

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CARA JONES, as parent and guardian of E.J., N.J., A.J., and L.J., minors; JUSTIN EFROS, as parent and guardian of J.A.E. and J.R.E., Minors; NICHOLE HUBBARD, as parent and guardian of C.H., a minor; individually and on behalf of all others similarly situated; RENEE GILMORE, as parent and guardian of M.W., a minor; JAY GOODWIN, as parent and guardian of A.G., a minor; BOBBI DISHMAN, as parent and guardian of C.D., a minor; PAULA RIDENTI, as parent and guardian of R.A. and R.M.A., minors; C.H.; E.J.; N.J.; A.J.; L.J.; J.A.E.; J.R.E.; M.W.; A.G.; C.D.,

Plaintiffs-Appellants,

v.

GOOGLE LLC; YOUTUBE, LLC; MATTEL, INC.; DREAMWORKS ANIMATION LLC; HASBRO, INC.; HASBRO STUDIOS, LLC; THE CARTOON NETWORK, INC.; CARTOON NETWORK STUDIOS, INC.; POCKETWATCH, INC.;

No. 21-16281

D.C. No. 5:19-cv-07016-BLF

OPINION

REMKA, INC.; RTR PRODUCTION,
LLC; RFR ENTERTAINMENT,
INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Beth Labson Freeman, District Judge, Presiding

Argued and Submitted August 31, 2022
Seattle, Washington

Filed December 28, 2022

Before: Michael Daly Hawkins, M. Margaret McKeown,
and Gabriel P. Sanchez, Circuit Judges.

Opinion by Judge McKeown

SUMMARY*

Preemption / Children's Online Privacy Protection Act

The panel reversed the district court's dismissal, on preemption grounds, of a third amended complaint in an action brought by a class of children, appearing through their

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

guardians ad litem, against Google LLC and others, alleging that Google used persistent identifiers to collect data and track their online behavior surreptitiously and without their consent in violation of the Children’s Online Privacy Protection Act (“COPPA”).

Google owns YouTube, a widely used online video-sharing platform that is popular among children. Google’s targeted advertising is aided by sophisticated technology that delivers curated, customized advertising based on information about specific users. Google’s technology depends partly on what Federal Trade Commission (“FTC”) regulations call “persistent identifiers,” which is information “that can be used to recognize a user over time and across different Web sites or online services.” 16 C.F.R. § 312.2. In 2013, the FTC adopted regulations under COPPA that barred the collection of children’s “persistent identifiers” without parental consent.

The plaintiff class alleges that Google used persistent identifiers to collect data and track their online behavior surreptitiously and without their consent. They plead only state law claims arising under the constitutional, statutory, and common law of California, Colorado, Indiana, Massachusetts, New Jersey, and Tennessee, but also allege Google’s activities violate COPPA. The district court held that the “core allegations” in the third amended complaint were squarely covered, and preempted, by COPPA.

The panel considered the question of whether COPPA preempts state law claims based on underlying conduct that also violates COPPA’s regulations. The Supreme Court has identified three different types of preemption—express, conflict, and field. First, express preemption is a question of statutory construction. COPPA’s preemption clause

provides: “[n]o State or local government may impose any liability . . . that is inconsistent with the treatment of those activities or actions under this section.” 15 U.S.C. § 6502(d). The panel held that state laws that supplement, or require the same thing, as federal law, do not stand as an obstacle to Congress’ objectives, and are not “inconsistent.” The panel was not persuaded that the insertion of “treatment” in the preemption clause here evinced clear congressional intent to create an *exclusive* remedial scheme for enforcement of COPPA requirements. If exercising state-law remedies does not stand as an obstacle to COPPA in purpose or effect, then those remedies are treatments consistent with COPPA. The panel concluded that COPPA’s preemption clause does not bar state-law causes of action that are parallel to, or proscribe the same conduct forbidden by, COPPA. Accordingly, express preemption does not apply to the plaintiff class’s claims. Second, even if express preemption is not applicable, preemptive intent may be inferred through conflict preemption principles. The panel held that although express and conflict preemption are analytically distinct inquiries, they effectively collapse into one when the preemption clause uses the term “inconsistent.” For the same reasons that the panel concluded there was no express preemption, the panel concluded that conflict preemption did not bar the plaintiffs’ claims.

The panel reversed the district court’s dismissal on preemption grounds, and remanded so that the district court could consider in the first instance the alternative arguments for dismissal, to the extent those arguments were properly preserved.

COUNSEL

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