

## Google's 3rd Circ. Win Keeps Door Ajar For Video Privacy Suits

By Allison Grande

*Law360, New York (June 28, 2016, 10:20 PM ET)* -- The Third Circuit's rejection of allegations that Viacom and Google unlawfully tracked minors' video-viewing habits gives companies a boost in defending against Video Protection Privacy Act claims, but the panel's refusal to establish a rule for what constitutes personally identifiable information under the statute will embolden consumers in their challenges of companies' data collection practices.

In a precedential ruling that spanned 76 pages and affirmed the dismissal of all but one state invasion of privacy claim lobbed at Viacom Inc., the three-judge appellate panel broke new ground by addressing questions of first impression in the circuit related to the VPPA and invasion of privacy under New Jersey law.

When it came to the federal video privacy statute, the panel concluded that although the 1988 statute is "not well drafted," it was not intended to apply to the duo's conduct. Specifically, the judges held that the "static digital identifiers" such as internet protocol addresses that Viacom shared with Google Inc. could not be considered PII under the statute and that the putative class of minors couldn't sue Google under the law because the tech giant had only received and not disclosed consumers' information.

"This decision represents one of the first concrete common sense rulings in the VPPA arena," Sheppard Mullin Richter & Hampton LLP partner David Almeida said. "Rather than stretch PII to include attenuated digital identifiers, the court specifically distanced itself from things like IP addresses that other courts have been willing to accept."

However, the conclusion concerning what constitutes PII under the video privacy statute came with a caveat. In its ruling, the panel stressed that its interpretation of the term PII was intended to "articulate a more general framework" rather than establish a sweeping, broadly applicable rule.

"We recognize that our interpretation of the phrase 'personally identifiable information' has not resulted in a single-sentence holding capable of mechanistically deciding future cases," the panel wrote in its decision, which was authored by Circuit Judge Julio M. Fuentes. "We have not endeavored to craft such a rule, nor do we think, given the rapid pace of technological change in our digital era, such a rule would even be advisable."

According to the panel, PII under the statute means "the kind of information that would readily permit an ordinary person to identify a specific video individual's video-watching behavior," with the "classic example" being a video clerk at a brick-and-mortar store leaking an individual customer's video rental

history.

"Every step away from that 1988 paradigm will make it harder for a plaintiff to make out a successful claim," the ruling said, noting that some new-age disclosures, such as the dissemination of precise GPS coordinates, may meet the standard while others, such as the identifiers that Viacom is accused of disseminating, may fall short of this liability trigger.

However, by failing to clearly define what types of disclosures run afoul of the VPPA, the panel has given future class action plaintiffs the ammunition to point to a host of new ways that companies are developing to maximize the value of the data they hold in order to prove that information that may not at first glance be identifiable can indeed be linked to specific users.

"It seems as though the court has left it open that some forms of alpha numeric data that's not your name or my name could still be considered PII depending on the circumstances," Irell & Manella LLP litigation partner Robert Schwartz said. "Appellate courts are supposed to establish rules, but there's no clear rule here."

The dispute before the Third Circuit and other recent ones like it stem from widespread confusion over how the decades-old VPPA should apply to modern technology. The appellate panel went to great lengths to point out the lack of clarity that it saw in the statute, calling the proper meaning of the phrase PII "not straightforward" and opining that the precise scope of the data that falls under the law is "difficult to discern from the face of the statute."

In order to help work through some of this uncertainty, the panel spent several pages reviewing the legislative history of the statute, which Congress drafted in response to the Washington City Paper publishing the video rental records of failed U.S. Supreme Court nominee Robert Bork, and attempting to apply the law's original intent as closely as it could to the facts at hand.

"Here, the Third Circuit takes a commonsense approach akin to what prompted the passage of the VPPA in the first place — the statute only concerns itself with personally identifiable information 'that would readily permit an ordinary person to identify a specific individual's video-watching behavior,'" Almeida said. "In other words, the type of disclosure the VPPA was passed to protect is the very kind of disclosure the Third Circuit is concerned with."

The approach varied significantly from prior rulings that have taken a more expansive view of what constitutes PII, attorneys noted.

One of the most notable examples was handed down in April, when the First Circuit issued a ruling backing a USA Today app user's bid to hold the paper's parent Gannett liable for violating the VPPA. In that decision, the appellate panel agreed with the lower court that the title of the video viewed along with the device's unique device identifier and GPS coordinates that Gannett sent to Adobe amounted to PII covered by the statute.

"Courts have, in essence, been willing to accept a puzzle-piece approach to PII — allowing allegations that various pieces of digital information, coupled with other software and databases, could conceivably allow a third party to identify the consumer, whether or not the third party does so in practice," Almeida said. "The Third Circuit shuts down this idea."

The Third Circuit's careful adherence to the statutory language also came through in its decision to drop

the VPPA claim against Google. In that portion of the ruling, the panel held that Google could not be held liable under the statute because it only received and did not disclose PII, as the panel concluded was necessary to assert a claim.

"The judges are again very disciplined in tracking the language of the statute and saying that 'We're not going to go beyond the bounds of the statute but rather are going to stay focused on the person who knows what the video habits were and disclosed it. And anyone else that this information may have been sent to, the statute doesn't apply to them,'" Polsinelli LLP principal Zuzana Ikels said. "It's essentially narrowing down who can be held liable under the statute."

While defense attorneys agreed that the Third Circuit's ruling strongly favored their side — Schwartz predicted that the panel's holding that identifiers such as IP addresses are not PII "will certainly dissuade some of the frivolous cases that have been filed from being filed in court" — there were some portions of the opinions that raised alarms.

In addition to insisting that its interpretation of PII should be viewed only as a "general framework," the Third Circuit asserted that its decision does not create a split with the looser definition of PII endorsed in the First Circuit's Gannett ruling. The panel noted that while its sister circuit had concluded that GPS coordinates could constitute PII, it had also acknowledged that there was a certain point where linking information to a consumer "becomes too uncertain, or too dependent on too much yet-to-be-done, or unforeseeable detective work" to trigger liability and that the information at issue in the Viacom dispute fell on that side of the divide.

"The Third Circuit seems to have taken a very disciplined approach to defining PII that I don't think I've seen in some of the other cases, and the fact that they say that there's no split with the First Circuit is interesting because it seems to me that there is a split," Ikels said, adding she saw the ruling less as a general framework and more as an endorsement for excluding the vast majority of static identifiers from the scope of the VPPA.

In its ruling, the panel explicitly punts the question of what other kinds of disclosures can trigger liability under the statute to "another day." But the judges do offer a recommendation for companies to avoid having to think about these lingering questions at all, saying that "companies in the business of streaming digital video are well advised to think carefully about customer notice and consent" while these issues get sorted out.

"What the court seems to be saying here with this comment is that this isn't as bad as it seems and that companies can avoid the statute by having in place robust consent methods that satisfy the peculiar needs of the VPPA," Schwartz said.

Circuit Judges Julio M. Fuentes, Patty Shwartz and Franklin S. Van Antwerpen decided the appeal.

The proposed class is represented by Jason O. Barnes of Barnes & Associates, Douglas A. Campbell and Frederick D. Rapone of Campbell & Levine LLC, Barry Eichen and Evan Rosenberg of Eichen Crutchlow Zaslow & McElroy LLP, James Frickleton, Edward Robertson III, Edward Robertson Jr. and Mary Winter of Bartimus Frickleton Robertson & Goza PC, Mark C. Goldenberg and Thomas Rosenfeld of Goldenberg Heller Antognoli & Rowland PC, and Adam Q. Voyles of Lubel Voyles LLP.

Viacom is represented by David O'Neil and Jeremy Feigelson of Debevoise & Plimpton LLP and Stephen Orlofsky and Seth J. Lapidow of Blank Rome LLP.

Google is represented by Colleen Bal, Michael Rubin and Tonia O. Klausner of Wilson Sonsini Goodrich & Rosati PC and Jeffrey J. Greenbaum and Joshua N. Howley of Sills Cummis & Gross PC.

The case is In re: Nickelodeon Consumer Privacy Litigation, case number 15-1441, in the U.S. Court of Appeals for the Third Circuit.

--Editing by Christine Chun and Philip Shea.

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