about how that activity might affect their children's future academic or employment opportunities.<sup>22 23</sup>

They may have good cause to be concerned. As of 2013, more than 80% of college admissions officers googled applicants and reviewed the Facebook pages of potential students. The likelihood is that that percentage is likely to grow.<sup>24</sup>

Some of this behavior might be mitigated by on screen tools that remind users of what they posting and who will be able to view the content. One study found a Facebook tool, "picture nudge," somewhat efficacious. The "[p]icture nudge was designed

<sup>18</sup> WEINSTEIN C. Emily. The Personal is Political on Social Media: Online Civic Expression Patterns and Pathways among Civically Engaged Youth. *International Journal of Communication*, Los Angeles, vol. 8, p. 210-233, 2014.

<sup>19</sup> WEINSTEIN C. Emily. The Personal is Political on Social Media: Online Civic Expression Patterns and Pathways among Civically Engaged Youth. *International Journal of Communication*, Los Angeles, vol. 8, p. 210-233, 2014.

<sup>20</sup> WANG, Yang; LEON, Pedro Giovanni; CHEN, Xiaoxuan; KOMANDURI, Saranga; NORCIE, Gregory. From Facebook Regrets to Facebook Privacy Nudges. *Ohio State Law Journal*, Columbus, vol. 74, n. 6, p. 1307-1334, nov./dec. 2013.

<sup>21</sup> CALIFORNIA. California Senate Judiciary Committee. **Bill Analysis of Privacy: Internet**. Minors, Senate Bill 568, 14 Session, at 5, 2013. Available at: <[http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb\\_05510600/sb\\_568\\_cfa\\_20130422\\_141430\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_05510600/sb_568_cfa_20130422_141430_sen_comm.html)>.

<sup>22</sup> UNITED STATES OF AMERICA. Bill S. 1563, 114th Cong. Do Not Track Kids Act of 2015, S. 2378, 113th Cong. § 102 (2014); UNITED STATES OF AMERICA. Bill S. 2378, 113th Cong. **Do Not Track Kids Act of 2014**. § 102. 2014, 4711, **113th United State Congress**, § 102, 2014.

<sup>23</sup> UNITED STATES OF AMERICA. Bill S. 2378, 113th Cong. **Do Not Track Kids Act of 2014**. § 102. 2014, § 2, 2013.

<sup>24</sup> MARKEY, Ed. **The Do Not Track Kids Act of 2013**. 2013. Available at: <[http://www.markey.senate.gov/documents/2013-11-14\\_DNTK\\_1pager.pdf](http://www.markey.senate.gov/documents/2013-11-14_DNTK_1pager.pdf)>.

to remind Facebook users who can see their posts” online.<sup>25</sup> Users positively responded to this pictorial warning and appropriately adjusted their settings. Although this tool was the most effective device studied, users also reported that they eventually began ignoring the picture nudge.”<sup>26</sup>

Because such warnings are not widely effective and do not stop youth from posting information, parents tend to want additional tools to be used as correctives—not only to remove damaging posts, but also review other information about their children that might be collected and redistributed on the Web. Some 94% of parents believe people should have the ability to request the deletion of all their child’s personal information held by an online search engine, social networking site, or marketing company after a specific period of time.<sup>27</sup>

The eraser button is offered as one such partial solution to posted content. Rep. Joe Barton of California, a strong proponent of DNTKA opined, “Young people do things that later on they wish they had not done and they say things and post pictures that they should not have. That eraser button is a way we don’t want to ruin somebody’s life because when they were 13 or 14 they posted something they should not have and they later on realized that and they cannot erase it [...] For a child or a teenager, it doesn’t necessarily have to be part of your permanent record.”<sup>28</sup>

With regard to the DNTKA eraser button legislation, the easiest information to remove from the Internet may be posted data stored in Facebook itself, and perhaps on other social network sites, Facebook’s “Statement of Rights and Responsibilities,” for example, says that any information a Facebook user uploads to the social network remains that user’s property—posting, liking, and otherwise interacting with Facebook merely gives the service a revocable license to the data. That license ends when the data are deleted.<sup>29</sup>

But more complicated is what happens after something is posted online and then copied, reused, and distributed on various other social media platforms and websites, and accessed by other users through those sites and through search engines. In this Note, I address key issues raised by the DNTKA with regard to the eraser button. The first concerns the poster’s proposed control over content he or she places on a website or social media. The second concerns the First Amendment rights and responsibilities

<sup>25</sup> WANG, Yang; LEON, Pedro Giovanni; CHEN, Xiaoxuan; KOMANDURI, Saranga; NORCIE, Gregory. From Facebook Regrets to Facebook Privacy Nudges. *Ohio State Law Journal*, Columbus, vol. 74, n. 6, p. 1307-1334, nov./dec. 2013.

<sup>26</sup> WANG, Yang; LEON, Pedro Giovanni; CHEN, Xiaoxuan; KOMANDURI, Saranga; NORCIE, Gregory. From Facebook Regrets to Facebook Privacy Nudges. *Ohio State Law Journal*, Columbus, vol. 74, n. 6, p. 1307-1334, nov./dec. 2013.

<sup>27</sup> MARKEY, Ed. *The Do Not Track Kids Act of 2013*. 2013. Available at: <[http://www.markey.senate.gov/documents/2013-11-14\\_DNTK\\_1pager.pdf](http://www.markey.senate.gov/documents/2013-11-14_DNTK_1pager.pdf)>.

<sup>28</sup> BARTON, Joey. The Communicators with Representative Joe Barton. *C-SPAN*, Washington D.C. Available on: <<http://www.cspan.org/video/?318011-1/communicators-representative-joe-barton-rtx>>.

<sup>29</sup> GARFINKEL, Simson. How to Delete Regrettable Posts from the Internet. *MIT Technology Review*, Cambridge, oct. 2012. Available at: <<https://www.technologyreview.com/s/506521/how-to-delete-regrettable-posts-from-the-internet/>>.



of the website or social media operator with regard to making that content publicly available, or restricting that availability.

## 2.2. From the DNTKA Eraser Button to the First Amendment

Senators Edward Markey (D-Massachusetts), Mark Kirk (R-Illinois), Richard Blumenthal (D-Connecticut) and Robert Menendez (D-New Jersey) have co-sponsored the Do Not Track Kids Act of 2015, as well as earlier versions of the bill that they introduced in 2013 and 2014.<sup>30</sup>

The DNTKA is currently before the Senate Committee on Commerce, Science, and Transportation. Congressmen Joe Barton (R-Texas) and Bobby Rush (D-Illinois) have introduced a parallel bill, H.R. 2734, which is currently before the House Committee on Energy and Commerce.<sup>31</sup> The DNTKA amends and expands the Children's Online Privacy Protection Act ("COPPA"), 15 U.S.C. 6501 *et seq.*, which was enacted in 1998 and became effective on April 21, 2000.<sup>32</sup>

COPPA provided a means for parents to control what information is collected from children under the age of 13 by commercial websites and online services.<sup>33</sup> COPPA applies to online service and website operators (1) that are directed at children and *collect, use, or disclose* personal information (PI) from children; or (2) that knowingly collect, use and disperse PI from children. When a site is directed towards children is determined by empirical criteria such as use of children's language and images, animated characters and the like. PI includes the child's name or other identifiable information such as screen name, address, location, social security number, or photo, video, or audio file of the child, or any other information combined with such identifiers.<sup>34</sup>

COPPA calls for website operators to protect children by posting their online privacy policy on their site; providing direct notice on how it collects, uses, and discloses children's PI; and obtaining parental consent for those children under 13 for such collection, use, and disclosure.<sup>35</sup> Operators must also have procedures for protecting confidentiality and security of PI and retain PI only as long as necessary to fulfill the purpose for which it was collected.<sup>35</sup>

<sup>30</sup> UNITED STATES OF AMERICA. Bill S. 1563, 114th Cong. Do Not Track Kids Act of 2015, §2, 2015; UNITED STATES OF AMERICA. Bill S. 1563, 114th Cong. Do Not Track Kids Act of 2015, 2014, S. 2378th Cong. § 102; H.R. 4711, 113th Cong. § 102 2014. S. 1700.

<sup>31</sup> UNITED STATES OF AMERICA. Bill S. 1563, 114th Cong. Do Not Track Kids Act of 2015, H.R. 2734, 114th Cong. § 2.

<sup>32</sup> UNITED STATES OF AMERICA. Bill S. 1563, 114th Cong. Do Not Track Kids Act of 2015, S. 1563, 114th Cong. § 2 (2015).

<sup>33</sup> UNITED STATES OF AMERICA. U.S. Congress. **Children's Online Privacy Protection Rule**. 16th Code Of Federal Regulations, § 312.2. 78 Federal Regulation 3972, 3972, Jan. 17, 2013, codified at 16th Code Of Federal Regulations, pt. 312.

<sup>34</sup> UNITED STATES OF AMERICA. U.S. Congress. **Children's Online Privacy Protection Rule**. 16th Code Of Federal Regulations, § 312.2. 78 Federal Regulation 3972, 3972, Jan. 17, 2013, codified at 16th Code Of Federal Regulations, pt. 312.

<sup>35</sup> UNITED STATES OF AMERICA. U.S. Congress. **Children's Online Privacy Protection Rule**. 16th Code Of Federal Regulations, § 312.2. 78 Federal Regulation 3972, 3972, Jan. 17, 2013, codified at 16th Code Of Federal Regulations, pt. 312

Many of these provisions took effect on July 1, 2013, with rules for doing so administered by the Federal Trade Commission (“FTC”).<sup>36</sup> DNTKA expands upon COPPA by increasing coverage to children from those age 12 up to but under age 16, extending the definition of operators to those persons allowed by such services and sites to collect children’s PI, adding protections with regard to digital marketing, and notably including a provision for the removal of content. Section 6 of the bill, contains the pertinent parts to the Removal of Content provision:

*(a) Acts prohibited: It is unlawful for an operator of a website, online service, online application, or mobile application to make publicly available through the website, service, or application content or information that contains or displays personal information of children or minors in a manner that violates the regulations prescribed under subsection.*

*(b) Regulations: [Operators are required] to [...] (A) implement mechanisms that permit a user of the website, service, or application of the operator to erase or otherwise eliminate content or information submitted to the website, service, or application by such user that is publicly available through the website, service, or application and contains or displays personal information of children or minors; and (B) to take appropriate steps to make users aware of such mechanisms and to provide notice to users that such mechanisms do not necessarily provide comprehensive removal of the content or information submitted by such users.*

*(2) Exception: The regulations promulgated under paragraph (1) may not require an operator or third party to erase or otherwise eliminate content or information that— (A) any other provision of Federal or State law requires the operator or third party to maintain; or (B) was submitted to the website, service, or application of the operator by any person other than the user who is attempting to erase or otherwise eliminate such content or information, including content or information submitted by such user that was republished or resubmitted by another person.<sup>37</sup>*

<sup>36</sup> UNITED STATES OF AMERICA. U.S. Congress. **Children’s Online Privacy Protection Rule**. 16th Code Of Federal Regulations, § 312.2. 78 Federal Regulation 3972, 3972, Jan. 17, 2013, codified at 16th Code Of Federal Regulations, pt. 312

<sup>37</sup> UNITED STATES OF AMERICA. Bill S. 1563, 114th Cong. Do Not Track Kids Act of 2015, S. 1563, 114th Cong. § 6, 2015.

The wording is consistent with the “Eraser Button” law in California.<sup>38</sup> That law, SB 568 came into effect in January 2015, and was authored by state senate leader Darrell Steinberg. According to Steinberg,

The second part of the bill is the so-called eraser button bill, which would require Internet companies to provide an easy-to-use method for a minor to delete a posting or a picture from a Web site before it’s transmitted to a third party. The purpose, of course, is to allow minors — and we’ve all been teenagers who sometimes act in ways that they regret a few moments or an hour later or makes their parents looking over their shoulder say “why did you post that?” — and allows them to remove it before it can be embarrassing to themselves or harmful to somebody else. That’s the piece that’s getting a lot of attention, and it’s a very important piece.<sup>39</sup>

When asked how California’s eraser button would differ from the delete buttons that most social media sites already have, Steinberg responded that “I think a lot of young people don’t know — it’s not always easily accessible to delete and it can still be accessed even if it is deleted I think in many instances with the right kind of technology. This will allow it to be removed and not be accessed by anybody subsequently.”<sup>40</sup>

The intent of the Removal of Content section is clearly the same form of “Eraser Button” as expressed by sponsors and in findings included in prior forms of the bill.<sup>41</sup> As Congressman Joe Barton, one of DNTKA sponsors stated, “This eraser button that would allow children to delete some ill-advised things they would post online. California passed a law like that a couple of months ago to do that and it goes into effect next year. [California’s law] shows what is in our bill could be enacted and implemented.”<sup>42</sup>

The DNTKA’s Removal of Content provision also contains a glaring exception, noted by its sponsors to account for the fact that often content was reposted, edited, re-used and distributed by others on the Internet subsequent to that content being posted on its original site by the child or youth.<sup>43</sup> This would obviate the effectiveness

<sup>38</sup> Compare Do Not Track Act of 2015, S. 1563, 114th Cong. § 2 (2015), with CALIFORNIA. California Legislative Service Chapter 336 (Senate Bill 568 – West), 2013.

<sup>39</sup> PETERSON, Andrea. Author of California Online Eraser Law: It’s Not Always Easy to Find the Delete Button. *Washington Post*. Washington, sept. 2013, Available at: <<https://www.washingtonpost.com/blogs/the-switch/wp/2013/09/25/author-of-california-online-eraser-law-its-not-always-easy-to-find-the-delete-button/>>.

<sup>40</sup> PETERSON, Andrea. Author of California Online Eraser Law: It’s Not Always Easy to Find the Delete Button. *Washington Post*. Washington, sept. 2013, Available at: <<https://www.washingtonpost.com/blogs/the-switch/wp/2013/09/25/author-of-california-online-eraser-law-its-not-always-easy-to-find-the-delete-button/>>.

<sup>41</sup> UNITED STATES OF AMERICA. Bill S. 1563, 114th Cong. Do Not Track Kids Act of 2015, S. 2378, UNITED STATES OF AMERICA. Bill S. 2378, 113th Cong. **Do Not Track Kids Act of 2014**. § 102, 2014; UNITED STATES OF AMERICA. Bill S. 2378, 113th Cong. **Do Not Track Kids Act of 2014**. § 102. 2014, H.R. 4711, UNITED STATES OF AMERICA. Bill S. 2378, 113th Cong. **Do Not Track Kids Act of 2014**. § 102. 2014; UNITED STATES OF AMERICA. Bill S. 2378, 113th Cong. **Do Not Track Kids Act of 2014**. § 102. 2014, S. 1700, § 2 (2013).

<sup>42</sup> BARTON, Joey. The Communicators with Representative Joe Barton. *C-SPAN*, Washington D.C. Available on: <<http://www.cspan.org/video/?318011-1/communicators-representative-joe-barton-rtx>>.

<sup>43</sup> UNITED STATES OF AMERICA. Bill S. 1563, 114th Cong. **Do Not Track Kids Act of 2015**. § 6(a)(2)(A)-(B) 2015.

that Steinberg asserted for proposing the eraser button as a more effective tool than extant social media delete functions. As Barton noted,

*In the last Congress a lot of technology companies had questions about what could be done, how could you do it, what their liability was. The bill that we introduced, we've gone to some length to revise the language so that it makes it explicitly clear that the requirement to erase it from the page or the location that the company has responsibility for. If something is first posted on Facebook, when that is erased, Facebook erases it from their page and erases it from their databank. But they cannot guarantee that if somebody took that and put it on Youtube and it has gone viral that you could erase it from all 10 million places it has gone to.<sup>44</sup>*

Commentators have noted that “[s]ocial media sites can play a positive role in the “unique and wholly new medium of worldwide human communication” that is the Internet not only by trimming censorship policies to a minimum but also by fostering robust and wide-open access to the information necessary for a functioning democracy.<sup>45</sup>

Key to the consideration and possible passage of DNTKA into law, and a challenge to its constitutionality, is the interpretation of the First Amendment. In 1996, Congress passed the Communications Decency Act. The Supreme Court found a provision of the CDA to be unconstitutional under the First Amendment because the statute criminalized “indecent” speech online.<sup>46</sup> In 1998, Congress passed the Child Online Protection Act (“COPA”) that imposed harsh criminal and civil penalties on those who placed material on the Web that the government deems “harmful to minors.”<sup>47</sup> The Court halted enforcement of COPA and returned the case to the district court for a full trial to examine whether there were effective ways to keep children safe online that did not unconstitutionally limit free speech.<sup>48</sup> In 2007, the U.S. District Court for the Eastern District of ruled that COPA failed to satisfy strict scrutiny and struck down the law.<sup>49</sup>

<sup>44</sup> BARTON, Joey. The Communicators with Representative Joe Barton. **C-SPAN**, Washington D.C. Available on: <<http://www.cspan.org/video/?318011-1/communicators-representative-joe-barton-rtx>>.

<sup>45</sup> HEINS, Marjorie. The Brave New World of Social Media Censorship. **Harvard Law Review**, Cambridge, v. 127, n. 325, p. 325-330, jun. 2014. Available at: <<https://harvardlawreview.org/2014/06/the-brave-new-world-of-social-media-censorship/>>.

<sup>46</sup> UNITED STATES OF AMERICA. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870. 1997.

<sup>47</sup> UNITED STATES OF AMERICA. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656. 2004.

<sup>48</sup> UNITED STATES OF AMERICA. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656. 2004; UNITED STATES OF AMERICA. *American Civil Liberties Union v. Gonzales*, 478 F. Supp. 2d 775. Pennsylvania. 2007.

<sup>49</sup> UNITED STATES OF AMERICA. *American Civil Liberties Union v. Gonzales*, 478 F. Supp. 2d 775. Pennsylvania. 2007. affirmed sub nom. UNITED STATES OF AMERICA. *American Civil Liberties Union v. Mukasey*, 534 F.3d 18,2008. cert. denied UNITED STATES OF AMERICA *Mukasey v. American Civil Liberties Union*, 555 U.S. 1137. 2009.

### 3. LEGAL DOCTRINE FOR CONTENT-BASED ANALYSIS UNDER THE FIRST AMENDMENT

The First Amendment expressly prohibits the Federal Government from enacting laws restricting the freedom of speech or of the press.<sup>50</sup> This freedom extends to communication and dissemination of content.<sup>51</sup> When it comes to operators like commercial online services and websites, courts have likened social media operators to newspaper publishers.<sup>52</sup> For example, Google's publishing of lawful content and editorial judgment as to its search results is constitutionally protected.<sup>53</sup> Even if the operator's content was voluntarily submitted by a third party, the court cannot compel the operator to add or remove content— unless the content falls into an unprotected category.<sup>54</sup>

The Court has recognized several categories of speech the Government may restrict. These categories included fighting words, true threats, incitement, obscenity, child pornography, fraud, defamation, or statements integral to criminal conduct.<sup>55</sup> The Government may also regulate commercial speech, but only if that speech is doing no more than proposing a commercial transaction.<sup>56</sup> Outside these categories, speech is presumptively protected and generally cannot be curtailed by the government.<sup>57</sup>

When the government seeks to restrict speech based on its content, the government bears the burden of rebutting that presumption.<sup>58</sup> The government proves the constitutionality of its actions by either demonstrating that the content-based action meets the rigors of the strict scrutiny or that the government's action is content-neutral and should be subject to lesser intermediate scrutiny.<sup>59</sup>

The fact that a statute does not impose a complete prohibition on certain type of speech but instead imposes a burden on speech does not affect the analysis.<sup>60</sup> For a content based test involving free speech, the Court will consider the actual words of the statute and its legislative history.<sup>60</sup> If the primary purpose off the statute is intended to silence speech protected under the First Amendment, the Court will apply a strict

<sup>50</sup> UNITED STATES OF AMERICA. Constitution. 1<sup>o</sup> Amendment.

<sup>51</sup> UNITED STATES OF AMERICA. *Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 541-42. 1980.

<sup>52</sup> UNITED STATES OF AMERICA. *Jian Zhang v. Baidu.com Inc.*, 10 F.Supp.3d 433. New York. 2014.

<sup>53</sup> UNITED STATES OF AMERICA. *Google, Inc. v. Hood*, No. 3:14CV981-HTW-LRA, 2015 WL 1546160, at \*9 (S.D. Miss. Mar. 27, 2015).

<sup>54</sup> UNITED STATES OF AMERICA. *Jian Zhang v. Baidu.com Inc.*, 10 F.Supp.3d 433. New York. 2014.

<sup>55</sup> UNITED STATES OF AMERICA. *United States v. Alvarez*, 132 S.Ct. 2537, 2544. 2012; UNITED STATES OF AMERICA. *Brown v. Entertainment Merchants Assn.*, 131 S.Ct. 2733. 2011.

<sup>56</sup> UNITED STATES OF AMERICA. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762. 1976.

<sup>57</sup> UNITED STATES OF AMERICA. *United States v. Alvarez*, 132 S.Ct. 2537, 2544. 2012.

<sup>58</sup> UNITED STATES OF AMERICA. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868. 1997.

<sup>59</sup> UNITED STATES OF AMERICA. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664. 2011.

<sup>60</sup> UNITED STATES OF AMERICA. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48. 1986.

scrutiny standard.<sup>61</sup> If the statute's intent is not to directly impact speech, but may have an incidental, collateral, or secondary effect, then the Court will deem the statute to be content-neutral and apply intermediate scrutiny. The DNTKA is clearly a content-based bill.<sup>62</sup>

## 4. ANALYSIS

### 4.1. Analysis Under *Reno v. American Civil Liberties Union*

The DNTKA is not regulation of commerce, but regulation of protected speech. The speech is presumptively presumed to be protected.<sup>63</sup> Commerce speech that does “no more than propose a commercial transaction lacks protection.”<sup>64</sup> However, a speaker's economic motive does not strip his speech of first amendment protection.<sup>65</sup>

Courts have rejected that the Government is merely regulating commerce and is not restricting speech when a statute includes limiting language, such as “for commercial purposes.”<sup>66</sup> Courts have specifically rejected that argument for the first manifestation of COPA that “provided for civil and criminal penalties—including up to six months imprisonment—for anyone who knowingly posts material that is harmful to minors on the Web *for commercial purposes*.”<sup>67</sup>

Courts have affirmed that the “contention that COPA regulates only commercial speech and, thus, should be analyzed under the less exacting standard for such speech is *utterly meritless*. If accepting advertising or selling subscriptions transformed speech into commercial speech, the First Amendment protections afforded to many modes of communication, including print, would be completely destroyed.”<sup>68</sup>

Similarly, the DNTKA is not merely a commerce regulation that applies to when a commercial transaction occurs. When the DNTKA's removal provision applies is based on a website's content.<sup>69</sup> In fact, such language only signals content-based bias. The

<sup>61</sup> UNITED STATES OF AMERICA. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664. 2011.

<sup>62</sup> UNITED STATES OF AMERICA. *McCullen v. Coakley*, 134 S. Ct. 2518, 2534-35. 2014.

<sup>63</sup> UNITED STATES OF AMERICA. *United States v. Alvarez*, 132 S.Ct. 2537, 2544. 2012.

<sup>64</sup> UNITED STATES OF AMERICA. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762. 1976.

<sup>65</sup> UNITED STATES OF AMERICA. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2665. 2011. (stating that although “the burdened speech results from an economic motive, so too does a great deal of vital expression.”); UNITED STATES OF AMERICA. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761. 1976. (“[S]peech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another.”).

<sup>66</sup> UNITED STATES OF AMERICA. *American Civil Liberties Union v. Mukasey*, 534 F.3d 181, 184-85.2008.

<sup>67</sup> UNITED STATES OF AMERICA. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 867-68. 1997.

<sup>68</sup> UNITED STATES OF AMERICA. *American Civil Liberties Union v. Gonzales*, 478 F. Supp. 2d 775, 809 (E.D. Pa. 2007) affirmed sub nom. *American Civil Liberties Union v. Mukasey*, 534 F.3d 181. 2008.

<sup>69</sup> UNITED STATES OF AMERICA. Bill S. 1563, 114th Cong. **Do Not Track Kids Act of 2015**. §§ 2, 5(b)(3), 6. 2015; UNITED STATES OF AMERICA. **Children's Online Privacy Protection Rule**, 78 Federal Regulation 3972, 3984. Jan. 2013.

Supreme Court has held that regulations are content-based when a statute imposes, either on its face or in practical operation, prohibitions or exemptions based on the content of a person's speech.<sup>70</sup>

In *Sorrell* the Court found that a Vermont statute disfavored marketing speech, and thus was content-based by (1) forbidding the collection of prescriber information based on the content of a purchaser's speech; (2) barring "any disclosure when recipient speakers will use the information for marketing;" (3) prohibiting "pharmaceutical manufacturers from using the information for marketing;" and (4) exempting from the prohibition "those who wish [use the prescriber information] to engage in certain educational communications."<sup>71</sup>

Like in *Sorrell*, the DNTKA imposes prohibitions and exemptions based on the content of the operator's website. On its face, the DNTKA seeks to enact content-and speaker-based restrictions on the collection, use, disclosure of children's PI based on whether the "operator of a website [...] make[s] publicly available through the website [...] content or information that contains or displays personal information of children or minors [...]"<sup>72</sup> When a child user posts content on a child-directed website, the operators of that website has both collected and used a child's PI, thus triggering the removal requirement. As such, the DNTKA would apply not to all websites or online services, but a specific subset of speakers and a specific content of speech. Specifically, the eraser button or removal of content provision would restrict the ability of Internet operators to publish content provided to them by youth. However, the DNTKA exempts non-children directed websites, third-parties, and non-profits from these collection, disclosure, and use restrictions.<sup>73</sup>

The Court will not find a government action to be content-based when the purpose of the regulation is not to restrict speech.<sup>74</sup> Regulations that only implicate speech as a secondary effect are content-neutral.

In *Reno* the Court found that the CDA was a content-based restriction because the purpose of the regulation was "to protect children from the primary effects of indecent" and "patently offensive" speech, rather than any "secondary" effect of such speech.<sup>75</sup> Similarly, in *Playboy Entertainment Group, Inc.*, the Court found that the overriding justification for imposing a signal bleed restriction on sexually explicit content was out of "concern for the effect of the subject matter on young viewers."<sup>76</sup>

<sup>70</sup> UNITED STATES OF AMERICA. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663. 2011.

<sup>71</sup> UNITED STATES OF AMERICA. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663. 2011.

<sup>72</sup> UNITED STATES OF AMERICA. Bill S. 1563, 114th Cong. **Do Not Track Kids Act of 2015**. § 6(a). 2015.

<sup>73</sup> UNITED STATES OF AMERICA. Bill S. 1563, 114th Cong. **Do Not Track Kids Act of 2015**. § 6(a). 2015.

<sup>74</sup> UNITED STATES OF AMERICA. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48. 1986.

<sup>75</sup> UNITED STATES OF AMERICA. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 867-68. 1997.

<sup>76</sup> UNITED STATES OF AMERICA. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811-12. 2000.

The DNTKA co-sponsors have made readily clear that primary purpose of the purpose of the “Eraser Button” is protect children from future employers and academic institutions reacting to embarrassing content children have posted of themselves on-line. The prior versions of the DNTKA indicate the removal is necessary because of the direct impact the content will have on the people reviewing it.<sup>77</sup>

Although there are no legislative studies on the DNTKA, *Renton* held that a government may choose to enact legislation based on the finding and experiences of another municipality.<sup>78</sup> Similarly, the DNTKA appears to rely heavily on the California legislature’s findings.<sup>79</sup>

California’s committee hearings also reveal that the purpose of the state’s eraser button was so children could remove photos that would prevent them from being hired.<sup>80</sup>

A content based test requires that the government must prove that there is a compelling purpose for enforcing the statute, that the statute is narrowly tailored be least restrictive on other forms of speech to meet that purpose, and that it is necessary because there are not less restrictive measures that are as effective in meeting the purpose.<sup>81</sup> DNTKA does not meet this test.

## 5. ANALYSIS UNDER TURNER BROADCASTING SYSTEM, INC. V. FCC

Nonetheless, the Court could hold that the DNTKA be subject to a less exacting scrutiny based on the nature of the broadcasting medium. In *Turner Broadcasting System, Inc. v. FCC*, and a subsequent line of cases, the Supreme Court has repeated exercise intermediate scrutiny for content regulation on broadcast medium.<sup>82</sup> For instance, in *Turner*, the Supreme Court, after applying intermediate scrutiny, upheld regulations requiring cable operators to carry the signals of a of local broadcast television stations.<sup>83</sup> The Court acknowledged the cable operators “by exercising editorial discretion over which stations or programs to include in its repertoire[.]” “engage[d] in and

<sup>77</sup> UNITED STATES OF AMERICA. Bill S. 1563, 114th Cong. **Do Not Track Kids Act of 2015**. § 6(a)(2)(A) 2015; UNITED STATES OF AMERICA. Bill S. 2378, 113th Cong. **Do Not Track Kids Act of 2014**. § 102. 2014.

<sup>78</sup> UNITED STATES OF AMERICA. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52. 1986. (“The record in this case reveals that Renton relied heavily on the experience of, and studies produced by, the city of Seattle [...] We hold that Renton was entitled to rely on the experiences of Seattle and other cities . . . in enacting its adult theater zoning ordinance.”).

<sup>79</sup> UNITED STATES OF AMERICA. Bill S. 1563, 114th Cong. **Do Not Track Kids Act of 2015**. § 6(a)(2)(A) 2015; UNITED STATES OF AMERICA. Bill S. 2378, 113th Cong. **Do Not Track Kids Act of 2014**. § 102. 2014; STEINBERG, Darrell, **California Senate Judiciary Committee**. Senate Bill 568 Privacy: Internet: Minors. Available at: < [http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201320140SB568](http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140SB568)>. 2013.

<sup>80</sup> STEINBERG, Darrell. **California Senate Judiciary Committee**. Senate Bill 568 Privacy: Internet: Minors. 2013. Available at: <[http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201320140SB568](http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140SB568)>.

<sup>81</sup> UNITED STATES OF AMERICA. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663-64. 2011.

<sup>82</sup> UNITED STATES OF AMERICA. *Turner Broad System, Inc. v. FCC* *Turner I*, 512 U.S. 622. 1994.

<sup>83</sup> UNITED STATES OF AMERICA. *Turner Broad System, Inc. v. FCC* *Turner I*, 512 U.S. 662. 1994



transmit[ted] speech” protected by the First Amendment.<sup>84</sup> Nevertheless, the Court devised a three-part intermediate scrutiny test for broadcasting. First, is the broadcast operator a mere conduit of the content?<sup>85</sup> Second, does the operator exist in a quasi-monopoly environment, whereby there is limited ability to publish content through that medium?<sup>86</sup> Finally, is the regulation content neutral, as in the burden is not being imposed because of a broadcaster’s views but is being applied uniformly to all broadcasters?<sup>87</sup>

As for the first prong of the test, the *Turner* Court was amenable to applying intermediate scrutiny because a cable operator only served as a mere conduit to transmit television shows. The cable operator was a conduit because the medium did not allow viewers to converse with the broadcasters or a television program.<sup>88</sup> In *Jian Zhang*, the district court held this prong was not applicable to an internet search engine.<sup>89</sup> The court found that the Baidu search engine was “more than a passive receptacle or conduit for news, comment, and advertising[,]” rather, distinguishable from *Turner*, Baidu was active in engaging its users as it had “purposely design[ed] its search engine algorithms to exclude any pro-democracy topics, articles, publications, and multimedia coverage.”<sup>90</sup> Websites, like those the DNTKA targets, are more than mere conduits but an active, real-time exchange of ideas between users and the operator of the platform.

The second prong of the *Turner* test inquires whether medium exists in a quasi-monopolistic atmosphere, thus making it more acceptable for imposing restriction because of the limited ability for other to control the medium. Access is limited for cable and radio broadcasting where the government must issue license for use because there is a finite number of waves or lines available. Thus, those broadcasters that have a license and the considerable financial means dominate the airwaves while shutting out other speakers.<sup>91</sup> But that is not the environment on the internet. As Justice Souter noted “Through the use of chat rooms, any person with a phone line can become a

<sup>84</sup> UNITED STATES OF AMERICA. *Turner Broad System, Inc. v. FCC Turner*, 512 U.S. 636. 1994.

<sup>85</sup> UNITED STATES OF AMERICA. *Turner Broad System, Inc. v. FCC Turner*, 512 U.S. 629. 1994 (inquiring whether the cable operator a “conduit for the speech of others, transmitting it on a continuous and unedited basis to subscribers[?]”).

<sup>86</sup> UNITED STATES OF AMERICA. *Turner Broad System, Inc. v. FCC Turner*, 512 U.S. 661. 1994; UNITED STATES OF AMERICA. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* 515 U.S. 557. 1995. (inquiring whether the cable operator’s ability to exclude some speakers “gives rise to the Government’s interest in limiting monopolistic autonomy in order to allow for the survival of broadcasters who might otherwise be silenced and consequently destroyed[?]”).

<sup>87</sup> UNITED STATES OF AMERICA. *Turner Broad System, Inc. v. FCC Turner*, 512 U.S. 622. 1994. (inquiring whether the regulation “imposes a restriction, penalty, or burden by reason of the views, programs, or stations the cable operator has selected or will select[?]”).

<sup>88</sup> UNITED STATES OF AMERICA. *Turner Broad System, Inc. v. FCC Turner*, 512 U.S. 629. 1994.

<sup>89</sup> UNITED STATES OF AMERICA. *Jian Zhang v. Baidu.com Inc.*, 10 F.Supp.3d 433. New York. 2014.

<sup>90</sup> UNITED STATES OF AMERICA. *Jian Zhang v. Baidu.com Inc.*, 10 F.Supp.3d 440-41. New York. 2014.

<sup>91</sup> UNITED STATES OF AMERICA. *Turner Broad System, Inc. v. FCC Turner*, 512 U.S. 661. 1994. UNITED STATES OF AMERICA. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* 515 U.S. 577. 1995.

town crier with a voice that resonates farther than it could from any soapbox.”<sup>92</sup> Court decisions have not found this prong applicable to the internet precisely for the same reason Justice Souter gave.<sup>93</sup>

The final prong the *Turner* Court gave considered whether the regulatory burden was content-neutral.<sup>94</sup> The Court determined that because all cable operators were only being required to carry local television programming, the regulation at issue was not content based burden. The Court thought it was important that the regulation applied uniformly to all broadcasters and said it was not being imposed because of a broadcaster’s viewpoint.<sup>95</sup>

Recall that as previously stated, the DNTKA is not content-neutral because it restricts speech based on the reactions to posters’ comments. But even accepting that the regulation applies to all online operators of children directed content, the burden they risk is still distinguishable to that in *Turner*. In the Court’s view, it is far more constitutionally precarious to ban content than require a medium provider to carry additional content.<sup>96</sup> Additionally, the Court rejected the initial version of COPPA because it imposed criminal penalties on persons engaging in protected speech.<sup>97</sup> Similarly, *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, the Court rejected a law that would amount to a substantial financial burden from civil fines if the company published a book by an organized crime figure.<sup>98</sup> The DNTKA similarly imposes substantial civil fines on violators that if not paid, the FTC can pursue criminal action against the platform operator.<sup>99</sup> Consequently, in both respect of a burden, the content removal and the penalty platform operators face make the DNTKA distinguishable from the burden imposed in *Turner*. Thus for prongs of the *Turner* test a lower scrutiny would not be applicable for the DNTKA.

## 6. CONCLUSION

The DNTKA co-sponsors’ ambitions may be well-intentioned in trying to help minors avoid future embarrassment, but the bill the legislators have drafted is deeply flawed in a number of ways.

<sup>92</sup> UNITED STATES OF AMERICA. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997).

<sup>93</sup> UNITED STATES OF AMERICA. *Jian Zhang v. Baidu.com Inc.*, 10 F.Supp.3d 433, 439. New York. 2014.

<sup>94</sup> UNITED STATES OF AMERICA. *Turner Broad System, Inc. v. FCC Turner!* *Turner!*, 512 U.S. 644. 1994.

<sup>95</sup> UNITED STATES OF AMERICA. *Turner Broad System, Inc. v. FCC Turner!* *Turner!*, 512 U.S. 644. 1994.

<sup>96</sup> UNITED STATES OF AMERICA. *Turner Broad System, Inc. v. FCC Turner!* *Turner!*, 512 U.S. 668. 1994 (adding content of local television programs); UNITED STATES OF AMERICA. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 811-12. 2000. (removing content of a signal bleed from the Playboy program).

<sup>97</sup> UNITED STATES OF AMERICA. *Reno v. American Civil Liberties Union*, 521 U.S. 844. 1997.

<sup>98</sup> UNITED STATES OF AMERICA. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116. 1991).

<sup>99</sup> KOHM, James; MOORE, Robin L. *Anatomy of an Order Enforcement Program. Antitrust*, Connecticut, v. 29, n. 3. 2015.

First and foremost, the bill is directed to the content of a service's and person's website. Some of these websites are set up to encourage public discourse and civic participation—that is, free speech and expression, the free interchange of ideas. The versatility of the Internet enables any person to “become a town crier,” no matter his age or market-share.<sup>100</sup>

By requiring operators of children-directed websites—a difficult to determine designation, and to delete on demand whatever photos and comments submitted by child users, the DNTKA deters public discourse. The bill's sponsors have tended to assume that items removed will be those that are embarrassing. But that is not necessarily the case. Teens might be bullied into removing important, even profound messages. The musings and explorations of a youth that provoke response and can lead to the formation of a mature adult might be stifled.

Discourse, even if uncomfortable, might lead to important self-discoveries. For example the postings of Megan Phelps-Roper prompted a 13 word response from David Abitbol—that changed her life—and as she herself argued, for the better. Allowing for the user controlled removal of content has serious consequences for the viability of social media sites themselves. Because the content of a site may be largely composed of such submissions—it essentially puts users in control of the product with the ability to effectively censor portions of it. The bill should clearly be subject to strict scrutiny by the courts.

Social media sites already have a means for the immediate removal of a posting if users abide by it. The bill though, puts an added burden on operators. While the bill recognizes the ability to remove materials will depend upon a changing technology, the possible financial burdens for the cost of compliance or FTC enforcement action may discourage potential website operators from entering the marketplace, thus curtailing innovation and opportunities for self-expression.

Additionally, the practical attributes of social media posting, reposting, editing somewhat, and maybe even to large extent obviate the stated intention of the legislation and its effectiveness. The bill carves out a big exemption for third-party reposted material—as it necessarily must. This means that when a picture or comment goes viral, it is inerasable. Thus the political rhetoric surrounding the bill may create a false impression among the public that youth can be protected when they are not. Parents and youthful posters may act with an unjustified, false sense of security

Current social media and website protections are in place to protect children and youth. Social media sites like Facebook offer warnings and an ability to immediately review and remove a post. But the bill could encourage a broader, “un-ringing the bell” attitude, which has consequences for our society. Do we want to encourage youth

<sup>100</sup> UNITED STATES OF AMERICA. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870. 1997.

to think it is okay to say whatever you want because you can simply take it back? Removing discourse rather than adding to it is not the way to instill in youthful citizens a sense of the free marketplace of ideas in a democracy. More effective might be parents teaching their children and schools teaching their students proper or appropriate digital behavior and a sense of responsibility for their actions, as we do now to avoid and curtail illicit and improper behavior.

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