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Google's Email Setback Hands Weapon To Privacy Plaintiffs

By **Allison Grande**

Law360, New York (September 27, 2013, 9:30 PM ET) -- A California federal judge on Thursday refused to toss a class action accusing Google Inc. of violating the federal wiretap statute by scanning users' emails to target advertising, providing plaintiffs that typically struggle to maintain privacy claims with a legal argument that could prove potent, attorneys say.

Google had tried to dispose of the plaintiffs' unauthorized interception claims by arguing that its reading of any emails would fall within an "ordinary course of business" exception under the Electronic Communications Privacy Act. Besides, it said, the plaintiffs had consented to Google's interception of the emails by signing up for its services.

But U.S. District Judge Lucy H. Koh **allowed the plaintiffs' ECPA claims to proceed** beyond the pleading stage, ruling that scanning emails to create user profiles and to target ads could not be considered an instrumental operation for an email system. Furthermore, she found that Google's policies did not explicitly notify the plaintiffs of any email interception.

The ruling boosts not only the plaintiffs in the Google case, but also other class action plaintiffs seeking ways to overcome the hurdles that often thwart data misuse claims, according to attorneys.

"Over the last several years, most plaintiffs' privacy class action suits against online companies have been tossed out by courts on standing and other technical grounds," Orrick Herrington & Sutcliffe LLP litigator Eulonda Skyles said. "This ruling should be a wake-up call to the Internet industry that the plaintiffs' privacy class action suits can indeed pose substantial legal exposure and liability."

The plaintiffs bar will likely seize on the ruling to attack other revenue-driven data-mining practices commonly used by Internet service providers, attorneys say. So companies should revisit their privacy policies to ensure customers are giving them explicit consent for activities that might fall outside the narrow scope of the "ordinary course of business" exception outlined by Judge Koh, attorneys say.

"The court's decision ... should put technology and communications companies on further guard in determining what data to collect or intercept and underscores the need to carefully review and craft their privacy policies, including ensuring that consent is obtained where necessary and that such consent is very conspicuously obtained through an opt-in [or] opt-out option," said Torin A. Dorros, managing attorney of Los Angeles-based boutique firm Dorros Law.

While it may be difficult for companies with rapidly evolving business models to keep their policies and procedures current, attorneys say it is imperative for them to make sure users know about any new data-mining practices.

Although email scanning of the type Google stands accused of did not exist when lawmakers passed ECPA in 1986, attorneys say the statute's intent appears to have been to bar the interception of personal communications for revenue-generating practices that are not necessary to ensure that messages are delivered and that fraud does not occur.

"My understanding is that the 'ordinary course of business' exception permits ISPs to intercept and monitor communications to be able to maintain the quality of their services and to combat fraud to the system," said Weisbrod Matteis & Copley PLLC partner Peter Toren. "ECPA was designed to protect the privacy of stored emails, so the idea that Google is electronically reviewing or reading email communications to send targeted ads to users hardly seems to be within the spirit of ECPA."

Google said in a statement Thursday that it uses automated scanning to provide Gmail users with services such as security and spam protection, but acknowledged that the practice also allows it to maintain "great features like Priority Inbox."

But while the statutory language appears to favor the plaintiffs' contentions, attorneys note that sweeping changes to companies' business models since 1986 make the statute's application less clear-cut than it may seem.

"The opinion's conclusion that Google's use of information in emails does not occur in the 'ordinary course of business' seems to ignore the fact that providing advertising in return for free services now is 'ordinary' and even 'routine' for many Internet services," Snell & Wilmer LLP partner Timothy Toohey said. "The model is far different from the one that prevailed when [ECPA] was passed, when users paid a company for services, such as telephone companies."

So companies would be wise to accelerate their **push for Congress to amend ECPA** to provide clear guideposts about what activities should be permitted, according to attorneys.

"Google is having to shoehorn its 21st-century technologies into the mindset of our legislators in 1986, when the concept of digitally targeted advertising did not even exist," Butzel Long PC shareholder Claudia Rast said. "With regard to how lawyers are trying to interpret existing outdated statutes such as ECPA on behalf of their information technology envelope-pushing clients, I can only quote Bette Davis's wonderful line from 'All About Eve': 'Fasten your seatbelts. It's going to be a bumpy night.'"

However, the prognosis is not all bad for companies like Google, according to attorneys. The email scanning case is still in its early stages, and Judge Koh's position may change once she is able to consider the underlying evidence rather than just the pleadings.

"A federal motion to dismiss is in large part a 'pleading motion' and merely looks to the adequacy of the complaint and whether the plaintiffs have at least alleged claims that are 'plausible,'" Dorros said. "Getting past a motion to dismiss is a far cry from prevailing in an entire case."

The plaintiffs are represented by Wylly-Rommel PLLC, Kerr & Wagstaffe LLP, Cory Watson Crowder & DeGaris PC, Golomb Honik PC, Slocumb Law Firm LLC, Goldenberg Heller Antognoli and Rowland PC, among others.

Google is represented by Michael G. Rhodes, Whitty Somvichian and Kyle C. Wong of Cooley LLP, Charles Babcock, Carl Christof Butzer, Shannon Zmud Teicher and David T. Moran of Jackson Walker LLP, and the Law Office of George L. McWilliams PC.

The case is In re: Google Inc. Gmail Litigation, case number 5:13-md-02430, in the U.S. District Court for the Northern District of California.

--Editing by Kat Laskowski and Melissa Tinklepaugh.

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