First Circuit Refuses To Narrow Free App User's Privacy Claims Under The VPPA

By: Julie Ann Shepard and Mary Ellen Callahan

Until the First Circuit's recent decision interpreting the Video Protection Privacy Act (VPPA), the trend over the last few years had been to take a narrow view of the VPPA's scope when applying it to electronic distribution models. In its first case interpreting the VPPA, the First Circuit bucked that trend and endorsed arguably broader interpretations of the VPPA's "personally identifiable information" (PII) and "consumer" definitions than seen in other circuits in similar contexts.

In *Yershov v. Gannett Satellite Information Network*, *Inc*., a putative class action, the plaintiff alleged that Gannett violated the VPPA, a statute that provides civil remedies against a "video tape service provider" for "knowingly disclos[ing], to any person, personally identifiable information concerning any consumer of such provider." 18 U.S.C. § 2710(b)(1). Plaintiff had downloaded Gannett's "USA Today Mobile App" (the "App") in 2013 from the Google Play Store on to his Android devoice. The free App allows users to access news and entertainment content, including videos, on their mobile devices. Whenever a user watches a video clip using the App, Gannett provides Adobe Systems Incorporation (Adobe) with the following information: (1) the title of the video viewed, (2) the GPS coordinates of the device at the time of viewing, and (3) certain device identifiers, such as its unique Android ID, alleged to be a randomly-generated 64-bit number (as a hex string) that remains constant for the life of the device. App users are not asked to consent to Gannett sharing or disclosing this information with Adobe or any other third parties. At the same time, App users are required to respond to a request for permission for "push" or display notifications when they commence using the App.

The VPPA defines PII as "includ[ing] information which identifies a person as having requested or obtained specific video material or services from a video tape service." 18 U.S.C. § 2710(B)(1). The First Circuit found that PII is not limited to information that explicitly names a person. The court went on to posit a hypothetical where Gannett disclosed that a person viewed videos on a single device at two sets of specified GPS coordinates. Noting the ease with which one may now locate a GPS coordinate on a street map, the court concluded the GPS information disclosed in this situation would enable most people to identify what are likely the home and work addresses of the viewer. The court concluded that the plaintiff plausibly alleged that, when Gannett discloses the GPS coordinates and unique Android ID information to Adobe, it knows Adobe has ability to link that information to a certain person by name, address, and phone number, and the disclosed information was "reasonably and foreseeably likely to reveal" which videos plaintiff had viewed.

The First Circuit also concluded that plaintiff was a "subscriber" as that term is used in the VPAA's definition of consumer: "any renter, purchaser, or subscriber of goods and services from a video tape service provider." 18 U.S.C. § 2710(B)(3). Since the VPPA does not define "subscriber," the court looked to multiple sources when interpreting the term. The court acknowledged that the Eleventh Circuit in a 2015 decision had held that downloading and using a free mobile device application from the Cartoon Network did not make the plaintiff a "subscriber" under the VPPA. Disagreeing with the Eleventh Circuit, the First Circuit declined to equate

downloading a free mobile device application as the equivalent to a person adding a website as a “favorite” to an Internet browser. The First Circuit found instead that downloading the App onto the plaintiff’s phone established “seamless access” to *USA Today* and a relationship materially different than if *USA Today* remained one of the million websites that the plaintiff could access through a browser. The court also noted that, even though plaintiff paid no money for the App, he provided consideration in the form of the PII which he was required to provide Gannett whenever he viewed a video on the App. The First Circuit explained that its unwillingness to adopt one of the possible narrower meanings of subscriber stemmed from the fact that Congress considered the impact of the VPPA on the electronic distribution of video in 2012 and made it easier to obtain consent rather than limiting the reach of the VPPA.

In apparent recognition that it was bucking the trend, the First Circuit was quick to note that its actual holding “need not be as broad as our reasoning suggests” and that it was only holding the transaction alleged in the complaint plausibly alleged a VPPA violation. The court acknowledged that it remained to be seen if the plaintiff was correct about the extent to which Adobe could foreseeably identify him. The court also suggested that the answers to the following questions would ultimately bear on whether the plaintiff was in fact a subscriber for VPPA purposes: (a) does Gannett classify App users and website users the same, (b) is the content and format the same on the App and the website, and (c) does the App generate value for Gannett that the website does not. The First Circuit remanded for further proceedings consistent with its decision where these questions, and others, were left to be decided.

With the rapid advancements in digital delivery and ever-increasing interest in big data analytics, in particular precise geolocation, the First Circuit’s VPPA decision serves as a reminder to electronic distributors of video content to implement systems which enable them to stay on top of the data is collected and shared with third parties and, where necessary, to implement consent protocols to prevent the provider from running afoul of the VPPA.

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