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Mobile App Video Privacy Protection Act Suit Survives Spokeo Standing Challenge

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In ***Yershov v. Gannett Satellite Information Network, Inc.***, a user of the free USA Today app alleged that each time he viewed a video clip, the app transmitted his mobile *Android* ID, GPS coordinates and identification of the watched video to a third-party analytics company to create user profiles for the purposes of targeted advertising, in violation of the ***Video Privacy Protection Act (VPPA)***. When we last wrote about this case in May, the First Circuit reversed the dismissal by the district court and allowed the case to proceed, taking a more generous view as to who is a "consumer" under the VPPA.

On remand, Gannett moved to dismiss the complaint again for lack of subject matter jurisdiction, contending that the complaint merely alleges a "bare procedural violation" of the VPPA, insufficient to establish Article III standing to bring suit under the standard enunciated in the Supreme Court's *Spokeo* decision. In essence, Gannett contended that the complaint does not allege a concrete injury in fact, and that even if it did, the complaint depends on the "implausible" assumption that the third-party analytics company receiving the data maintains a "profile" on the plaintiff.

This past week, a Massachusetts district court denied Gannett's motion, ruling that the intangible harm allegedly suffered by plaintiff from Gannett's alleged disclosure of his PII is a concrete injury in fact. (*Yershov v. Gannett Satellite Information Network Inc.*, No. 14-13112 (D. Mass. Sept. 2, 2016)). The court reasoned that Congress enacted the VPPA to create a right of privacy in one's video watching history, and that persons whose statutory rights have been invaded through wrongful disclosure have standing to bring suit to vindicate that right:

> "Congress, by enacting the VPPA, elevated an otherwise nonactionable invasion of privacy into a concrete, legally cognizable injury. […] Thus, 'it is well-settled that Congress may create a statutory right to privacy in certain information that strengthens or replaces the common law, and citizens whose statutory right to informational privacy has been invaded [have standing to] bring suit under the statute to vindicate that right.'"

The court also rejected Gannett's argument that plaintiff's alleged concrete injury depends on the

analytics company that received the GPS and video viewing data having a detailed profile on the plaintiff. To state a claim under the VPPA, the court ruled, a consumer needs only to allege that a video tape service provider knowingly disclosed his personally identifiable information to a third party without his consent – that is, Gannett disclosed information to a third party "which identifies [Yershov] as having requested or obtained specific video materials…" (See 18 U.S.C. §2710(b)). The court noted that the First Circuit already stated that plaintiff asserted at least "a plausible allegation that the [third party analytics company] could identify Yershov by using *only* the information disclosed by Gannett (Android ID, GPS coordinates, video history)," regardless of whether any "profile" was created.

While certain defendants have been successful in dismissing actions based upon a standing argument under *Spokeo*, the ruling is not entirely surprising – in June, the Third Circuit previously ruled that a plaintiff asserting VPPA claims had Article III standing under *Spokeo*. Beyond the standing argument, however, the proceedings in this case are still preliminary and the case may yet turn on other issues.

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