Catholic University Journal of Law and Technology

Volume 25 | Issue 1 Article 2

2017

Targeted Advertising and the First Amendment: Student Privacy vs. Protected Speech

Marco Crocetti
Holland & Knight LLP

TARGETED ADVERTISING AND THE FIRST AMENDMENT: STUDENT PRIVACY VS. PROTECTED SPEECH

Marco Crocetti*

I. INTRODUCTION

As technology has started to play a bigger role in education, student information has increasingly shifted from paper to digital and online formats. This shift has unlocked many new potential uses for student information. Consequently, schools from the Kindergarten to 12th grade level ("K-12") have started to adopt online education technology, for example, tools that allow students to collaborate on assignments, or to receive lectures, textbooks, homework, and assessments online.[1] As the adoption rate of online education technology has increased, so has the quantity and quality of student information collected by schools, government entities, and education technology companies ("ETCs").

As the collection and use of student information by schools and ETCs has increased, state legislatures throughout the country have begun regulating student information. In 2014, at least 110 bills attempting to regulate student information were introduced throughout 36 state legislatures.[2] In 2015, the number rose to at least 182 bills.[3] These proposals seek to regulate student information privacy (e.g. how student information can be accessed, used, or disclosed) and security (e.g. how student information must be stored and protect-

* Juris Doctor 2016, Georgetown University Law Center. I am deeply grateful to Professor David Vladeck for his invaluable guidance, challenges and feedback on this project. Additionally, for the many helpful conversations, debates and feedback, I am also very thankful to Mack Abbeduto.

1 *See generally* Cal. Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1177 (2014 Reg. Sess.) as amended Apr. 21, 2014, 5 (enumerating methods to protect students ranging from K-12 from targeted advertisements and disclosure of salient information).

2 *Student Data Privacy Legislation: What Happened in 2015, and What Is Next?*, DATA QUALITY CAMPAIGN 1 (Sept. 24, 2015), http://dataqualitycampaign.org/find-resources/student-data-privacy-legislation-2015.

3 *Id.*

ed), without hindering educational quality and opportunity. For example, many states have attempted to regulate the permissibility of targeted advertising based on student information.[4] As a result, schools and ETCs that provide services involving student information have had to grapple with increased compliance costs in order to avoid liability and public relations ("PR") risks.[5]

This article will analyze the constitutionality of California's approach in the recently passed "Student Online Personal Information Protection Act" ("SOPIPA")[6] to regulating targeted advertising based on student information.[7] This article was motivated by the negative economic consequences of banning targeted advertising, namely the closing off of a potentially large revenue source that could be diverted to making educational resources cheaper and to investing in lower income technologically equipped-school districts.[8] This article will show that SOPIPA bars certain forms of advertising that could be beneficial to students, parents, and teachers. Subsequently, this article will argue that SOPIPA's advertising prohibitions raise serious First Amendment concerns, namely that when construed fairly, SOPIPA is overly broad and more restrictive than necessary to advance California's alleged governmental objectives. Finally, this article will conclude by proposing a number of less restrictive alternatives that would sufficiently advance California's governmental objective, such as consent exceptions, industry self-regulatory regimes, and advertising filtering regimes. These alternatives would be easy to implement, and many have already been incorporated into similar state student privacy laws throughout the country.

II. BACKGROUND AND IMPETUS FOR SOPIPA

SOPIPA is the product of privacy and security concerns raised by privacy advocates and parent groups in response to the increased collection of student

---

4 *See generally* H.B. 1961, 2015, 90th Gen. Assemb., Reg. Sess. (Ark. 2015); S. 89, 2015 Gen. Assem. (Ga. 2015); S. 183, 454 127th Reg. Sess. (Me. 2015); S. 187, 78th Reg. Sess. (Or. 2015); H.B. 289, 1248 (Md. 2016).

5 Michelle J. Anderson & Jim Halpert, *New student data privacy laws: top points for school contractors and K-12 education sites, apps and online services*, DLA PIPER (Jan. 6, 2015), https://www.dlapiper.com/en/us/insights/publications/2015/01/new-student-data-privacy-laws.

6 *See generally* CAL. BUS. & PROF. CODE § 22584a-r (West 2015) (setting forth proscribed activities regarding targeted advertisements and disclosure of personal information for K-12 students).

7 SOPIPA, also known as California Senate Bill 1177, was passed by the California state legislature at the end of 2014, and became effective on January 1, 2016. *Id.*

8 Kate Kaye, *In Wake of Privacy Laws, Kids' Sites See Ad Revenue Plummet*, ADAGE (Aug. 23, 2013), http://adage.com/article/privacy-and-regulation/kids-sites-freaking-privacy-laws/243795.

information.[9] However, before delving into these concerns, it is important to first understand the benefits of the increased collection of student information.[10] First, teachers can better allocate instruction time by using services that identify in real-time which students are struggling on a particular subject.[11] Second, many educational tools now allow parents to create parental access accounts, where they can track their child's progress before a point of no return, e.g. finalized grades on a report card.[12] Third, academic experts have used student information to better analyze how students learn and to evaluate curriculum models, education policies (e.g., No Child Left Behind), and the predictive value of standardized tests.[13]

ETCs have also used student information to create tools that allow students to personalize learning.[14] Personalized learning means that "instruction is paced to learning needs, tailored to learning preferences, and tailored to the specific interests of different learners…Learning goals are the same for all students, but students can progress through the material at different speeds according to their learning needs. For example, students might take longer to progress through a given topic, skip topics that cover information they already know, or repeat topics they need more help on."[15] Schools across the United States have started to recognize the benefits of a personalized learning model, compared to the current one-size fits all model.[16]

These technologies have the potential to greatly enhance student achievement; however, they must not become a privilege only for those school districts and parents that can afford it. Unfortunately, there are currently a variety of economic factors that have made it difficult for schools to adopt new ETC

---

9 Benjamin Herold, *Landmark Student-Data-Privacy Law Enacted in California*, EDWEEK (Sept. 30, 2014), http://blogs.edweek.org/edweek/DigitalEducation/2014/09/_landmark_student-data-privacy.html.

10 *See generally Who uses student data?*, DATA QUALITY CAMPAIGN (Nov. 24, 2014), http://dataqualitycampaign.org/find-resources/who-uses-student-data.The increased collection of student information has resulted in many beneficial applications, largely created by ETCs, for education stakeholders across the spectrum, including parents, students, teachers, school administrators, state and federal departments of education, education researchers, policy makers, and ETCs. *Id.*

11 *Data: The Missing Piece to Improving Student Achievement*, DATA QUALITY CAMPAIGN (Apr. 23, 2013), http://dataqualitycampaign.org/find-resources/data-the-missing-piece-to-improving-student-achievement.

12 *Id.*

13 *Id.*

14 *Edtech Wiki: Personalized Learning*, EDSURGE, https://www.edsurge.com/research/edtech-wiki/personalized-learning (last visited Sept. 30, 2016).

15 *Id.*

16 *Id.*

tools. First, state education budgets have been plagued with funding cuts.[17] Second, many schools throughout the country, especially in lower income and rural areas, do not have sufficient computer or internet infrastructures to run new education technology tools.[18] Further exacerbating this problem is the reality that many families still do not have their own home computer or a sufficient internet connection.[19] Third, lower income and rural areas, compared to schools in higher income urban areas, often do not have the budget to invest in upgrading their technology (e.g. buying more computers or upgrading their internet speeds), or to afford education technology that is not free (i.e. that charges a one-time fee, or subscription model).[20] This is largely due to the fact that roughly 40 percent of school funding is based on local property taxes – which often results in disproportionately small budgets for lower income areas.[21] Finally, due to the current political trend surrounding school funding, it is unlikely that these budgets will increase by any marketable amount in the near future.[22] Consequently, these dynamics are creating an increasing digital divide between who has access to the latest education tools.

Fortunately, revenue from targeted advertising may be able to help remedy the growing digital divide in education. In response to educational budgetary constraints, and to increase the availability of their services, ETCs have started to realize the commercial potential of student information.[23] Through advertising ETCs can potentially supplement the revenue from their education technology tools and services, partially or completely, allowing them to offer their services to schools and students at a reduced cost. In order to maximize revenue from advertising, ETCs may want to use student information, or even teacher and parent information, collected through their tools, to target advertisements to students, parents, and teachers.[24] Thus, the promulgation of student

---

17 Michael Leachman, et al., *Most States Have Cut School Funding, and Some Continue Cutting*, CTR. ON BUDGET & POL'Y PRIORITIES (Jan. 25, 2016), http://www.cbpp.org/research/state-budget-and-tax/most-states-have-cut-school-funding-and-some-continue-cutting.

18 *Id.*

19 John Wihbey, *Computer Usage and Access in Low-Income Urban Communities*, JOURNALIST'S RES., http://journalistsresource.org/studies/society/internet/computer-usage-access-low-income-urban-communities (last updated Aug. 19, 2013).

20 *Id.*

21 Press Release, Dep't of Educ., More Than 40% of Low-Income Schools Don't Get a Fair Share of State and Local Funds, Department of Education Research Finds (Nov. 30, 2011).

22 Michael Leachman, *supra* note 18.

23 Tanya Roscorla, *California Protects Student Data Privacy with Two Bills*, CTR. FOR DIGITAL EDUC. (Sept. 4, 2014), http://www.centerdigitaled.com/news/California-Protects-Student-Data-Privacy-with-Two-Bills.html.

24 For example, they may want to advertise extracurricular activities, supplies, supple-

privacy regulations should not be an isolated process, and instead should acknowledge the broader education landscape.

Despite the beneficial uses of student information, the increased collection of potentially sensitive and personal information has generated concern among parent and privacy groups.[25] Primary areas of concern have included how personal student information can be collected, used, disclosed, accessed, and secured. Parent and privacy groups are especially concerned with the personal student information being used or disclosed for targeted advertising or other commercial purposes.[26] For example, ETCs could use personal student information to create profiles describing various attributes of a student. Such a profile could in turn be used to tailor advertisements to a student based on their personal information. These concerns have only been exacerbated by education technology's rapid growth and school adoption rate.[27]

California happens to house the headquarters of numerous ETCs and has a state legislature that heavily focuses on protecting consumer privacy.[28] Thus, it is no coincidence that the California state legislature would address issues relating to the management of student information. California Senator Darrell Steinberg, now retired, introduced SOPIPA as a bill to promote the privacy and security of student information.[29] He wanted to limit the ability of ETCs to use or disclose student information for commercial purposes, especially targeted advertising. The California Senate Judiciary Bill Analysis of SOPIPA documented Senator Steinberg's intent as wanting to close "loopholes that can be exploited by Internet companies for profit through collecting and sharing students' personal information obtained through online services marketed for school purposes."[30] Senator Steinberg believed that Internet companies were "operating with zero restrictions . . . [which] is unacceptable. Kids are in the classroom to learn and we [must] value the security of their personal information above private profit."[31]

---

mentary tutoring services, or even financial aid information for college.

25 S. Judic. Comm., Analysis of S.B. 1177, 2013-2014 Reg. Sess., at 2 (Cal. 2014).

26 James P. Steyer, *Bill Would Safeguard Students' Data from Cloud-Computing Providers*, COMMON SENSE MEDIA (Sept. 3, 2014), https://www.commonsensemedia.org/kids-action/blog/bill-would-safeguard-students-data-from-cloud-computing-providers; Tanya Roscorla, *supra* note 24.

27 James P. Steyer, *supra* note 27.

28 Marc Lifsher, *New California Assembly Privacy Panel is 'The Key Committee to Watch'*, L.A. TIMES (Jan. 18, 2015), http://www.latimes.com/business/la-fi-capitol-business-beat-20150119-story.html.

29 S. Judic. Comm., Analysis of S.B. 1177, 2013-2014 Reg. Sess., at 7 (Cal. 2014).

30 *Id*. at 4.

31 *Id*. The claim that there are "zero restrictions" was likely a hyperbolic statement by Senator Steinberg. Under California law minors (e.g. under age 18) are protected by California Senate Bill 568 (2013) (authored by Senator Steinberg). Additionally, under federal law student information is protected by FERPA, COPPA and the PPRA (discussed below).

III. WHAT SOPIPA REGULATES AND REQUIRES

SOPIPA requires entities that provide online K-12 educational services to comply with certain privacy and security requirements regarding the information they collect.[32] A summary of SOPIPA's requirements is outlined in the law's digest (i.e. a summary of how the new law affects current law).[33] The digest states:

> This bill would prohibit an operator [defined below] of an Internet Web site, online service, online application, or mobile application from knowingly [1] engaging in targeted advertising to students or their parents or legal guardians, [2] using covered information [defined below] to amass a profile about a K–12 student, [3] selling a student's information, or [4] disclosing covered information . . . . The bill would [also] require an operator to implement and maintain reasonable security procedures and practices appropriate to the nature of the covered information, to protect the information from unauthorized access, destruction, use, modification, or disclosure, and to delete a student's covered information if the school or district requests deletion of data under the control of the school or district.[34]

A. What Entities Are Covered by SOPIPA?

Before delving into SOPIPA's advertising regulations, it is important to first understand what entities are regulated. SOPIPA regulates "operators," which are defined as "the operator of an Internet Web site, online service, online application, or mobile application with actual knowledge that the site, service, or application [1] is used primarily for K–12 school purposes and [2] was designed and marketed for K–12 school purposes."[35] It is helpful to clarify that the operator definition does not use a contract base approach to regulating operators. Thus instead of stating that any company that contracts with a school or teacher to provide an educational service must comply with the following requirements, this law takes a categorical approach of regulating providers – i.e. anyone that provides a service that falls under the operator and "K-12 School Purposes" definition. The categorical approach is broader in the sense that it includes all companies that fit into this category, but narrower in the sense that a contract approach could apply to any company that contracts with a school irrespective of the type of service being provided. However, to fully

---

Id.

32 CAL. BUS. & PROF. CODE § 22584.

33 Under California Law, the "Digest" is language prepared by the Legislative Counsel and summarizes the effect of the proposed bill on current law. *A Guide for Accessing California Legislative Information on the Internet*, OFFICIAL CAL. LEGIS. INFO., http://www.leginfo.ca.gov/guide.html (last visited Sept. 29, 2016).

34 S.B. 1177, Reg. Sess. 2013-2014 (Cal. 2014).

35 *Id.*

understand the scope of the operator definition and what services and entities are covered we need to understand what are considered "K-12 School Purposes."

"K-12 School Purposes" are defined as:

> Purposes that customarily take place at the direction of the K–12 school, teacher, or school district or aid in the administration of school activities, including, but not limited to, instruction in the classroom or at home, administrative activities, and collaboration between students, school personnel, or parents, or are for the use and benefit of the school.[36]

Applying the Operator and "K-12 School Purposes" definitions together, SOPIPA regulates a broad spectrum of online services in schools. SOPIPA regulates any operator that designs and markets a website for "K-12 School Purposes," and knows that the website is primarily used for those purposes. For example, an operator would be regulated if the operator (1) designed and marketed a website that helped teachers lecture to students, and (2) knew that the website was primarily used to help teachers lecture to students.

The core purpose of SOPIPA is to regulate services that are used in schools, at direction of a teacher, and are part of the student's curriculum.[37] However, the broad language of the "K-12 School Purposes" definition may ensnare companies and services that are beyond the intended scope of SOPIPA. For example, SOPIPA regulates entities that operate services that (1) are designed and marketed for X, and (2) are primarily used for X. For this example, X is functioning as an abbreviation for the "K-12 School Purposes" definition. However, within SOPIPA it is unclear whether X only includes a purpose that is uniquely related to a school (e.g. an online high school science textbook), or if X is simply a purpose that could benefit a school but is not unique to a school (e.g. an accounting service that is used in the same way by a post office, a police department, or a private company). Student privacy laws in Maine, Nevada, Virginia, and Washington have used more precise language to make clear that their laws only regulate services specifically "designed and marketed for use in public schools."[38] Thus, under Washington's student privacy law, fictional company Infinity's information storage platform would not be regulated if it was not designed and marketed for use in public schools, but was instead designed and marketed for use by any entity that wants to store information in their storage system.

---

36 *Id.*

37 S.B. 1177, 2013-2014 Leg. Sess. (Cal. 2014).

38 *See* S.B. 463, 78th Reg. Sess. (Nev. 2015) ("School service" means an Internet website, online service or mobile application that: (a) Collects or maintains personally identifiable information concerning a pupil; (b) Is used primarily for educational purposes; and (c) Is designed and marketed for use in public schools and is used at the direction of teachers and other educational personnel."); *see also* H.B. 1612, Gen. Assemb. (Va. 2015); S.B. 5419, 64th Leg., Reg. Sess. (Wash. 2015).

Whereas under these alternative state definitions it would be clear that Infinity's information storage platform would not be regulated under SOPIPA if it was marketed their services generally and not uniquely for schools – the opposite interpretation may be reasonable under SOPIPA's definition.[39] For example, Infinity's information storage platform could be regulated under SOPIPA simply if Infinity (1) marketed the product to schools (in addition to other entities) and (2) if a school could possibly benefit from an information storage service that could store all of the school's records. Arguably, to fall within SOPIPA's scope, Infinity would not need to market the service to schools at all, but simply market to anyone who is interested in information storage. Thus Infinity's information storage system could be regulated under SOPIPA even if information storage service is not uniquely designed and marketed for student information storage, and could simply be just as useful to a private hospital for storing medical records. Consequently, the following "K-12 School Purposes" language, "for the use and benefit of the school" or "aid in the administration of school activities,"[40] can be interpreted as including any activity that could possibly benefit the school or aid in its administration.

The operator definition can also be interpreted more broadly than intended by the California state legislature. First, the operator definition is not narrowly tailored to only regulate a specific type of entity, e.g. a corporation. Instead, the lack of specificity means that an operator could be any person, corporation, nonprofit, or governmental entity that operates (e.g. controls the functioning of) a website that falls under the operator and "K-12 School Purposes" definitional scope.[41] Second, the operator definition functions to regulate the entity that operates the website, instead of the website itself.[42] For example, if a company operates two information storage services, one that is designed and marketed generally (e.g. to anyone who wants to store any information), and another storage service that is designed and marketed for "K-12 School Purposes," and primarily used for those purposes; the company as a whole could be regulated by SOPIPA (because it technically is an Operator of a "K-12 School Purposes" service). Consequently, the company would have to abide by SOPIPA's requirements and conduct prohibitions when operating the more general service, in addition to the "K-12 School Purposes" service. This is clear because SOPIPA's ban on advertising and other conduct prohibit an "operator,"

---

39 S.B. 463, 78th Leg. Sess. (Nev. 2015); H.B. 1612, Gen. Assemb. (Va. 2015); S.B. 5419, 64th Leg., Reg. Sess. (Wash. 2015).

40 S.B. 463, 78th Leg. Sess. (Nev. 2015); H.B. 1612, Gen. Assemb. (Va. 2015); S.B. 5419, 64th Leg., Reg. Sess. (Wash. 2015).

41 S.B. 1177, 2013-2014 Leg. Sess. (Cal. 2014).

42 *Id*.

not the operator's service, from engaging in such activity.[43] Specifically, SOPIPA states "[a]n operator shall not knowingly engage in any of the following activities with respect to their site, service or application."[44]

When enacting similar laws, Arkansas, Georgia, Maryland, Maine, and Oregon have attempted to fix the "Operator" definition ambiguity by adding the following change to be precise as to the types of services and business practices regulated by the law, specifically adding "to the extent that the person is operating in that capacity" to the end of the definition.[45] This amendment is *critical* to ensuring that the law doesn't apply to the non-school portions of an operator's service.[46]

Further, even if SOPIPA's conduct prohibitions were interpreted to only pertain to operator activity "with respect to their site, service or application," the law does not specify that the prohibition *only* applies to their 'K-12 School Purposes' site, service or application.[47] Instead, this clause could refer to any of its many services. For example, because fictional company Infinity is an "operator" for its Student Education App, which was designed and market for "K-12 School Purposes", it arguably could be subject to SOPIPA's conduct prohibitions regarding all services, in addition to the Student Education App, due to the statutes imprecision and focus on "operator conduct" versus "service conduct". Thus, under SOPIPA, Infinity's information storage platform, which was not designed and marketed for "K-12 School Purposes," could be subject to SOPIPA's conduct prohibitions.[48]

B. What "Operator" Conduct Does SOPIPA Prohibit?

Understanding the scope of what entities and services are regulated by SOPIPA will provide a helpful foundation for the focus of this article, namely the constitutionality of the absolute prohibition on targeted advertising. The prohibition on targeted advertising states that:

---

43 CAL. BUS. & PROF. CODE § 22584(a).

44 *Id.* at § 22584(b).

45 H.B. 1961, 90th Gen. Assemb., Reg. Sess. (Ark. 2015); S.B. 89,153rd Gen. Assemb. (Ga. 2015); H.B. 298, Gen. Assemb., Reg. Sess. (Md. 2015); S.B. 183, 127th Gen. Assemb., Reg. Sess. (Me. 2015); S.B. 187, 78th Leg. Assemb., Reg. Sess. (Or. 2015).

46 *SOPIPA: Student Online Personal Information Protection Act*, TERMSFEED (Jan. 26, 2015), https://termsfeed.com/blog/sopipa/ (listing the possible entities that are considered operator under the act).

47 CAL. BUS. & PROF. CODE § 22584(b).

48 *Cf*., *Id.* at § 22584(m) ("This section does not apply to general audience Internet web sites, general audience online services, general audience online applications, or general audience mobile applications, even if login credentials created for an operator's site, service, or application may be used to access those general audience sites, services, or applications.").

> (b) An operator shall not knowingly engage in any of the following activities with respect to their site, service, or application . . . (1)(A) Engage in targeted advertising on the operator's site, service, or application, or (B) target advertising on any other site, service, or application when the targeting of the advertising is based upon any information, including covered information and persistent unique identifiers, that the operator has acquired because of the use of that operator's site, service, or application.[49]

To understand the scope and consequences of the targeted advertising ban it is helpful to break up the analysis into the following four categories. First, what would trigger the targeted advertising ban? The ban is triggered when advertisements are targeted based on "any information, including covered information and persistent unique identifiers, that the operator has acquired because of the use of that operator's site, service or application."[50] This is a very broad trigger, because it includes literally "any information," instead of being scoped more narrowly, for example, to only "covered information," which is defined in the law.[51] If the trigger only included covered information the ban would focus more on sensitive information, i.e., information that personally identifies a student like the student's name or email address.[52] Instead the ban could be triggered by the use of de-identified information, (i.e. information that cannot reasonably be used to identify or trace back to a student) or aggregated data (i.e. the mean test scores of all students in a school).[53]

---

49 CAL. BUS. & PROF. CODE § 22584(b)(1).

50 *Id.* at § 22584(b)(1)(B).

51 *Id.* at § 22584(h)(i).

> "Covered information" means personally identifiable information or materials, in any media or format that meets any of the following: (1) Is created or provided by a student, or the student's parent or legal guardian, to an operator in the course of the student's, parent's, or legal guardian's use of the operator's site, service, or application for K–12 school purposes. (2) Is created or provided by an employee or agent of the K–12 school, school district, local education agency, or county office of education, to an operator. (3) Is gathered by an operator through the operation of a site, service, or application described in subdivision (a) and is descriptive of a student or otherwise identifies a student, including, but not limited to, information in the student's educational record or email, first and last name, home address, telephone number, email address, or other information that allows physical or online contact, discipline records, test results, special education data, juvenile dependency records, grades, evaluations, criminal records, medical records, health records, social security number, biometric information, disabilities, socioeconomic information, food purchases, political affiliations, religious information, text messages, documents, student identifiers, search activity, photos, voice recordings, or geolocation information.

Id.

52 *Id.* at § 22584(h)(i).

53 For more examples and explanation of aggregate data in the education context *See* DEP'T OF EDUC., PRIVACY TECH. ASSISTANCE CTR., FREQUENTLY ASKED QUESTIONS – DIS-

Further, it is important to understand that "any information" is not limited to student related information. Instead "any information" could include all of the information collected from teachers, school administrators, and parents that use the regulated service. For example, the "Covered Information" definition includes personally identifiable information or materials that are "created or provided by an employee or agent of the K-12 school, school district, local education agency, or county office of education, to an operator."[54] Thus the targeted advertising ban does not textually have a student focus, but instead has a "User" focus, i.e. prohibiting using or disclosing any information collected from anyone through the service for targeted advertising purposes. When referred to below, "User" will be defined as any Student, Parent, Teacher, or School Official that uses an Operator's "K-12 School Purposes" service. Consequently, the ban also applies to all audiences, i.e. SOPIPA prohibits targeting advertisements to anyone, whether they are students, parents, minors, adults, schools, or business.[55]

Second, what activity does the ban prohibit? The first word in the ban, "engage," is a broad term that prohibits any operator conduct that facilitates targeted advertising (whether the operator is acting alone or with third parties).[56] In practice this means that an operator cannot collect, use or disclose any information acquired from the use of its site for the purpose of targeted advertising.[57] It will be helpful to discuss "use" and "disclose**"** separately. Although illegal under SOPIPA, there are many ways an operator hypothetically could use information such as "covered information" to serve advertisements without disclosing it to third parties.[58] For example, many websites currently serve advertisements by creating forms generated by personal information collected from consumers.[59] Imagine a form like a menu of drop down boxes where advertisers can select from a list of demographics (e.g. age, gender, location, etc.), and the website will send the advertisements to the consumers that fit into those demographics.

If information is properly de-identified, the advertiser is unlikely to learn the identities of the individuals who receive the advertisements.[60] Although, in

---

CLOSURE AVOIDANCE, 1-2 (2013), http://ptac.ed.gov/sites/default/files/FAQs_disclosure_avoidance.pdf (explaining that aggregate data still requires disclosure avoidance to prevent identification).

54 CAL. BUS. & PROF. CODE § 22584(h)(i)(2).

55 *Id.* at § 22584(b)(1)(A).

56 *Id.* at § 22584(b).

57 *Id.* at § 22584(1)-(3).

58 *Id.* at § 22584(b)(1).

59 *How to Target Facebook Ads: Refine Your Advertising to Reach the People That Matter Most to Your Business*, FACEBOOK, https://www.facebook.com/business/a/online-sales/ad-targeting-details (last visited Oct. 10, 2016).

60 *Cf. supra* note 54, at 3 (explaining there can be a small risk of de-identification).

some cases there can be a risk of re-identification if the de-identification is not executed rigorously to make sure all personal identifiers are removed, or if the data set concerns a small population of people and the person seeking to re-identify knows data points about the person they are looking for.[61] For example, take a pizza advertisement; the advertiser is unlikely to learn that it is John or Jane specifically (i.e. compared to someone else) that are thirty, live in Washington, D.C. and like pizza. Instead all the advertiser would know is that the pizza advertisement has been sent to men and women in their thirties in Washington, D.C. Through this method, the operator can decide what information the advertiser does and does not receive. The operator can prevent the advertiser from receiving a consumer's personal information, such as the consumer's name or email. For example, the operator can create a system where the advertiser can only view aggregate statistics of that information (e.g. there are five hundred men and women in their thirties in Washington, D.C. that like pizza, and that are consumers of the operator's website).

In contrast, if operators disclose (in addition to only using) personal information collected from consumers to advertisers, then the same demographic forms, provided by operators and used by advertisers, would contain personal information. For example, the demographic forms would have a list of the names of John, Jane and every other man and women in their thirties in Washington, D.C. that likes pizza and is a consumer of the operator's website. The prohibition on using information for targeted advertising is further complicated by SOPIPA's 'Amassing a Profile' ban. This provision prohibits an operator from amassing a profile on a student except for "K-12 School Purposes."[62] A student information profile can be analogized to a student's education record, which includes a student's name, address, courses, and grades. However, a student information profile can also include information on a student's online behavior such as their website browsing history, or how long it took the student to complete an assignment.

Third, where are targeted advertisements prohibited? Neither an operator, nor any other entity (i.e., third party advertiser), can target advertise on the operator's service. For example, an operator providing a service to complete homework problems cannot advertise supplementary practice problems on the

---

61 *See Id*. at 2 (explaining that an accidental disclosure can occur when data in aggregate reports are unintentionally presented in a manner that allows individual students to be identified).

62 *See* CAL. BUS. & PROF. CODE § 22584(b)(2) (regarding the prohibition on amassing a profile, SOPIPA states that an operator cannot knowingly: "(2) Use information, including persistent unique identifiers, created or gathered by the operator's site, service, or application, to amass a profile about a K–12 student except in furtherance of K–12 school purposes.").

service. The ban also prohibits the operator from using or disclosing any information it has collected to target advertisements "on any other site, service, or application."[63] For example, an operator cannot use collected information to tailor the advertisements viewed on CNN's website by students or parents. Thus, an operator cannot target advertisements on or off its "K-12 School Purposes" service.

C. Beneficial Advertising Banned Under SOPIPA

Banning targeted advertising outright has broad consequences. Because the ban prohibits any type of advertisement, regardless of its content, the ban is not limited to advertisements that are predatory or deceptive, i.e. intended to induce consumers, especially vulnerable consumers, with false or misleading information. Thus, the ban also prohibits a wide variety of non-deceptive ads that parents, students and teachers could find valuable. For example, they are likely to find valuable advertisements related to education, jobs, or politics. In addition to its breadth, the ban is absolute and does not provide users (i.e., parents, students, or teachers) with choice regarding whether or not they would like to receive certain advertisements. Failure to provide a consent mechanism represents a major deviation from other statutes that seek to protect the privacy of minors and students.[64] Although the ban absolutely prohibits targeted advertisements, SOPIPA does not prohibit presenting the same exact advertisement as long as it is not targeted-based information collected by an operator its "K-12 School Purposes" service.[65] Thus, general (non-targeted) advertisements that are presented in the education technology platform to every teacher or every student in the school are *not* prohibited. Following are examples of some of the least controversial categories of advertisements that 'Users' could reasonably find valuable.

College & Career Counseling Ads: One could imagine a "K-12 School Purposes" service that has an online college counseling tool where students can input the following information: grades, academic interests, extracurricular activities, and a list of desired colleges. To many, this request for information on the internet is a very familiar and routine exercise, often taking the form of googling factoids to rebut friends, entering travel dates to book flights, or looking up the best new restaurants in your area. The results generated often fit into one of two categories: (1) those paid for by advertisers, or (2) those not paid

63 *Id.* at § 22584(b)(1)(B).

64 *See, e.g.*, Children's Online Privacy Protection Rule, 16 C.F.R. § 312.5(a)(1-2) (2016); Family Educational Rights and Privacy, 34 C.F.R. § 99.30(a) (2016); Protection of Pupil Rights Amendment, 20 U.S.C. § 1232h(b) (2015).

65 CAL. BUS. & PROF. CODE § 22584(o).

for by advertisers and instead are generated by relevance to the inputted terms. In the second category, a student would enter the above information and receive information on all of the most relevant colleges or jobs, without these results being influenced by one of the colleges bidding to be higher up in the results. This request for information could also be helpful in recommending to students the next book in a series, or supplementary reading if the student would like to go further into a certain subject.

There is also a third scenario, where the colleges generated in the non-altered search may want to unilaterally provide tailored follow up information to the student. Based on the inputted information, parents and students could receive advertisements about financial aid options, college application counseling, or college specific information. College specific information could include test score and GPA requirements, department strengths (e.g. the college is ranked fifth in math), career placements, the price of living, tuition costs and financing options. Similarly, such a tool could be used by employers to target internships and extracurricular activities to students, based on student-selected interests.

On an imaginary spectrum of what is and is not advertising, requests for information with results generated without any influence or payment by the result entity (i.e. the college, company etc.) are theoretically the least likely to be considered advertisements and can provide valuable information to students. Many states that have adopted their own versions of SOPIPA have realized the value of these recommendations, have decided to define targeted advertising, and provide an exemption for such 'recommendation engines.'[66] For example, the Maryland Student Privacy law passed in 2015, modeled after SOPIPA, created a new section stating:

> (j) This Section does not limit the ability of an operator to: (2) Use recommendation engines to recommend to a student additional content or services relating to an educational, other learning, or employment opportunity purpose within an operator's site, service or application if the recommendation is not determined in whole or in part by payment or other consideration from a third party; (3) Respond to a student's search query, other request for information, or request for feedback if the information or response is not determined in whole or in part by payment or other consideration from a third party.[67]

Arkansas, Maine, Georgia, Nevada, and Washington have all enacted simi-

---

66 *See* Amelia Vance, *Policymaking on Education Data Privacy: Lessons Learned* 8 (2016), http://www.nasbe.org/wp-content/uploads/Vance_Lessons-Learned-Final.pdf (providing examples of states such as Virginia and Utah that have amended its SOPIPA-style law to define 'targeted advertising' and allowing 'recommendation engines' as an exception).

67 H.B. 298, 435th Gen. Assemb., Reg. Sess. (Md. 2015).

lar language to the recommendation engine exception,[68] and Arkansas, Georgia Nevada and Oregon have all enacted similar language to the request for information exception.[69]

Discounts Ads: One could also envision businesses having an incentive to offer discounts to their services for being able to provide targeted advertisements. For example, an operator could be willing to discount the subscription fee for its 'K-12 School Purposes' service if it could recoup revenue through targeted advertising. Additionally, extracurricular math or science camps could be willing to discount the admission fees to their camps if they can target their advertising to students interested in math and science. For advertisers, it could be worth discounting their services because, due to the targeted information, they would get more value for each advertisement by serving consumers who are more likely to be interested in their services. Targeted advertisements to parents, students, and teachers could also increase the reach of an advertiser's brand.

Political Ads: This article takes the position that students should not be insulated from the political discourse. Prohibiting political advertising in schools could act to close off a major forum for children to receive political information and be able to engage in the debate. Children spend a considerable amount of their childhood in school settings, and because school attendance is compulsory, children would have little freedom to avoid any political content they are exposed to in schools. Additionally, it should not matter if the student audience cannot vote at the time of election because early education will promote a more politically informed electorate. Students' ineligible to vote can still participate in the political process by writing letters, organizing events, and knocking on doors.

IV. FIRST AMENDMENT: FREE SPEECH DOCTRINE

Any statute that restricts expressive activity must be viewed under the lens of the First Amendment.[70] The First Amendment provides, in part, that "Congress shall make no law . . . abridging the freedom of speech."[71] When deter-

---

68 H.B. 1961, 90th Gen. Assemb., Reg. Sess. (Ark. 2015); S.B. 89, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015); H.B. 298, 435th Gen. Assemb., Reg. Sess. (Md. 2015); S. Proposal 183, 127th Leg., Reg. Sess. (Me. 2015); S.B. 463, 78th Leg., Reg. Sess. (Nev. 2015); S.B. 5419, 64th Leg., Reg. Sess. (Wash. 2015).

69 H.B. 1961, 90th Gen. Assemb., Reg. Sess. (Ark. 2015); S.B. 89, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015); H.B. 298, 435th Gen. Assemb., Reg. Sess. (Md. 2015); S.B. 463, 78th Leg., Reg. Sess. (Nev. 2015); S.B. 187, 78th Leg. Assemb., Reg. Sess. (Or. 2015).

70 Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

71 U.S. CONST. amend. I.

mining whether a statute violates the First Amendment, the Supreme Court generally will first examine whether the expression is protected.[72] Commercial speech, i.e. speech advertising a product or proposing a commercial transaction, is protected by the First Amendment.[73] However, this protection is in some ways more limited than the protection given to non-commercial (i.e. political) speech.[74]

For commercial speech to be protected by the First Amendment it must at least concern constitutionally protected speech.[75] Within the commercial speech doctrine there is a clear distinction between how the Court views protected versus unprotected speech.[76] Protected commercial speech concerns informational speech that does not fall into an unprotected category.[77] Whereas commercial speech that is false, misleading, deceptive, or concerns an illegal transaction, is not entitled to First Amendment protection.[78] In fact, there are already many regularly-enforced laws that prohibit unprotected commercial speech.[79]

SOPIPA's targeted advertising ban would be appropriately analyzed under the commercial speech doctrine because it bans expressive activity that advertises a product or proposes a commercial transaction.[80] This ban restricts both protected and unprotected commercial speech; however, when conducting the commercial speech analysis, this article will focus only on the constitutionality of restricting protected commercial speech (i.e. targeted advertisements that are not deceptive, misleading or illegal). Additionally, it is worth noting that the targeted advertising ban also prohibits political speech (i.e. political advertisements), and thus could bear greater scrutiny.[81] For example, if certain condi-

---

72 Cent. Hudson Gas & Elec. Corp., 447 U.S. at 566.

73 *Id.*

74 *Id.*

75 *Id.* at 563.

76 *Id.*

77 *Id.*

78 *Id.* at 563-64.

79 *See Division of Advertising Practices*, FTC.GOV, https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection/our-divisions/division-advertising-practices (last visited Jan. 11, 2016); *See also* Carolyn L. Carter, *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practice Statutes*, NAT'L CONSUMER L. CTR. 2 (2009), https://www.nclc.org/images/pdf/udap/report_50_states.pdf.

80 S. Judic. Comm., Analysis of S.B. 1177, 2013-2014 Reg. Sess., at 8 (Cal. 2014) ("It should be noted that this bill would limit advertising ("commercial speech") under the First Amendment."); *see also* Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2657 (2011) ("The creation and dissemination of information are speech for First Amendment purposes. *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 527, 121 S.Ct. 1753, 149 L.Ed.2d 787.").

81 Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010) ((stating "laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve

tions are met,[82] California would likely have to prove that it has a compelling interest to justify a ban on politically targeted advertisements.[83] A "compelling interest" is a greater burden for the government to satisfy than the standard for restricting commercial speech, and thus restrictions on political speech are rarely upheld.[84] However, this article will focus on the commercial speech analysis of SOPIPA's targeted advertising ban.

The Supreme Court's "review of commercial speech restrictions has gradually become more stringent over time . . . leaning further and further in the direction of strict scrutiny . . . . [more specifically] the Supreme Court's review has become more rigorous over time, but only for a certain type of commercial speech regulation: laws that restrict non-misleading, *informational* advertising."[85] Thus, California may restrict protected commercial speech only if the regulation meets the three following requirements originally articulated in *Central Hudson*: (1) the asserted government interest is substantial, (2) the government interest is directly advanced by the law, and (3) and the law is "more extensive than is necessary" to achieve the government's interest.[86]

A. First Amendment Argument Summary

The constitutional analysis below will focus on illustrating how SOPIPA's targeted advertising ban would likely be held by the Supreme Court to be an unconstitutional restriction on commercial speech. Specifically, the Court would likely hold that the ban is overly broad and is more restrictive than necessary to achieve California's alleged governmental objectives. As mentioned

---

that interest.") (internal quotation marks omitted) (quoting Fed. Election Comm'n v. Wisconsin Right To Life, Inc., 551 U.S. 449, 464 (2007)).

82 For example, if the advertiser could show that SOPIPA is a content-based, in contrast to a content-neutral, restriction on political speech in a public forum. *See* Boos v. Barry, 485 U.S. 312, 321-22 (1988) ("Our cases indicate that as a *content-based* restriction on *political speech* in a *public forum*, § 22-1115 must be subjected to the most exacting scrutiny. Thus, we have required the State to show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.") (internal quotation marks omitted) (quoting Perry Educ. Assn. v. Perry Local Educ. Assn., 460 U.S. 37, 45-46 (1983); Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 572-573 (1987); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985); United States v. Grace, 461 U.S 171, 177 (1983)).

83 *Id.*

84 *Id.; see also* BLACK'S LAW DICTIONARY 342 (10th ed. 2014) ("A method for determining the constitutional validity of a law, whereby the government's interest in the law and its purpose are balanced against an individual's constitutional right that is affected by the law. Only if the government's interest is strong enough will the law be upheld.").

85 Micah L. Berman, *Manipulative Marketing and the First Amendment*, 103 GEO. L. J. 497, 499 (2015).

86 Bd. of Tr. of St. Univ. of N.Y. v. Fox, 492 U.S. 469, 475 (1989) (quoting Cen. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm. of N.Y. 447 U.S. 557, 566 (1980)).

above, this analysis will focus only on the constitutionality of restricting protected targeted advertisements. Further, this paper will argue that SOPIPA should at least have the following exceptions, many of which have been incorporated into subsequently enacted state student privacy laws throughout the country. First, targeted advertising should at least be permitted to be student "Users," ages 13 and over, of Operator run "K-12 School Purpose" services, to adult "Users" of Operator run "K-12 School Purpose" services. Second, these advertisements should at least be permitted to be presented to "Users" when they are off of the educational platform (e.g. not presented in the platform). Third, targeted advertising should be permissible, at least, when it only uses, but does not disclose, a "User's" personal information for targeted advertising. Fourth, targeted advertising should be able to serve advertisements based on non-personal "User" information. Fifth, the categories of permissible targeted advertising should at least be extended to protected commercial advertisements related to education, jobs, and politics. Finally, whenever this article refers to students below, a student is defined as age 13 through 17. Students ages 18 and over will be considered adults.

B. Substantial Government Interest

Under the *Central Hudson* test, the government's interest in restricting protected commercial speech must be substantial.[87] California's interest in creating the targeted advertising ban is best understood when broken down into two categories. The first category is California's interest in protecting the privacy of student information. The second category is California's interest in preventing the commercial exploitation of students, and preserving the educational atmosphere in schools. The second category will be referred to below as the "Commercial Interest."

C. California's Privacy Interest

What does it mean to have an interest in privacy? Informational privacy conventionally concerns an individual's control over the processing (i.e. collection, disclosure, and use) of his or her personal information. SOPIPA's targeted advertising ban seeks to protect the privacy of student information by creating a prohibition on the disclosure, of student information, or any other information (i.e. parent or teacher information) collected by the operator through the use of its "K-12 School Purposes" service for targeted advertising

---

[87] Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm. of N.Y., 447 U.S. 557, 566 (1980).

purposes. There is extensive evidence that, in both the legislative history[88] and the public discourse,[89] by creating SOPIPA the California state legislature intended to curb the dissemination of personal student information, especially for non-educational purposes.

The Supreme Court is likely to hold that as a general principle, limiting the dissemination of personal student information collected by operators, especially for targeted advertising and other commercial purposes, is a substantial interest.[90] First, student personal information can include sensitive categories of information, e.g. information related to a student's health, disabilities, behavioral problems, past indiscretions, or performance indicators.[91] Intentional or unintentional disclosure of sensitive student information could result in negative externalities for students.[92] For example, concerns have been raised sur-

---

88 S. Judic. Comm., Analysis of S.B. 1177, 2013-2014 Reg. Sess., at 54 (Cal. 2014) ("This bill seeks to protect the personal information of students by generally prohibiting the operator of an Internet Web site, service or application that is used, designed and marketed for K-12 school purposes from sharing, disclosing, or compiling personal information about a student for any purpose other than the K-12 school purpose.").

89 Tanya Roscorla, *Student Data Privacy Bill Would Close a Loophole in Current Law*, CTR. FOR DIGITAL EDUC. (Feb. 21, 2014), http://www.centerdigitaled.com/news/Student-Data-Privacy-Bill-California.html; Benjamin Herold, *supra* note 10; *Common Sense Applauds California Governor Jerry Brown for Signing Landmark Student Privacy Law*, COMMON SENSE MEDIA (Sept. 29, 2014), https://www.commonsensemedia.org/about-us/news/press-releases/common-sense-applauds-california-governor-jerry-brown-for-signing; Alex Bradshaw, *California Takes a Meaningful Step Toward Shoring Up Student Privacy*, CTR. FOR DEMOCRACY & TECH. (Sept. 30, 2014), https://cdt.org/blog/california-takes-meaningful-step-toward-shoring-up-student-privacy/.

90 The topic of student privacy has become relevant in various jurisdictions over the past couple of decades, and may be approaching the time where it has become ripe for adjudication by the U.S. Supreme Court. *See* W.A. v. Hendrick Hudson Cent. Sch. Dist., No. 14-CV-8093, 2016 WL 1274587, at *1, 5 (S.D.N.Y. Mar. 31, 2016) (discussing the case of W.E., a seventeen year old student afflicted with a medical disability whose medical condition was "released into the community" after W.E.'s parents sought reimbursement for school expenses from the school district. The court held that W.E. had a "viable privacy interest" in not having his medical information released into the community); *See also* N.C. v. Bedford Cent. Sch. Dist., 348 F. Supp. 2d 32, 37 (S.D.N.Y. 2004) (holding that in a case where a student had been sexually abused while in the 7th grade, the student had a protected privacy interest in the confidentiality of that information, but that privacy interest had to be weighed against the professional interest of the school district and its employees to ascertain whether the sharing of the information was a "substantial interest".).

91 S. Judic. Comm., Analysis of S.B. 1177, 2013-2014 Reg. Sess., at 4 (Cal. 2014) ("Many companies provide online services to aide classroom teaching but they require students to create accounts that capture contact data and personal academic information such as grades, disciplinary history, and chat records. In some instances, companies are mining data from schoolchildren beyond the needs of the classroom.").

92 Katie Rose Guest Pryal, *Raped on Campus? Don't Trust Your College to Do the Right Thing*, THE CHRON. OF HIGHER EDUC. (Mar. 2, 2015), http://www.chronicle.com/article/Raped-on-Campus-Don-t-Trust/228093/ (examining the case of a rape victim whose therapy records were disclosed by the University of Oregon to the university's general counsel's office to be used in a lawsuit brought against the victim,

rounding the potential risk of discrimination from having sensitive information disclosed to jobs or schools to which students would like to apply. Additionally, SOPIPA's legislative history warned that "[s]ome Apps marketed to teachers and kids could track a child's physical location."[93] Further, as sensitive information is disclosed to more parties there is a greater risk of sensitive information being inadvertently disclosed or hacked.[94]

Unfortunately, without the proper training, students, when creating or entering personal information into a platform, are unlikely to fully understand or be able to prevent the future consequences of an online "permanent" information record. An online information record can be "permanent" in the sense that it is very difficult to control or delete information once it is disclosed online to third parties.

Thus, through limiting the disclosure of personal student information, California is attempting to preserve the notion that schools should be safe places where students can struggle and fail without fear of future repercussions. In addition, that schools should be structured to acknowledge that students learn at least as much from their failures as their successes, and that student's change and shouldn't have to live in fear that past indiscretions will define their future. California believes that the best way to achieve these aims is to maintain schools as havens for education and wall them off from the outside commercial world.[95]

To date, Congress has passed three laws, the Children's Online Privacy Protection Act ("COPPA"),[96] the Family Educational Rights and Privacy Act ("FERPA"),[97] and the Protection of Pupil Rights Amendment ("PPRA"),[98] that among other functions, advance similar privacy interests of protecting the personal information of children and students. COPPA, FERPA and the PPRA have been around respectively for 15, 41, and 37 years.[99] They have yet to be successfully challenged on the legitimacy of their general interest of limiting the dissemination of personal student and child information, as opposed to their specific prohibitions or requirements.[100]

---

who has filed action against the university for mishandling the investigation).

93 S. Judic. Comm., Analysis of S.B. 1177, 2013-2014 Reg. Sess., at 4 (Cal. 2014).

94 Nena Giandomenico & Julia de Groot, *Insider v. Outsider Data Security Threats: What's the Greater Risk?*, DIGITAL GUARDIAN, https://digitalguardian.com/blog/insider-outsider-data-security-threats (last updated Sept. 13, 2016).

95 CAL. S. COMM. ON JUDICIARY, ANALYSIS OF S. NO. 1177, 2013-2014 REG. SESS., S. 1177, at 5 (2014).

96 Children's Online Privacy Protection Act of 1998, 15 U.S.C. § 6501-06 (1998).

97 Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2013).

98 Protection of Pupil Rights, 20 U.S.C. § 1232h (2002).

99 15 U.S.C. § 6501; 20 U.S.C. § 1232g; 20 U.S.C.A. § 1232h.

100 *Protecting Student Privacy While Using Online Educational Services: Requirements*

In contrast to personal student information, it is less clear whether the Court would hold that California has a substantial interest in curbing the dissemination of non-personal information for targeted advertising purposes. For example, it is unlikely that California has a substantial privacy interest in curbing the dissemination of aggregate student information because it does not reveal personal information, i.e. the type of information that triggers privacy harms. Specifically, the process of aggregation only leaves the viewer of the information with a list of population level statistics, compared to a list of individual consumer profiles. For example, aggregated student information in the school context would most likely be in the form of lists of the number of students in a specific school that took Algebra, or the number of students that received "B" grades. Aggregated lists would not reveal which students took Algebra or received "B" grades. Thus, aggregation is unlikely to provide sufficient information to trace back to an individual student.[101] Even COPPA drew it's age line at 13, indicating that the government has less of an interest in dictating how personal information of children ages 13 and over should be regulated.[102] In fact, under COPPA non-personal child information may be used for commercial purposes.[103]

It is also unlikely that California has a substantial privacy interest in curbing the dissemination of information collected from adult "Users," e.g. parents or teachers. Currently, there are very few laws that completely prohibit the dissemination of adult information for advertising purposes.[104] Instead, privacy laws pertaining to adult advertising typically focus on requiring advertisers to provide adults with the proper notice and consent that their information will be used for advertising purposes.[105]

---

and Past Practices, PRIVACY TECHNICAL ASSISTANCE CENTER 1, 4, 6, 8 (2014), https://tech.ed.gov/wp-content/uploads/2014/09/Student-Privacy-and-Online-Educational-Services-February-2014.pdf.

101 However, there can be a small risk of de-identification. E.g. in Small School Communities. *Supra* note 54, at 3.

102 Stephen J. Astringer, *The Endless Bummer: California's Latest Attempt to Protect Children Online Is Far Out(Side) Effective*, 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 271, 273 (2015).

103 15 U.S.C. § 6501.

104 Astringer, *supra* note 103, at 282-83 (quoting Reno v. ACLU, 521 U.S. 844, 874 (1997)).

105 *See generally* FED. TRADE COMM., 2014 PRIVACY AND DATA SECURITY UPDATE (2014), https://www.ftc.gov/system/files/documents/reports/privacy-data-security-update-2014/privacydatasecurityupdate_2014.pdf (highlighting the FTC's support to the "notice and consent" method of data collecting as a way of protecting consumer privacy in the era of "Big Data").

D. California's Commercial Interest

SOPIPA's legislative history contains extensive evidence of California's intent to prohibit targeted advertising in order to prevent the commercial exploitation of students, and preserve the educational atmosphere in schools.[106] The California Senate Judiciary Committee Bill Analysis states that "when students are using these [Operator K-12 School Purposes] sites for school purposes, their time on these sites should be for learning, not advertising. Children are especially impressionable, particularly at younger ages."[107] As a general principle the Commercial Interest is likely to be upheld by the Supreme Court as a significant interest. For example, in *Board of Trustees of State University of New York v. Fox*, the Supreme Court held that "promoting an educational rather than commercial atmosphere on SUNY's campuses, promoting safety and security, preventing commercial exploitation of students, and preserving residential tranquility," were substantial government interests.[108]

SOPIPA attempts to advance the "Commercial Interest" by prohibiting targeted advertisements to students that use school-directed educational services in the classroom or at home.[109] SOPIPA bans all targeted advertisements regardless of their content (i.e. both advertisements with commercial or political content), and the Court is likely to hold that California has a significant interest in prohibiting targeted advertising to students regarding products and services that have been shown to harm students or are illegal for students under the age of 18 to consume.[110] For example, studies have shown that advertising vice goods, such as tobacco and alcohol, to children at a young age can increase their consumption of these products and at younger ages.[111] Consequently, ad-

---

106 CAL. S. COMM. ON JUDICIARY, ANALYSIS OF S. NO. 1177, 2013-2014 REG. SESS., S. 1177, at 5 (2014).

107 CAL. S. COMM. ON JUDICIARY, ANALYSIS OF S. NO. 1177, 2013-2014 REG. SESS., S. 1177, at 8 (2014).

108 Bd. of Tr. of St. Univ. of N.Y. v. Fox, 492 U.S. 469, 475 (1989).

109 Limited to services that fall within the definitional scope of the Operator and "K-12 School Purposes" definitions. CAL. S. COMM. ON JUDICIARY, ANALYSIS OF S. NO. 1177, 2013-2014 REG. SESS., S. 1177, at 7-8 (2014).

110 *See* Educational Media Co. at Virginia Tech, Inc. v. Swecker, 602 F.3d 583, 590 (4th Cir. 2010) (sustaining Virginia limits on alcoholic beverage ads in campus journals to combat underage drinking. The Court held the regulation directly and materially advanced government's substantial interest to decrease in demand for alcohol among college students was sufficient to demonstrate that prohibition directly and materially advanced government's substantial interest in combating problem of underage and abusive drinking; and regulation was narrowly tailored to serve Board's interest and need not be the least restrictive alternative).

111 *See Children Adolescents and Advertising*, 118 AM. ACAD. OF PEDIATRICS 2563, 2563 (2006), http://pediatrics.aappublications.org/content/118/6/2563.full (discussing the detrimental effects advertising can have on adolescents while recognizing how media advertising

vertising restrictions upheld in the school context have largely been limited to vice goods, e.g. alcohol, cigarettes, drugs, and guns.[112] In fact, California has already outlawed advertising vice goods to children under the age of 18.[113]

However, the Court is less likely to hold that California has a significant interest in absolutely prohibiting targeted advertisements limited to education, jobs, or politics. California's interest in prohibiting such targeted advertisements is weakened if they are protected commercial speech. California's interest is especially weakened if targeted advertisements can be filtered by schools or parents, or their receipt can be opted out of all together – these less restrictive methods are discussed below. The Court has held that government fear that if the commercial information is divulged to the public, the public will make "bad decisions" is not a legitimate state objective, specifically stating: "Fear that people would make bad decisions if given truthful information cannot justify content-based burdens on speech."[114] However, this article is not

---

can help mitigate some of these harmful effects); Susan Villani, *Impact of Media on Children and Adolescents: A 10-Year Review of the Research*, 40 J. OF THE AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY 4, 392-93 (2001), http://www.jaacap.com/article/S0890-8567(09)60387-7/abstract?cc=y= (concluding "the primary effects of media exposure are increased violent and aggressive behavior, increased high-risk behaviors, including alcohol and tobacco use, and accelerated onset of sexual activity. [That] newer forms of media have not been adequately studied, but concern is warranted through the logical extension of earlier research on other media forms and the amount of time the average child spends with increasingly sophisticated media.").

112 *See* Educational Media Co. at Virginia Tech, Inc., 602 F.3d at 589-90 (concluding that the restriction on alcohol advertising in the college paper designed to reduce demand for alcohol was "amply supported by the record").

113 S. 568, 2013 Leg., (Cal. 2013). Prohibited an operator of an Internet Web site, online service, online application, or mobile application, as specified, from marketing or advertising specified types of products or services to a minor; prohibited an operator from knowingly using, disclosing, compiling, or allowing a third party to use, disclose, or compile, the personal information of a minor for the purpose of marketing or advertising specified types of products or services; required the operator of an Internet Web site, online service, online application, or mobile application to permit a minor, who is a registered user of the operator's Internet Web site, online service, online application, or mobile application, to remove, or to request and obtain removal of, content or information posted on the operator's Internet Web site, service, or application by the minor, as specified.

114 Sorrell, 131 S. Ct. at 2670-72 ("Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects. But the 'fear that people would make bad decisions if given truthful information' cannot justify content-based burdens on speech."); Thompson v. W. States Med. Ctr., 535 U.S. 357, 374 (2002); *see also* Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 769-70 (1976) ("But [Virginia] may not [issue professional standards] by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering."); Liqourmart, Inc. v. Rhode Island, 517 U.S. 484, 503 (1996)) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.") (opinion of Stevens, J.); *see also* Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 97 (1977) (concluding "since we can find no meaningful distinction between Ordinance 5-1974 and the statue overturned in *Virginia Pharmacy Bd.,* we

advocating for the permissibility of targeting advertisements of vice goods. Instead this article is focused on the permissibility of advertisements at least relating to education, jobs, and politics.

The Court is also unlikely to find that students of all ages face the same level of risk of commercial exploitation. Research has shown that children under the age of 9 are more impressionable and at a greater risk of being unfairly persuaded by advertisements.[115] The American Pediatrics Association ("APA") states that in order for children not to be uniquely susceptible to advertisements they (i) must be able to distinguish between commercial and noncommercial content and (ii) must be able to recognize "that the advertiser has a perspective different from the viewer and that advertisers intend to persuade their audience to want to buy their products, but also that such persuasive communication is biased, and that biased messages must be interpreted differently than unbiased messages."[116] In the APA's study on children's psychological susceptibility to advertisements they found that there is a great deal of evidence that children under the age of 9 often "do not recognize the persuasive intent of commercial appeals," and children below 5 often cannot "consistently distinguish program from commercial content."[117]

It is important to clarify that this article is not intended to argue for the permissibility of sending targeted advertisements to students of all ages. Instead, this article argues that targeted advertising should be permissible at least to students ages 13 and over, and consequently adults. Currently there is not sufficient research to show that students over the age of 13 are uniquely susceptible advertisements and require special treatment under the law.[118] For example, when drafting the age cutoff for COPPA Congress decided that children ages 13 and over did not warrant special protection from online targeted advertisements based on their personal information.[119] This article takes an evidence based approach, arguing that targeted advertising should only be banned when there is sufficient evidence of harm. Thus, if in the coming years there is a wealth of research showing that students ages 13 through 17 are uniquely susceptible to advertisements, then the ban's age range should be revisited by the California state legislature. Regarding the risk of distraction interest to students

---

must conclude that this ordinance violates the First Amendment.").

115 *Report of the APA Task Force on Advertising and Children*, AM. PSYCHOLOGICAL ASS'N (2004), http://www.apa.org/pubs/info/reports/advertising-children.aspx.

116 *Id.*

117 *Id.*

118 *Id.* COMMON SENSE MEDIA, ADVERTISING TO CHILDREN AND TEENS: CURRENT PRACTICES 1, 16 (Jan. 28, 2014), https://www.commonsensemedia.org/research/advertising-to-children-and-teens-current-practices.

119 Astringer, *supra* note 103, at 273.

ages 13 and over, this paper argues that targeted advertising should at least be permitted to be presented to student "Users" off of the platform. This is discussed further below.[120] However, if this statute is truly aimed at curbing commercial exploitation and distraction, it is vastly underinclusive because it would still allow unlimited non-targeted advertisements to be presented in the platform to students of all ages.

Finally, the Court is unlikely to hold that there is a significant interest in preventing the commercial exploitation of adult "Users" from protected commercial speech because adults do not suffer from the same impressionability and vulnerability concerns as children under the age of 9.[121] For example, in *Edenfield v. Fane*, the Court held that it was unconstitutional to prohibit Certified Public Accountants ("CPAs") from engaging in "direct, in-person, uninvited solicitation" because it fails to advance the interests of protecting consumers from fraud or overreaching, maintaining CPA independence, and ensuring against conflicts of interest - despite the substantiality of these interests.[122] The Court distinguished CPA solicitation from lawyer solicitation by stating that CPA consumers are more sophisticated, and that lawyers, but not CPAs, engaged in advocacy and the art of persuasion, whereas CPAs are more independent and objective.[123] Additionally, SOPIPA's legislative history did not offer any significant reasons why adults should be prohibited from receiving targeted advertisements. Currently, there are very few laws, if any, that outright ban protected commercial advertisements to adults.[124] Instead the more common practice is to limit the frequency, manner, or place that these advertisements are served.[125] For example, disclosure requirements are a common practice requiring advertisers to clearly indicate that their content is an advertisement, either through banners or advertising labels.[126]

i. Directly Advance

The second prong of the Commercial Speech Doctrine asks whether the challenged regulation "directly advances" the government's interest at issue in the regulation.[127] To satisfy the "directly advance" requirement, the regulation

120 *See infra* Part IV § D(2)-E.

121 Brian L. Wilcox, et al., *Report of the APA Task Force on Advertising and Children*, AM. PSYCHOLOGICAL ASS'N 1, 5 (2004), http://www.apa.org/pubs/info/reports/advertising-children.aspx.

122 Edenfield v. Fane, 507 U.S. 761, 761-62 (1993).

123 *Id.* at 762.

124 *See generally supra* note 3 (describing SOPIPA's legislative history to demonstrate the majority of bills are focused on student protection).

125 *Id.* at 1.

126 Brian L. Wilcox, et al., *supra* note 122, at 38.

127 Educ. Media Co. at Va. Tech v. Insley, 731 F.3d 291, 298 (4th Cir. 2013); *see also*

must "significantly," not just slightly, advance the state's goal.[128] The "directly advance" prong places the burden on the government to establish the means of the commercial speech restriction actually advance the proposed governmental objective.[129] The Court has held that the government's burden is "not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[130] For example, in *Brown*, the Court held that the proffered evidence by the California government was not sufficient to prove that violent video games caused children gamers to be exhibit more violent behavior.[131]

The Court is likely to hold that California's privacy interest is directly advanced by the targeted advertising ban's prohibition on disclosing information. Namely, the disclosure prohibition significantly advances California's goal of limiting the dissemination of student information for advertising purposes by absolutely prohibiting such dissemination. However, the Court is less likely to hold that the prohibition on using, without disclosing, information for targeted advertising purposes directly advances SOPIPA's privacy interest. As mentioned above, operators are currently able to use information, even personal information, to serve targeted advertisements without disclosing that information to advertisers.[132] Thus if "User" personal information is only used and not disclosed, "Users" are less likely to suffer a privacy harm because third parties are not receiving personal information on "Users."

Additionally, the Court is unlikely to hold that prohibiting targeted advertising that is triggered by non-personal information would directly advance California's privacy interest. As mentioned above, SOPIPA does not only prohibit targeted advertisements based on personal information collected from its users, but also prohibits targeted advertisements based on "any information," including de-identified and aggregated information.[133] However, California has a lesser interest in limiting the dissemination of non-personal information for the purposes of targeted advertising. Limiting non-personal information has a negligible effect on promoting privacy because by definition such information cannot be used to personally identify an individual user. Thus, the notion of a

---

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 539 (2001) ("The State's interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by adults is a legal activity.").

128 44 Liquormart v. Rhode Island, 517 U.S. 484, 505-06 (1996).

129 *Id.* at 505.

130 Edenfield, 507 U.S. at 770-71.

131 Brown v. Entertainment Merchants Ass'n, 131 S. Ct. 2729, 2732 (2011).

132 *Supra* note 54, at 1-2.

133 S.B. 1177, Reg. Sess. 2013-2014 (Cal. 2014).

privacy harm necessitates the revelation of information specifically tied to an individual. The inability to identify an individual user assumes that the operator used proper de-identification methods to remove personal identifiers from personal information. However, even if information is de-identified or aggregated properly, in some cases there can be a small risk of re-identification.[134] Further, SOPIPA's legislative history supports the notion that the targeted advertising ban's focus should be on personal information, and that the harms associated with privacy relate to personally identifiable information.[135] The legislative history is silent on any significant privacy risks posed by the dissemination of non-personal information.[136] Thus, the ban's information trigger is overly broad, and should instead be limited to personal information.

In contrast, the Court is likely to hold that the California's "Commercial Interest" is directly advanced by SOPIPA's targeted advertising ban. First, the ban helps to prevent the commercial exploitation of students by limiting the number of commercial ads that students view. Specifically, the ban prohibits tailored commercial ads to students, which are more likely to be enticing because they are based on student interests (gleamed from personal information).[137] However, the extent to which targeted ads exploit students commercially, or cause the commercialization of schools arguably can depend on the manner in which the advertisements are displayed (e.g. with a banner labeling the content as an ad) or their content (e.g. educational and political ads may be less harmful than cigarette and junk food ads). Additionally, banning targeted advertisements helps to preserve a school's educational atmosphere by allowing users to focus on the educational content provided by "K-12 School Purposes" services. However, the fact that SOPIPA does not ban advertising that is not based on information collected from "Users" sheds doubt on how effective the statute is at limiting the commercialization of education. In other words, this statute would still allow non-targeted advertisements to be displayed in the education technology service to students of all ages.

ii. No More Extensive Than Necessary

The third and final prong of the commercial speech analysis requires that the regulation be "not more extensive than necessary" to achieve the government's

---

134 S*upra* note 54, at 2.

135 S.B. 1177, Reg. Sess. 2013-2014 (Cal. 2014).

136 *See Id.* (describing protection of personal information without identifying the effect of privacy on non-personal information).

137 *See* COMMON SENSE MEDIA, ADVERTISING TO CHILDREN AND TEENS: CURRENT PRACTICES 12 (Jan. 28, 2014), https://www.commonsensemedia.org/research/advertising-to-children-and-teens-current-practices (describing how one advantage of social media is the ability to target messages to children and teens based on their interests.)

objective.[138] The Court will not hesitate to strike down the restriction if is convinced that there is some alternative method of achieving the same end, as well or almost as well, and with significantly less interference with protected speech. The government generally has the burden of showing that less-restrictive alternatives would not adequately fulfill the government's alleged objective.[139]

SOPIPA's targeted advertising ban is unconstitutionally more restrictive than necessary because (1) the ban prohibits targeting advertisements to adult "Users" (e.g. teachers, parents, or school administrators); (2) the ban prohibits targeting advertisements off of the operator's "K-12 School Purposes" platform; and (3) because parents should be able to decide what content their children view (especially when the content is not obscene, illegal, or deceptive). Fortunately, there are alternative methods of achieving California's objectives, at least as well, and with significantly less interference with protected commercial speech. Less restrictive alternatives include: (4) allowing adult "Users" and students to consent (e.g. opt-in) to receiving targeted advertisements; (5) filtering tools that allow schools or parents to filter the type and/or number of targeted advertisements received by student and adult "Users;" and (6) by deferring to industry self-regulatory regimes.

E. SOPIPA's Ban Should Not Prohibit Targeted Advertisements to Adult Users

SOPIPA not only prohibits targeting advertisements to students based on any student information collected through an operator's "K-12 School Purposes" service, but also prohibits targeting advertisements to any other "User" (e.g. teachers, parents or school administrators) based on any student information, or any "User" information collected through the operator's "K-12 School Purposes" service. For example, if a teacher uses a service regulated by SOPIPA, an operator cannot target any advertisements to the teacher based on any information the operator has collected from the teacher.

When analyzing broad statutes intended for minors that also capture adults, the Courts have valued the rights of adults to receive information.[140] Consequently, Supreme Court case law has often held that if the government's principal justification for regulating speech is to prevent minors from gaining access to, or being enticed by, a "vice" product, the government must tailor its

---

138 Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554 (2001) (quoting Cent. Hudson Gas & Electric Corp. v. Pub. Service Commission of N.Y., 447 U.S. 557, 566 (1980)).

139 *See* Thompson v. Western States Med. Center, 535 U.S. 357, 373 (2002).

140 Reno v. Am. Civil Liberties Union, 521 U.S. 844, 875 (1997).

methods very tightly so that there is no undue interference with the rights of adults to obtain or learn about the product.[141] For example, in *Lorillard Tobacco Co. v. Reilly*, Massachusetts tried to dramatically restrict the advertising of smokeless tobacco and cigars by forbidding billboard advertisements within 1,000 feet of a school or playground.[142] The advertising ban was so broad that the Court stated that it constituted a nearly complete ban in some metropolitan areas, unduly impinging sellers' opportunity to propose legal transactions with adults.[143] The state defended the restriction on the grounds that it would protect minors from being attracted to the product.[144] However, the Court held that the regulation violated the free-speech rights of the tobacco industry and its adult customers because "the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults."[145] Further, in *Reno v. Am. Civil Liberties Union* and *Ashcroft v. American Civil Liberties Union* the Supreme Court struck down bans on putting non-obscene, "indecent" material in any place where minors might see it, because adults have a right to see the material and the ban would dissuade people from making the material broadly available.[146]

Courts have also struck down advertising bans in the higher education context as overly broad when advertisements have unconstitutionally interfered with an adult's right to receive information. In *Educ. Media Co. at Virginia Tech, Inc. v. Insley*, the Court struck down a ban on alcohol advertisements in college newspapers even though there was a significant government interest in curtailing underage drinking.[147] The Court reasoned that the ban was more restrictive than necessary because it prohibited large numbers of those who were able to legally consume alcohol from receiving truthful information.[148] Similarly, in *Pitt News v. Pappert*, 379 F.3d 96, 191 (3d Cir. 2004), the Court invalidated a statute prohibiting advertisers from paying for alcoholic beverage advertisements distributed by communications media affiliated with educational institutions. The Court held that the statute failed to directly advance, and was not "adequately tailored to achieve", asserted government interests.[149] Thus, the statute violated the commercial speech doctrine by interfering with the free speech rights of a student-run university newspaper and by imposing a finan-

---

141 Reilly, 533 U.S. at 564.
142 *Id.* at 534-35.
143 *Id.* at 562.
144 *Id.* at 561.
145 *Id.* at 564 (quoting Reno, 521 U.S. at 875).
146 Reno, 521 U.S. at 883; Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 672 (2004).
147 Educ. Media Company at Va. Tech, Inc. v. Insley, 731 F.3d 291, 301 (4th Cir. 2013).
148 *Id.*
149 Pitt News v. Pappert, 379 F.3d 96, 97 (3d Cir. 2004).

cial burden on media.[150]

SOPIPA was similarly intended to focus on minors (i.e. students) by prohibiting their access to targeted advertisements.[151] The law is aptly named the "Student Online Personal Information Protection Act." However, as applied, the targeted advertising ban goes beyond SOPIPA's legislative intent to protect students from targeted advertisements. Instead, the statute regulates advertising in a way that interferes materially with the legitimate rights of operators, advertisers, and adult "Users" to exchange truthful information. California's proclaimed Commercial Interest (e.g. protecting students from commercial exploitation and maintain an educational atmosphere) cannot be used to justify a ban on targeted advertisements to adult "Users." Further, compared to older forms of media such as newspapers and magazines, internet media has the technological advantage of being able to distinguish/differentiate between adult and children users through age verification. Online platforms can create requirements where users must authenticate their age before being able to login to their account.[152] Thus online platforms can choose to only serve advertisements, or certain advertisements, to "Users" above a certain age. Although there are limits to the effectiveness of age verification, the user can easily fabricate their age.[153] Age verification, where the burden is on the advertisers to wall off advertisements from "Users" under a specified age, is a less restrictive means to achieving California's Commercial and Privacy Interests. However, in *Ashcroft*, even an age verification regime was held to be unconstitutionally more restrictive than a filtering regime.[154] Discussed more below, in a filtering regime, parents or schools can obtain software that filters out content (e.g. advertisements or certain websites) that they do not want students to access.[155] The Court reasoned that a filter could simply be turned off whenever the adult wanted to use the computer, and thus did not overly burden an adult's right to receive information.[156]

Finally, in contrast to SOPIPA, there are many other states, including Arkansas,[157] Georgia,[158] Maine,[159] and Nevada,[160] that have passed student privacy

---

150 *Id.* at 113.
151 S.B. 1177, Reg. Sess. 2013-2014 (Cal. 2014).
152 *Id.*
153 *See* Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 657, 667-68 (2004) (explaining how minors can circumvent age verification systems when they have access to their own credit card, because they do not need parental permission to visit certain websites or make certain purchases online).
154 *Id.* at 656.
155 *Id.* at 667.
156 *Id*.
157 H.B. 1961, 90th General Assemb. (Ark. 2015).
158 S.B. 89, 153rd General Assemb. (Ga. 2015).

laws with narrower targeted advertising bans. These laws have included much narrower information triggers that are tailored only to personal student information, instead of adopting SOPIPA's broader trigger that could include adult "User" information.[161] Thus the Supreme Court is likely to hold that SOPIPA's targeted advertising ban when applied to adults is more restrictive than necessary to achieve its objective, and that there are significantly less restrictive alternatives such as age verification regimes, filtering software (discussed below), or a narrowing of the ban's information trigger.

F. Targeting Advertising On vs. Off Platform

SOPIPA prohibits targeted advertisements that are presented on an "Operator's" "K-12 School Purposes" service or off of the service. For example, without the ban, "Operators" could serve targeted advertisements, based on information collected through the Operator's "K-12 School Purposes" service, on other websites such as CNN (i.e. off of the education platform).[162] However, California has a weaker Commercial Interest in prohibiting targeted advertisements that are served to student or adult "Users" off of the "Operator's" "K-12 School Purposes" platform.[163] Off-platform advertisements do not pose the same threat of commercializing education or distracting students from their studies because they are not being served on the educational platform. Further, students are already legally inundated with targeted advertisements all over the internet. Thus allowing "operators" to participate in serving off-platform targeted advertisements would pose no sufficiently greater harm to California's Commercial Interest than the current targeted advertising world to which students are exposed.

The Courts have struck down commercial speech bans where the government's means in achieving its interest were not found to be consistently rational.[164] For example, in *Rubin v. Coors Brewing Co.*, the Court invalidated a federal statute prohibiting beer manufacturers from listing their beverage's alcohol content on the label.[165] The federal government defended the ban on the grounds of attempting to prevent brewers from engaging in "strength wars," in

159 S. Proposal 183, 127th Legis. (Me. 2015).

160 S.B. 463, 78th Reg. Sess. (Nev. 2015).

161 H.B. 1961, 90th General Assemb. (Ark. 2015); S.B. 89 (Ga. 2015); S. Proposal 183, 127th Legis. (Me. 2015); S.B. 463, 78th Reg. Sess. (Nev. 2015).

162 *See Getting Started with the Facebook Pixel*, FACEBOOK.COM, https://developers.facebook.com/docs/facebook-pixel/using-the-pixel (last visited Nov. 15, 2016) (explaining how certain websites allow tracking of user content).

163 Cal. Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1177 (2014 Reg. Sess.) as amended Apr. 21, 2014, 4-5.

164 Rubin v. Coors Brewing Co., 514 U.S. 476, 488 (1995).

165 *Id.*

which each maker increases its beer's alcohol content and then tries to lure drinkers by promoting the high content.[166] However, the federal government did not prohibit alcohol strength listings in advertising, only on labels.[167] Similarly, the government didn't ban such listings for the labels of wines and spirits, only beer.[168] Thus the Court held that these inconsistencies make the scheme so irrational that it does not "directly and materially advance" the objective of preventing strength wars.[169] Similarly, SOPIPA's means for achieving California's commercial interest are not consistently rational. If the California legislature truly wanted to prevent the harm of commercializing education and distracting students from their studies, then SOPIPA should ban all advertising on an "Operator's" "K-12 School Purposes" platform, including ads not targeted based on information collected through the "Operator's" platform. However, the targeted advertising ban is arguably not inclusive because it only bans targeted advertisements based on information gathered through the "Operator's" platform.

G. SOPIPA's Paternalism Regarding "User" Choice

SOPIPA's targeted advertising ban has a paternalistic approach because it (i) prohibits parents from being able to decide how their own information, or their children's information, can be used or disclosed, and (ii) prohibits parents from being able to decide what legal content is permissible to view themselves or for their children to view. The Supreme Court has struck down paternalistic speech bans as being overinclusive in areas where parents should have the right to decide what protected commercial speech their children should have access to, and where parents can have reasonably differing views on the permissibility of the content.[170] In *Brown v. Entertainment Merchants Ass'n*, the Supreme Court struck down, as violating the First Amendment, a California law that restricted the sale or rental of violent video games to minors.[171] During the narrowly tailored analysis, the Court stated that "as a means of assisting parents the Act is greatly overinclusive, since not all of the children who are prohibited from purchasing violent video games have parents who disapprove of their doing so…[and] the Act's purported aid to parental authority is vastly overinclusive. Not all of the children who are forbidden to purchase violent video games on their own have parents who *care* whether they purchase vio-

166 *Id.* at 476.
167 *Id.* at 488.
168 *Id.* at 484.
169 *Id.* at 488.
170 Brown, 131 S. Ct. at 2741.
171 *Id.*

lent video games. While some of the legislation's effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents *ought* to want. This is not the narrow tailoring to "assisting parents" that restriction of First Amendment rights requires."[172]

Applying *Brown's* standard to SOPIPA, the Supreme Court would likely conclude that parents can have differing views on the importance of protecting the privacy of their child's information. For example, currently parents differ on how much they permit their children to share personal information on the internet. Parents enforce differing privacy preferences through parental control filters, device (e.g. computer, tablet, mobile) passwords, or household rules. Thus, when there are reasonably differing views on legal activity, parents are in the best position to judge, at the very least, what legal activity they should be able to opt their child into (e.g. consent to). For example, in *Sorrell v. IMS Health Inc.*, the Supreme Court stated that "Vermont's law [limiting the use of personal information for marketing] might burden less speech if it came into the operation only after an individual choice."[173]

Similarly, the Supreme Court would likely rule that parents can hold differing views on the value or harm posed by targeted advertisements for products and services that their children can legally consume, as opposed to age-restricted products like alcohol and cigarettes. Many parents may view the permissibility of advertisements as more of an issue of the content or quantity of advertisements, compared to an absolute value judgment on whether targeted advertisements as a whole are beneficial or harmful. For example, many parents may view the targeted advertising of certain products, like junk food or cigarettes, as harmful and habit forming, while they could view many educational advertisements as informative, and would want to opt in (e.g. consent) to their provision. Additionally, some parents may want to opt into receiving targeted advertisements if it would result in lower prices for their children's educational services, which could disproportionately help low-income school districts and parents. However, even if parents view certain legal informational-advertisements as objectionable, the Court may still strike down overly restrictive bans.[174]

---

172 *Id*.

173 Sorrell, 131 S. Ct. at 2669.

174 *See* Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 71-72 (1983) (holding that the "statute prohibiting the unsolicited mailing of contraceptive advertisements could not be justified under the First Amendment… on the ground that it shielded recipients of mail from materials that they were likely to find offensive, since the recipients who found the mailings objectionable could effectively avoid further bombardment of their sensibilities simply by averting their eyes.").

H. Consent: Users Should Have the Right to Decide How Their Information is Used or Disclosed

California's Privacy and Commercial Interests can be more narrowly achieved by providing "Users" with robust and meaningful choice about how their personal information is used and disclosed. Currently, SOPIPA takes a very paternalistic approach and does not grant "Users" the right to control the use of their information or control the information they receive. However, this lack of choice can have many unintended consequences. For example, because the targeted advertising ban prohibits any advertisement, regardless of its content or author (e.g. NGO, corporation, or school), "Users" are not able receive ads that they may find beneficial and informative.[175] Thus, this article is arguing for an exception to the targeted advertising ban for protected commercial speech, at least relating to education, jobs, and politics. For clarification, this article's consent argument is limited to allowing "Users" to opt-in to receiving certain targeted advertisements. In contrast, this article is not arguing that school administrators, teachers, parents or students should have absolute control of how their information is used and disclosed. For example, there may be some situations where parents and students should not be able to delete an unfavorable exam grade.

i. Adult "User" Consent

The Supreme Court is likely to hold that granting adult "Users" the ability to consent to (i.e. opt into) receiving targeted advertisements, based on adult "User" information, is a substantially less restrictive alternative to SOPIPA's absolute targeted advertising ban. The Court is likely to consider the following factors in its "less restrictive alterative" analysis. First, the Supreme Court has consistently recognized the value of protected commercial advertisements.[176] In *Virginia Pharmacy Board*, the informational value of commercial speech was a key justification for its constitutional protection.[177] The Court held that a "consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue."[178] Additionally, the Court stated that "information is not in itself harmful, that people will perceive their

---

175 For example, "Users" may find the following targeted advertisements valuable: discount advertisements, political advertisements, college and career counseling advertisements, or advertisements relating to supplementary education materials and tools.

176 Va. St. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc. 425 U.S. 748, 770 (1976).

177 *Id.* at 770; *see also* Sorrell, 131 S. Ct. at 2671.

178 Va. St. Pharmacy Bd., 425 U.S. at 763.

own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."[179]

In *Sorrell*, the Court reiterated the importance of protecting informational, in contrast to deceptive and misleading, commercial speech.[180] Additionally, the Court stated that "Vermont's law [limiting the use of personal information for marketing] might burden less speech if it came into the operation only after an individual choice."[181] Consequently, *Virginia Pharmacy Bd.* and *Sorrell* arguably suggest that it would be very difficult for commercial speech restrictions to survive Supreme Court review if they restrict protected informational advertising for a legal product.[182] Six justices, including Justice Sotomayor, signed the 2011 majority opinion in *Sorrell*, signaling that a stable majority of the court is highly skeptical of commercial speech that it views as paternalistic.[183] Regarding SOPIPA, although the ban prohibits targeted advertisements that may be deceptive, misleading or illegal, SOPIPA also bans protected informational targeted advertisements. Even without SOPIPA, however, such deceptive and misleading advertisements are illegal under California and Federal law,[184] and are regularly prosecuted by the Federal Trade Commission[185] and the 50 State Attorneys General offices.

Second, the Supreme Court has recognized that the First Amendment includes not only a right to free speech, but also a right to receive protected commercial information.[186] Thus, the Court would apply careful scrutiny to preserve the rights of adult "Users" to receive protected commercial advertisements. For example, *Lorillard*, *Reno*, and *Ashcroft* all suggest that the Court would strike down restrictions on protected commercial speech where the restriction is aimed at protecting minors but is so broad that it significantly restricts the ability of adults to receive the same speech.[187] Thus, the Court is

---

179 *Id.* at 770.

180 Sorrell, 131 U.S. at 2669; Micah L. Berman, *Manipulative Marketing and the First Amendment*, 103 GEO. L.J. 497, 511-13 (2015) (explaining that in Sorrell, the Court struck down a Vermont law that limited the sale and use of pharmacy records that identified the prescribing physician. "Under the law, pharmaceutical marketers were barred from using this factual information for commercial purposes… The Court emphasized that many doctors (the most relevant consumers in this case), found the pharmaceutical detailing [e.g. pharmaceutical representatives advertising drugs to doctors] based on the restricted information to be "instructive" and "very helpful.").

181 Sorrell, 131 U.S. at 2669.

182 *Id.* at 2670-71.

183 *Id.* at 2653.

184 Carolyn L. Carter, *supra* note 80.

185 *Division of Advertising Practices*, *supra* note 80.

186 Doe v. City of Albuquerque, 667 F.3d 1111, 1118 (10th Cir. 2012); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976).

187 Ashcroft v. Am. C.L. Union, 542 U.S. 656, 665-66 (2004); Reilly, 533 U.S. at 564;

likely to find an adult "User" consent exception to the targeted advertising ban to be a sufficiently less restrictive alternative.

a. Parental Consent for Student "Users"

The Court is also likely hold that granting parents the ability to consent to their children/students receiving protected targeted advertisements based on student "User" information is a substantially less restrictive alternative to SOPIPA's absolute targeted advertising ban. The Court is likely to consider the following factors in its "less restrictive alternative" analysis. First, as mentioned above, the Supreme Court has recognized the importance of limiting restrictions on protected commercial advertising.[188]

Second, a consumer's right to receive information isn't limited to adults. The Supreme Court has also recognized a child's interest in receiving information. In the Internet context, the Supreme Court has been unfavorable to content-based restrictions, even if aimed towards the protection of children.[189] Recently, the Supreme Court struck down a California statute that prohibited the sale of violent video games to minors.[190] The Court reasoned that a State may have "legitimate power to protect children from harm" but it "does not include a free-floating power to restrict the ideas to which children may be exposed."[191] Third, as mentioned above, *Brown* arguably protects a parent's right to decide what protected commercial speech is permissible for their children to view.[192]

Fourth, state legislatures around the country have recognized the need to give parents or students the ability, and right, to make choices about the use of "User" information and to obtain the benefits of these choices.[193] For example, Arkansas,[194] Georgia,[195] Maine[196] and Maryland[197] have all passed student in-

---

Reno, 521 U.S. at 879-80.

188 Va. State Bd. of Pharmacy, 425 U.S. at 770.

189 Reno, 521 U.S. at 876-77.

190 Brown, 131 S. Ct. at 2729.

191 *Id.* at 2736; *see also* Erznoznik v. City of Jacksonville, 422 U.S. 205, 213-14 (1975) (holding that "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." The Court went on to say "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.").

192 Brown, 131 S. Ct. at 2741.

193 Often these states used SOPIPA as their initial draft and revised it to address the major shortfalls resulting from the lack of consent exceptions.

194 H.B.1961, 90th Gen. Assemb., Reg. Sess. (Ark. 2015).

195 S.B. 89, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015).

196 S.B. 183, 127th Leg., 1st Reg. Sess. (Me. 2015).

formation privacy laws similar to SOPIPA. However, they have all adopted consent language similar to the following: "This Act shall not limit the ability of an operator to use or disclose covered information with the affirmative consent of the student's parent or guardian, or a student, when consent is given in response to clear and conspicuous notice of the use or disclosure." Affirmative consent is the gold standard in privacy law and is found in all major federal child and student privacy statutes, including COPPA,[198] FERPA,[199] and the PPRA.[200] Further, "clear and conspicuous" notice is a strong standard that requires prominent notice without specifying things like color/font/font size. The lack of specification is important because it is impossible to craft a single set of standards that will make sense both across surfaces (e.g. laptop, TV monitor, tablet, or mobile screen) and across various types of experiences students could have on those surfaces. Thus, the "clear and conspicuous" standard is appropriately flexible. At the same time, the FTC has created extensive guidance[201] on what "clear and conspicuous" means in practice.

Finally, students, ages 13-17, should be granted some degree of choice over the use and disclosure of their data. There is already federal precedent for a 13 and over age cutoff in COPPA. When passing COPPA, Congress made the decision that children ages 13 and over do not require parental consent, but instead can make their own decisions about how personal information is collected online from commercial companies and used for targeted advertising.

ii. Contract Negotiation and Filtering

Currently, even without SOPIPA, schools can limit what information is given to "Operators" and under what circumstances "Operators" can use and disclose information.[202] Many schools already place limitations on "Operators" through contracting. There is no law that requires a school to sell or disclose personal student information to an operator's service without any limitations (e.g., targeted advertising limitations). Additionally, nothing requires a school to adopt a specific "K-12 School Purposes" platform. The Supreme Court in *Sorrell* found the ability to reject solicitation persuasive as a less restrictive

---

197 H.B. 298, 435th Gen. Assemb., Reg. Sess. (Md. 2015).

198 15 U.S.C. § 6501(9) (1998).

199 20 U.S.C. § 1232g (2002).

200 *Id.* at § 1232h.

201 FED. TRADE COMM., .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING 6-7 (Mar. 2013), https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf.

202 *Complying with COPPA: Frequently Asked Questions*, FTC.GOV, https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions#Requirement to Limit (last visited Sept. 30, 2016).

alternative, where the recipients of such speech had many options at their disposal to reject or limit the speech in question.[203] Regarding targeted advertising, schools have such ability to reject or limit speech. Schools can and do negotiate for contract provisions banning the use of student personal information for advertising. For example, two of the biggest "K-12 School Purposes" service providers (Google and Apple), have similar provisions standard in their contracts.[204]

Instead of banning advertising outright, schools can also dictate advertising terms to operators. One method could involve schools requiring prior approval for targeted advertisements that would be served on contracted "K-12 School Purposes" services. For example, schools could contractually require that certain subject matter targeted ads cannot use student personal information (e.g., ads relating to cigarettes, alcohol, or junk food). With the current state of technology, one could imagine a "filtering" portal where a school administrator, or even parent, simply unchecks boxes (e.g., denying) for ads that they don't view as permissible. Operators can also be required to abide by strict requirements on how advertisements are presented, for example, requiring ads to be framed with prominent borders and captions that distinguish the advertisement and the advertisement's author from other types of content on the platform. Such advertising disclosure requirements represent less restrictive alternatives because they (i) are already common in the advertising industry, (ii) wouldn't be diffi-

---

[203] Sorrell, 564 U.S. at 575.

> The State also contends that § 4631(d) protects doctors from "harassing sales behaviors." 2007 Vt. Laws No. 80, § 1(28). "Some doctors in Vermont are experiencing an undesired increase in the aggressiveness of pharmaceutical sales representatives," the Vermont Legislature found, "and a few have reported that they felt coerced and harassed." § 1(20). It is doubtful that concern for "a few" physicians who may have "felt coerced and harassed" by pharmaceutical marketers can sustain a broad content-based rule like § 4631(d). Many are those who must endure speech they do not like, but that is a necessary cost of freedom. (citations omitted)…. Physicians can, and often do, simply decline to meet with detailers, including detailers who use prescriber-identifying information. *See, e.g.*, App. 180, *2670 333–334. Doctors who wish to forgo detailing altogether are free to give "No Solicitation" or "No Detailing" instructions to their office managers or to receptionists at their places of work. Personal privacy even in one's own home receives "ample protection" from the "resident's unquestioned right to refuse to engage in conversation with unwelcome visitors." (citations omitted). A physician's office is no more private and is entitled to no greater protection.

Id.

[204] *Google Apps for Education (Online) Agreement*, GOOGLE, https://www.google.com/apps/intl/en/terms/education_terms.html (last visited Sept. 29, 2016); *Apple ID and Family Sharing Disclosure*, APPLE, http://www.apple.com/legal/privacy/en-ww/parent-disclosure/ (last visited Sept. 29, 2016).

cult to implement, and (iii) would help to mitigate concerns regarding the risk of misleading students or other consumers with advertisements that look like educational content.[205]

In *Ashcroft*, the Supreme Court upheld a filtering approach as a less restrictive alternative and struck down the Child Online Protection Act ("COPA"), which made it a crime to put on the Web content considered "harmful to minors."[206] The Court held that using filtering technology was not shown to be less effective by the government. In particular, the Court focused on "blocking and filtering software" that could voluntarily be installed by users on their own computers. Such filtering software would clearly be less restrictive than the age-verification scheme required by COPA; for instance, an adult with children could simply turn off the filter when the adult wanted to use the computer. Additionally, the Court stated that user-installed filters might well prove more effective than COPA, for example, filters could block foreign-hosted material (which COPA could not effectively reach).[207] Thus, the Court is likely to hold that filters that can prohibit all or certain targeted advertisements from being served to students (which can be controlled by the school or parents), are sufficiently less restrictive alternatives to SOPIPA's targeted advertising ban.

iii. Privacy & Targeted Advertising Self-Regulatory Regimes

The Student Privacy Pledge ("Pledge") also represents a less restrictive alternative to SOPIPA's targeted advertising ban, and substantially serves to directly advance SOPIPA's Privacy and Commercial Interests.[208] The Pledge is a list of privacy and security promises regarding the use and disclosure of personal student information by school service providers.[209] The school service provider definition[210] in the Pledge covers an overlapping group of entities reg-

---

205 *See supra* note 202, at 7 (describing the factors advertisers consider when evaluating whether a particular disclosure is clear and conspicuous).

206 Ashcroft, 542 U.S. at 668.

207 *Id.* at 666-67.

208 STUDENT PRIVACY PLEDGE, K-12 SCHOOL SERVICE PROVIDER PLEDGE TO SAFEGUARD STUDENT PRIVACY 1.0 (2004), https://studentprivacypledge.org/wp-content/uploads/2014/09/Student-Privacy-Pledge-V1.pdf.

209 *Id.*

210 *Id.*

> 'School service provider' refers to any entity that: (1) is providing, and is operating in its capacity as a provider of, an online or mobile application, online service or website that is both designed and marketed for use in United States elementary and secondary educational institutions/agencies and is used at the direction of their teachers or other employees; and (2) collects, maintains or uses student personal information in digital/electronic format. The term 'school service provider' does not include an entity that is providing, and that is operating in its capacity as

ulated by the "Operator" and "K-12 School Purposes" definitions. The Pledge was developed by the Future of Privacy Forum and the Software & Information Industry Association with guidance from school service providers, educator organizations, and other education stakeholders following a convening by United States Representatives Jared Polis (CO) and Luke Messer (IN).[211] In less than two years the Pledge has been signed by over 200 ETCs, including major actors such as Amazon, Apple, Google, and Microsoft.[212] The Pledge has become a standard industry best practice for promoting student privacy, and a major tool to vet and rate companies on their commitment to student privacy.[213] The Pledge has even been endorsed by President Barack Obama.[214] In addition to outlining privacy promises, the Pledge has potential legal and public relations enforcement teeth. The Pledge can be enforced both the 50 State Attorneys' General and the FTC under their authority to enforce against "unfair or deceptive acts or practices in or affecting commerce."[215] Enforcing privacy promises within the pledge could be most easily analogized to enforcing privacy promises listed in a company's privacy policy.[216] For example, if a Pledge signatory targeted advertisements using a student's personal information in violation of the Pledge, the FTC could investigate the company for unfair and deceptive practices.[217]

> a provider of, general audience software, applications, services or websites not designed and marketed for schools.

Id.

211 *Id.*

212 *Signatories*, STUDENT PRIVACY PLEDGE, https://studentprivacypledge.org/signatories/ (last visited Sept. 30, 2016).

213 Alistair Barr, *Why Google Didn't Sign Obama-Backed Student Privacy Pledge*, WALL STREET J. (Jan. 12, 2015), http://blogs.wsj.com/digits/2015/01/13/why-google-didnt-sign-obama-backed-student-privacy-pledge/.

214 Jules Polonetsky, *President Obama Backs FPF-SIIA Student Privacy Pledge*, LINKEDIN (Jan. 12, 2015), https://www.linkedin.com/pulse/president-obama-backs-fpf-siia-student-privacy-pledge-polonetsky?forceNoSplash=true.

215 *Enforcing Privacy Promises: Making Sure Companies Keep Their Privacy Promises to Consumer*s, FTC, https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy/enforcing-privacy-promises (last visited Sept. 30, 2016); FED. TRADE COMM., 2014 PRIVACY AND DATA SECURITY UPDATE (2014), https://www.ftc.gov/system/files/documents/reports/privacy-data-security-update-2014/privacydatasecurityupdate_2014.pdf.

216 *Id.*

217 Lesley Fair, *Federal Trade Commission Advertising Enforcement*, 1, 66, FTC.GOV (Mar. 1, 2008), https://www.ftc.gov/sites/default/files/attachments/training-materials/enforcement.pdf; *See also supra* note 80 (listing enforcement priorities, rules and guides, and consumer protection initiatives of the FTC's Division of Advertising); Anya Kamenetz, *Google Hit With A Student Privacy Complaint*, NAT'L PUB. RADIO (Dec. 8, 2015), http://www.npr.org/sections/ed/2015/12/08/458460509/google-hit-with-a-student-privacy-complaint (reporting a complaint by the Electronic Frontier Foundation alleging

The Supreme Court has held that the means of achieving government interests are unconstitutionally restrictive when there have been robust self-regulatory programs serving similar interests.[218] For example, in *Brown*, the Supreme Court stated that California "cannot show that the Act's restrictions meet the alleged substantial need of parents who wish to restrict their children's access to violent videos. The video-game industry's voluntary rating system already accomplishes that to a large extent."[219] Regarding SOPIPA, the Pledge sufficiently addresses the California government's Privacy and Commercial Interests, allegedly advanced by the targeted advertising ban, because by signing the Pledge, signatories agree to: "Not use or disclose student information collected through an educational/school service (whether personal information or otherwise) for behavioral targeting of advertisements to students."

In addition to the Pledge, the Network Advertising Initiative's ("NAI") Interest Based Advertising Opt-Out is a major self-regulatory regime that provides consumers the ability to not have their information used for targeted advertising purposes.[220] The NAI opt-out tool was developed, in conjunction with the Digital Advertising Alliance ("DAA") for the express purpose of allowing consumers to "opt out" of the Interest-Based Advertising delivered by NAI and DAA members on Web pages using cookies.[221] Interest-Based Advertising is a

---

Google violated the Student Privacy Pledge by not seeking parent authorization to view browsing history of students on their chromebooks).

218 Brown, 131 S. Ct. at 2741-42.

219 *Id.* California cannot show that the Act's restrictions meet a substantial need of parents who wish to restrict their children's access to violent video games but cannot do so. The video-game industry has in place a voluntary rating system designed to inform consumers about the content of games. The system, implemented by the Entertainment Software Rating Board (ESRB), assigns age-specific ratings to each video game submitted: EC (Early Childhood); E (Everyone); E10+ (Everyone 10 and older); T (Teens); M (17 and older); and AO (Adults Only—18 and older). App. 86. The Video Software Dealers Association encourages retailers to prominently display information about the ESRB system in their stores; to refrain from renting or selling adults-only games to minors; and to rent or sell "M" rated games to minors only with parental consent. *Id.*, at 47. In 2009, the Federal Trade Commission (FTC) found that, as a result of this system, "the video game industry outpaces the movie and music industries" in "(1) restricting target-marketing of mature-rated products to children; (2) clearly and prominently disclosing rating information; and (3) restricting children's access to mature-rated products at retail." FTC, Report to Congress, Marketing Violent Entertainment to Children 30 (Dec. 2009), online at http://www.ftc.gov/os/2009/12/P994511violententertainment.pdf (last visited June 24, 2011, and available in Clerk of Court's case file) (FTC Report). This system does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home. Filling the remaining modest gap in concerned-parents' control can hardly be a compelling state interest." *Id.*

220 *Opt Out of Interest-Based Advertising*, NETWORK ADVERT. INITIATIVE, http://www.networkadvertising.org/choices/ (last visited Nov. 15, 2016).

221 *Id.*

form of targeted advertising where "the ads you receive on Web pages are customized based on predictions about your interests generated from your visits over time and across different web-sites. This type of ad customization — sometimes called "interest-based" or "online behavioral" advertising — is enabled through various technologies, including browser cookies as well as other non-cookie technologies." The opt-out tool allows consumers to opt-out from receiving Interest-Based Advertising from some or all of the NAI and DAA participating member companies that use cookies on a consumer's computer browser for Interest-Based Advertising. Most major online advertisers are part of the Online Interest-Based Advertising opt-out regime.[222] Thus, the NAI opt-out regime provides a less restrictive alternative to SOPIPA's targeted advertising ban, by allowing "Users" of online education services to opt-out of receiving targeted advertisements on the service's platform based on personal information.

Due to the success of the Pledge and the NAI Advertising Opt-Out, one could imagine a self-regulatory regime where advertisers and businesses with advertising platforms agree not to advertise certain content (e.g., vice goods like cigarettes and alcohol) on educational services to students under the age of 18. Categories of impermissible advertisements could be determined by academic research demonstrating a certain degree of harm, for example, to the educational atmosphere or student behavior. As mentioned before, academics have already conducted research on the harm of advertising cigarettes, alcohol, and junk-food to children.[223] Additionally, privacy groups have called for more academic research focusing on the effect of advertising in K-12 education environments.[224]

V. CONCLUSION

Student information privacy is destined to be an issue of growing importance as education technology becomes more popular and sophisticated. As the regulatory scheme surrounding student information grows, legislatures

---

[222] *NAI Members*, NETWORK ADVERT. INITIATIVE, http://www.networkadvertising.org/participating-networks (last visited Nov. 15, 2016).

[223] COMMON SENSE MEDIA, ADVERTISING TO CHILDREN AND TEENS: CURRENT PRACTICES 15-16 (Jan. 28, 2014), https://www.commonsensemedia.org/research/advertising-to-children-and-teens-current-practices (discussing the research on how many hours of television children and teens watch and the types of programs they typically view along with what they search for on the internet, mobiles, and integrated advertising effects on this targeted audience); Brian L. Wilcox et al., *supra* note 122, at 7 (discussing the need for more research into the effects of advertising on children given the current research showing that advertisements exert considerable influence on children).

[224] *Id.*

must maintain balance between the need to protect student information privacy and the need to maximize student achievement. Education technology has the potential to greatly enhance student achievement, and must not become a privilege for those school districts and parents who can afford it. Revenue from targeted advertising may help remedy the growing digital divide in education. Thus, the promulgation of student privacy regulations should not be an isolated process, and instead should acknowledge the broader education landscape.

This article is motivated by the unintended consequences created by SOPIPA's targeted advertising ban, namely closing off a potentially large revenue source that could be diverted to bettering education. The First Amendment argument in this article is limited to illustrating how SOPIPA's targeted advertising ban would likely be held by the Supreme Court to be an unconstitutional restriction on commercial speech. The Supreme Court is likely to hold first that California does have a Privacy Interest in limiting the dissemination of personal student information for advertising purposes, and a Commercial Interest in preventing the commercial exploitation of students, and preserve the educational atmosphere in schools. However, the Court is less likely to hold that California has the same Privacy Interest in limiting the disclosure of adult "User" information for targeted advertising purposes. Similarly, the Court is less likely to hold that California has a Commercial Interest in protecting adult "Users" from targeted advertisements. Second, the Court is unlikely to hold that restricting the use of "User" information for targeted advertising purposes, in contrast to the disclosure, directly advances California's interests.

Third, the Supreme Court is likely to rule that SOPIPA's targeted advertising ban is unconstitutionally more restrictive than necessary because (1) the ban prohibits targeting advertisements to adult "Users" (e.g. teachers, parents, or school administrators); (2) the ban prohibits targeting advertisements off of the operator's "K-12 School Purposes" platform; and (3) because parents should be able to decide what content their children view (especially when the content is not obscene, illegal, or deceptive). Fortunately, there are alternative methods of achieving California's objectives, at least as well as, and with significantly less interference than with protected commercial speech. Less restrictive alternatives include: (4) allowing adult "Users" and students to consent (e.g. opt-in) to receiving targeted advertisements; (5) filtering tools that allow schools or parents to filter the type and/or number of targeted advertisements received by student and adult "Users;" and (6) by deferring to industry self-regulatory regimes.

Finally, this paper argued that SOPIPA should at least have the following exceptions, many of which have been incorporated into subsequently enacted state student privacy laws throughout the country. First, targeted advertising should be permitted to student "Users," ages 13 and over, of Operator run "K-

12 School Purpose" services, to adult "Users" of Operator run "K-12 School Purpose" services. Second, these advertisements should be permitted to be presented to "Users" when they are off of the educational platform (e.g. not presented in the platform). Third, targeted advertising should be permissible when it only **uses**, but does not **disclose**, a "User's" personal information for targeted advertising. Fourth, targeted advertising should be able to serve advertisements based on non-personal "User" information. Fifth, the categories of permissible targeted advertising should be extended to protected commercial advertisements related to education, jobs, and politics.