

Revival of Cookie Litigation Highlights Risks Associated with Mobile Tracking Technologies

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On November



On November 10, 2015, the U.S. Court of Appeals for the Third Circuit revived several privacy claims against Google pertaining to the Internet company's practice of side-stepping "cookie blockers" on Microsoft's Internet Explorer and Apple's Safari browsers.

The Third Circuit found that Google could be required to respond to claims that it intentionally circumvented "cookie blockers" on Internet browsers by exploiting loopholes found in the cookie blockers and that Google was actually tracking users' browsing habits without these users' knowledge. Meanwhile, Google's privacy policy as well as a number of other public statements indicated that the company was abiding by the browsers' cookie-blocking settings.

"Cookie blockers" are features built in to web browsers that allow a user to prevent the installation of cookies by third-party servers. Internet users have grown wary of Internet "cookies" because cookies can track visits to webpages and clicks throughout the site. Information collected from cookies is often sold to third-party advertisers or marketers.

The case, *In re: [Google Cookie Placement Consumer Privacy Litigation](#)*, consists of 24 consolidated suits alleging violations of California state law and federal statutes, specifically, the Computer Fraud and Abuse Act (CFAA), the Stored Communications Act (SCA) and the Wiretap Act. While the Third Circuit decision affirmed the dismissal of claims pertaining to the CFAA, SCA and the Wiretap Act, the Court vacated the trial court's dismissal of claims under California tort law and the state's constitutional right to privacy, reviving the suit.

The Third Circuit noted that Google's actions amounted to "deceit and disregard" as the Company "not only contravened the cookie blockers – it held itself out as respecting the cookie blockers." The Court concluded that a reasonable jury could find that Google's conduct was "highly offensive" or "an egregious breach of social norms" as the Company's actions touched millions of unsuspecting internet users over an indeterminable amount of time. Accordingly, the Third Circuit vacated the trial court's dismissal of the plaintiffs' claims under the California constitution and California tort law.

While Google's "cookie blocking" practices sparked both the instant lawsuits and settlements with the [FTC](#) and [38 state attorneys general](#), Google isn't the only company to come under fire for the use of cookie-blocking technology. Earlier this week, MoPub Inc., a mobile ad server owned by Twitter,

was sued in California court for using “super cookies” to track and store the Internet browsing history of anyone accessing the web through their Verizon smartphone. The suit alleges that MoPub then used this information to build a personal profile which it then used to send targeted advertising, without subscribers’ knowledge or consent. Similar to the Google litigation, MoPub is accused of misleading subscribers who believed that their browser’s “opt-out” mechanism would stop MoPub’s tracking.

Companies that use tracking cookies or obtain information from cookies should pay close attention to Google’s current litigation. Companies should also be aware of their own privacy practices, specifically, who they are collecting data from, how that data is used and who the company may be sharing that data with. When it comes to privacy policies, companies should clearly communicate their practices to users and then live up to those commitments.