

## Children’s Online Privacy and Protection Act “COPPA”

### Breaking Down Statutory Text

This chart details which preemption sections of various omnibus and sectoral statutes deal with federal preemption.

Codified Section	Type of Preemption	Are the circuit courts in general agreement on what this means?
<a href="#">15 U.S.C. §6502(d)</a>	Express Preemption	Yes – courts determine if litigation will “impose any liability” or if the conduct is “inconsistent” with obligations under COPPA.
<a href="#">15 U.S.C. §6504(a)</a>	Anti-Preemption Provision	Not litigated
<a href="#">15 U.S.C. §6504(c)</a>	Anti-Preemption Provision	Not litigated
<a href="#">15 U.S.C. §6504(d)</a>	Express Preemption	Not litigated

### Methodology

The statutory text overwhelmingly contains express preemption and various savings clauses. Express preemption is directly related to statutory text, and it is the only form of preemption with this quality. The remaining types of preemption – field, impossibility, and obstacle – are forms of *implied* preemption. As the name suggests, these preemption categories are implicit in every statute and consequently do not rely on statutory text. (However, sometimes a statute will explicitly address an implied preemption principle, such as 42 U.S.C. § 2000h-4.) Instead, implied preemption principles appear exclusively in case law. Case law that relies on a theory of implied preemption are appropriately notated.

Since courts have not addressed every issue, there may be areas that are marked as “Not litigated.”

Legend:

**Express Preemption**

**Field Preemption**

Impossibility Preemption

**Obstacle Preemption**

Floor Preemption

*Anti-Preemption Provision*

Compliance Savings Clause

**Remedies Savings Clause**

Sunset Provision

Ceiling Preemption

### Statutory Text

15 U.S.C. §6502

Regulation of unfair and deceptive acts and practices in connection with the collection and use of personal information from and about children on the Internet.

(d) Inconsistent State law. No State or local government may impose any liability for commercial activities or actions by operators in interstate or foreign commerce in connection with an activity or action described in this title that is inconsistent with the treatment of those activities or actions under this section.

15 U.S.C. §6504  
Actions by States

(a) *In general.*

(1) *Civil actions.* In any case in which the attorney general of a State has reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by the engagement of any person in a practice that violates any regulation of the Commission prescribed under section 1303(b) [15 USCS § 6502(b)], the State, as *parens patriae*, may bring a civil action on behalf of the residents of the State in a district court of the United States of appropriate jurisdiction to—

(A) *enjoin that practice;*

(B) *enforce compliance with the regulation;*

(C) *obtain damage, restitution, or other compensation on behalf of residents of the State; or*

(D) *obtain such other relief as the court may consider to be appropriate.*

(2) *Notice.* ...

(b) *Intervention.* ...

(c) *Construction.* For purposes of bringing any civil action under subsection (a), nothing in this title shall be construed to prevent an attorney general of a State from exercising the powers conferred on the attorney general by the laws of that State to—

(1) *conduct investigations;*

(2) *administer oaths or affirmations; or*

(3) *compel the attendance of witnesses or the production of documentary and other evidence.*

(d) Actions by the Commission. In any case in which an action is instituted by or on behalf of the Commission for violation of any regulation prescribed under section 1303, no State may, during the pendency of that action, institute an action under subsection (a) against any defendant named in the complaint in that action for violation of that regulation.

(e) *Venue; service of process.* ...

### Summary

Currently, there is not a large amount of litigation regarding the preemptive effect of COPPA. When discussed, courts have narrowed in on express preemption. Express preemption has focused on 15 U.S.C. §6502(d), where courts determine if litigation will “impose any liability” or if the conduct is “inconsistent” with obligations under COPPA.

## Case Law

*In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262 (3d Cir. 2015)

Facts: Plaintiffs allege Viacom, the owner of Nickelodeon, in conjunction with Google, collected information about children visiting the website Nick.com. This information is used to sell targeted advertising. Children's advertising is particularly profitable because "children are generally unable to distinguish between content and advertisements."

Issue: Is Plaintiff's intrusion claim inconsistent with the obligations imposed by COPPA or does it rest on common-law duties that are compatible with COPAA?

Rule: Under *Medtronic*, the Supreme Court has held that when federal laws have preemptive effects, states can continue to provide "traditional damages remedy for violations of common-law duties when those duties parallel federal requirements."

Application: Viacom created an expectation of privacy on its website, then collected and sold children's personal information. This deceptive conduct leads to a claim that is compatible with COPPA.

Holding: COPPA does not preempt a state-law privacy claim.

*Fraley v. Batman*, 638 Fed. Appx. 594 (9th Cir. 2016)

Facts: This class is made of about 150 million members of Facebook's website who claim their name/likenesses were misappropriated to promote products and services in its "Sponsored Stories." The District Court was reviewing a settlement requiring Facebook to pay small cash payments to some class members, pay millions to organizations dedicated to internet privacy issues, change its Statement of Rights and Responsibility, create additional mechanisms for user control of its "Sponsored Stories."

Procedural History: Based on preemption, the District Court held "the objectors have not persuasively shown the settlement to be improper." COPPA could bar efforts by Plaintiffs to use state law to impose parental consent requirements. However, the objection fails because objectors did not show the differences in law were material or that choice-of-law principles would permit the application of the law.

Holding: The district court's duty was to determine if the settlement was fair, reasonable, and adequate. It was within its discretion when finding COPPA "may well" preempt claims of the minor subclass, without determining if COPPA actually would preempt them.

*N.M. ex rel. Balderas v. Tiny Lab Prods.*, 457 F. Supp. 3d 1103 (D.N.M. 2020)

Facts: Software development kits, "SDKs" are codes sold to app developers, which are places in apps to collect information about its users. Tiny Lab Productions develops child-directed mobile game apps which were available in the Google Play Store. Tiny Lab's apps contain SDKs, which track information about the child's online behavior that is subsequently used in targeted advertising. New Mexico alleges, among others, violations of COPPA and a state common law claim for intrusion on seclusion.

Procedural History: The state common law claim against the Ad Networks affects Defendants differently. All Ad Networks except Google are referred to as "SDK Defendants." Google filed its own, separate, motion to dismiss.

Holding: Plaintiff's state law claims against SDK Defendants are preempted because the claim would impose liability without meeting COPPA's imposition of actual knowledge

standard. The state law claim against Google is not preempted because Plaintiff adequately alleges Google's actual knowledge.

*Hubbard v. Google LLC*, 508 F. Supp. 3d 623 (N.D. Cal. 2020)

Facts: YouTube, owned by Google, is "the #1 website regularly visited by kids." Google collects information about those who use its site, develops a valuable user profile, and sells the data to advertisers. COPPA limits company's ability to legally collect data from children without parental consent. Plaintiffs allege violations of intrusion upon seclusion, unjust enrichments, various state consumer protection acts, and California's constitutional right to privacy. Defendants argue Plaintiff's claims are preempted.

Holding: COPPA preempts the Plaintiff's claims.

*Manigault-Johnson v. Google, LLC*, 2019 U.S. Dist. LEXIS 59892 (D.S.C. 2019)

Facts: This class action suit alleges Defendants extracted and sold children's personally identifying information in violation of COPPA. The claims are under both federal and state laws – including COPPA, intrusion upon seclusion, and California's constitutional right to privacy.

Holding: The Court decided the case in favor of Defendants on grounds other than preemption. However, the Court addressed preemption in dicta: "it appears to the Court that Plaintiffs seek to use the vehicle of state law to privately enforce provisions of COPPA, which Congress clearly intended to preclude" with express preemption.

### Further Readings

Tsan Abrahamson. *Coping with COPPA: The Practical Aspects of Children's Privacy*. 48 PRAC. L. 49 (2002)

Anita Allen. *Minor Distractions: Children, Privacy and E-commerce*. 38 HOUS. L. REV. 751, (2001)

Laurel Jamtgaard. *Big Bird Meets Big Brother: a look at the Children's Online Protection Act*. 16 SANTA CLARA HIGH TECH. L.J. 385 (2000)