



WINTER 2021 E-NEWSLETTER

At Digital Mountain we assist our clients with their computer forensics, e-discovery, cybersecurity and data analytics needs. For this E-Newsletter, we focus on data leakage and organizational risk, as well as cybersecurity trends for 2021.

Lawsuits Take Aim at Data-Collecting Giants

If you've been watching the news of court activity in the US that isn't centered on the post-election legal fracas, a couple of headlines in particular have probably caught your eye: Data-collecting giants Google and Facebook are facing lawsuits that, while differing in allegations, could both lead to big changes for tech giants and smaller companies alike. At issue, among many, in these lawsuits is data collection, the ways and means of data collection, and the use of the information. In this article, we will examine those lawsuits and discuss how the business of data collection may evolve as a result.



Facebook Privacy Lawsuit – Time for the Supreme Court?

Just how far is Facebook willing to go to defend its data collection practices? All the way to the Supreme Court, the company hopes. The original lawsuit, *Perrin Aikens Davis, et al v Facebook, Inc.*, which may celebrate its ninth birthday in 2021 at the highest court in the land, is now *FACEBOOK, INC., Petitioner, v. PERRIN AIKENS DAVIS ET AL., Respondents*, in a Petition for Writ of Certiorari with the United States Supreme Court filed November 20, 2020 (docket number 20-727). Pared down from a myriad of complaints including, violation of the Stored Communications Act, violation of the California Invasion of Privacy Act, invasion of privacy, intrusion upon seclusion, breach of contract, breach of the duty of good faith and fair dealing, civil fraud, trespass to chattels, violations of California's Computer Data Access and Fraud Act, and statutory larceny, Facebook's Petition to the Supreme Court focus on the remaining issue of whether Facebook's data collection practices violate The Wiretap Act.

Facebook disagrees with the Ninth Circuit's determination that it was not a "party" to communications between internet users whose off-Facebook interaction with Facebook plug-ins, such as the Facebook "Like" and "Share" buttons that can be found on non-Facebook websites, resulted in data being sent, collected, and utilized by Facebook. By determining that Facebook

was not a “party” to the communications, the Ninth Circuit agreed with the claim that Facebook therein violated The Wiretap Act by intercepting communications not meant for Facebook. Facebook, in a very technical discussion of GET requests, claims that they are, in fact, a party to the communication. We won’t know if Facebook’s Petition will result in the Supreme Court granting certiorari until the first half of 2021, but if the justices are swayed by Facebook’s claim that disagreement among the nation’s various Circuit Courts make the issue ripe for adjudication by the Supreme Court, the technical issues should provide quite an education. Should the case be heard in the highest court and Facebook prevail, the question it poses in the Petition, “do certain ubiquitous practices in the technology industry involving computer-to-computer communications violate the federal Wiretap Act?”

(https://www.supremecourt.gov/DocketPDF/20/20-727/161368/20201120103504470_No.%20-%20Facebook%20Cert%20Petition.pdf) will be a many-layered victory. The choice of the word “ubiquitous” may prove to be more prescient than hyperbole as, free from the threat of penalties and potential criminal allegations, data-amassing companies such as Facebook will no doubt firmly plant themselves in our data with even broader aims.

Department of Justice, State Attorneys General Don’t Trust Google

As of this writing, there are currently three lawsuits filed by 38 state attorneys general, counterparts in two territories, and the Department of Justice (“DOJ”) all suing Google for anti-competition, anti-trust practices, to include data collection, begging the question is this a case of legal piling on or is there something monopolistic about Google’s business practices? The cases point to Google’s use of exclusivity agreements, revenue sharing agreements, and Android-compatible app controls as methods by which the search engine behemoth monopolizes the market, reducing consumer choice, and eroding the impetus for innovation. Data collection isn’t just a sideline to these allegations. The DOJ suit, *United States of America v Google LLC*, (Case 1:20-cv-03010, DC District Court, 2020) claims that Google’s massive scale has allowed collection of enough data on individual user searches that has led to monetization of a \$50 billion targeted advertising market for Google, which it uses to lock up advertisers in exclusive deals (<https://www.justice.gov/opa/press-release/file/1328941/download>).

A victory for the DOJ and the other state attorneys general does not guarantee that any number of new, innovative, or privacy-centered search engines will appear on devices overnight. The DOJ’s lawsuit recognizes that the obstacles to entering the search engine market are steep because the technology to create a search engine that works well is not a low-cost venture. In addition, Google’s current scale is nearly absolute – a fact that smaller market players know is not just a matter of money, but time required to establish oneself as a viable alternative to an established market leader. What a victory for the DOJ would most likely do with respect to data collection practices is to identify what data collection practices are proprietary to Google and what practices can be adopted by other search engine companies without fear of reprisal from Google or restrictions in the form of exclusivity agreements, and whether or how Google is free to profit from that data.

When it pleases the courts, there will be decisions handed down on the data collection practices of internet giants currently targeted by lawsuits. Whether the tech world will be shaken up by the resulting changes is yet to be seen. If we look back decades to the famous Microsoft antitrust case, there is not a great deal of anticipation for the idea that the tech industry is about to be turned on its head. Microsoft is still a dominant force in the operating system market. However, irrespective of the court edicts to come, what we do know is that there is ample evidence that when you browse, search, and post, your data is being gathered and tech giants have no intention to stop until they are ordered to cease and desist.

Please direct questions and inquiries about electronic discovery, computer forensics, cybersecurity and data analytics to info@digitalmountain.com.

UPCOMING INDUSTRY EVENTS

ALA MIDWINTER MEETING & EXHIBITS, VIRTUAL

January 22-26, 2021

PLI GOVERNMENT INVESTIGATIONS 2021: INVESTIGATIONS ARISING FROM DATA BREACH AND PRIVACY CONCERNS AND PARALLEL PROCEEDINGS, VIRTUAL

January 27, 2021

EDRM EXPOCOM 2021

February 1-3, 2021

LEGALWEEK VIRTUAL SERIES 1

February 2-4, 2021

TECHSHOW 2020, VIRTUAL

March 8-13, 2021

[Click here to see more upcoming events and links.](#)



Digital Mountain, Inc. Founder and CEO, Julie Lewis, will be presenting at various upcoming industry events. Please send requests for speaker or panel participation for her to marketing@digitalmountain.com. In the short term, she is available for webinars and remote e-conferences.

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