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1st Circ. Video Privacy Decision Creates Split With 11th Circ.

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On April 29, 2016, a three-judge panel of the First Circuit Court of Appeals, with retired U.S. Supreme Court Justice David Souter sitting by designation, issued a potentially significant opinion concerning the Video Privacy Protection Act. The opinion, Yershov v. Gannett[1] contains two significant — and surprising — holdings.

First, the court held that an individual who merely downloads a free mobile application and watches free video clips may be considered a "subscriber" under the VPPA. This arguably creates a circuit split because in 2015, based on very similar facts, the Eleventh Circuit reached the opposite conclusion in Ellis v. Cartoon Network Inc.[2]

Second, the Gannett court held that the app's transmittal to a third party of the app user's Android device ID and GPS coordinates constituted a disclosure of "personally identifiable information" under the Act. But the majority of courts have held that device identifiers and similar types of information do not alone constitute "personally identifiable information" under the VPPA, even if a third party may be able link such identifiers to the user's identity.

The Gannett court's decision on both of these issues is likely to inspire a litany of new VPPA lawsuits, and the decision is arguably flawed.

The Video Privacy Protection Act

The VPPA was enacted in 1988 to prevent the disclosure of a person's video rental records in response to the publication of Judge Robert Bork's video-store rental list during his Supreme Court confirmation hearings. The VPPA prohibits "video tape service providers" from "knowingly disclos[ing]" (without consent) a "consumer's" personally identifiable information, which "includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider."[1] "Consumer" is defined as "any renter, purchaser, or subscriber of goods or services from a video tape service provider."[4] The statute's consent allowance was broadened in a 2012 amendment.[5]

When the VPPA became law in 1988, the World Wide Web, smartphones and mobile applications did not even exist. People went to brick-and-mortar stores to buy or rent copies of videos. Today, people can watch videos by, among other things, registering for free or paid online streaming services, such as Netflix or Hulu, or through intermittent usage of free mobile apps. The latter group does not constitute

"renters" or "purchasers" under the VPPA, but may they be "subscribers"?

Conflicting Views on the Meaning of "Subscriber" in the Eleventh and First Circuits

Last fall, the Eleventh Circuit concluded that such users could not be considered "subscribers" in the absence of an "ongoing commitment or relationship" between the user and app provider.[6] In Ellis, the plaintiff alleged that he downloaded the free Cartoon Network app to watch TV and video clips.[7] He alleged that CN then transmitted his Android ID and video-viewing history to a third party (Bango), which could "'automatically' link an Android ID to a particular person by compiling information about that individual from other websites, applications, and sources."[8] Thus, "when Cartoon Network [sent] Bango the Android ID of a CN app user along with his video viewing history, Bango associat[ed] that video history with a particular individual."[9]

The Eleventh Circuit held that the Ellis plaintiff was not a "subscriber." The court highlighted a "common thread" among several dictionary definitions that "subscription" "involves some type of commitment, relationship, or association (financial or otherwise) between a person and an entity."[10] Further, citing the district court opinion in Gannett, the court stated that "[s]ubscriptions involve some or [most] of the following [factors]: payment, registration, commitment, delivery, [expressed association,] and/or access to restricted content."[11]

The court found that the requisite "ongoing commitment or relationship" did not exist.[12] The plaintiff in Ellis "did not sign up for or establish an account with … did not provide any personal information to … [and] did not make any payments to Cartoon Network for use of the CN app, did not become a registered user … did not receive a Cartoon Network ID [or] establish a Cartoon Network profile, did not sign up for any periodic services or transmissions, and did not make any commitment or establish any relationship that would allow him to have access to exclusive or restricted content."[13] Instead, he "simply watched video clips on the [free] CN app" ("the equivalent of adding a particular website to one's Internet browser as a favorite") and could "delete the app without consequences whenever he like[d], and never access its content again."[14]

The facts in Gannett were materially similar. The plaintiff downloaded and used Gannett's free USA Today mobile app on his Android device, and alleged that the app disclosed his device's Android ID and GPS coordinates, along with the titles of videos he had viewed, to Adobe. Like Bango, Adobe allegedly could use a "unique identifier such as an Android ID … 'to identify and track specific users across multiple electronic devices, applications, and services,'" and the plaintiff alleged that Adobe was able to identify him by name "and link the videos he had viewed to his individualized profile maintained by Adobe."[15]

The district court dismissed the complaint on the ground that the plaintiff was not a "subscriber" under the VPPA. The First Circuit reversed, stating that while it was a "close[] question," the plaintiff's "subscriber" allegations were sufficient to state a VPPA claim.

Several aspects of the appeals court's rationale are questionable. For example, in concluding that the plaintiff was a "subscriber," the court relied heavily on a dictionary from 2000 — 12 years after the VPPA was enacted — which defined "subscribe" as "[t]o receive or be allowed to access electronic texts or services by subscription," and "subscription" as "[a]n agreement to receive or be given access to electronic texts or services.'"[16] "This is just what we have here," the court observed. But no cited pre-1988 dictionary contained these definitions.

The court also found it relevant that Congress "left untouched the definition of 'consumer'" when it amended the VPPA's consent requirement in 2012, which "support[ed] an inference that Congress understood its originally-provided definition to provide at least as much protection in the digital age as it provided in 1988."[17] But this observation only begs the question as to what the term meant when the statute was enacted in 1988.

Additionally, in attempting to distinguish Ellis, the court stated that the Gannett plaintiff "did indeed have to provide Gannett with personal information, such as his Android ID and his mobile device's GPS location at the time he viewed a video … access was not free of a commitment to provide consideration in the form of that information, which was of value to Gannett."[18] But the Ellis plaintiff's Android ID likewise was allegedly provided to CN, and there is no indication that either the Gannett or Ellis plaintiff actually "provided" such information to the respective apps, as opposed to simply using the apps and having such information automatically transmitted from their devices.

Finally, the Gannett court disagreed that downloading and using an app was equivalent to visiting or bookmarking a webpage on an Internet browser, instead stating that "by installing the App on his phone … [the plaintiff] established a relationship with Gannett that is materially different from what would have been the case had USA Today simply remained one of millions of sites on the web that [the plaintiff] might have accessed through a web browser."[19] But there are more than two million apps available in the Google Play store for Android devices (where the plaintiff downloaded the app), and the court did not explain how the mere act of downloading and using the USA Today app could make a person a "subscriber" in a way that visiting (or bookmarking) the USA Today website (an act that also can be accomplished on a smartphone) would not.

Device Identifier and GPS Coordinates As "Personally Identifiable Information" under the VPPA

The second noteworthy aspect of the Gannett court's holding was that the plaintiff's Android ID and GPS coordinates could constitute "PII" under the VPPA. The majority of courts to consider this issue have concluded that these types of information do not constitute PII because they alone are not sufficient to "identify a person."[20]

The First Circuit's rationale for this holding likewise was not compelling. The court acknowledged that the VPPA's definition of "PII" was "awkward and unclear" and "add[ed] little clarity beyond training our focus on the question whether the information identifies the person who obtained the video."[21] The court observed that "[m]any types of information other than a name," such as a social security number, "can easily identify a person," but then took a logical leap to conclude that a device identifier and GPS coordinates could constitute PII.[22] In reaching this conclusion, the court hypothesized that two sets of GPS coordinates transmitted over the course of 146 video viewings "would enable most people to identify what are likely the home and work addresses of the viewer."[23] But this overlooks the fact that mobile devices are just that — mobile — and users may use them anywhere, which can hardly render GPS coordinates (even in combination with a device identifier) "PII."

The Gannett court likely was swayed by the complaint's allegation that "when Gannett makes such a disclosure to Adobe, it knows that Adobe has the 'game program,' so to speak, allowing it to link the GPS address and device identifier information to a certain person by name."[24] This allegation, according to the court, adequately pled that Gannett disclosed information "reasonably and foreseeably likely to reveal which USA Today videos [the plaintiff] obtained."[25] But the VPPA prohibits only the knowing disclosure of "information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider," not disclosure of data that are "reasonably and

foreseeably likely" to "identif[y] a person."[26]

The Gannett court ultimately concluded that its "actual holding" was not "quite as broad as [its] reasoning suggest[ed]," and stated that it was simply crediting the well-pled allegations of the complaint for purposes of deciding a Rule 12(b)(6) motion.[27] That may well be, but the court's rationale for allowing the case to continue is likely to embolden the plaintiffs' bar to file a rash of new (and dubious) VPPA lawsuits, and it takes the VPPA very far afield from the Bork disclosures that inspired its passage.

App providers that deliver video content would be well advised to review their practices, and consult with experienced counsel, to ensure VPPA compliance in light of the uncertainty created by the Gannett opinion.

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[1] No. 15-1719, 2016 WL 1719825 (1st Cir. Apr. 29, 2016).

[2] 803 F.3d 1251 (11th Cir. 2015).

[3] 18 U.S.C. § 2710(a).

[4] Id. (emphasis added).

[5] 18 U.S.C. § 2710(b)(2).

[6] 803 F.3d at 1257.

[7] Id. at 1254.

[8] Id.

[9] Id.

[10] Id. at 1256.

[11] Id.

[12] Id. at 1257.

[13] Id.

[14] Id.

[15] Gannett, 2016 WL 1719825, at *2.

[16] Id. at *3 (emphasis added).

[17] Id. at *4.

[18] Gannett, 2016 WL 1719825, at *5

[19] Id. at *5.

[20] See Ellis v. Cartoon Network, No. l:14-CV-484-TWT, 2014 WL 5023535, at *3 (N.D. Ga. Oct. 8, 2014) (an Android ID does not constitute PII, because without more information, it does not identify a specific person); see also Locklear v. Dow Jones & Co., 2015 WL 1730068, at *6 (N.D. Ga. Jan. 23, 2015) (a device serial number, without more, is not PII).

[21] Gannett, 2016 WL 1719825, at *2.

[22] Id.

[23] Id. at *3.

[24] Id. (emphasis added).

[25] Id.

[26] 18 U.S.C. § 2710(a). See, e.g., Robinson v. Disney, No. 14-4146, 2015 WL 6161284, at *7 (S.D.N.Y. Oct. 20, 2015) (defining PII 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"); In re Nickelodeon Privacy Litig., MDL No. 2443, 2014 WL 3012873, at *10 (D.N.J. July 2, 2014) (anonymous username, IP address, and unique device identifier do not constitute PII, and allegations that Google "could" combine them with other information to identify plaintiffs were "entirely hypothetical"); Eichenberger v. ESPN, No. 14-CV-00463 [Dkt. 38 at 2] (W.D. Wash. Nov. 24, 2014) ("Even if Adobe does 'possess a wealth of information' about individual consumers, it is speculative to state that it can, and does, identify specific persons as having watched or requested specific video materials.").

[27] Gannett, 2016 WL 1719825, at *6 ("As is often true with Rule 12(b)(6) motions, further development of the facts may cast that which is alleged in a different light.").