

Litigators of the (Past) Week: Google Agrees to Delete User Data in ‘Incognito’ Browsing Privacy Settlement

By Ross Todd

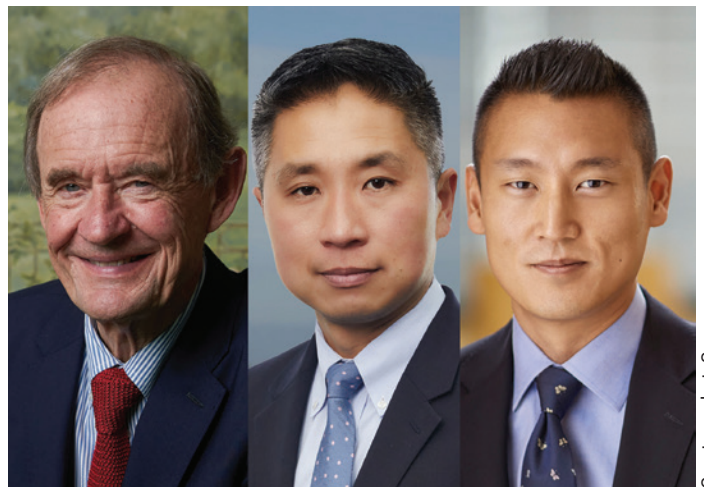
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Just how private is browsing using the “Incognito” mode in Google’s Chrome browser?

A little less than four years ago, lawyers at **Boies Schiller Flexner** sued the search giant and its parent company Alphabet claiming they’d misled users about what would be tracked in Incognito mode and by whom.

Last week, after Google had **twice been hit with discovery sanctions** in the suit over the ensuing years, the company agreed to delete a massive trove of data about Chrome users’ browsing and to take steps to keep third parties from tracking Incognito browsing as part of **a proposed deal** to settle the class action. Our Litigators of the Week are BSF’s **David Boies, Mark Mao** and **James Lee**, who led a team that included co-counsel at **Susman Godfrey and Morgan & Morgan**.

Lit Daily: How did this matter come to you and the firm?



Courtesy photos

(l-r) David Boies, Mark Mao, and James Lee of Boies Schiller Flexner.

Mark Mao: The case grew out of a general investigation James Lee and I were doing of Google’s products and practices. There were hints that Google’s motivations and conduct might be inconsistent with its public representations about private browsing, and we decided to investigate.

What did the pre-suit investigation the firm conducted involve?

James Lee: It was intensive. Google intentionally makes its adtech services difficult to

penetrate. We pored over public documents, tested Google products, and hired experts.

Who was on your team and how did you divide the work?

Lee: The complaint was initially drafted and filed by Mark and myself. Morgan & Morgan and Susman Godfrey joined soon afterwards. Prosecuting the case was a team effort. While David, as lead counsel, led a number of the key hearings, including cross examining key Google witnesses at those hearings, both the in-court arguments and the out-of-court preparations were shared by all three firms. We functioned as an integrated team—in effect, a virtual law firm. Key members of the team, in addition to David, Mark, and myself, included **Bill Carmody, Amanda Bonn, Alex Frawley** and **Ryan Sila** from Susman; **John Yanchunis, Jean Martin**, Michael Ram and Ryan McGee from Morgan; and **Beko Reblitz-Richardson, Alison Anderson, Alex Boies** and **Logan Wright** from BSF.

You had multiple rounds of sanctions motions and evidentiary hearings before the magistrate judge during discovery. Give me the basic outlines of those disputes and the adverse jury instruction you ended up getting as a result?

David Boies: Before and during the litigation, Google repeatedly denied that it tracked consumers browsing in “Incognito” mode. During discovery, Google concealed not only documents inconsistent with that denial, but even the identities of employees with knowledge of Google’s tracking. Based on an intensive analysis of terabytes of data,

expert testimony, and a few internal emails that slipped through, we were able to convince the court that a hearing was justified. The hearing that followed showed that Google did in fact track incognito browsing, and that Google had improperly concealed evidence it had been obligated to produce. The court ordered Google to produce all data sources recording such tracking. The court also imposed serious sanctions, requiring Google to pay approximately \$1 million, precluding Google from calling certain key witnesses in its defense, and ordering adverse jury instructions. A subsequent motion and hearing demonstrated that even then Google continued to withhold evidence it was obligated to produce, and the court ordered additional monetary and evidentiary sanctions.

The judge certified a class, but not on damages. Why?

Mao: The court held that while there were many common issues that justified an injunctive relief class, class members were required to bring individual claims for damages because individual issues regarding implied consent precluded a damages class.

Where do the individual state court cases pursuing damages stand. Who is leading that effort?

Lee: BSF and Morgan have already filed damages claims on behalf of over a thousand individual users in California state court. We expect to file many more.

A Google spokesman stressed last week that this settlement has no cash payout. Why

are the elements of this settlement valuable to the class?

Mao: As in any injunctive relief class, damages are awarded not in that class action but in any individual claims for monetary relief that follow. Following the court's evidentiary sanctions and the court's rejection of Google's key defenses both in motions to dismiss and motions for summary judgment, Google agreed to unprecedented injunctive relief. The injunction orders Google not only to correct its disclosures to honestly describe its tracking of private browsing, but also to delete and remediate the data it had previously improperly collected and logged. Based on what Google paid its users previously, the value of that data is more than \$3 billion. Google also conceded that this lawsuit was the catalyst for its Incognito "ChromeGuard" feature, which now blocks third-party cookies and further limits the data Google can collect. Google must maintain this feature for the next five years, which

Google estimated will cost it an additional \$1.7 billion in revenue.

What can others who are litigating against Google take from your effort here?

Boies: First, trust the courts. You must do your homework, and be prepared for a scorched earth defense, but if you can build a good case, and have the resources to take Google to trial, you can succeed. Second, don't assume Google's discovery responses are true. Distrust and verify. If you catch Google at serious discovery abuses, hold them accountable. Third, be patient. You will generally get your best resolution after a class has been certified and the court has denied Google's efforts to avoid a trial.

What will you remember most about this matter?

Boies: We demonstrated that dominant technology companies, like everyone else, must be honest with their consumers; that when they lie, they can be held to account; that despite their enormous resources and aggressive tactics they are not above the law.