

Privacy & CP Group Of The Year: Covington

By **Sindhu Sundar**

Law360, New York (January 05, 2012, 9:10 PM ET) -- Microsoft Corp.'s swift \$8.5 billion acquisition of Skype Technologies SA over five months in October belied the complexity of the data privacy issues that Covington & Burling LLP helped longtime client Microsoft navigate on both sides of the Atlantic, landing the firm on Law360's list of Privacy and Consumer Protection Groups of 2011.

When the Redmond, Wash., computer giant announced its intention to buy the Luxembourg-based Internet protocol service in May, it had a team of Covington lawyers in the U.S. and Brussels working on due diligence exercises on Skype, a process in which data protection issues played an unusually huge role, Covington attorneys say.

"Skype, unlike other more traditional companies, uses technology used by millions of people worldwide," said Henriette Tielemans, a partner in the firm's Brussels office and co-chair of its global privacy and data security practice group, who led the Covington team on the Skype deal. "And each of these people using Skype leaves traces somewhere, and those traces are personal data."

Tielemans noted that because Skype's users are individuals rather than companies, data protection issues were amplified because of the volume of personal data involved, and also because of nuanced data protection rules in the European Union.

"Privacy, unlike other traditional practice areas, has its own logic," Tielemans said. "In the European Union, the rights and obligations of various parties that deal with personal data flow from whether you are a data processor or a data controller."

Covington, which also advised Microsoft on the antitrust aspects of the transaction, was its only counsel advising it on the deal's privacy and telecom aspects, verifying Skype's user and other regulatory licenses.

The completion of the Skype deal was among several wins for Covington's global privacy and data security group, which the firm said has tripled since 2006 in response to the ongoing reform of data protection rules, with 40 attorneys working in the group across five offices worldwide.

The group's rapid growth in the last few years in the U.S. has come with the increased awareness of consumer privacy issues and the lag between the development of privacy laws to keep up with the rapidly changing ways in which data is being communicated in social and online advertising networks, according to Kurt Wimmer, partner and U.S. chair of the global privacy and data security practice.

"Unlike Europe and Australia, there is no general consumer privacy bill in the U.S.," Wimmer said. "There is going to be increased regulatory scrutiny in the next two years, and Congress at some point will pass federal legislation, but it probably won't be this election year."

A majority of the group works in the firm's Washington office, with growing offices in New York and San Francisco, while 10 attorneys work in the group's offices in Brussels and London, and two privacy attorneys work in Beijing, according to Wimmer.

"Privacy practice relates a lot to the Federal Trade Commission and Congress so we have a critical mass in Washington," Wimmer said.

Wimmer noted that while the group is not among its largest overall, it is one of its largest and fastest growing regulatory groups, with plans to expand in all its offices, particularly in Europe, in anticipation of updates in its data protection directive in 2012 since the mid-90s.

"Instead of the current broad, general framework which each country has to implement, and which takes years, there will now be new regulation in place that will take effect immediately in all 27 countries in the EU," Wimmer said. "So there are significant opportunities to scale up in Europe this year."

Most of the firm's data security work in the U.S. relates to information technology and social media, Wimmer said, noting that attorneys working in the area have to have a deeper understanding of the technology they're dealing with.

"The amount of granularity you have to have in knowing how things work online has increased a lot in just the last year because the way information is being handled on the Web has changed so much."

The firm's win in August for clients Microsoft, CBS Corp., McDonald's Corp. and Mazda Motor of America Inc. in a proposed class action accusing them of tracking user's online activities, exemplified some of the nuances of the changing landscape of online privacy, Covington attorneys say.

The suit, filed December 2010 in New York federal court, accused online advertising network Interclick Inc. of secretly monitoring the browsing habits of users of websites, including those of the advertising defendants that Covington represented, which had used Interclick to place online ads.

Interclick provided counsel of record, while Covington was retained as separate counsel.

U.S. District Judge Deborah A. Batts was persuaded by Covington's argument that the plaintiff was not able to show that she was injured by those alleged activities or that the advertising defendants had any involvement in the alleged conduct, said Eric Bosset, the Covington partner who led his firm's team in the suit.

Judge Batts dismissed the claims against Microsoft, CBS, Mazda and McDonald's with prejudice on Aug. 17, according to court documents.

“It was significant in that it was one of the first decisions out of the southern district of New York to address privacy claims,” Bosset said. “It exposed the fact that often times these complaints don’t have substance behind them on injury issues.”

On Feb. 23, Bosset’s team secured a win in a similar suit against Arizona-based Internet service provider Cable One Inc. which accused the company of violating the Electronic Communications Privacy Act and the Computer Fraud and Abuse Act by allowing online advertising company NebuAd to test a system using “deep packet inspection” to secretly monitor subscribers’ online activity to deliver targeted ads.

The claims were tossed when Bosset’s team discovered that the plaintiff in the suit had not used the Cable One Internet service while NebuAd was conducting the alleged test, Bosset said, noting that the plaintiff in this case was also unable to demonstrate injury.

“It is important to note that the statutes that the plaintiffs invoke in these cases were drafted before the World Wide Web became so popular,” Bosset said. “The challenge is for plaintiffs to articulate a theory of liability under statutes that were enacted long before the technologies at issue were ever envisioned. They have not had success to date.”

Methodology: In November, Law360 solicited submissions from over 500 law firms for its practice group of the year series. The more than 550 submissions received were reviewed by a committee of Law360 editors. Winners were selected based on the significance of the litigation wins or deals worked on; the size and complexity of the litigation wins or deals worked on; and the number of significant, large or complex deals the firms worked on or lawsuits the firm had wins in. Only accomplishments from Dec. 1, 2010, to Dec. 1, 2011, were considered.

--Editing by Andrew Park.

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