Business Better (Season 2, Episode 8): New Privacy Litigation Targets Sharing of Consumer Personal Data

Speakers: Aliza Karetnick, Phillip Yannella, and Gregory Szewczyk

Steve Burkhart:

Welcome to Business Better, a podcast designed to help businesses navigate the new normal. I'm your host, Steve Burkhart. After a long career at global consumer products company, BIC, where I served as Vice President of Administration, General Counsel and Secretary, I'm now of counsel in the Litigation Department at Ballard Spahr, a law firm with clients across industries and throughout the country. Today's episode features a discussion on the growing friends in privacy litigation, particularly companies sharing and selling consumer data. Plaintiff's liability theories, including the right of publicity, and some best business practices to consider in anticipation of privacy claims. Leading this discussion is Aliza Karetnick, a partner in our Philadelphia office. Aliza is joined by Phillip Yannella, a partner in our Philadelphia office, and Gregory Szewczyk, a partner in our Denver office. So let's turn the episode over to Aliza Karetnick.

Aliza Karetnick:

We're here today to talk about privacy litigation targets, sharing consumer personal financial data. Really, as technological innovations and eCommerce continue to explode, retailers are increasingly using consumer data to personalize customer experiences, prevent fraud, in some cases, proof services and, of course, generate revenue. But with a lot of these newer analytical tools come some risk. So today, my partner, Phil Yannella, leader of Ballard Spahr's Privacy and Data Security group and Greg Szewczyk, a privacy and data security litigator, are going to discuss the trends in privacy litigation and highlight some of the considerations and steps that companies should consider to avoid finding themselves really embroiled in litigation as much as possible. So with that, I'm going to start off with a question for you, Phil. Can you give us some background really on the right of publicity lawsuits that we're seeing proliferate today. What do they allege and what are the cases that are being filed?

Phil Yannella:

Thanks, Aliza. Right of Publicity lawsuits are the latest trend in data privacy litigation. As background in the privacy space, plaintiffs' lawyers have long been very creative in trying to apply older, oftentimes overlooked statutes, to modern technology usage. So for example, back in the mid-80s, plaintiffs' lawyers seized on a Michigan statute that had a Liquidated Damages clause, which required consent to share a subscriber list. And now this was a very particular law that arose from the Bork hearings back in 1988, where Judge Bork's video rentals became a national issue. The Michigan law went a little further than just requiring consent for sharing video rental history and included media subscriptions, which led to a number of lawsuits against magazine publishers who sold their subscriber list. A few years ago, we saw a plaintiff's lawyers bringing lawsuits under state Wire Tap laws against companies that use analytics technologies that track consumers' behavior on their website. Plaintiffs' lawyers claimed that those analytic tools were an illegal recording and entitled them to statutory damages.

Phil Yannella:

So that brings us to this latest trend in privacy litigation. Right of publicity lawsuits fit squarely into this history of creatively using old statutes in new ways. These are claims that are brought under state statutes that require that companies obtain consent from a consumer before commercializing a consumer's likeness. South Dakota, Puerto Rico, Illinois, Alabama and Ohio all have statutes like this. These statutes, importantly, have liquidated damages clauses that provide for actual damages or damages of typically $1000 to $5000 per violation. Puerto Rico allows for statutory damages of up to $20,000 per violation. These lawsuits are being brought, typically, in federal court while they're being brought in state court and then typically removed to federal court, throughout the country. But a lot of them seem to be venued in California where there is a pro-privacy bent, typically, among the judiciary there. There's also a lot of claims that are being brought in New York as well as Illinois.

Phil Yannella:

What's problematic about these lawsuits for defendants is that the definition of "likeness" under these statutes is often very broad and it can include individual names. Additionally, it's not really clear under some of these statutes what "commercializing" means. It's not always defined. By our count, 33 of these lawsuits have been filed since October of 2021. Plaintiffs are targeting defendants that allegedly sell or share consumer data, including names and addresses, to third party without consumer consent. And some of these lawsuits have been brought against online retailers who often share consumer lists with other retailers or analytics providers, as you mentioned Aliza.

Aliza Karetnick:

Thanks Phil. So I'm going to turn to Greg and put him in the hot seat for a moment. Greg, how does a company defend Right of Publicity claims like the claims that Phil just described?

Greg Szewczyk:

Yeah. Thanks Aliza. The defenses that we're seeing so far take a hybrid approach here, where on the one hand they follow some of the traditional defenses that we've seen in other data or privacy breach context. But we're also seeing some defenses that really challenge the core notion that these types of claims are appropriate for this type of alleged violation. And so, I'll start with the defense's stemming from more of the data breach context, which the big one is Article III Standing in federal court. We've seen this for years that a key threshold to data-related claims is whether the plaintiffs have suffered concrete harm sufficient to constitute standing in federal court. And we're seeing those arguments arise again in these Right of Publicity cases. For example, in one of the earlier cases brought, which was against ancestry.com, ancestry argued that the plaintiffs had not alleged any injury sufficient to constitute Standing.

Greg Szewczyk:

The plaintiffs counter that they argued for ... suffered injury in three forms. The first being that Ancestry allegedly exploited and profited from their likeness; the second that they had lost potential earnings from the commercial use of their likeness; and the third that they suffered a denial of their statutory rights. The District Court for the Northern District of California found in favor of Ancestry on all three of these theories. In doing so, the court explained that a plaintiff must do more than point to the dollars in the defendant's pocket. They must also allege that they lost dollars out of their own pocket or that they actually suffered some concrete harm. And as the court considered especially the second two of the plaintiff's arguments, it really dovetails into the more specific defense about, is this the right type of claim for this type of action? And getting into that is necessarily going to depend on the specifics of each state or other statute or common law involved.

Greg Szewczyk:

But generally speaking, to prevail on a Right of Publicity claim, a plaintiff has to allege that one, the defendant used the plaintiff's identity; two, that the appropriation of the plaintiff's name or likeness was to the defendant's advantage, whether that be commercial or otherwise; three, that there was a lack of consent; and four, that there was resulting injury. And so far, the real fight's been on that second prong: Whether there is an appropriation or whether it was commercialized in any way.

Greg Szewczyk:

And we've seen a couple different types of arguments when you get to this prong. One has focused on the fact that these types of ... these claims, they don't involve advertisements or other, any other kind of a suggestion of endorsement, which is something that you traditionally saw in Right of Publicity claims. Now, this track has really, at least at these early stages, been rejected even by courts that seem receptive to other arguments.

Greg Szewczyk:

And the reasoning that the courts have had in this has been that although the traditional type of Right of Publicity claim is in the endorsement context, it isn't always like that. There have been some successful false news pieces. They really are just trying

to drum up more. It is a commercialization without any kind of a specific endorsement. But the other argument that we've seen gained some success, at least in these early cases, has been arguing that the defendant is not using the plaintiff's name or likeness for promotional purposes at all. And in other words, this is not a Right of Publicity case where an image or name is being used to promote a separate product; and instead, the image or name is the product itself. And although there's a lot of pending motions out there, this has started to gain a little traction.

Greg Szewczyk:

For example, back in the Northern District to California in a case against Thompson Reuters, the court granted a motion to dismiss on this ground. The court really just made a categorical distinction between data as the product, as opposed to using it to promote or commercializing in any other sense. But it is worth noting that there are some dicta, even in that case, that gives a little hope to plaintiffs that the court really said that it found the practice deeply concerning and perhaps a violation of privacy, just not this particular right related to privacy.

Greg Szewczyk:

Outside of California, the Central District of Illinois adopted similar reasoning in a case against the media conglomerate Hearst Communications. In that case, the court used, basically, the exact same analysis that we saw the Northern District of California use, but that court didn't seem to have any concerns related to the practice. Noting what Phil had just spoke to, which is mailing lists of subscribers has been a standard practice for decades. And in the Central District of Illinois' reasoning, this is just a different type of that. But it's something that has been going on for years and really did not seem to be some particularly deeply concerning or troubling practice.

Aliza Karetnick:

Greg, Phil mentioned that since October 2021, some 30 or more cases have been filed. And I guess what I'm wondering is, what is the status of those cases? Where do you see things trending?

Greg Szewczyk:

So I think we're in the very early stages of developing the case law in this area. We had a few early cases, such as the Ancestry case that I just mentioned, there were decided earlier in 2021. But for the most part, these are claims that caught hold in the fall of last year. And for people who are familiar with the turnaround time in federal court, if cases are being filed in the fall, full briefing on Motions to Dismiss, aren't getting done until late winter or even early right now in 2022. So once things are fully briefed, I think it's fair to expect that we're probably looking at a six to nine-month turnaround time for a ruling, which puts us towards late summer, early fall, maybe even into the winter of this year, before we really start getting that critical mass of Motion to Dismiss opinions that can shape whether or not these suits continue to get filed.

Greg Szewczyk:

So I think two important things to keep in mind as to where things are and where they're going is one, until we get a critical mass of case law, I think that we should expect plaintiffs' attorneys to continue to file these suits throughout 2022. Both because there isn't anything preventing them yet, and because even based on some of the early cases, they might see something that lets them try to poke a hole or explore other areas of allegations. And two, there are a handful of different jurisdictions, they have different standards and case law and precedent for their state statutes or common law. And we should keep an eye out for, even if we're getting good rulings in one, something could go different in any particular case in another jurisdiction, which could prompt a flood of lawsuits in that particular jurisdiction. So I think there's a lot of unknowns in at this point and it's really something that we need to keep an eye on.

Aliza Karetnick:

Thanks, Greg. So given the uncertainty here and Phil, I'm directing this question at you. How big a concern are these lawsuits and specifically how big a concern are they for online retailers? What are the consequences and potential exposure that retailers should be focused on?

Phil Yannella:

Yeah. To piggyback on Greg's comments ... At this stage, it's not quite clear how much of a risk these lawsuits are going to pose for online retailers. Because again, the litigation is still quite early and there have not been any rulings on the critical issues that defendants are using to try to dismiss these claims. In the abstract, if you look at the way some of the other privacy litigations have gone, if we start seeing a lot of Motions to Dismiss, and there probably will be a flurry of them, and they're all granting defendants' motions, then it's quite likely that at this litigation is going to wither on the vine. This is what happened, for example, with the Wire Tap lawsuits that I had alluded to earlier. Courts began granting a bunch of Dismissal Motions and ruling that the plaintiffs were misapplying the Wire Tap laws and the litigation just went away.

Phil Yannella:

There's a good chance that courts may start viewing these cases the same way, but we just don't know. And that's why it can be of concern. If courts start denying these motions, it is almost certain that we're going to see more case filings. And as we talked about earlier, retailers are likely going to continue to be a target of these kinds of lawsuits if the litigation takes off. Retailers tend to have very large CRMs. They tend to collect quite a bit of customer data. Some of that data is sensitive. Some of it is not. It has become a large part of the business model for online retailers to share that data or to sell that data. Analytics providers can provide a great deal of information to retailers or other companies about that customer data. Quite often, the data is shared for the purposes of trying to augment it.

Phil Yannella:

So in general, online retailers are very, very active users and sharers of customer data. And for that reason, I think there is a significant potential for liability if these cases take off. I do want to point to something else. And Greg alluded to this earlier when he mentioned that even the courts that have dismissed these cases have paused and noted that there was some privacy risk involved in these cases. And that gets to another point that I want to stress, which is that the real heart of these publicity lawsuits is a theory that more and more courts are coming to recognize, namely that people's data has an inherent value and that consumers should be required to consent to the monetization of their data before companies are enriched.

Phil Yannella:

Putting Right of Publicity lawsuits to the side for a moment, plaintiffs' lawyers have been bringing more and more of these lawsuits based on a theory of improper data sharing or sharing that occurs either without a clear notice or without express consent, and arguing that online businesses have been unjustly enriched through their lack of disclosure. Thus, from my perspective, there are really two potential risks that online retailers need to be thinking about in the context of their data sharing. There is the potential exposure under a Right of Publicity statute that Greg and I been talking about, but there's also this potential exposure under common law theories like Breach of Contract or state UDAP laws or Unjust Enrichment. So it's a potentially thorny area that I think online retailers have to be paying more and more attention to

Aliza Karetnick:

Well Phil, to that end, what steps can online retailers take to protect themselves from Right of Publicity lawsuits?

Phil Yannella:

Well, if these lawsuits begin to take off, I think the most immediate course of action for retailers is going to be to review their Terms of Use and their privacy policies to make certain that their data sharing activities are clearly disclosed. I think it would probably be wise for retailers to also obtain consumer consent to such data sharing. Now, admittedly, we're in a bit of a gray

area right now because the Standard of Consent under these Right of Publicity laws can vary. So it may be that under some of the laws, Implied Consent would be sufficient and you might have a good Implied Consent argument if you simply make robust disclosures.

Phil Yannella:

But if the litigation takes off it, I would argue that it may not be prudent to rely simply on an Implied Consent argument. It would be better to get Express Consent if you can. And the most obvious mechanism to do that would be by requiring consumers to affirmatively agree to the Terms of Use and to the privacy policy, and many retailers and other online companies do that. But just bear in mind that courts tend to be less inclined to conclude that a consumer did consent, for example, to the sale of their data if the disclosures aren't clear. And a lot of companies have been hit pretty hard in both litigation and by regulators over the lack of clarity or transparency in their disclosure. So if there's any one thing to do immediately, I would tell online retailers to start looking a little more closely at their disclosures about data sharing.

Phil Yannella:

Now, if companies are going to go the route of trying to get consent, they may also want to consider getting consent through a cookie banner or some kind of popup rather than via Terms of Use. And we're all pretty familiar with banners. They appear the moment a consumer accesses a page or provides their data online to a retailer. And the banner would explicitly seek consent to share that data. I think if you were to do that, courts would likely find that the consent obtained in this manner is valid because it would be very clear and it would be at the moment that the data is being collected.

Phil Yannella:

Now the downside of that approach is that consumers and companies really hate cookie banners and a lot of consumers just ignore them. So there's a question from a practical standpoint of whether you want to go that route to get consent. I will offer this though. A lot of companies in 2023 are going to have to begin implementing some kind of cookie banner because there are three new privacy laws. California's, Colorado's, and Virginia that will require opt-outs for the sharing of personal data with ad tech providers.

Phil Yannella:

So one school of thought is, if you're a company that is subjected to those laws, you're going to need to use a banner. Then why not implement a banner that allows you to gain consent for the sharing of data. Beyond looking at Terms of Use and considering ways to get consent from consumers, the other thing that retailers should be looking at are their Terms of Use to make certain that they've got arbitration clauses. You would, typically, I would advise that you have a mandatory arbitration clause with a class action waiver built into the Terms of Service. Obviously, some states, there are restrictions on that. But for online retailers, you may not be subject to some of those restrictions.

Phil Yannella:

The other thing to take a look at is in those mandatory arbitration clauses, you may also want to craft them in a way that would allow you to avoid mass arbitration filings. So as to avoid some of the administrative fees that come with some of these mass arbitration filings, which has been a recent plaintiff strategy. So ... That's what I would do if I was an online retailer right now, I'd take a close look at those disclosures, think about how I would get consent, and then double check to make certain that I've got an arbitration clause with a class action waiver.

Aliza Karetnick:

Phil, thanks. Those are practical and easily implementable tips. One thing, I guess, a retailer may implement revised policies, may review everything, and be really as airtight as they think they can be, and still find themselves staring down the barrel of a lawsuit. And if that's the case, I guess, best advice is call counsel. Don't panic. Call counsel. For anyone who's interested in learning more about this, take a look at our blog, Cyber Advisor. You can find it at: www.cyberadvisorblog.com.

Steve Burkhart:

Thanks again to Aliza Karetnick, Phil Yannella, and Greg Szewczyk. Make sure to visit our website: www.ballard.spahr.com where you can find the latest news and guidance from our attorneys. Subscribe to the show in Apple podcasts, Google Play, Spotify, or your favorite podcast platform. If you have any questions or suggestions for the show, please email: podcast@ballardspahr.com. Stay tuned for a new episode coming soon. Thank you for listening.