

# DOES THE CALIFORNIA ERASER LAW WITHSTAND DORMANT COMMERCE CLAUSE SCRUTINY?

## DOES IT DO ANY GOOD AT ALL?

by SAM ERNST

### The California Eraser Law, and Its Detractors

Long ago I promised myself that I would never “tweet.” After all, the only time I have ever read the contents of a tweet, it has been in a news story about some person stepping into public embarrassment. Whether they are insulting a major segment of the population, revealing their scandals and vices, or otherwise exposing themselves, the tweeting public are not doing themselves any favors. See, e.g., Bianca Bosker, *The Most Embarrassing Politician Twitter Scandals: Photos, Weird Videos, And More*, The Huffington Post (Aug. 3, 2011). So I shall not tweet. And who among us is not thankful that the social network did not exist when we were in college? A public chronicle of those years should be discreetly selected and sparse. Today’s youth must be wary not to trigger ticking time-bombs of embarrassment, set to explode when a job interviewer discovers the ill-advised sorority party photo posted on Facebook many years ago.

These impulses of concern for young people have moved the California Legislature to add a new chapter to the Business and Professions Code called “Privacy Rights for Minors in the Digital World,” popularly known as the Internet “Eraser Law.” The law imposes two requirements on operators of Internet websites who have actual knowledge that a California minor is using the website. In general terms, the requirements are as follows: First, if the minor is a registered user of the website (such as a Facebook or

Twitter member), the operator must allow the minor to remove content the minor posted on the website. Second, website operators may not knowingly direct marketing or advertising that falls into certain prohibited categories to California minors (for example, by using the registered minor’s profile information). The prohibited categories of advertising include such things as alcohol, tobacco, firearms, aerosol paint containers “capable of defacing property,” tattoos, tanning devices, and other paraphernalia

of a dissolute and delinquent youth. The law goes into effect on January 1, 2015.

The immediate reaction to the law was mixed, to put the matter politely. Professor Eric Goldman argues that the law could violate the First Amendment as applied to situations where website publishers obtain a free speech interest in content containing the speech of minors, and then are forced to erase that content under the new law. Eric Goldman, *California’s New ‘Online Eraser’ Law Should Be Erased*, Forbes.com (Sept. 24, 2013).

Others have complained that the law does not provide enough protection because it only requires that erased content be invisible to other users and the public; it does not require the actual deletion or complete elimination of the material (something that is, apparently, a technological impossibility in this age when we no longer put men on the moon). See, e.g., *California’s ‘Internet Eraser’ Gives Teens a Second Chance to Make a First Impression Online—But It’s Not a Cure-All...*, JD Supra: Is That Legal? <http://isthatlegal.jdsupra.com/post/63118153520/californians-internet-eraser-gives-teens-a-second> (Oct. 4, 2013).

Still others complain that the law will perversely result in the increased invasion of minors’ privacy because “[t]o comply with the law, for



example, companies would have to collect more information about their customers, including whether they are under eighteen and whether they are in California.” See, e.g., Somini Sengupta, “Sharing With a Safety Net,” *New York Times* (Sept. 19, 2013). This concern is dubious, given that the law only applies to website operators that already have this information, because they are knowingly directing advertising to a California minor or because they know that a registered member of the website is a California minor.

One commentator suggests that the law is bad policy if “teens learn to be less discriminating about what they posted online—only to wake up on their eighteenth birthdays with delusions of Internet infallibility[.]” Katy Waldman, *California’s Internet Eraser Law: Nice Idea, but It Won’t Work*, Slate.com (Sept. 25, 2013). Under this line of reasoning, I suppose one should let one’s children play with the stove, lest they never learn the lessons that come from being burned.

One of the most interesting questions is whether the California Eraser Law is unconstitutional because it interferes with interstate commerce. Website operators use a tool—the Internet—that broadcasts indiscriminately across state and national boundaries. Accordingly, some argue that only the federal government may regulate the Internet. If each state creates its own Internet regulations, the argument goes, it will result in a patchwork of regimes, creating an undue burden on interstate commerce as companies must tailor their broadcasts to particular states and even particular recipients within each state.

### **Is the Eraser Law Invalid Under the Dormant Commerce Clause as an Extraterritorial Regulation?**

Does California’s Internet Eraser Law violate the Commerce Clause of the Constitution, which gives only Congress the power to regulate commerce “among the several states”?

Congress has not itself regulated in this specific area, and so there is no direct federal preemption of the law. Nonetheless, a state law can be unconstitutional under the “dormant” commerce clause if it unduly burdens interstate commerce. There are a variety of tests for determining whether the dormant commerce clause invalidates a

law. The California Eraser Law would appear to survive each of these hurdles.

First, the California law is not facially protectionist or discriminatory. The law applies with equal force to California and out-of-state companies that knowingly direct advertising to minors or register minors as users. Accordingly, the Eraser Law need not pass the strict scrutiny that courts accord protectionist schemes.

Even state laws that are non-discriminatory are unconstitutional if they have the practical effect of regulating out-of-state commerce. Under this principle, courts have stricken state laws regulating the Internet where transactions occurring wholly out of state were swept in by the law. For example, in *Am. Booksellers Found. v. Dean*, 342 F.3d 96 (2d Cir. 2003), the Second Circuit

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declared unconstitutional a Vermont law prohibiting the knowing distribution of pornographic content to minors over the Internet. The court interpreted this prohibition to include the broadcasting of information over websites, and not just direct communications with children. *Id.* at 100. Accordingly, someone broadcasting prohibited information could be liable even if they were conducting their activities wholly outside of the state. *Id.* at 103. The court found that the knowledge requirement of the law would be satisfied under these circumstances, because the out-of-state offender could presume that people in Vermont could see the website, including Vermont minors. *Id.* Accordingly, the court declared the law unconstitutional

because it regulated conduct occurring wholly outside of Vermont. *Id.* at 104. Other state Internet laws having the effect of prohibiting the widespread broadcasting of particular information over the Internet have been stricken under similar reasoning. See, e.g., *ACLU v. Johnson*, 194 F.3d 1149, 1160-63 (10th Cir. 1999).

But the California Eraser Law does not regulate activity occurring wholly outside of the state. Rather than banning the general broadcasting of prohibited information, the law only forbids using a minor’s personal information to direct prohibited advertising to someone whom the website operator has “actual knowledge” is a California minor. Cal. Bus. & Prof. Code § 22580(c). For example, the website provider may not use a registered user’s profile information to target firearms and tattoo advertising to the user if the website provider knows the user is a California minor. Accordingly, this provision of the law only regulates communications intentionally and directly targeted at a California minor. It does not regulate any wholly out-of-state activity.

The law’s command that website providers allow registered California minors to erase their posts similarly regulates conduct having a direct and known connection to specific California residents. It does not regulate wholly out-of-state conduct in violation of the Commerce Clause.

Under similar circumstances, the courts have upheld state regulations of the Internet. For example, in *Ferguson v. Friendfinders, Inc.*, 94 Cal. App. 4th 1255 (2002), the court held that a statute regulating the sending of unsolicited email to California residents did not violate the Commerce Clause. The court held that, unlike in the cases regulating the broadcasting of information, the statute at issue governed only email sent to California residents via equipment located in California. *Id.* at 1264-65. Accordingly, the statute did not regulate wholly out-of-state conduct. Under similar reasoning, the courts have repeatedly affirmed the constitutionality of laws prohibiting the direct and intentional communication of prohibited materials to minors. See, e.g., *People v. Garelick*, 16 Cal. App. 4th 1107, 1122 (2008); *Hatch v. Superior Court*, 80 Cal.

App. 4th 170, 197 (2000).

Like the state laws at issue in these cases, the California Eraser Law likely withstands Commerce Clause scrutiny on the basis that it is tailored to regulate conduct only if there is direct, intentional contact with a California resident.

### Is the Eraser Law Invalid Under the Dormant Commerce Clause Under the Pike Balancing Test?

Even if a state law does not regulate wholly out-of-state commerce, it can be unconstitutional under the dormant commerce clause if it fails the test developed in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). That test asks “if the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefit.” *Id.* at 142.

The state’s interests in protecting California minors from inappropriate advertising or harm to reputation are inarguably legitimate state interests. *See, ACLU*, 194 F.3d at 1161. One may reasonably question, however, how well the California Eraser Law promotes these goals. With respect to the law’s “eraser” protection, there are so many necessary loopholes in the law allowing scandalous information to remain at large that it is unclear if the law is effective at all. First, website providers need not delete or eliminate information that the minor erases, only make it invisible to other users of the website. Cal Bus. & Prof. § 22851(d) (1). The law explicitly allows website providers to maintain the information on their servers (*id.*), meaning that it may come to light to harm to the minor some day despite being “erased.”

Moreover, a minor’s postings need not remain invisible if a third party has copied the minor’s posting and reposted it. *Id.* at § 22851(d)(2). Presumably the law contains this loophole to avoid infringing the re-poster’s First Amendment Rights. But the result is that a vast number of minors’ posts, and any scandalous materials worth their salt, need not be erasable under the law because they will be re-posted by other users.

Finally, the law only gives minors

the right to erase their own posts, and only if they are registered users. *Id.* at § 22851(1). Doubtless, many embarrassing and incriminating prom night photos are posted by one’s “friends.” The Eraser law does not protect our youth from such friendly fire.

Similarly, the advertising restrictions are limited, applying only to the direct, intentional, targeted advertising to minors based on their profile information. The law does not—and cannot under the Constitution—protect minors from the potentially vast quantity of inappropriate advertising that is generally broadcast over the Internet.

In short, the California Eraser Law is too weak of a net to catch the whale of the Internet. The law scarcely puts a dent in the Internet’s capacity to humiliate or corrupt our youths.

Nonetheless, the State has an undeniably legitimate interest in protecting minors. And although courts have inquired into whether a state law is the least restrictive means of achieving the state’s goals (*see, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981)), this law goes out of its way to avoid unconstitutional restrictions. Any less restrictive law would scarcely be a law at all.

Moreover, balanced against the legitimate state interest, the burden on interstate commerce would appear to be negligible. First with respect to the “eraser” provision, it does not appear to impose a tremendous burden on website providers to allow their registered users to erase their posts. Many sites already do this. Facebook instructs users on how to delete a comment or post that they have made. *See*, <https://www.facebook.com/help/www/252986458110193>. LinkedIn does the same. *See*, [http://help.linkedin.com/app/answers/detail/a\\_id/3003/-/deleting-an-update-you've-shared](http://help.linkedin.com/app/answers/detail/a_id/3003/-/deleting-an-update-you've-shared). Such features would appear to be neither technologically burdensome nor otherwise objectionable because website providers already voluntarily provide them.

Similarly, the technology to control

which advertising reaches particular users appears to be ubiquitous and voluntarily adopted in the industry. LinkedIn advertises its ability to “[r]each your ideal customers with LinkedIn ads,” using registered users’ profile information to direct advertising. *See*, <https://www.linkedin.com/ads/>. Facebook too trumpets that it “can target your ads to exactly the people you’d like to connect with.” *See*, <https://www.facebook.com/business/products/ads/>. Apparently even “the most basic of mobile apps” can target advertising to users based on their age and address. *See*, Jim Edwards, *How Snapchat Will Make Money Even Though It Deletes the Most Important Asset It Has—Data*, Business Insider (Nov. 21, 2013). Accordingly, the technology to make it possible for website providers to avoid targeting known California minors with advertisements related to guns, drugs, and other prohibited subject matter would appear to be widely available and already in use.

In short, the California Eraser Law likely withstands a dormant commerce clause challenge. The real question is whether the law does any good at all, given the large quantity of inappropriate advertising it lets slip through to minors and the large quantity of scandalous posts that need not be erasable; and given that the major social network providers appear already to be complying with major aspects of the law.



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