

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN JOSE DIVISION**

NICHOLE HUBBARD, et al.,

Plaintiffs,

v.

GOOGLE LLC, et al.,

Defendants.

Case No. 19-cv-07016-BLF

**ORDER GRANTING MOTION TO  
DISMISS WITH LEAVE TO AMEND**

[Re: ECF 125]

For the second time, this Court must decide whether Plaintiffs in this action have alleged illegal behavior on the part of Defendants that goes beyond what Congress has regulated under the Children’s Online Privacy Protection Act, 15 U.S.C. §§ 6501–6506 (“COPPA”). For the second time, this Court finds that they have not.

Minor Plaintiffs C.H., by and through their guardian ad litem Nichole Hubbard; E.J., N.J., A.J., and L.J., by and through their guardian ad litem Cara Jones; J.A.E. and J.R.E., by and through their guardian ad litem Justin Efros; M.W., by and through their guardian ad litem Renee Gilmore; A.G., by and through their guardian ad litem Jay Goodwin; and C.D., by and through their guardian ad litem Bobbi Dishman, (“Plaintiffs”) bring this suit against Defendants Google LLC and YouTube LLC (collectively “Google”) and Cartoon Network, Inc., Cartoon Network Studios, Inc., ChuChu TV Studios, DreamWorks Animation LLC, DreamWorks Animation Television, LLC, Hasbro, Inc., Hasbro Studios LLC, Mattel, Inc., Remka, Inc., RTR Production, LLC, RFR Entertainment, Inc., and Pocketwatch, Inc. (collectively “Channel Owners”). Plaintiffs allege Defendants unlawfully violated the right to privacy and reasonable expectation of privacy of their children, who are all under thirteen years of age and subject to COPPA’s protections. *See*

*Third Am. Compl. (“3AC”) ECF 121. Plaintiffs have brought analogous state law claims against*

Defendants. *Id.*

On December 21, 2020, this Court granted Defendants' motion to dismiss and held that Plaintiffs' claims were preempted under COPPA. *See* Order ("Prior Order") ECF 117. Now, Defendants have filed another motion to dismiss, maintaining that the claims in Plaintiffs' third amended complaint are still preempted by COPPA. *See* Mot., ECF 125. Plaintiffs oppose, arguing that they have sufficiently alleged deceptive conduct on the part of Defendants that goes beyond the conduct regulated by COPPA. *See* Opp'n, ECF 127. The Court agrees with Defendants and finds Plaintiffs' claims remain preempted by COPPA. Accordingly, the Court GRANTS Defendants' motion. As further explained below, because Plaintiffs could potentially cure the defects in their complaint with named plaintiffs in the 13-16 age range, the Court dismisses the complaint with leave to amend.

### **I. BACKGROUND**

Google operates the video sharing-platform YouTube ("YouTube platform"). 3AC ¶ 2. The YouTube platform is accessible as a website, mobile application, or via an application on a set-top streaming device that can connect to a television. *Id.* Any individual or organization registered with YouTube, through a Google account, may upload videos they have created. *Id.* These videos are uploaded to that individual's or organization's "channel." *Id.* Individuals do not have to register or sign in to view videos uploaded to the YouTube platform. *Id.* There is no age verification required to view videos. *Id.*

The YouTube platform is "the #1 website regularly visited by kids." 3AC ¶ 4. Defendants Mattel and Hasbro, classic toy brands, are among the Channel Owners who maintain and create content aimed at children. *Id.* Other Channel Owners do the same: for example, Defendant ChuChuTV's channel features cartoons and nursery rhymes. *Id.* ¶ 101. Defendants Remka, RTR Production, RFR Entertainment, and Pocketwatch together operate a channel, Ryan's World, featuring a nine-year-old boy unboxing toys and other children's products. *Id.* ¶ 106. This is the second-most popular YouTube channel, with approximately 22.5 million subscribers and over 33

1 billion views. *Id.* ¶ 107. Plaintiffs detail the child-aimed content of the other Channel Owner  
2 Defendants as well. *Id.* ¶¶ 112-13; 119, 122, 126, 130-31.

3 Google and the Channel Owners generate revenue from the YouTube platform through  
4 advertising, with Google placing ads on the channels and keeping 45% of the ad revenue. 3AC ¶  
5 5. The Channel Owners retain 55% of the ad revenue. *Id.* Plaintiffs allege that Google, with the  
6 authorization and consent of the channel owners, impermissibly “knowingly and purposefully  
7 tracked, profiled, and targeted minors on the YouTube Platform for advertising revenue.” *Id.* ¶ 81.  
8 Plaintiffs allege that Google tracked Plaintiffs’ personal data and information, such as internet  
9 protocol addresses and device serial numbers, and that allowed Google to develop profiles of  
10 individuals over time by tracking their activities across multiple websites. *Id.* ¶ 9. While Google  
11 maintained in the YouTube terms of service and the Google Privacy Policy that the YouTube  
12 Platform was not for children under thirteen, *id.* at ¶ 85, the Channel Owners intentionally created  
13 content aimed at children under thirteen so that Google could target and track young children for  
14 ad revenue, *id.* ¶ 99.

15 Through COPPA, Congress has regulated the amount of data Google is legally able to  
16 collect from children without parental consent. TAC ¶ 72. COPPA provides, in pertinent part, that,

17  
18 It is unlawful for an operator of a website or online service directed to children, or any  
19 operator that has actual knowledge that it is collecting personal information from a child,  
20 to collect personal information from a child in a manner that violates the regulations  
prescribed [by the Federal Trade Commission].

21 15 U.S.C. § 6502(a). TAC ¶ 72. COPPA applies to any operator of a commercial website or online  
22 service directed to children under thirteen years of age that collects, uses, and/or discloses personal  
23 information from children. *Id.* ¶ 73. The Federal Trade Commission (“FTC”) has interpreted  
24 COPPA’s definition of “website or online service” to include individual channels on a general  
25 audience platform—according to the FTC, “content creators and channel owners” are both  
26 “standalone ‘operators’ under COPPA, subject to strict liability for COPPA violations.” *Id.*;  
27 Statement of Joseph J. Simons & Christine S. Wilson, Federal Trade Commission, *Regarding FTC*  
28 *and People of the State of New York v. Google LLC and YouTube LLC* (Sept. 4, 2019).

1 [https://www.ftc.gov/system/files/documents/public\\_statements/1542922/simons\\_wilson\\_google\\_y](https://www.ftc.gov/system/files/documents/public_statements/1542922/simons_wilson_google_y)  
 2 [outube\\_statement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1542922/simons_wilson_google_y). The FTC also considers third parties with actual knowledge that they are  
 3 collecting personal information from users of a child-directed site or service as operators under  
 4 COPPA. *Id.* ¶ 73.

5 In order to determine whether a website or online service is “directed to children” the FTC  
 6 is to:

7 [C]onsider [the website’s or online service’s] subject matter, visual content, use of  
 8 animated characters or child-oriented activities and incentives, music or other audio  
 9 content, age of models, presence of child celebrities or celebrities who appeal to children,  
 10 language or other characteristics of the Web site or online service, as well as whether  
 11 advertising promoting or appearing on the Web site or online service is directed to  
 12 children.

13 16 CFR § 312.2. TAC ¶ 74. COPPA defines a “child” as an individual under the age of thirteen.  
 14 15 U.S.C. § 6501(a). TAC ¶ 76. The FTC regulations require an operator to disclose information  
 15 collection practices and “obtain verifiable parental consent for [any] collection, use, or disclosure  
 16 of personal information from children.” 15 U.S.C. § 6502(b)(1)(A); 16 C.F.R. § 312.5(a); TAC ¶  
 17 76. Among the types of personal information under COPPA that may only be collected from  
 18 children with parental consent are “persistent identifier[s] that can be used to recognize a user over  
 19 time and across different sites, including a cookie number, an IP address, a processor or device  
 20 serial number, or a unique device identifier.” TAC ¶ 77.

21 Google has been subject to COPPA enforcement previously. TAC ¶ 66. In Fall 2019,  
 22 Google reached a settlement with the FTC and New York Attorney General, and Google  
 23 announced it would start treating data from anyone watching children’s content on the YouTube  
 24 Platform as coming from a child, regardless of the age of the user, which brought it into  
 25 compliance with COPPA. *Id.*

26 Plaintiffs allege that Google did its tracking, profiling, and targeting of children while  
 27 feigning compliance with applicable federal and state laws. 3AC ¶¶ 81, 164. Plaintiffs cite  
 28 Google’s then-Code of Conduct, which read, in relevant part:

29 “Don’t be evil.” Googlers generally apply those words to how we serve our users. But “Don’t  
 30 be evil” is much more than that. Yes, it’s about providing our users unbiased access to

can. But it's also about doing the right thing more generally – following the law, acting honorably and treating co-workers with courtesy and respect.

3AC ¶ 164. Plaintiffs also cite Google's then-Privacy Policy ("Our goal is to be clear about what information we collect, so that you can make meaningful choices about how it is used") and Terms of Service ("We want to maintain a respectful environment for everyone, which means you must follow these basic rules of conduct" including "comply[ing] with applicable laws") and allege that these corporate policies created an expectation of privacy with respect to the YouTube Platform. *Id.* ¶¶ 161-167. Despite this alleged expectation of privacy, Google tracked and collected the personal information of children under the allegedly false pretense that Google would be "transparent" with parents about what information was being collected from child viewers and compliant with applicable legal requirements and prohibitions, including COPPA. *Id.* ¶ 166. Plaintiffs further allege that Google's Privacy Policy deceptively conceals that the purpose of its tracking and assimilating information from the YouTube Platform is to enable it to target the vulnerabilities of children through behavioral advertising for profit. *Id.* ¶ 9.

Plaintiffs also acknowledge that Google's Privacy Policy discloses that it collects personal information from individuals who access the YouTube Platform, including persistent identifiers such as a user's IP address. TAC ¶ 55. Plaintiffs also allege that Google discloses that it tracks any individuals' activity on any webpage that uses Google's advertising services, and this tracking activity allows Google to deliver more relevant search results and ads to YouTube video viewers. TAC ¶¶ 62-63.

Plaintiffs also allege deception on Google's part through the creation of the YouTube Kids application, which they allege was "guise to generate content for children on the YouTube Platform. TAC ¶ 89. Google did not track users or serve targeted behavior ads on the YouTube Kids app. *Id.* ¶ 90 Every video available on the YouTube Kids app was also uploaded to the YouTube Platform. *Id.* ¶ 89. The YouTube Kids app was only available as a mobile application until 2019, so when children searched for their favorite show on a web browser, they would be shown links to child-directed content hosted on the YouTube Platform and not the YouTube Kids app, which allowed Google to employ its tracking and behavioral advertising scheme on the

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