

Cybersecurity & Privacy Group Of The Year: Covington

By Allison Grande

Law360 (January 28, 2022, 2:03 PM EST) -- Covington & Burling LLP helped TikTok fend off the Trump administration's push to ban the app from the U.S. market and aided Microsoft in lifting gag orders barring it from telling corporate customers about the federal government's demands to access their data, earning it a spot among Law360's 2021 Cybersecurity & Privacy Practice Groups of the Year.

Leveraging more than two decades of experience in helping clients across the globe navigate increasingly complex issues around handling and protecting the personal information they hold, the firm's data privacy and cybersecurity group has spent the past year helping businesses such as Microsoft, Facebook and TikTok and its parent company ByteDance respond to challenges to their data use, disclosure and content moderation practices.

"Unlike a lot of practice groups that popped up in the last five to seven years as privacy has gotten hot or that go deep on a particular vertical like privacy litigation or commercial work, our practice group has been around for over 25 years and is unique in our global coverage and deep expertise in a range of issues, including litigation, commercial and regulatory work, investigations and public policy matters," said Covington partner and practice group co-chair Lindsey Tonsager.

The group, which has more than 70 lawyers across the world, has seized on this vast experience in its recent work on behalf of clients such as TikTok, which called on the firm after former President Donald Trump issued an executive order in August 2020 attempting to ban the popular video-sharing app based on data privacy concerns. Trump's order claimed that TikTok "automatically captures vast swaths of information from its users" and shares it with the Chinese government, Covington said.

Covington won an injunction from a D.C. federal judge in September 2020 halting its removal from U.S. app stores hours before the ban was set to take effect, and again delivered the winning argument that led to a December 2020 ruling putting on hold the remaining proposed restrictions that would have effectively disabled the app. In June 2021, President Joe Biden revoked the order.

"The TikTok case was significant because it involved a governmental exercise of authority that was quite unprecedented, in that the government trying to ban outright a platform used by millions had never happened before," said Alexander Berengaut, a partner in Covington's D.C. office who led the team working on the dispute.



Shortly after securing the second TikTok injunction, the Covington team was again faced with a challenge that required it to push back on a governmental action, after the U.S. Department of Defense in the waning days of the Trump administration in January 2021 designated Chinese electronics company Xiaomi as a "communist Chinese military company," which barred Americans from transacting in its securities.

Covington argued that the designation — which the government said was based on the company's heavy investments in fifth-generation telecommunications capabilities, artificial intelligence and the growing network of connected devices known as the Internet of Things — violated the Administrative Procedure Act because the Trump administration provided no evidence of the electronic maker's alleged ties to the Chinese military, and the company was never given an opportunity to challenge the designation before it suddenly landed on the blacklist.

U.S. District Judge Rudolph Contreras of the District of Columbia sided with Xiaomi in March when he issued a preliminary injunction blocking the designation. The judge found that the government's order was arbitrary and capricious because it offered little support and no analysis for why the company was blacklisted.

The company's stock immediately surged after the preliminary injunction was announced, restoring \$10 billion in market capitalization that had been lost when the designation was disclosed. The U.S. Department of Justice, under the Biden administration, agreed to a final order vacating Xiaomi's designation as a CCMC in May 2021.

Berengaut, a Law360 2021 Cybersecurity & Privacy MVP, noted that Covington's deep bench of skilled litigators and vast regulatory expertise put it in a strong position to handle these cutting-edge and precedent-setting matters.

"Both decisions in their own ways were not only very consequential for the clients involved, but more broadly these decisions are going to be important as the government thinks about how to regulate data privacy issues using these particular laws going forward, as each decision has put limits on what the government's powers are, and ultimately the government is bound by the APA to act in a reasonable way when acting through agencies like the DoD," Berengaut said.

The team has also continued to aid Microsoft in its long-running fight with the federal government over the scope of prosecutors' power to access Microsoft customers' electronic data.

The latest round stemmed from warrants the government issued requiring the company to produce data associated with its enterprise customers. The demands included gag orders that prohibited Microsoft from notifying anyone about their existence.

Microsoft urged judges in Maryland and New York to modify secrecy orders they had issued in disputes over the government's bid to access data on one of the company's business clients to allow Microsoft to notify an appropriate representative of the customer. The tech giant argued that customers' data remains their property even when stored in the cloud and that the First Amendment protects Microsoft's right to notify customers when the government requests their data.

In response to the challenges, the government in both cases agreed to inform the customers of these

requests, Microsoft revealed in a January 2021 blog post written after the court files in the disputes were unsealed.

"As enterprises of all kinds contemplate the possibility of migrating sensitive data to the cloud, a really important question is what happens if that data is sought for investigation, and Microsoft believes it's paramount to fight for the ability to be able to communicate with its customers," Berengaut said.

During the past year, the practice group has also kept busy serving as lead counsel to Facebook in resolving and dismissing two high-profile proposed class actions brought by former content moderators in California and Florida courts.

The moderators claimed that the online content they were required to view caused them psychological harm for which Facebook should be held liable. A Florida federal judge in May dismissed these claims with prejudice, ruling that they hadn't shown that the social media giant and the contractor that employed them had concealed the risks of trauma, while the parties in the California suit recently obtained final approval of a \$52 million settlement that covers all content moderators employed by Facebook's vendors in four states.

Additionally, the practice group has been helping bat down a growing trend of consumer privacy class actions asserting theories of wiretapping under the California Invasion of Privacy Act.

In April, U.S. Magistrate Judge Laurel Beeler dismissed two such lawsuits against software company FullStory and its customers Blue Nile and Noom. The plaintiffs claimed the companies eavesdropped on their communications through the analytics software that FullStory provides to its retail clients, but the judge concluded that FullStory is merely a software vendor who hadn't engaged in any wiretapping.

"We've been seeing more wiretap law cases in recent years where the theories are so broad, they would ensnare a lot of normal internet activities," said Covington partner Emily Henn, who worked on the FullStory and Blue Nile cases. "These cases are significant because they confirm that there shouldn't be radically different rules if retailers want to retain the expertise of a third-party vendor to undertake data collection activities that everyone acknowledges those retailers can do on their own without implicating the Wiretap Act."

As privacy and cybersecurity law and regulation evolve, the Covington practice group is planning to keep looking out for opportunities to expand its already robust presence in the U.S., the EU and China, as well as move deeper into markets such as South Africa and the Middle East that are pushing to put new restrictions on the use and flow of consumer data.

"Increasing tensions between countries and jurisdictions on privacy and cybersecurity matters often make it difficult for companies to comply and operate," said Berengaut. "That creates a lot of need for legal advice, and we're a really robust practice that's focused on paying a lot of attention to developing talent internally and growing the layers in our practice to meet that need."

--Editing by Adam LoBelia.
