

ALERT

DISPUTES / INSURANCE LITIGATION

April 2001 Number 3

Cookies Remain Intact While Plaintiffs' Claims Crumble

The United States District Court for the Southern District of New York dismissed claims against DoubleClick, Inc. that alleged DoubleClick's use of "cookies" violated the privacy of Internet users and federal statutes. "Cookies" are pieces of information stored on a user's computer when a user visits an Internet site. The cookie identifies the user's computer the next time it visits the site. On March 28, 2001, United States District Judge Naomi Reice Buchwald dismissed the class action lawsuit against DoubleClick including claims that the placing of cookies on an Internet user's hard drive is not an invasion of privacy. *In re DoubleClick, Inc. Privacy Litigation*, No. 00 Civ. 0641 (S.D.N.Y. Mar. 28, 2001). The well-reasoned decision is significant and likely will impact other cases with similar claims.

In *In re DoubleClick, Inc. Privacy Litigation*, the plaintiffs challenged DoubleClick's practice of building detailed profiles of Internet users by placing cookies on the hard drives of persons who visit web sites affiliated with DoubleClick. DoubleClick uses cookies or computer programs that store information about the user so it can be collected by the company as a way of identifying computer users who will be likely candidates to respond to banner advertisements on web sites. The plaintiffs objected to the fact that the cookies could track user names, e-mail addresses, searches performed, and web sites visited. The plaintiffs filed suit in federal court last spring alleging that cookie placement amounted to an invasion of privacy and the unjust enrichment of DoubleClick, and also violated federal laws.

In re DoubleClick, Inc. Privacy Litigation is the first decision on whether the use of cookies violates privacy. There are several pending cases in other jurisdictions where plaintiffs allege privacy violations for the use of

cookies. *Illinois v. Clearstation*, No. 00CH 17405 (Ill. Cir. Ct., filed Dec. 5, 2000); *Dearman v. Toys R Us, Inc.*, No. C 00 2746 (N.D. Cal., filed Aug. 2, 2000); *Rivera v. Matchlogic, Inc.*, No. 00-K-2289 (D. Colo., filed Nov. 30, 2000). In its motion to dismiss, DoubleClick argued, among other things, that DoubleClick's collection of information through cookies was not illegal under federal anti-hacking laws because the web sites affiliated with DoubleClick authorized the advertiser's access to information about those who visited their sites. Moreover, since a visit to a web site is a communication between the site and a computer user, DoubleClick gained legitimate access to the communication when it gained authorization from the affiliated web site—one of the participants in the communication. The Court agreed and ruled in DoubleClick's favor finding that plaintiffs "fail[ed] to state a claim on which relief can be granted."

The Underlying Allegations

The initial complaint was filed in the Southern District of New York on January 31, 2000. Subsequently, 11 related federal class action suits were filed against DoubleClick in the Southern and Eastern Districts of New York. On May 10, 2000, the Southern District of New York consolidated the cases into one class action lawsuit, and the consolidated class filed its Amended Complaint on May 26, 2000.

The plaintiffs alleged that DoubleClick violated their privacy and federal statutes by its use of cookies. "Cookies are computer programs commonly used by Web sites to store useful information such as usernames, passwords, and preferences, making it easier for users to access Web pages in an efficient manner." *In re DoubleClick, Inc. Privacy Litigation*, at 9. According to

the plaintiffs' Amended Complaint, "DoubleClick's cookies collect 'information that Web users, including plaintiffs and the Class, consider to be personal and private, such as names, e-mail addresses, home and business addresses, telephone numbers, searches performed on the Internet, Web pages or sites visited on the Internet and other communications and information that users would not ordinarily expect advertisers to be able to collect.'" *Id.* (citing Amended Complaint at 38). DoubleClick's use of cookies is invisible to the user. Moreover, DoubleClick's cookies only capture certain parts of the communications that users send to DoubleClick-affiliated web sites. The cookies collect this information in three ways: 1) "GET" submissions; 2) "POST" submissions; and 3) "GIF" submissions. "GET information is submitted as part of a web site's address or 'URL,' in what is known as a 'query string.'" *Id.* at 12. GET information is the "URL" the user requested. Users submit POST information when they fill in multiple blank fields on a web page, like fields for name, address, e-mail address, phone number, and discussion group alias. The cookie captures this POST information. Finally, DoubleClick's cookies gather GIF tags. GIF tags are small and invisible to the users. "Unseen, GIF tags record the user's movements throughout the affiliated web site, enabling DoubleClick to learn what information the user sought and viewed." *Id.* at 13.

Plaintiffs did not allege that DoubleClick attempted to collect any information other than the GET, POST, and GIF information submitted by users. Moreover, DoubleClick's cookies only collect information concerning users' activities on DoubleClick-affiliated web sites. DoubleClick's cookies cannot track users to unaffiliated web sites. Third, as plaintiffs' counsel demonstrated, DoubleClick will not collect information from any user who takes simple steps to prevent DoubleClick's tracking. Finally, plaintiffs did not allege that DoubleClick disclosed the information to a third party.¹ "Once DoubleClick collects information from the cookies on users' hard drives, it aggregates and compiles the information to build demographic profiles of users." *Id.* at 14.

Because the Southern District's federal jurisdiction was based on the plaintiffs' three federal claims, Judge Buchwald addressed them first. When she dismissed each federal claim for failure to state a claim on which relief can be granted, Judge Buchwald declined to address the plaintiffs' state law claims. The Court's analysis on each of the plaintiffs' three federal claims is set forth below.

DoubleClick's Use of Cookies Does Not Violate Title II of the Electronic Communications Privacy Act

The purpose of Title II of the Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2701 *et seq.*, is to prevent hackers from obtaining, altering, or destroying certain stored electronic communications. It creates both criminal sanctions and a civil right of action against any person who gains unauthorized access to communications facilities and thereby accesses electronic communications stored incident to their transmission. Plaintiffs contended that DoubleClick's placement of cookies on plaintiffs' hard drives constituted unauthorized access and, as a result, DoubleClick's collection of information from the cookies violated Title II. DoubleClick argued that its conduct fell within an exception to Title II because the DoubleClick-affiliated web

¹In mid-1999, the Federal Trade Commission (FTC) launched an investigation into whether DoubleClick's collection, compilation, and use of consumer information constituted unfair or deceptive trade practices in violation of the Federal Trade Commissions Act. Specifically, the FTC was concerned with 1) whether DoubleClick used or disclosed users' personal identifying information in violation of its privacy policy and 2) whether DoubleClick used or disclosed sensitive information about consumers in violation of its privacy policy. *Id.* at 16 (quoting Letter from Joel Winston, Acting Associate Director, Division of Financial Practices, FTC to Outside Counsel for DoubleClick, Jan. 22, 2001). On January 22, 2001, the FTC concluded its investigation and determined that DoubleClick had not engaged in unfair or deceptive trade practices. *Id.* The FTC noted several commitments DoubleClick made to modify its privacy policy including allowing a user to request an "opt out" cookie in order to prevent DoubleClick from collecting information from that user. *Id.* at 18.

sites are “users” of the Internet and all of plaintiffs’ communications accessed by DoubleClick’s cookies have been “of or intended for” these web sites. According to DoubleClick, this “authorization excepts DoubleClick’s access from Title II’s general prohibition.” *In re DoubleClick, Inc. Privacy Litigation* at 21.

The Court agreed, finding that all of the communications DoubleClick accessed through its cookies had been authorized or had fallen outside of Title II’s scope. According to the Court, because plaintiffs only alleged that DoubleClick accessed communications from plaintiffs to DoubleClick-affiliated web sites, the issue became whether the web sites gave DoubleClick adequate authorization under Title II to access those communications. *Id.* at 27-28. The Court found that the plaintiffs proffered no proof to support their bare assertion that DoubleClick’s access was unauthorized. *Id.* at 28-29. Relying on practical explanations, the Court held that “the very reason clients hire DoubleClick is to target advertisements based on users’ demographic profiles.” *Id.* at 29. Moreover, it is irrelevant how DoubleClick collects demographic information through cookies to the issue of authorization. “All that the Web sites must authorize is that DoubleClick access plaintiffs’ communications to them.” *Id.* The Court also easily dismissed the plaintiffs’ claim that DoubleClick’s access to plaintiffs’ cookie identification numbers are not properly authorized because they are never sent to or through the web sites. The Court held that “DoubleClick does not need anyone’s authority to access them.” *Id.* at 32. Further, because DoubleClick’s cookies remain on plaintiffs’ hard drives for long-term periods, the Court found that they fall outside the scope of Title II. Title II only applies to electronic communications in temporary or intermediate storage. *Id.* at 33. In contrast and in the plaintiffs own words, DoubleClick’s cookies remain on the plaintiffs’ computers “for a virtually indefinite time period.” *Id.* at 34 (quoting Amended Complaint at 68). Finally, the Court held that even if the cookies were “electronic communications” for purpose of Title II, DoubleClick’s access is still authorized. According to the Court, “the cookies’ identification numbers are internal DoubleClick communications-both ‘of’ and

‘intended for’ DoubleClick.” *Id.* at 36. The cookies serve an important internal function for DoubleClick. In contrast, the cookies are meaningless to anyone else. *Id.*

DoubleClick’s Use of Cookies Does Not Violate the Wiretap Act

Plaintiffs’ second claim was that DoubleClick violated the Federal Wiretap Act (the Wiretap Act), 18 U.S.C. § 2510, *et seq.* The Wiretap Act provides for criminal punishment and a private right of action against any person who intentionally intercepts wire, oral, or electronic communications. DoubleClick claimed that its actions fell under an explicit statutory exception that provides that “[i]t shall not be unlawful . . . for a person . . . to intercept a wire, oral, or electronic communication . . . where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act.” 18 U.S.C. § 2511 (2)(d). DoubleClick again argued that the DoubleClick-affiliated web sites consented to its interceptions, and, as a result, its conduct was exempted from the Wiretap Act’s general prohibition. The Court agreed and held that “the DoubleClick-affiliated Web sites are ‘parties to the communication[s]’ from plaintiffs and have given sufficient consent to DoubleClick to intercept them.” *In re DoubleClick, Inc. Privacy Litigation* at 39-40.

Plaintiffs argued that even if the web sites consented, the exception does not apply because DoubleClick’s purpose was to commit criminal or tortious acts. *Id.* at 39. The Court rejected the plaintiffs’ argument holding that the Wiretap Act covers only acts “accompanied by a specific contemporary intention to commit a crime or tort.” *Id.* at 41. According to the Court, plaintiffs failed to allege that DoubleClick’s primary motivation or intention in its actions was to injure plaintiffs tortiously. *Id.* at 49. Citing three cases involving the American Broadcast Companies, Inc. (“ABC”), the Court ruled that “a plaintiff cannot establish that a defendant acted with a ‘criminal or tortious’ purpose simply by proving that the defendant committed any tort or crime.” *Id.* at 43 (citing

Sussman v. ABC, 186 F.3d 1200 (9th Cir. 1999); *Deteresa v. ABC*, 121 F.3d 460 (9th Cir. 1997); *Desnick v. ABC*, 44 F.3d 1345 (7th Cir. 1995)). According to the Court, “DoubleClick’s purpose has plainly not been to perpetuate torts on millions of Internet users, but to make money by providing a valued service to commercial Web sites.” *Id.* at 51.

DoubleClick’s Use of Cookies Does Not Violate the Computer Fraud and Abuse Act

Plaintiffs’ final federal claim was under the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030, *et seq.* The CFAA provides that “whoever intentionally accesses a computer without authorization or express authorized access, and thereby obtains . . . information from any protected computer . . . shall be punished.” 18 U.S.C. § 1030(a)(2)(c). Damages under the statute are limited to “any impairment to the integrity or availability of data, a program, a system, or information that (a) causes loss aggregating at least \$5,000 in value during any 1-year period to one or more individuals.” 18 U.S.C. § 1030(e)(8). DoubleClick did not dispute that the plaintiffs’ computers were “protected,” but argued that plaintiffs failed to plead adequate damages. The Court agreed finding that plaintiffs failed to allege facts that could support a finding that their injuries meet the \$5,000 threshold. Plaintiffs essentially pleaded two bases of “damage or loss”: 1) costs in remedying their computers and data in the wake of DoubleClick’s access, and 2) the economic value of their attention and demographic information. *In re DoubleClick, Inc. Privacy Litigation* at 63-64. The Court rejected plaintiffs’ economic loss argument because the users could have prevented DoubleClick from collecting information by simply selecting options on their browsers or downloading an “opt out” cookie. Moreover, the plaintiffs failed to demonstrate what damage, if any, DoubleClick caused to the plaintiffs’ computers, systems, or data that could require economic remedy. *Id.* at 64. The Court also

refused to measure the economic value of the plaintiffs’ attention and demographic information as damages or loss. The Court concluded: “We do not commonly believe that the economic value of our attention is unjustly taken from us when we choose to watch a television show or read a newspaper with advertisements and we are unaware of any statute or caselaw that holds it is.” *Id.* at 65.

Implications

- *In re DoubleClick, Inc. Privacy Litigation* is likely to impact significantly on other class actions involving the collection of user information over the Internet. The decision’s reasoning and findings likely will undermine similar class actions pending nationwide.
- *In re DoubleClick, Inc. Privacy Litigation* demonstrates that the use of cookies to collect user information for internal, business purposes does not violate the current federal statutory scheme.

If you have any questions regarding this Alert or any other related matter, please contact:

Walter J. Andrews
walter.andrews@shawpittman.com - 703.770.7642

Lon A. Berk
lon.berk@shawpittman.com - 703.770.7669

Frank Winston, Jr.
frank.winston@shawpittman.com - 703.770.7672

Erica Simpson assisted with the preparation of this *Alert*.

Copyright © 2001 by Shaw Pittman. All Rights Reserved. This publication is provided by Shaw Pittman for general information purposes; it is not and should not be used as a substitute for legal advice.