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ESPN Ruling Further Narrows Video Privacy Law's Reach

By **Allison Grande**

Law360, New York (December 4, 2017, 4:09 PM EST) -- The Ninth Circuit's recent ruling that ESPN didn't violate the Video Privacy Protection Act by disclosing app users' data to an analytics company deals yet another blow to plaintiffs' efforts to expand liability under the statute to cover streaming services and other new technologies, attorneys say.

In a published decision issued Wednesday, the three-judge appellate panel held that while plaintiff Chad Eichenberger had standing to sue ESPN over its alleged disclosure of his device serial number and viewing history to third-party Adobe Analytics, he could not continue with his suit because the shared information was not personally identifiable under the VPPA.

"The court recognized that the concept of being publicly identified has limits, despite technological evolution," Covington & Burling LLP data privacy and cybersecurity chair Kurt Wimmer said. "By reducing ambiguity around what qualifies as PII, this decision permits content and video providers, especially small or early-stage companies, to continue innovating in this space."

The appellate panel, in determining whether the information disclosed by ESPN could be swept up by the 1988 statute, relied on the "ordinary person" standard established by the Third Circuit in its 2016 ruling involving alleged video privacy violations by Viacom and Google. Under that test, which Wimmer characterized as a "manageable standard for video service providers," information can only be considered "personally identifiable" under the statute if an ordinary person could use it to pinpoint a specific individual's video-watching behavior.

In the case of ESPN's data-sharing, the Ninth Circuit found that an ordinary person could not use the Roku device identifiers that the sports network disclosed to Adobe to identify an individual because doing so would require the data to be combined with other personal information that ESPN never shared and apparently never even possessed. That conclusion has sweeping consequences for video privacy litigation against app developers, which typically use alphanumeric strings such as Roku serial numbers as a stand-in for more traditional and specific user data, according to Cooley LLP privacy and data protection practice group chair Michael Rhodes.

"On the merits, the court's standard for determining whether PII is involved will make it harder for plaintiffs targeting mobile apps that serve video content," Rhodes said. "Without more [than alphanumeric strings], you can't identify the person who watched any specific video. As such, app developers can engage third-party analytics companies to optimize user experience without running

afoul of VPPA.”

The panel's decision to exclude device identifiers from the definition of personally identifiable information under the VPPA builds on a growing body of case law that has refused to embrace the argument that newer ways of gaining general insights about consumers' viewing habits should be covered by the nearly three-decades-old statute, attorneys say.

In the Viacom case, the Third Circuit last year rejected the contention that the term "personally identifiable information" could be stretched to cover the information the company allegedly provided to Google — which included links for viewed videos and “static digital identifiers" such as internet protocol addresses and unique device identifiers — because that data couldn't be used to identify specific consumers on their own.

"It’s good to see the Ninth Circuit continue the holdings that reject VPPA liability for disclosing forms of information that do not, on their face, identify a user, but would require the use of tools and additional data to link to actual PII," Irell & Manella LLP litigation partner Robert Schwartz said.

The Ninth Circuit ruling in some ways goes even further than the standard set by the Third Circuit, in that it measures the probability of being able to identify the user from the perspective of the information that the disclosing party holds or has the ability to obtain, rather than from the vantage point of what data the receiving party may have and what it is able to do with the shared data, said Venkat Balasubramani, a partner with internet and media boutique Focal PLLC.

The reasoning appears to harken back to the original intent of the VPPA, which Congress drafted in response to the Washington City Paper publishing the video rental records of failed U.S. Supreme Court nominee Robert Bork, attorneys noted.

"What prompted the passage of the statute in the first place was Judge Bork's viewing records being disclosed, and the Ninth Circuit seems to have analogized the current situation to that and said that's not what happened here — it was a more general disclosure that didn't identify an actual person, and that's not something that was intended to be covered by the statute," said Balasubramani.

The appellate panel's conclusion shares similarities to one of the first major decisions of the modern VPPA era, when a California magistrate judge in April 2015 refused to hold Hulu liable for video privacy violations due to a lack of evidence that the video-streaming provider knew that Facebook could use the data Hulu shared with it to identify users. That ruling was appealed to the Ninth Circuit, but the consumers pressing the case dropped their claims before the appellate court could weigh in on the issue.

This line of reasoning that places the focus on the disclosing party is likely to make it harder for plaintiffs to bring claims that rely on the disclosure of video viewing habits absent an actual name of a consumer being revealed, and has the potential to give "a little breathing room to companies that disclose records short of consumers' actual identity," according to Balasubramani.

"The Ninth Circuit seems to be recognizing that with the advent of broad advertising networks and databases, it may be easier to identify someone today, but at the same time, when the statute was passed, Congress didn't intend to have such a broad conception of personal information," said Balasubramani.

Still, despite the blow to plaintiffs, these suits are far from dead, attorneys said, citing the Ninth Circuit's finding when it came to Article III standing.

Specifically, the appellate panel found that because every disclosure of an individual's personally identifiable information and video-viewing history "offends the interests" that the VPPA is designed to protect, Eichenberger did not need to allege any further harm to establish standing under the U.S. Supreme Court's May 2016 ruling in Spokeo v. Robins. In that case, the high court justices ruled that plaintiffs cannot rely on mere statutory violations, but instead must cite some sort of tangible or intangible concrete harm to have standing.

Attorneys characterized the standing decision as both unsurprising and in line with a number of post-Spokeo decisions involving allegations of data disclosures. These cases include separate rulings issued by the Eleventh Circuit in 2015 and 2016 that found standing for video privacy claims against Cartoon Network and CNN, respectively, but ultimately disposed of the suits on the grounds that downloading an app wasn't enough to create the type of ongoing relationship necessary to be considered a "consumer" or "subscriber" covered by the VPPA.

"Reasonable minds can debate whether it was prudent for ESPN to also push a Spokeo Article III standing issue on this type of alleged disclosure under this particular statute," Schwartz said. "That part of the Ninth Circuit's opinion could, unfortunately, encourage the filing of claims that will fail to satisfy Article III but will nonetheless require effort and expense to defend."

The Electronic Privacy Information Center, which filed an amicus brief in support of Eichenberger at the Ninth Circuit, flagged the standing aspect of the decision as significant for consumers.

"While we disagree with the Ninth Circuit view of the PII issue — they adopted the wrong test — the view on standing is favorable for consumer privacy and is closely aligned with the position that EPIC has argued in several amicus briefs since the Spokeo decision," EPIC President Marc Rotenberg told Law360.

Although courts have been veering away from taking the VPPA too far from its brick-and-mortar roots, attorneys noted that the repeated affirmations that VPPA claims can clear the Spokeo standing bar are likely to continue to fuel plaintiffs, especially those who are able to find companies that may be unfamiliar with the statute's obligations and have disclosed more specific personal data such as names and locations.

Plaintiffs can also derive some strength from what has to date been an outlier ruling from the First Circuit, which in a May 2016 ruling reviving a USA Today app user's VPPA claims against Gannett bucked a trend with its sister circuits by holding that the disclosure of video-viewing data along with the device's unique identifier and GPS coordinates constituted personally identifiable information, and that downloading an app made the plaintiff a subscriber covered by the VPPA.

"There's still a fair amount of uncertainty around the VPPA," Balasubramani said. "Keeping disclosures narrow and drafting contractual provisions stating that the disclosing party can't identify the data could prove to be useful, especially in venues like the Ninth Circuit, but an app provider or ad network might get sued elsewhere, and the outcome might vary depending on where the lawsuit is heard."

Eichenberger is represented by Ryan D. Andrews, Roger Perlstadt and J. Aaron Lawson of Edelson PC.

ESPN is represented by Rosemarie T. Ring, Glenn D. Pomerantz, Jonathan H. Blavin, Bryan H.

Heckenlively and Daniel P. Collins of Munger Tolles & Olson LLP.

The case is Chad Eichenberger v. ESPN Inc., case number 15-35449, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Philip Shea and Kelly Duncan.

Correction: EPIC filed an amicus brief in support of plaintiff Chad Eichenberger, not ESPN. The error has been corrected.

Update: This story has been updated with additional counsel information.
