

Privacy Group Of The Year: Cooley

By **Martin Bricketto**

Law360, New York (January 19, 2016, 8:21 PM ET) -- Cooley LLP has burnished its reputation for top-flight privacy work with appellate victories for Sony under the Video Privacy Protection Act and for Facebook in litigation challenging the use of minors' names and likenesses in ads, earning the firm a place among Law360's Privacy Groups of the Year.



Sony Corp. entities and Facebook Inc. are just some of the technology and Web giants that have turned to Cooley and its more than 50-attorney privacy and data protection practice group when faced with lawsuits over the handling of user information, data breaches and other controversies.

For example, Cooley in February secured summary judgment for Google Inc. in class action litigation in Massachusetts state court claiming the company was scanning users' emails for keywords to display targeted advertisements in violation of the state's Wiretapping Act. Three months later, the firm won the toss of a proposed class action in Louisiana federal court against eBay Inc. over a data breach that compromised millions of users' personal information.

Cooley is operating in an environment in which its attorneys say data breach and privacy litigation has become increasingly common and plaintiffs are launching more technically specific claims that often hinge on laws that allow for statutory damages.

The firm's impressive track record in that fast-evolving area of the law has evolved from what Matthew D. Brown, the practice group's vice chair, described as its long-running relationships with some of the country's premier technology companies.

"We're steeped in the culture of Silicon Valley and San Francisco technology companies and, added to

that, we have deep expertise and experience with privacy and data security issues,” Brown said. “Our practice group is in part the marriage of those two things, as we often have to defend novel and disruptive business models against challenges under aging privacy laws.”

Cooley complements its firepower in the courtroom with counseling before companies find themselves in hot water and response services when a data breach or other incident with privacy implications occurs, according to Randy Sabett, who is also vice chair of the practice group.

“We have all areas related to both privacy and data protection covered,” Sabett said.

One major win for Cooley in the past year was a Ninth Circuit decision in September upholding the dismissal of Daniel Rodriguez's putative class action against Sony Computer Entertainment America LLC and Sony Network Entertainment International LLC.

In a novel issue for the circuit, a three-judge panel found that the VPAA didn't provide Rodriguez with a private right of action over the retention of his data. The court also found that the disclosure of his personal information between Sony entities was exempt from the statute's non-disclosure requirements.

The VPAA has become a favorite statute of the plaintiffs bar because of the potential availability of statutory damages on a class-wide basis, according to Brown.

“We think this will become a very, very significant ruling for defendants going forward because if other courts follow the Ninth Circuit ruling, it will take that cause of action off the table,” he said.

The following month, Cooley found further success with the Ninth Circuit in representing Facebook Inc., which fended off a putative class action over the use of minors' names and profile pictures in advertising vehicles such as “sponsored stories” and “social ads.”

The Ninth Circuit rejected arguments that the minors couldn't consent to terms of service that gave the company permission to use their likenesses in advertisements. The terms that the minors accepted didn't involve any personal property rights as required to invalidate a contract under California Family Code, the court found, adding that state law also dictates that a person can't disaffirm part of a contract that they don't like while continuing to enjoy another part of the contract that provides some benefit.

Another trend in the world of privacy litigation has been courts struggling to assess whether plaintiffs suffered the harm necessary to bring claims, according to attorneys.

Cooley prevailed on eBay's behalf when a Louisiana federal judge considered that type of question in the proposed class action over a 2014 data breach.

Finding that plaintiff Collin Green couldn't claim that eBay failed to properly secure its internal databases before the cyberattack, U.S. District Judge Susie Morgan ruled in May that just because Green's information was accessed during the breach wasn't sufficient to establish injury and the potential of identity theft or fraud didn't give him standing.

The firm became involved soon after the cyberattack, helping eBay to investigate the incident and also prepare for any litigation, according to Brown.

“The opinion that the court issued in the eBay case is one that cites much of the law in the area based on our briefing and we think it will be a key case that other courts and litigants are going to reference in the future in similar cases,” Brown said.

--Additional reporting by Emily Field, Joe Van Acker and Sindhu Sundar. Editing by Patricia K. Cole.

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