

MVP: Cooley's Michael Rhodes

Law360, New York (December 12, 2017, 2:22 PM EST) -- Cooley LLP partner Michael Rhodes helped swat away, for good, \$15 billion multidistrict litigation accusing Facebook of unlawfully tracking users, while defending the makers of "Pokemon Go" from novel claims that sending users to real-life locations in pursuit of virtual creatures encouraged trespassing, landing him a spot among Law360's 2017 Cybersecurity & Privacy MVPs.

HIS BIGGEST ACCOMPLISHMENT THIS YEAR:

Rhodes, a Law360 MVP for the seventh straight year, said he was thrilled to see a California federal judge put the final nail in the coffin in a slate of lawsuits claiming Facebook violated wiretapping and privacy laws by installing Internet cookies in users' browsers that tracked their activity to outside websites.

U.S. District Judge Edward Davila tossed the bulk of the multidistrict litigation in July, ruling that the users had not proven that they'd suffered economic damage and that Facebook's acquisition of users' web addresses did not amount to illegal eavesdropping. Judge Davila axed the case's remaining breach of contract claims in November.

Rhodes, who had been defending the case for over five years, said the lawsuits had tried to "shoehorn" Facebook's use of tracking cookies into privacy laws that don't apply to the way the Internet works today.

"They were trying to take some of the fundamental aspects about the Internet and convert that into a privacy claim," he said. "This is not spyware. This is not Facebook trying to know everything about you. This is a fundamental characteristic of the Internet, a backbone of the web."

OTHER CASES HE'S WORKED ON:



Rhodes, who works out of Cooley's San Francisco and San Diego offices, has become an expert at defending Silicon Valley companies from novel legal claims arising from new technology. In July, he scored a win, for now, in yet another head-scratcher, this time lobbed against "Pokémon Go" maker Niantic: Does putting virtual objects on someone's physical property amount to trespassing?

The game, in what is known as augmented reality, places virtual objects on real-life locations and guides players toward them using the GPS on their cellphones. The plaintiffs, claiming that the game's developers sent hordes of Pokémon-seeking players onto their properties, accused Niantic of trespass and nuisance, while asserting a claim for unjust enrichment against both Niantic and the Pokémon Co., which markets and licenses the Pokémon franchise.

Rhodes' team argued that the software company, which forbids its users from trespassing, could not be held liable for actions taken by third parties. Niantic's attorneys also argued that endorsing the plaintiffs' theory of liability could "implicate innumerable online services that help users find specific locations," including apps that list real estate open houses in desirable areas and public parks that are good for children.

"Using a law like trespass in this case is archaic in its application," Rhodes said.

A California federal judge in July dismissed the suits, saying the putative class was too broad and the plaintiffs failed to show that purported damages exceeded the \$5 million minimum required to keep the case in federal court. But the plaintiffs have the option of trying again with an amended suit.

THE BIGGEST CHALLENGE HE'S FACED:

Rhodes spends much of his time explaining complex technologies to judges and juries, but a proposed class action claiming that the Golden State Warriors spied on fans with its new app has presented especially thorny issues, he said.

The technology at the root of the privacy claims uses a smartphone's microphone to track a user's location through audio signals emitted by inaudible "beacons" scattered throughout the Warriors stadium. The app is designed to send users notifications based on where they are, but the plaintiffs claim the activated mic also picks up private conversations.

Rhodes, who is on the team representing the Warriors and app maker Signal360, said he's still trying to figure out the best way to make his case that the program does not, in fact, record or intercept communications in the way that is forbidden by federal wiretap laws.

"I have to go to court and explain cutting edge technology that is new to everybody and very specific to the advent of smartphones and explain why it's not what the plaintiffs say it is," he said.

A California federal judge ruled in November that the Warriors and Signal360 could not escape the suit, but tossed claims against app developer YinzCam Inc.

WHAT MOTIVATES HIM:

Rhodes' work over the last decade has put him face-to-face with some of the world's most successful innovators, including Facebook's Mark Zuckerberg and Tesla's Elon Musk.

A naturally curious person, he said he gets a thrill out of peppering programmers and engineers with questions as he delves into the details of the technology driving inventions like augmented reality games and ultrasonic beacon apps.

After throwing himself head-first into the new technologies that are disrupting the way we live, Rhodes then gets fired up about defending inventors and tech creators from lawsuits that, he said, are often overblown.

"I'm grateful to represent some of the most interesting and innovative companies in the world," he said. "And I get passionate about unfair attempts to target the very valuable services they provide with claims that are often trumped up."

— *As told to Ben Kochman*

Law360's MVPs are attorneys who have distinguished themselves from their peers over the past year through high-stakes litigation, record-breaking deals and complex global matters. A team of Law360 editors selected the 2017 MVP winners after reviewing more than 1,000 submissions.

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