



Digital Content Next Legal & Legislative Day

State of Play on VPPA:
The Implications of Yershov and Spokeo
Along with Sweeping Amendments to the
Michigan Video Rental Privacy Law

attorney advertisement

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June 14, 2016

Executive Summary

- *Yershov v. Gannett Satellite Information Network, Inc.*, No. 15-1719 (1st Cir. Apr. 29, 2016).
 - 1st Circuit decision reversing Motion to Dismiss ruling in favor of Gannett in case alleging violations of Video Privacy Protection Act.
- *Spokeo, Inc. v. Robins*, No. 13-1339 (S. Ct. May 16, 2016).
 - Supreme Court decision reversing 9th Circuit opinion reversing a Motion to Dismiss ruling in favor of Spokeo.
- Michigan Senate Bill 490.
 - Michigan Legislature amended Video Rental Privacy Act.

Yershov v. Gannett

- Plaintiff alleges that Gannett, owner of USA TODAY, improperly disclosed “personal information” protected by the federal Video Privacy Protection Act to its analytic services provider, Adobe.
- Yershov contends that each time he viewed a video file using the USAT app on his Android phone, Gannett disclosed the title of the video, his Android device ID and GPS coordinates of his viewing location to Adobe.
- Complaint alleges that the unique identifier disclosed by Gannett allows Adobe to “identify and track specific users across multiple devices, apps and services” and to assemble profiles composed of personal information “culled from a variety of sources” to target advertisements to users.

Yershov v. Gannett

- On motion to dismiss, district court ruled that the Android device ID allegedly passed to Adobe was PII under the VPPA but nonetheless dismissed the suit on grounds that Yershov was not a “subscriber.”
 - The statute only prohibits disclosure of PII of a “consumer” defined as a “renter, purchaser or *subscriber* of goods or services from a video tape service provider.”

Yershov v. Gannett

- First Circuit panel affirmed lower court's ruling that an Android device ID is PII (in combination with geographic location information) but reversed determination that Yershov was not Gannett's "subscriber."
- Both rulings conflict with previous holdings by the Eleventh Circuit and several lower courts that adopted narrower definitions of covered PII and "subscribers."
- Ruling could breath new life into theory of action that was largely discredited by a string of decisions favoring defendant publishers.

Yershov v. Gannett

- Definition of PII: Court acknowledged that a device ID (without additional information) can't identify a person. However, it credited allegations that Adobe had additional data that allowed it to easily identify the person using the information disclosed by Gannett. It also credited allegations that this identification was "foreseeable" to defendant:
- *"While there is certainly a point at which the linkage of information to identify becomes too uncertain, or too dependent on too much yet-to-be done, or unforeseeable detective work, here the linkage as plausibly alleged, is both firm and readily foreseeable to Gannett."*

Yershov v. Gannett

- Decision is unclear about whether the Android device ID and GPS coordinates *separately* constitute PII or whether disclosure of both elements together determine the result. Location data played no apparent role in lower court's decision.
- Meaning of “subscriber”: Court examined various dictionary definitions before settling on one that favored the plaintiff: someone who enters into “an agreement to receive or be given access to electronic texts or services.”

Yershov v. Gannett

- Like other courts, *Yershov* panel rejected payment-based definitions under rationale that if the term “subscriber” required a payment, other terms in the statute (i.e., “purchaser” or “renter”) would be superfluous.
- Court declined to follow *Ellis v. Cartoon Network* decision in which the 11th Circuit held that a plaintiff app user was not a subscriber because he did not "sign up for or establish an account," "make any payments," "become a registered user," "receive a Cartoon Network ID," "establish a Cartoon Network profile," "sign up for any periodic services or transmissions," or "make any commitment or establish any relationship that would allow him to have access to exclusive or restricted content."

Yershov v. Gannett

- First Circuit tried to distinguish ostensibly identical issue raised by *Ellis* by focusing on perceived differences in underlying allegations regarding the app user's "commitment" to provide consideration to the publisher:

“The Ellis court was . . . under the impression that the user . . . did not have ‘to provide any information to Cartoon Network.’ We would describe the allegations (and their reasonable inferences) in this case quite differently. Yershov did indeed have to provide Gannett with personal information, such as his Android ID and his mobile device’s GPS location. . . . While he paid no money, access was not free of a commitment to provide consideration in the form of that information, which was of value to Gannett.”

Yershov v. Gannett

- First Circuit also rejected Eleventh Circuit's analogy of downloading an app to "favoriting" or bookmarking a website address.
- Instead, the panel awkwardly analogized the USAT app to a private "hotline" installed at Yershov's home, for free, in exchange for plaintiff's name and address, and then used over the course of many months to call Gannett and order and receive instant delivery of videos.
- *"[B]y installing the App on his phone, thereby establishing seamless access to an electronic version of USA TODAY, Yershov 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 Yershov might have accessed through a web browser."*

Yershov v. Gannett

- Motion for rehearing *en banc* (supported by DCN as amicus) was just denied – So what's next?
- Summary Judgment and Class Certification
 - Were any disclosures of PII “knowing”? (Knowledge requirement was dispositive defense for Hulu)
 - Post-*Spokeo* Article III standing challenge?
- Cert petition based on 1st/11th Circuit split?
- Renewed Congressional lobbying efforts to amend VPPA?
 - Narrowing of PII definition to exclude UDIDs and/or expand “ordinary course of business” exception to expressly allow disclosures to service providers.
 - Ordinary course of business currently defined as “only debt collection activities, order fulfillment, request processing, and the transfer of ownership.”

Yershov v. Gannett

- Technical and Operational Considerations for Publishers
- “*App developers are now in panic mode.*” – Jay Edelson
- Masking of video title information in data transfers to service providers
- Encryption of device IDs prior to data transfers
- Restricting transfer of precise location information
- Contract language prohibiting service providers from combining device IDs with PII
- Other strategies for mitigating risk?

Spokeo, Inc. v. Robins

- **Overview:**

- On May 16, 2016, the U.S. Supreme Court issued its opinion in *Spokeo, Inc. v. Robins*, No. 13-1339 (May 16, 2016) and held that a plaintiff cannot satisfy the injury-in-fact requirement of Article III by alleging a “bare” statutory violation of the Fair Credit Reporting Act of 1970 (“FCRA”), “divorced from any concrete harm....”

- **The Fair Credit Reporting Act of 1970, 15 U.S.C. § 1681, *et seq.*:**

- FRCA requires consumer reporting agencies to “follow reasonable procedures to assure maximum possible accuracy of” consumer reports. 15 U.S.C. § 1681e(b)).
- Willful violations trigger either actual or statutory damages of \$100 to \$1,000 per violation. 15 U.S.C. § 1681n(a).

Spokeo, Inc. v. Robins Cont'd

- **Background:**

- Robins contended that Spokeo published false information in consumer reports indicating that he was wealthy, married with children, and worked in a professional or technical field. In fact, though, he had a low income, was single, childless, unemployed and lacked professional or technical credentials.
- Although the alleged errors seemingly made Robins appear more creditworthy and employable than he was, he contended they posed a problem because they could potentially make him seem overqualified for the positions he was seeking or suggest that he might want a higher salary or be unwilling to relocate because of his responsibilities to his (non-existent) family.
- The district court granted the defendant's motion to dismiss, finding the plaintiff failed to satisfy Article III's injury-in-fact requirement.
- The Ninth Circuit reversed because "Spokeo violated *his* statutory rights, not just the statutory rights of other people ... [and] Robins' personal interests in the handling of his credit information are individualized rather than collective."

Spokeo, Inc. v. Robins Cont'd

- **Supreme Court Ruling – Don't conflate concrete with particularized harm:**

- There are three “irreducible minimums” of standing: “The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.”
- With respect to the injury in fact requirement, the Court again emphasized that a plaintiff must show that he suffered “an invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.”
- With respect to the “particularized” element of the injury in fact requirement, the Court reiterated that the injury at-issue “must affect the plaintiff in a personal and individual way.”

Spokeo, Inc. v. Robins Cont'd

- **Supreme Court Ruling – Don't Forget the “Concreteness”**

- The Supreme Court reversed and remanded because “the Ninth Circuit failed to fully appreciate the distinction between concreteness and particularization” leaving its standing analysis incomplete. The Court stated that the Ninth Circuit’s ruling finding that the plaintiff had satisfied Article III’s injury in fact requirement incorrectly only “concern[ed] particularization, not concreteness.”
- With respect to the “concreteness” element, the Court explained that the injury must be “*de facto*”; that is, it must be “real,” and not “abstract.”
- The Court made clear, however, that to be “concrete” an injury need not be “tangible,” noting that injuries to free speech can be concrete. The court also stated that a concrete injury can be shown through a “material risk of harm.”

Spokeo, Inc. v. Robins Cont'd

- **Supreme Court Ruling – What Is an Intangible, Yet Concrete Injury?**
 - The Supreme Court stated that “[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles....”
 - Specifically, “it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.”
 - However, Court also emphasized that “Congress is well positioned to identify intangible harms that meet minimum Article III requirements” and stated that its judgments are “instructive and important.”

Spokeo, Inc. v. Robins Cont'd

- **Supreme Court Ruling – What Is *NOT* an Intangible, Yet Concrete Injury?**

- The Court stated that although Congress may “define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before” this does not mean “that a plaintiff automatically satisfies” the concreteness requirement by referencing a statutory violation.
- As an example of an FCRA violation that is not sufficiently concrete, the Supreme Court stated: “[i]t is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.”
- The Court also reasoned that the failure to deliver a notice designed to provide consumer’s an opportunity to correct inaccurate information in their credit report would not result in concrete harm if the information if the report was indisputably accurate.

Spokeo, Inc. v. Robins Cont'd

- **Take Away**

- Both the plaintiff and defendant declared victory following the Supreme Court's decision.
 - **Andrew Pincus** (counsel for Spokeo): "There's some wiggle room here and there, but the theory on which so many class actions have been upheld has now been rejected."
 - **Jay Edelson (counsel for Robins)**: "This is overall a major win for consumers and privacy advocates...."

Spokeo, Inc. v. Robins Cont'd

- **Take Away**

- On the one hand, it seems clear that a "bare violation" of a purely "procedural" right is not sufficient to constitute "concrete injury" if there is no possible harm to the interests protected by the procedure in question.
- However, the Court also indicates that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact" and that in such circumstances, the plaintiff "need not allege any additional harm beyond the one Congress has identified."
- Ambiguity of these concepts will probably have the lower courts scratching their heads for many years.

Michigan Senate Bill 490

- Michigan Video Rental Privacy Act (VRPA)
- Modelled on federal VPPA but broader in scope: restricts disclosures of personally identifiable information concerning the purchase, lease, rental or borrowing of “**books or other written materials, sound recordings, or video recordings.**”
- Violations punished as misdemeanors plus private right of action for actual damages or (prior to amendment) \$5k in statutory damages, whichever is greater, plus costs & att’y fees.

Michigan Senate Bill 490

- Source of numerous class action complaints against magazine publishers prosecuted by Edelson firm and others.
- Allegations focus on disclosure of subscriber lists to data cooperatives that provide analytic services to magazine list rental industry.
- While federal VPPA actions struggled to gain traction before *Yershov* ruling, Michigan suits have resulted in a string of decisions favoring plaintiffs.
- Three class settlements to date:
 - Meredith = \$7.5 MM
 - Bauer = \$775 K
 - Rodale = \$4.5 MM

Michigan Senate Bill 490

- Other active cases pending against Conde Nast, Hearst, Time, Inc., TV Guide, Consumers Union, Mansueto, Forbes . . .
- Magazine industry successfully lobbied for sweeping amendment to VRPA that removes many of its teeth.
- Amendments provide possible roadmap for similar efforts to amend federal VPPA

Michigan Senate Bill 490

Major Changes:

- Creates expansive new exception for disclosures “incident to the ordinary course of business” of the disclosing company, defined broadly as “activities related to the sale, rental, or lending of, or advertising in,” covered books, written materials, video and sound recordings.
- Eliminates statutory damages remedy, leaving only a remedy for actual damages (plus costs and attorney fees).
- Limits private right of action to customers who have suffered “actual damages as a result of a violation.”



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