

## Hundreds Of Gmail Users Can't Join To Bring Privacy Claims

By **Kat Sieniuc**

*Law360, New York (August 22, 2016, 5:40 PM ET)* -- A California federal judge on Friday told 879 college students, faculty and staff accusing Google Inc. of scanning their emails for unlawful advertising purposes that they must file separate lawsuits against the tech giant, saying that a mass joinder would be unfair since the question of consent is "intensely individualized."

The students and staff from more than 20 schools claim that Google violated the Electronic Communications Privacy Act by reviewing the content of communications sent through their Google Apps for Education, or GAFE, accounts in order to create targeted advertising profiles, even though the company had said it wouldn't engage in the practice.

U.S. District Judge Lucy H. Koh said the individual and unique contracts that each educational institution had with Google provided different disclosures to users about the scanning practice and varied too much for the court to conclude the group's claims come from the same transactions or occurrences, adding that "joinder is not appropriate where different products or processes are involved."

"Google had no single policy that required all Google Apps Administrators to provide the same disclosures to end users. This means that the end users received vastly different disclosures depending on with which educational institution they were affiliated," Judge Koh said, adding that "these differences impacted what Google scanned and analyzed, what disclosures each plaintiff read, and whether any particular plaintiff consented to Google's practices."

Different users at each school could have consented to Google's scanning practices, given no consent or opted out by changing their Gmail settings or choosing a different email provider, the judge said, adding that determining the level of consent of all the plaintiffs would require Google in its defense to undertake a "highly individualized analysis to investigate, research, and present defenses as to each plaintiff," that makes mass joinder inappropriate.

"Google would potentially have to take discovery of each plaintiff, investigate the disclosures made by each educational institution, and determine whether to file hundreds if not thousands of pretrial motions," the judge said.

Google filed a motion to sever the plaintiffs' claims in May, arguing that whether the company's automated processes actually scanned any student emails in a way that violated the ECPA was unique to each email user.

Judge Koh agreed, and said all plaintiffs except for the original three, Ryan Corley, William Dormann, and Shannon Mehaffey, must file individual complaints if they wish to proceed with their claims.

Judge Koh added that if the case went to trial, a mass joinder would confuse the jury because the jurors would potentially have to keep track of the facts and circumstances of hundreds of different plaintiffs' levels of disclosure and consent, as well as "consider and analyze different privacy policies to reflect the diversity of disclosures in this litigation."

"It would be impractical to litigate all 879 plaintiffs' claims together. The sheer number of plaintiffs, combined with their geographic diversity, would impede effective case management and would not promote judicial economy," the court said.

Ray Gallo, an attorney representing the plaintiffs, disagreed with the ruling. He told Law360 on Monday his clients' claims involve "numerous common issues and functionally identical occurrences," including that Google's interception and scanning of users' emails happened in the same way.

Gallo said while his clients do plan to file 876 new actions, "managing 877 different but largely identical small cases does not seem any easier to us than managing two big ones."

"Absent an informal resolution, it appears that Google and the court will get what they wished for: numerous individual actions and possibly even plaintiffs opposing consolidation or coordination," Gallo said, adding, "That would be ironic in that it would create a great deal of work for the parties and the court. Google will spend a multiple of what it would have spent, and plaintiffs expect to recover fees."

"We wanted the cases managed by efficiently litigating a small representative sample. Google opposed and prevailed to what we believe is its detriment. This path benefits us more than anybody else if we prevail on the merits, though we had sought to avoid it as needless," he said.

Google did not respond to a request for comment on Monday.

Four college students at the University of California, Berkeley initially filed the suit in January. In March, the students filed an amended complaint dropping one named plaintiff and adding hundreds more who reside in 35 states as well as Washington, D.C., Canada, Germany, Spain and Hong Kong and attend nearly two dozen U.S. colleges, including New York University, University of Hawaii, University of Michigan, Harvard University, Yale University and Northwestern University.

Another suit, Keith Amaral et al. v. Google also sought to be part of the joinder.

The plaintiffs are represented by Ray E. Gallo, Dominic R. Valerian and Warren Stramiello of Gallo LLP.

Google is represented by Michael Rhodes, Whitty Somvichian, Kyle Wong, Karen Burhans and Amy Smith of Cooley LLP.

The cases are Ryan Corley et al. v. Google Inc., case number 5:16-cv-00473, and Keith Amaral et al v. Google Inc, case number 16-cv-02553 in the U.S. District Court for the Northern District of California.

--Additional reporting by Brandon Lowrey. Editing by Jill Coffey.

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