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Microsoft May Feel Privacy Heat Despite Xbox Backtracking

By **Emily Atkin**

Law360, New York (June 20, 2013, 5:57 PM ET) -- In a striking policy reversal, Microsoft Corp. on Wednesday nixed some controversial features of its new Xbox One gaming console, but attorneys say the company could still face privacy lawsuits over the system's data collection methods.

As part of the reversal of their digital rights management rules, Microsoft's announcement rescinds the requirement that the yet-to-be-released gaming system must connect to the Internet once every 24 hours in order for users to play games. Attorneys say this takes some weight off the shoulders of consumers who were concerned about the privacy-infringing capabilities of the console, which includes a high-tech, always-on video camera.

"They have significantly ratcheted down the risk [of a lawsuit] because they're no longer sticking their finger in the consumer's face," Snell & Wilmer LLP attorney Ryan Ricks said. "The potential for privacy breaches remain, but the likelihood has been mitigated."

Because the console won't need to connect to the Internet, Ricks said consumers would likely be more comfortable with the fact that the Xbox One comes with a built-in product called the Kinect, a motion-sensor camera that can recognize voices, see in the dark and read a player's heart rate. The Kinect, Microsoft said, would always be on, even when the system itself was off.

Paired with recent revelations about the National Security Agency's efforts to collect the data of American citizens, consumers expressed skepticism that the Kinect wouldn't be used to store information gathered from the Kinect — especially considering the Internet connection requirement.

International privacy watchdogs expressed disdain as well, according to media accounts. Germany's Federal Data Protection Commissioner Peter Schaar told prominent German news site Spiegel that the console was a "twisted nightmare" used for "spying on my living room," and Australian Civil Liberty Director Tim Vines said the Xbox One "meets the definition of a surveillance device under some Australian laws," according to MSN.

Microsoft fought those concerns in a June 6 blog post, saying no data would leave the Xbox One without explicit permission from the user. Xbox spokeswoman Kathy Roeder told Law360 on Thursday that the new console would not send off information to third parties, citing "robust" controls that consumers "are notified of and are aware of."

"There's lots of control over where the data goes," she said. "This data will not leave your Xbox One."

But Ricks said it wouldn't much matter if the data was stored solely on the Xbox if an agency like the NSA decided to compel Microsoft to hand over data collected by the console.

"It's difficult to imagine how Microsoft could mitigate against that," he said. "Data collection is a capability of the system, and the capability is not being removed."

Torin A. Dorros of Michelman & Robinson LLP also said Microsoft's reversal would likely lessen the risk of consumer litigation, but noted that the company had been unclear about what type of information the console can store, leaving questions about Microsoft's liability to people in the vicinity of the system who haven't accepted a user agreement.

"If [the Kinect] has the capability to record the room ... those people that have no control over the Xbox, who haven't even picked up a controller — that's where Microsoft is going to have a concern," he said.

Dorros added that, given the negative international response, Microsoft might also face potential threats of an investigation from the European Union over how it has ensured compliance with their stricter privacy laws. Citing the recent action it has taken against Google, Dorros said the agency's "aggressiveness" would make legal action unsurprising.

"The EU has heightened awareness of privacy issues stemming from U.S. corporations, coupled with NSA concerns," he said. "What it will really come down to is clarity on what data Microsoft collects, how it collects it and, if any data is improperly collected, what it does when it obtains knowledge of that fact."

Potential legal action against Microsoft in the U.S., however, may not succeed, according to Butzel Long PC shareholder Claudia Rast. Rast said the lack of any federal law regulating what type of information corporations can gather from consumers would make litigation difficult.

"Microsoft and other corporations are not doing anything that is really against the law here, because we don't have a law that sets forth what you can and can't do," she said. "You don't have that overall law for companies creating games, websites or the latest apps."

However, a federal bill introduced June 13 by Reps. Walter B. Jones, R-N.C., and Michael Capuano, D-Mass., might give consumers legal standing, she said. The We Are Watching You Act would implement an opt-in requirement for devices that observe consumers as they watch television.

But Rast noted that the legislation only prohibits companies from monitoring customers who are "unwitting," so as long as a consumer signs the terms of use required for system operation, data collection would still be legal.

"As long as the terms are stated and clear, that would not be 'unwitting,'" she said. "You can lead a horse to water, but you can't make it read the terms of use."

--Editing by Elizabeth Bowen.

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