

ABA Privacy & Information Security Committee

Monthly Update for October 2011 November 3, 2011 1:00 – 2:00 pm EST

Speakers

Kurt Wimmer Libbie Canter Lindsey Tonsager

Covington & Burling LLP, Washington, D.C.

Moderator: Aryeh Friedman, Chief Privacy Officer & Sr. Compliance Counsel, Dun & Bradstreet



Protecting Consumers

Congressional Action

- Rep. Bono Mack's Subcommittee held two Internet privacy hearings in October:
 - Understanding Consumer Attitudes About Privacy
 - Protecting Children's Privacy in an Electronic World
- The House Judiciary Committee approved an amendment to the VPPA.
 - If enacted, consent to the sharing of video usage information could be obtained electronically in advance of the disclosure.

ANTITRUST LAW

Promoting Competition Protecting Consumers

Congressional Action (cont'd)

- Sens. Ron Wyden and Mark Kirk call for ECPA reform.
- A group of House GOP members urged the House Appropriations Committee to withhold funding for a centralized health care database, citing patient privacy.
- Rep. Ed Markey has asked Amazon to respond to privacy questions related to the Silk browser and Kindle Fire; Electronic Frontier Foundation said it does not have concerns.
- Sen. Rockefeller sent letters to Visa and Mastercard about their reported plans to use customers' purchasing information for behavioral advertising.
- Reps. Joe Barton and Ed Markey sent letter to Facebook about its data storage and retention practices.



FTC Enforcement

- In re Google Inc. FTC approved a final administrative consent agreement with Google in connection with Buzz.
- FTC v. Frostwire Under proposed stipulated final order for permanent injunction with the FTC, filed Oct. 7 in the U.S. District Court for the Southern District of Florida, a developer of peer-to-peer file-sharing applications may not use default settings likely to cause consumers' files to be shared without their knowledge.



FTC Enforcement (cont'd)

- Public interest groups have asked FTC to investigate:
 - > Online Doritos marketing campaign aimed at teenagers.
 - Verizon Wireless opt-out policy change to location data practices.
- Sen. Rockefeller requested a report from FTC on security implications of facial recognition technology.
 - Report would follow December facial recognition workshop.
- Bipartisan Senate group urged FTC and DOJ to investigate "stalking apps" — mobile phone applications that allow people to stalk others.

Promoting Competition Protecting Consumers

MMA Releases Mobile Application Privacy Policy Guidelines

- Draft framework released that suggests privacy policy language for mobile apps, but recommends that language should be tailored to a company's own needs and jurisdictional requirements.
- The major areas covered by the proposed policy language include:
 - > what types of information the application collects and uses
 - > whether the application collects "precise real-time location information"
 - > whether third parties can view or gain access to the information collected
 - what a user's opt-out rights are
 - > what the company's data retention policy is
 - whether the application and the developer's privacy practice comply with COPPA
 - \succ the security procedures; and
 - > when and how the developer will notify users of changes to its privacy policy.
- Public comment period on the draft framework closes Nov. 18.



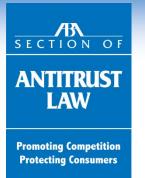
Data Breaches and Incidents

- SEC Division of Corporation Finance released guidance recommending disclosures relating to financial impact of data breaches and other cybersecurity incidents.
- Litigation
 - Anderson v. Hannaford Bros. Co. First Circuit finds that data breach plaintiffs may recover out-of-pocket mitigation expenses.
 - Gaffney v. TRICARE Management Activity Class action complaint filed against TRICARE and the Department of Defense in connection with unauthorized disclosure of medical records and personal information of approximately 4.9 million patients.

Data Breach - Recent Incidents

Promoting Competition Protecting Consumers

- Sony Inc. discovered new hacking attempt involving approximately 93,000 online entertainment user accounts.
- SEC informed employees that brokerage account information and other personal data was provided by a contractor to unauthorized parties; vendor denies unauthorized access.
- Children's health system Nemours says that it cannot locate three computer backup tapes with unencrypted patient billing and employee payroll data of approximately 1.6 million individuals.
- Emory Healthcare notified 7,300 patients of a data breach.
- Stanford released a statement blaming the subcontractor of an outside vendor for causing patient data to be posted online. Standard is defending itself from a putative class action alleging violations of the California's Confidentiality of Medical Information Act



Other Litigation

- *E.R. James Real Estate Servs. LLC v. Spinell* District Court finds that employee use of personal computer supports unauthorized access claim under CFAA.
- Goodman v. HTC America, Inc. Class action claims that AccuWeather smartphone app tracks and shares geographic location data.
- Cohen v. Facebook, Inc. District Court dismissed a putative class action against Facebook alleging that the company violated users' rights of publicity by using their names and pictures for its Friend Finder service.
- Pitt v. Kmart Corp. Class action claims that Kmart violates the FCRA by running background checks on applicants without first obtaining permission.

ANTITRUST LAW

Promoting Competition Protecting Consumers

Cybersecurity

NIST announced release of three new publications on Oct. 25

- A draft Bluetooth security guide
- Draft guidelines for improving the security of wireless local area networks (WLANs)
- > A final definition of cloud computing
- Outlook for Cybersecurity Legislation
 - Oct. 4 White House Cybersecurity Coordinator Howard Schmidt says he has "a high level of confidence that something will move forward."
 - Oct. 18 Lieberman says he remains optimistic about the possibility of getting cybersecurity legislation to the floor this year.
 - Oct. 19 Administration officials and key senators meet on Capitol Hill and reach agreement on need for prompt legislative action.
 - Oct. 26 Rep. Jim Langevin calls for Congress to move forward with cybersecurity legislation.



State Law Developments

- California enacts E-Reader Law that creates warrant requirement for government agencies to access book purchase records.
- California amends Song-Beverly Credit Card Act.
 - Creates specific exception for collection of personal information (such as a zip code) during a credit card transaction.
 - Responds to *Pineda v. Williams Sonoma* decision, which held that a zip code is personal information under Song-Beverly.
- Conflicting decisions involving New Jersey Truth-in-Consumer Contract, Warranty and Notice Act.
- California enacts law that blocks employers from using credit reports to evaluate employees or applicants, making California the seventh state with such a law on the books.

Promoting Competition Protecting Consumers

Health Privacy

- OCR official says that release of final omnibus HIPAA Rule could be early 2012.
- Litigation
 - IMS Health Inc. v. Ayotte District court implemented Supreme Court decision; reinstated April 2007 finding that New Hampshire law banning sale of prescription drug information identifying doctors violated the First Amendment.
 - Sargese v. Horizon Healthcare Servs. Inc. New Jersey Psychological Association alleged that health insurance plans that require New Jersey psychologists to disclose confidential patient information violates state law.
- ONC approved recommendations for proposed State 2 criteria for the "meaningful use" of electronic health records



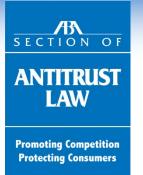
Health Privacy (cont'd)

- HHS will audit whether federal grant recipients comply with informed consent and privacy mandates when conducting federally funded genetic research.
 > OIG plans to issue a report in fiscal year 2012
- Federal advisory panel says that more harm than good could come out of HHS proposal to revamp human subject protection regulations.

➢ Proposed rule was released July 26.

≻ Comments on proposed rule were due Oct. 26.

• ONC awarded \$1.2 million contract to improve patient choice policies.



Marketing

- Hafke v. Rossdale Group LLC Court holds that Michigan law is preempted by the federal CAN-SPAM Act.
- Giovanniello v. ALM Media LLC Second Circuit finds that Connecticut's two-year limitations period for claims involving unsolicited faxes applies to a parallel federal TCPA claim.

Promoting Competition Protecting Consumers

International

- ICO Commissioner Christopher Graham warned that nearly half of the one-year grace period for implementing cookie consent obligations has elapsed.
- German data protection authorities tell Facebook that it has until November 7 to make compliance changes to its facial recognition software.
- The British Columbia government Oct. 4 introduced a bill to update and expand government data-sharing, but at the same time increased the authority of the Office of the Information and Privacy Commissioner to oversee such efforts.
- European Commission formally warned Germany and Romania that they have two months to implement the European Union's Data Retention Directive.



International (cont'd)

- European Network and Information Security Agency (ENISA) releases guide of 36 recommendations to protect security of critical information infrastructures through public-private partnerships.
- British Columbia issues guidelines to assist organizations and public bodies using social media sites to lawfully conduct background checks of prospective employees.
- Alberta and British Columbia privacy commissioners call for legislation to ensure that companies implement adequate security systems.
- French regional court affirmed suspension of SOX whistleblower hotline that had been audited and approved by the CNIL.
- Norway's data protection authority will likely cancel service that helps individuals delete unwanted personal data posted on websites across the world.

Promoting Competition Protecting Consumers

Federal Government Privacy and Security

- Privacy Act Senator Akaka introduced legislation to strengthen privacy protections for PII contained in government records.
- GAO report found that DHS faces "key challenges" in implementing a framework to ensure that its data-mining systems provide the necessary privacy protections.
 - DHS considers terminating part of its counterterrorism data search program.
- Proposed rule would require federal government contractors who work with government records or handle PII to complete privacy training before being allowed access to records.
- GAO rejected GSA attempt to address data security concerns in a cloud computing procurement solicitation by limiting the foreign countries where vendor servers could be located.
- The IRS is expanding pilot program to provide special identification numbers for use by victims of identity theft to file tax returns.



Other

Promoting Competition Protecting Consumers

- Stanford researcher unveiled Internet privacy study on "leakage."
- Government access to information
 - Doe v. SEC Northern District of California held that SEC may subpoena Google for identity and contact information of Gmail account owner.
 - IRS Counsel recommended withdrawal of administrative summons to ISP seeking contents of customer e-mail because of Stored Communications Act concerns.
- 7th Circuit finds that FCRA preempts state common law claims.
- 3rd Circuit permits Fourteenth Amendment breach of privacy claim to go forward in connection with videotaping of female deputy sheriff.
- LA councilman questions whether Google Apps for city employees meet data security requirements.