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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Google Tracking Win Exposes Cracks In Stale Privacy Laws

By **Allison Grande**

Law360, New York (October 15, 2013, 10:18 PM ET) -- Google Inc. last week escaped multidistrict litigation accusing it of bypassing Apple Inc.'s Safari browser privacy settings to illegally track consumers' Internet activity, a decision that attorneys say further establishes courts' unwillingness to reinterpret outdated privacy laws to cover new uses of personal data.

In an **Oct. 9 opinion**, District of Delaware Judge Sue L. Robinson tossed the 24 consolidated suits against Google and several other online advertisers, finding the plaintiffs lacked standing because they hadn't alleged an injury-in-fact from the companies' use of cookies to track the browsing activities of Safari users.

The plaintiffs had attempted to avoid thorny injury issues and establish standing by shoehorning their claims into decades-old statutes such as the Electronic Communications Privacy Act and the Computer Fraud and Abuse Act, a failed effort that attorneys say marks the latest example of judges' reluctance to read too far outside the outdated statutory language.

"Here we go again: parties losing really valid claims because courts cannot fit round pegs into square holes," Butzel Long PC shareholder Claudia Rast said. "Plaintiffs will continue to bring these types of lawsuits, but I don't see our federal judges refashioning these statutes to meet today's innovative technologies."

According to Steptoe & Johnson LLP partner Jason Weinstein, the case is an example of courts increasingly demanding that plaintiffs show actual, rather than theoretical, harm. Although Judge Robinson acknowledged that a statutory violation can in some cases create standing absent actual injury, she refused to find that any statute currently on the books operated to bar the defendants' alleged browser tracking.

For example, with respect to ECPA, the judge found that the URLs and other personal information allegedly tracked by Google did not qualify as "contents" of communications that the law was designed to protect, such as the spoken words of a telephone call.

"Cookie litigation has been a tough road for plaintiffs for over a decade, and this case is no exception," Orrick Herrington & Sutcliffe LLP counsel Eulonda Skyles said. While the court acknowledged that portions of ECPA were outdated, it refused to interpret how modern technology would fit with Congress' intent in drafting privacy law, she said.

The ruling marks the third time in recent weeks that courts have ruled on an issue under ECPA that involves Google, although it is the first time that the statutory interpretation has gone the company's way.

A California federal judge on Sept. 26 **refused to toss** a class action accusing Google of violating ECPA by scanning users' emails, finding the conduct didn't fall within the statute's "ordinary course of business" exception. And on Sept. 10, the Ninth Circuit **rejected Google's novel argument** that data collection from unencrypted Wi-Fi networks is allowed under an ECPA exemption allowing for the collection of unencrypted radio communications that are "readily accessible to the public."

While all three cases highlighted the difficulties of applying statutory frameworks like ECPA, which was enacted in 1986, to new technology, attorneys noted that the type of data at issue in the three cases may have also influenced the extent to which the alleged conduct fit into the privacy law.

"In the browser tracking case, the court was clear that this didn't involve the content of communications [as with the other two cases], and as such, the law wasn't designed to protect those types of things," Snell & Wilmer LLP attorney Ryan Ricks said. "This hits on the fundamental problem and challenge of statutory regimes that are behind technological progress. As new technology comes along, the laws are poorly suited to analyze potential violations because the technology wasn't around at the time the statute was drafted."

As companies continue to seek out innovative ways to capitalize on consumer data, current privacy law leaves plaintiffs with little recourse to challenge the practices, according to attorneys.

"The court's opinion highlights the proverbial cat-and-mouse chase that the law and technology constantly find themselves in: The law is in a never-ending struggle to keep pace with the ever and rapidly changing technology landscape, and too often the law cannot keep up," said Torin A. Dorros, managing attorney of Los Angeles-based boutique firm Dorros Law. "Plaintiffs may face some real uphill battles in the future in the Internet privacy arena without some legislative or High Court focus on the issues."

While Congress has previously passed statutes like the Gramm-Leach-Bliley Act and the Health Insurance Portability and Accountability Act to address new uses of data in the financial services and health care sectors, it has failed to address general personal privacy concerns, and the current gridlock in Congress makes it unlikely that a fix will be coming anytime soon, according to Rast.

However, the Federal Trade Commission has attempted to step up to fill the void created by outdated privacy laws, and in August 2012 addressed revelations about Google's alleged tracking cookie placement by **hitting the company** with a \$22.5 million fine that represented the largest civil penalty that agency had ever obtained for violation of a prior commission order.

"I think one of the points to take away is that the FTC does not face the same obstacles with respect to standing that individual consumers bringing private causes of action do," Shook Hardy & Bacon LLP data security and privacy group co-chair Al Saikali said.

But while the FTC and other regulators might be able to chip away at potential privacy issues, their actions still can't obtain the relief possible in a successful consumer class action, attorneys noted.

"What the FTC can do only addresses one particular entity and not the global problem, and it's not an especially effective or efficient route for consumers interested in protecting privacy online," Ricks said.

The plaintiffs in the browser tracking MDL are represented by Seeger Weiss LLP, Keefe Bartels LLC, Strange & Carpenter, Stewarts Law LLP, Bartimus Frickleton Robertson &

Gorny PC and Eichen Crutchlow Zaslow & McElroy LLP, among others.

Google is represented by Wilson Sonsini Goodrich & Rosati PC and Jacover Law LLC.

The case is In re: Google Inc. Cookie Placement Consumer Privacy Litigation, case number 1:12-md-02358, in the U.S. District Court for the District of Delaware.

--Editing by Elizabeth Bowen and Chris Yates.

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