

Digital Content Next

Legal and Legislative Committee
May 12, 2015

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Agenda

- 2015 Legal and Legislative Day Agenda
- FCC Privacy Workshop Update
- Robins v Spokeo: the Potential Impact on Class Action Suits

2015 Legal and Legislative Day Agenda

June 9 from 12 Noon - 5 PM

Comcast/NBCUniversal
300 New Jersey Ave, NW
Suite 700
Washington, DC

Email Chris@digitalcontentnext.org
with questions or to RSVP

2015 Legal and Legislative Day Agenda

Agenda items include:

- Ad Fraud 101: Non Human Traffic and the Implications for Premium Publishers
- VPPA: Review of Court Rulings and Remaining Liability
- Data Breach Case Studies: Practical Lessons Learned
- DAA AppChoices and Mobile Principles: What Do Publishers Need to Know?
- Hear From Key Policymakers
- Networking Opportunities

On April 28, the FCC held a “Public Workshop on Broadband Consumer Privacy”

- Explored how Section 222 of the communications Act should apply to broadband
- Opening presentation by Matt Blaze from the University of Pennsylvania
 - Education session about ISP networks
 - Advocated for privacy regulations

Panel 1: Privacy Implications Associated with Broadband Internet Access Services

- Robert Quinn, AT&T Chief Privacy Officer, argued that data collected by an ISP is not unique
 - Argued that many others in ecosystem collect same or more data (mentioned apps repeatedly)
- Laura Moy, New America Foundation, argued that context is key
 - Consumers expect data to be used w/in context
 - Data use outside of consumer expectations should be subject to transparency and choice
 - Broadband providers provide essential service

Panel 2: Application of Section 222 of the Communications Act to Broadband Internet Access Services

- Harold Feld, Public Knowledge
 - Sec 222 should be applied broadly
- Jim Halpert, DLA Piper
 - Consumers wouldn't expect different rules for ISPs and apps
- Nancy Libin, Wilkinson Barker Knauer
 - Should regulate data the same across ecosystem
 - Other entities have as much or more data
- Erik Stallman, CDT
 - ISPs have a unique relationship with consumers
 - Consumer interacts with website selectively, but cannot avoid broadband provider

Panel 2: Application of Section 222 of the Communications Act to Broadband Internet Access Services (cont'd)

- Peter Swire, Georgia Institute of Technology
 - Difficult for organizations to manage different rules for same data
 - Some uses of data should be allowed: fraud detection, cybersecurity, research, de-identified data
- Note: Q&A focused on what should be considered CPNI
 - Most agreed that public comment process would be useful

Spokeo, Inc. v. Robins: **Background, Implications, and Next Steps**

Prepared for

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- Question Presented
- Case Background
- Implications
- Legal Landscape
- Role of Amicus/Next Steps

QUESTION PRESENTED

Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.

CASE BACKGROUND

- Fair Credit Reporting Act provides consumers with a private right of action to recover “actual damages *or* damages of not less than \$100 and not more than \$1000” for willful failure to comply with the Act.
- Robins claimed Spokeo failed to take reasonable care in publishing inaccurate information about him.
- The information showed that Robins had more education and experience than he actually has, and showed he was married, when he is not.

- Robins sued on behalf of a putative class containing “millions of individuals.”
- The district court dismissed for lack of standing.
- Following an amended complaint, the district court held an injury-in-fact stemmed from Robins’ “anxiety” about his diminished employment prospects.
- The district court then reversed itself again, holding Robins lacked standing.

The Ninth Circuit reversed, holding that “the violation of a statutory right is usually a sufficient injury to confer standing.”

Robins v. Spokeo, Inc., 742 F. 3d 409, 412 (9th Cir. 2014) (citing *Edwards v. First American Corp.*, 610 F.3d 514, 517 (9th Cir. 2010)).

IMPLICATIONS

- Several federal statutes provide for (1) a private cause of action; and (2) statutory damages.
- These statutes include the following:
 - Video Piracy Protection Act
 - Cable Communications Privacy Act
 - Telephone Consumer Protection Act
 - Fair Credit Reporting Act

- Many state statutes also provide private rights of action and statutory damages.
- Some of these may also be heard in federal court in light of diversity jurisdiction under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332.

- **Standing:** if statutory “injury” suffices, causation and redressability would be essentially assumed.
- **Class Certification:** commonality and predominance would be more readily answered in plaintiffs’ favor.
- **Risk:** Defendants who could not get cases dismissed at the standing stage would be pressured to endure high litigation costs and risk huge judgments, or settle cases where no one was harmed.

LEGAL LANDSCAPE

“Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.” *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997).

vs.

“The actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.” *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

- In the FCRA context, the Sixth and Ninth Circuit have granted plaintiffs standing based on statutory violations.
- In the ERISA context, the Second and Fourth have rejected the argument that mere deprivation of a statutory right is sufficient to constitute an injury-in-fact for Article III standing.

- The Supreme Court previously granted cert on the same issue, then dismissed the writ of certiorari as improvidently granted.
- 17 Amici weighed in at the cert stage, including the Chamber of Commerce, eBay, Facebook, Google, and Yahoo!
- The Solicitor General argued against granting cert, but the Supreme Court nonetheless took the case.

- At the cert stage, neither the respondent nor the Solicitor General argued squarely for the position that standing could be established absent an injury-in-fact.
- The Solicitor General argued that publication of inaccurate information was an injury-in-fact akin to common law defamation.
- The Respondent further argued that he had suffered economic, reputational, and emotion injuries caused by the publication of inaccurate information about him.

ROLE OF AMICI AND NEXT STEPS

- We would add value to the degree we have expertise, authority, or a particular interest at stake.
- We could sign on to another amicus brief, or contribute our own.
- The determining factor should be whether our interests are sufficiently represented by others, or if we have a particular interest to protect, such as a statute that particularly concerns us.