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# Memorandum

## Ninth Circuit Supports Standing in Social Media Privacy Case

April 16, 2020

On April 9, 2020, the Ninth Circuit held that Facebook's users had standing to pursue claims, made under multiple U.S. federal and state laws, based on Facebook's use of third-party plug-ins and cookies to track such users' Internet activities, including their visits to third-party websites after they logged out of Facebook.[1]

### Case Lessons

The case underscores the following principles:

- Courts deem social media user data to have substantial value, even absent evidence that the users would sell their data on their own.
- Internet users have a right to privacy in their "off-line" browsing activities and an interest in the privacy of data generated by their use of social media, which is sold by social media platforms to advertisers.
- This decision joins other appellate courts in supporting plaintiffs' standing in a data privacy case, even when the plaintiffs were not shown to suffer obvious harm based on alleged misuse of their data.[2]
- A binding contract is not necessarily created between a website and its users based on the terms of a posted policy, and even a binding online contract requires explicit promises to support a breach of contract claim.

### Case Summary

As with many other social media platforms, Facebook uses plug-ins (*e.g.*, the "Like" button) and Internet cookies to track its users' browsing activities on third-party websites. Facebook compiles this information to create personal profiles of users that are then sold to advertisers. In this case, the plaintiffs alleged that Facebook tracked users' Internet browsing activities even after they had logged out of Facebook. Facebook embedded Internet cookies onto users' browsers, which then stored information about the users, including their IP address, login ID,

[1] *In re Facebook, Inc. Internet Tracking Litig.*, No. 17-17486, 2020 WL 1807978 (9th Cir. Apr. 9, 2020).

[2] This case concerns alleged privacy violations by an *intended* recipient of user data, not a data security breach where unauthorized access occurred. Several (but not all) appellate courts have supported standing based on alleged user harm in the data breach context. *Compare In re U.S. Off. of Personnel Mgt. Data Sec. Breach Litig.*, 928 F.3d 42 (D.C. Cir. 2019); *Dieffenbach v. Barnes & Noble*, 887 F.3d 826 (7th Cir. 2018); *and Galaria v. Nationwide Mut. Ins.*, 663 Fed. Appx. 384 (6th Cir. 2016) (all supporting standing) *with Whalen v. Michaels Stores, Inc.*, 2017 WL 1556116 (2d Cir. May 2, 2017); *Beck v. McDonald*, 848 F.3d 262 (4th Cir. 2017); *and In re SuperValu, Inc.*, 870 F.3d 763 (8th Cir. 2017) (all dismissing class actions for lack of standing).

search terms they used, and third-party websites they visited, creating an alleged "cradle-to-grave" profile of these users without obtaining their consent.

Plaintiffs brought a putative class action against Facebook, alleging a variety of federal and state-law claims, including violation of the Wiretap Act, Stored Communications Act ("SCA"), California Computer Data Access and Fraud Act ("CDAFA"), and California Invasion of Privacy Act ("CIPA"), invasion of privacy and seclusion, trespass, fraud, larceny, and breach of contract.[3]

The Ninth Circuit affirmed the district court's finding of standing for the Wiretap Act, SCA, CIPA and contract claims. The court noted the requirements for standing—a "concrete and particularized" invasion of a legally protected interest.[4] It stated that a bare procedural violation of a statute is generally not sufficient to support standing, but that Congress could elevate the status of certain legal injuries to provide such support. The Ninth Circuit noted that (i) privacy violations have long been actionable at common law, (ii) Congress and the California legislature intended to protect privacy when they passed the Wiretap Act, SCA and CIPA, and (iii) the plaintiffs had adequately alleged harm to their privacy rights.

As for the trespass, fraud, larceny and CDAFA claims, the Ninth Circuit reversed the district court's dismissal, and held that plaintiffs had demonstrated sufficient economic harm to support standing in alleging that Facebook was unjustly enriched by using their personal data. The court rejected Facebook's argument that plaintiffs must demonstrate that they intended to sell the data themselves or that Facebook's use of their data harmed its value.

The Ninth Circuit also held that plaintiffs' Wiretap Act, CIPA, invasion of privacy, seclusion and contract claims survived a motion to dismiss for failure to state a claim. The court held that plaintiffs had sufficiently alleged a reasonable expectation of privacy in their user data, and a highly offensive violation thereof by Facebook. Further, the court held that Facebook was not exempt from Wiretap Act and CIPA liability as a party to (and not a third-party interceptor of) the users' website activities, due to the nature of how such user data was sent from third-party websites to Facebook. The court did dismiss the SCA claim, but on technical grounds.

Finally, the Ninth Circuit upheld the district court's dismissal of the plaintiffs' breach of contract claim. The court held that Facebook's data use policy, which contained language that would support a contract claim, was not a free-standing contract and was not properly incorporated into another website policy that was deemed to be a binding contract. Meanwhile, the binding website contract made general statements about privacy protection but did not explicitly promise not to track offline user activities.

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[3] The California Consumer Privacy Act ("CCPA") became effective on January, 1, 2020 and thus was too recently effective to support plaintiffs' claims here. The CCPA requires businesses to disclose to consumers at the time of collection how their personal data is used and to use such data consistent with such disclosure. See our previous CCPA Alert here.

[4] *Spokeo v. Robins*, 136 S. Ct. 1540 (2016).

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