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New Obstacles For VPPA Plaintiffs At 9th Circ.

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On Nov. 29, 2017, in Eichenberger v. ESPN Inc., a three-judge panel of the Ninth Circuit unanimously affirmed the dismissal of a putative class action lawsuit alleging that ESPN had disclosed users' "personally identifiable information" to a third-party analytics company (Adobe Analytics) in violation of the Video Privacy Protection Act.[1]

Subject to certain exceptions (including consent), the VPPA makes it unlawful for a "video tape service provider" to "knowingly" disclose "personally identifiable information concerning any consumer" to third parties.[2] The Ninth Circuit's decision includes two key holdings: first, allegations that a company disclosed personally identifiable information in violation of the VPPA are sufficient to plead Article III standing; and second, the VPPA's definition of "personally identifiable information" is limited to information that would readily permit an "ordinary person" to identify a specific individual's video-viewing behavior. Although the lure of hefty statutory damages (potentially $2,500 per violation) means that VPPA litigation will almost certainly continue, the ruling is another setback for plaintiffs attempting to map this pre-internet law onto modern websites and mobile applications that serve video content.

With respect to the Ninth Circuit's first holding, the court joined other circuit courts[3] and virtually every district court to have considered the issue[4] in concluding that the mere allegation of an improper disclosure of "personally identifiable information" under the VPPA is sufficient to plead Article III standing. The court held that the VPPA confers a substantive right to privacy — a right of consumers to "retain control over their personal information" — meaning that, absent a statutory exception, "every disclosure" of an individual's personally identifiable information and video-viewing history "offends the interests" the VPPA protects.[5] The court contrasted this substantive privacy right with the procedural obligations imposed by the Fair Credit Reporting Act that were at issue in the 2016 U.S. Supreme Court decision of Spokeo Inc. v. Robins,[6] a violation of which (depending on the facts of a given case) may or may not result in a concrete injury for purposes of Article III standing. As the court observed, "although the FCRA outlines *procedural* obligations that *sometimes* protect individual interests, the VPPA identifies

a *substantive* right to privacy that suffers *any time* a video service provider discloses otherwise private information."[7] Given the holdings of other courts addressing the issue, this holding is unsurprising, and it adds to a growing consensus setting a low Article III barrier to entry for the assertion of VPPA claims.

More significantly, in a holding that will be well-received by video service providers, the Ninth Circuit held that the information ESPN allegedly disclosed to Adobe — which consisted of (1) the serial number of the plaintiff's Roku digital streaming device, and (2) the identity of videos the plaintiff had watched through an application called the "WatchESPN Channel" — did not constitute "personally identifiable information" under the VPPA (even though Adobe allegedly could link this information to the plaintiff) and adopted the "ordinary person" test articulated by the Third Circuit.

The VPPA awkwardly defines "personally identifiable information" to "*include*[] information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider."[8] The court initially observed that this definition covered both information that, "standing alone, identifies a person," *as well as* "some information that is 'capable of' identifying a person."[9] In examining what Congress intended to cover as "'capable of' identifying an individual," the court considered the two different tests articulated in 2016 by the First and Third Circuits.

The First Circuit, in Yershov v. Gannett Satellite Info. Network Inc., departed from the decisions of virtually all district courts[10] in concluding that the term "personally identifiable information" encompasses "information *reasonably and foreseeably likely* to reveal which ... videos [a person] has obtained."[11] Applying this test, the First Circuit concluded that an Android user's device identifier and GPS coordinates fell within this definition — at least at the pleading stage, and at least when the plaintiff alleged that a third party could combine this information with other information in its possession to identify him.

In contrast, the Third Circuit, in In re Nickelodeon Consumer Privacy Litigation, in an opinion that was much more consistent with the holdings of the several district courts that had considered the issue, rejected the argument that "static digital identifiers" such as IP addresses and browser and operating system settings qualified as "personally identifiable information." The Third Circuit held that "personally identifiable information" includes only information that "would readily permit *an ordinary person* to identify a specific individual's video-watching behavior."[12]

In ESPN, the Ninth Circuit determined that the Third Circuit's "ordinary person" test "better informs video service providers of their obligations under the VPPA" and observed that the statute "looks to what information a video service provider discloses, not to what the recipient of that information decides to do with it."[13] The court noted that this test "fits most neatly" with congressional intent, stating that "the advent of the Internet did not change the disclosing-party focus of the statute," and that it was not persuaded that Congress "intended for the VPPA to cover circumstances so different from the ones that motivated its passage.[14]

The Ninth Circuit did not exhaustively address the origins of the VPPA in its decision, but they are well known (and the court nodded to them in a footnote): Congress enacted the VPPA in response to a profile of then-Supreme Court nominee Judge Robert H. Bork that was published by a Washington, D.C., newspaper during his confirmation hearings that contained Judge Bork's video rental history.[15] After members of Congress denounced the disclosure, Congress passed the VPPA in 1988 in order "[t]o preserve *personal privacy* with respect to the rental, purchase or delivery of video tapes or similar audio visual materials."[16]

With this history in mind, the Ninth Circuit applied the "ordinary person" test to the case before it, holding that the information allegedly disclosed to Adobe by ESPN — again: (1) the serial number of the plaintiff's Roku device, and (2) the identity of videos the plaintiff had watched on the WatchESPN Channel application — could not be used by an "ordinary person" to identify an individual because doing so would require the information to be combined with other personal information that ESPN never shared or possessed. It was beside the point, the court held, that Adobe may have been able to identify the plaintiff by using other information in its possession. By way of example, the court explained that if a video rental store manager disclosed merely that a "local high school teacher" had rented a specific movie, that disclosure would not violate the VPPA, even if a "resourceful private investigator" could identify the individual "with great effort."[17] By analogy, even though "today's technology may allow Adobe to identify an individual from the large pool by using other information," the court observed, no violation of the VPPA occurred because the statute has no regard for "the recipient's capabilities."[18]

Notably, as the Third Circuit did in In re Nickelodeon, the Ninth Circuit sought to minimize any potential conflict with the First Circuit's Gannett decision. In In re Nickelodeon, the Third Circuit insisted that its decision did not create a split with the definition of "personally identifiable information" endorsed in Gannett and stressed that it intended to "articulate a more general framework" rather than a sweeping, broadly applicable rule "given the rapid pace of technological change in our digital era."[19] The Third Circuit reserved for "another day" the question of whether other types of disclosures could trigger liability under the VPPA and cautioned that "companies in the business of streaming digital video are well advised to think carefully about customer notice and consent" while such issues get sorted out.[20] In ESPN, the Ninth Circuit characterized the First Circuit's holding in Gannett as "quite narrow," noting that the decision was based on the disclosure of GPS data that "would enable most people to identify an individual's home and work addresses," and that the First Circuit had expressly left room for situations where "the linkage of information to identity becomes too uncertain" to trigger VPPA liability.[21] The court also took pains to make clear that its decision did not render the VPPA "powerless," noting that names and addresses still qualify as "personally identifiable information," and that it was "not difficult to imagine other examples that may also count."[22]

At bottom, the Ninth Circuit's interpretation of what constitutes "personally identifiable information" restores some much-needed balance and clarity to the VPPA and will likely (and appropriately) make it more difficult for plaintiffs to assert actionable VPPA claims. The court's call to examine only the information that is disclosed from the disclosing party's point of view will rightly be welcomed by video service providers, who in turn should be able to better assess VPPA compliance. With such increased clarity, such businesses will likely feel greater freedom to innovate.

That said, as technology evolves, so too will the standard of what it takes for an "ordinary person" to identify an individual's viewing habits. In fact, the Ninth Circuit recognized as much in cautioning that "modern technology may indeed alter — or may already have altered — what qualifies" as "personally identifiable information" under the VPPA.[23] It is not difficult to imagine a time in the not-too-distant future when an "ordinary person" could link information that is currently viewed as highly technical to an individual's identity. As long as technology continues to move the goalpost in this discussion, companies should continue to assess their practices against the requirements of the VPPA.

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[1] Eichenberger v. ESPN Inc., No. 15-35449, 2017 WL 5762817 (9th Cir. Nov. 29, 2017).

[2] 18 U.S.C. § 2710.

[3] Perry v. Cable News Network Inc., 854 F.3d 1336, 1340-41 (11th Cir. 2017); In re Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 274 (3d Cir. 2016), cert. denied sub nom. C.A.F. v. Viacom Inc., 137 S. Ct. 624 (2017); Sterk v. Redbox Automated Retail LLC, 770 F.3d 618, 623 (7th Cir. 2014).

[4] See, e.g., Yershov v. Gannet Satellite Info. Network Inc., 204 F. Supp. 3d 353, 358-59 (D. Mass. 2016); Boelter v. Advance Magazine Publishers Inc., 210 F. Supp. 3d 579, 590 (S.D.N.Y. 2016); Austin-Spearman v. AMC Network Entm't LLC, 98 F. Supp. 3d 662, 666 (S.D.N.Y. 2015); In re Hulu Privacy Litig., No. C 11-03764 LB, 2013 WL 6773794, at *5 (N.D. Cal. Dec. 20, 2013); Ellis v. Cartoon Network Inc., No. 1:14-CV-484-TWT, 2014 WL 5023535, at *2 (N.D. Ga. Oct. 8, 2014), aff'd on other grounds, 803 F.3d 1251 (11th Cir. 2015).

[5] ESPN, 2017 WL 5762817, at *3.

[6] 136 S. Ct. 1540 (2016).

[7] ESPN, 2017 WL 5762817, at *3 (emphasis in original).

[8] 18 U.S.C. § 2710(a)(3) (emphasis added).

[9] ESPN, 2017 WL 5762817, at *4.

[10] See, e.g., Ellis v. Cartoon Network Inc., No. 1:14-CV-484, 2014 WL 5023535, at *3 (N.D. Ga. Oct. 8, 2014) (an Android ID does not constitute "personally identifiable information," because "without more, [it] does not "identify a specific person"); see also Locklear v. Dow Jones & Co., 101 F. Supp. 3d 1312, 1318 (N.D. Ga. 2015), abrogated on other grounds in Ellis v. Cartoon Network Inc., 803 F.3d 1251 (11th Cir. 2015) (a device serial number, "without more, does not constitute PII" under the VPPA); Robinson v. Disney Online, 152 F. Supp. 3d 176, 182 (S.D.N.Y. 2015) (defining "personally identifiable information" as "information actually disclosed by a video tape service provider, which must itself do the identifying ... not information disclosed by a provider, plus other pieces of information collected elsewhere by non-defendant third-parties"); but see In re Vizio Inc. Consumer Privacy Litig., 238 F. Supp. 3d 1204, 1224-25 (C.D. Cal. 2017) (following Gannett and holding that the disclosure of "consumers' MAC addresses and information about other devices connected to the same network" could qualify as "personally identifiable information" under the VPPA).

[11] 820 F.3d 482, 486 (1st Cir. 2016) (emphasis added).

[12] 827 F.3d 262, 290 (3d Cir. 2016) (emphasis added).

[13] ESPN, 2017 WL 5762817, at *4.

[14] Id. at *5.

[15] S. Rep. No. 100-599, at 5 (1988), reprinted in 1988 U.S.C.C.A.N. 4342–1.

[16] Id. at 1 (emphasis added).

[17] ESPN, 2017 WL 5762817, at *5.

[18] Id. at *4-5.

[19] Nickelodeon, 827 F.3d at 290.

[20] Id.

[21] ESPN, 2017 WL 5762817, at *5 (quoting Yershov, 820 F.3d at 486).

[22] ESPN, 2017 WL 5762817, at *5.

[23] Id.