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Apple's Facebook, Google App Bans Shake Up Privacy Fight

By **Allison Grande**

Law360 (February 1, 2019, 10:38 PM EST) -- Apple recently acted on its tough consumer privacy talk by temporarily blocking Facebook and Google from distributing internal employee apps to consumers after data collection concerns came to light, fueling already strong calls for tighter online privacy rules and recalibrating the role that these tech giants are likely to play in that debate, attorneys say.

Reports emerged Tuesday that Facebook had been paying consumers as young as 13 to use an internal marketing research app that tracks all of its users' phone and web activity, a move that appeared to be in violation of Apple's policy that such apps can only be used by employees. Apple confirmed this contractual breach the following day and revoked the social media giant's enterprise developer certificate, which blocked access to not only the disputed app but other internal-use apps that run on Apple's software and enable employees to perform basic work tasks like chatting and checking the lunch menu.

Google similarly saw its enterprise certificate revoked Wednesday, after Apple concluded that the tech giant had also used the developer enterprise program — which allows companies to test and use apps internally while avoiding more stringent rules for offering apps publicly through the App Store — to widely distribute an app to track internet usage.

While Apple restored both certificates late Thursday, allowing all internal apps except the disputed ones to come back online, the tech giant won broad praise for independently acting to halt what many stakeholders, including several Senate Democrats, viewed as unsavory data collection practices, especially in light of the absence of robust federal data privacy rules and **mounting criticism about** the insufficiency of enforcement efforts by watchdogs such as the Federal Trade Commission.

"State and federal regulators have dropped the ball when it comes to regulating the digital space, and this matter demonstrates once again that private companies need to take matters into their own hands to protect their customers," said Bradley Shear, a lawyer who focuses his practice at Shear Law LLC on social media and technology issues. "Hopefully, Apple’s actions will make Facebook and other companies think twice before engaging in unethical and illegal behavior."

Much of the frustration over the regulation of tech giants' privacy practices stems from the lack of a federal law that clearly lays out how these companies are allowed to collect, use, share and sell consumers' personal data. While the European Union began adhering to stringent data protection rules last May and a novel California law that gives consumers more control over their data is set to take effect this upcoming January, federal lawmakers are still struggling to craft a national privacy regime that establishes clear rules for both consumers and the online community.

"The current Apple/Facebook squabble highlights a critical debate in U.S. law — do individuals have a right to privacy?" said Fran Goins, co-chair of the cybersecurity and privacy practice at Ulmer & Berne LLP. "In the EU, the answer is clearly 'yes.' In the U.S., it’s a murky issue."

While the U.S. Supreme Court has recognized a constitutional right of individuals to have their personal information protected from unauthorized governmental intrusions, the question of what protections apply to similar practices by non-governmental actors in the commercial marketplace

remains wide open, Goins noted, leaving policymakers to fill the void.

Major tech companies have recently become more vocal in this policy debate, with Apple, Google and several other tech giants **publicly pushing Congress** to preempt more stringent state laws and use a lighter touch than regulators have in Europe.

While lawmakers are unlikely to single out any one company as they consider enacting a privacy law that would broadly apply to the tech community, Facebook and Google's data collection efforts through their internal research apps and Apple's reaction to them has the potential to shift the fault lines and give more ammunition to privacy group's calls to tightly regulate these practices, attorneys say.

"This really puts other big tech companies on notice as well that we are in an environment where people are becoming more aware of potential privacy concerns and they really want to see transparency from companies about what data is being collected and how it's being used and shared, and what significance that has for the people who's data is being gathered," said April Doss, a partner on the cybersecurity and privacy team at Saul Ewing Arnstein & Lehr LLP.

That's particularly true for Facebook, which in the past year alone has faced increased scrutiny in the wake of incidents including the Cambridge Analytica data scandal and a massive September data breach.

"There's no question that the public, regulators, lawmakers and other tech companies are all showing real impatience with the string of privacy issues that have been coming out of Facebook," Doss said. "Whatever reservoir of good will that Facebook had on the privacy front has really been getting diminished significantly by what seems like a steady stream of privacy surprises and concerns."

Apple's move to take action against Facebook and Google not only makes good on CEO Tim Cook's promises to closely guard consumer data and criticisms of Facebook for its broad use of this information, but is also likely to boost the iPhone maker's clout in the raging privacy law fight.

"This action seems to be an opportunity for Apple to rise above the crowd and be seen as an honest broker at the negotiating table and to hopefully be able to defend itself better in the privacy law wars," said Robert Braun, a partner at Jeffer Mangels Butler & Mitchell LLP and co-chair of the firm's cybersecurity and privacy group.

Apple's aggressive action also highlights the evolving and complex nature of the technology marketplace, where there's significant overlap between the biggest players in hardware, software and hosting platforms, Doss noted.

"There was a time in the past where the major tech companies were sort of in the same place from a policy perspective and had their interests in many respects aligned with each other," Doss said. "What we're seeing in this instance is a very definite disagreement between Apple and Facebook and Google and a message from Apple that we're not going to be in lockstep if it's going to be harmful to our corporate brand, so we'll have to see where that goes and if it's the start of more divergency within the tech sector."

At the least, the app debacle is likely to give added urgency to efforts to improve privacy protections for both consumers in general and teens not covered by the Children's Online Privacy Protection Act in particular and to enhance regulatory scrutiny.

But attorneys were divided about what impact these efforts would have in curbing this kind of conduct in the future, particularly considering that on its face, the current dispute is over an alleged breach of contract, not an overt privacy violation.

"Apple does not dispute Facebook’s right to collect consumer data for marketing purposes, but rather its right to use an Apple-based app to do so," Goins said.

If that remains the case, even a statute like the California Consumer Privacy Act — which will allow consumers to hold companies accountable if they fail to adequately inform them about what's being done with their data and give them the choice to opt out of the sharing and sale of their data —

wouldn't cover a situation like the dispute between Apple and its tech counterparts because, as Facebook has claimed, those who were paid to use the app knew exactly what they were getting into.

But several critics have said that both Facebook and Google were not entirely up front with users about the purpose of the app and how much data was actually being collected and for what purposes, which would bring the alleged conduct under the purview of both proposed privacy legislation and the FTC's authority to police unfair and deceptive trade practices, attorneys say.

In a statement released in the wake of the Facebook app revelations, Sen. Ed Markey, D-Mass., called it "inherently manipulative to offer teens money in exchange for their personal information when younger users don’t have a clear understanding of how much data they’re handing over and how sensitive it is."

Sen. Mark Warner, D-Va., echoed these sentiments in a Wednesday letter to Facebook that voiced "concerns that users were not appropriately informed about the extent of Facebook’s data-gathering and the commercial purposes of this data collection."

"Facebook’s apparent lack of full transparency with users — particularly in the context of ‘research’ efforts — has been a source of frustration for me,” Warner said in his letter.

Attorneys agreed that this line of reasoning was the one that was most likely to trip up Facebook and Google in its future encounters with policymakers such as the FTC, who already has a probe open into Facebook's other recent data privacy missteps.

"I don’t regard a teenager — or for that matter an adult — being incentivized to download a 'survey' app based on a statement that trusting the app 'may give' Facebook’s developers 'access to your data' and tapping a 'Trust' button as having given his or her consent," said Phillips Nizer LLP technology practice group chair Thomas G. Jackson.

Dan Goldstein, the president and owner of digital marketing agency Page 1 Solutions, said that the allegations that Facebook knew its app violated Apple's terms of service for the App Store and continued to distribute the app through the developer platform was one of the most "disturbing" aspects of the recent revelations.

"This shows, once again, that Facebook doesn't value user privacy and goes to great lengths to collect private behavioral data to give it a competitive advantage," Goldstein said. "As Facebook's efforts to collect and use private data continue to be exposed, it risks losing market share and may prompt additional governmental investigations and regulation."

The situation also brings to the forefront the issue of what role platform operators should play in policing app developers' privacy practices, experts noted.

"This is the first time that I am aware of in which Apple removed one of Facebook's apps," Goldstein said. "It is now clear that Apple takes user privacy seriously and app developers are on notice that apps that collect private user data will be viewed with skepticism."

However, the legal responsibility that platforms have to monitor and take action against these apps remains murky.

While federal law broadly shields platforms from liability for what's hosted on their site, they could still face claims that they intentionally ignored their own rules or were complicit in the illegal activity by turning a blind eye to the challenged conduct, attorneys noted.

The New Mexico attorney general has **employed that strategy** in drawing Google and Twitter into his suit over the alleged surreptitious collection of kids' data by app developer Tiny Lab, claiming that both companies' mobile advertising units and Google's Play store continued to support the disputed apps despite knowing about their allegedly unlawful data gathering practices.

Apple will almost certainly dodge these sort of claims due to their swift action against Facebook and Google, although attorneys noted that the move was likely inspired more by policy concerns than

legal ones.

"In truth, I think Apple has taken the high road and, in the process, had a little fun at Facebook’s expense," Jackson said.

--Editing by Emily Kokoll and Kelly Duncan.
