

CNN Video Data Win Leaves Spokeo Door Open For App Users

By **Allison Grande**

Law360, New York (April 27, 2017, 10:14 PM EDT) -- The Eleventh Circuit on Thursday gave another boost to mobile apps' ability to skirt video privacy claims by nixing a proposed class action brought by a CNN app user, but its refusal to find that the U.S. Supreme Court's Spokeo ruling bars the allegations from being brought in the first place leaves subscription-based services vulnerable to litigation.

In a 15-page published decision, the appellate panel affirmed the lower court's conclusion that plaintiff Ryan Perry could not continue with his claims that CNN violated the Video Privacy Protection Act by sharing his video-viewing data with data analytics provider Bango, finding that Perry did not qualify as a "consumer" under the statute.

But in tossing the claims, the panel also found that Perry had met the standing bar set by the Supreme Court's ruling last May in *Spokeo v. Robins*, offering a mixed bag that litigants on both sides could draw from, attorneys say.

"With this ruling, standing doesn't seem to be a hurdle, but proving a claim is still not that easy absent egregious facts," said Venkat Balasubramani, a partner with Internet and media boutique Focal PLLC.

Since the high court handed down its Spokeo decision, in which the justices held that allegations of bare procedural violations divorced from any concrete harm aren't enough to establish Article III standing, courts across the country have been divided on how to apply it.

With its ruling Thursday, the Eleventh Circuit came down squarely on the side of courts that have taken a more liberal view of standing in light of Spokeo.

Seizing on the high court's finding that the violation of a procedural right granted by statute can be enough to constitute an injury-in-fact in some circumstances, the appellate panel concluded that Perry had alleged a sufficiently concrete injury because the "structure and purpose of the VPPA supports the conclusion that it provides actionable rights."

"Most courts have been sort of textual in following Spokeo and saying a mere procedural violation isn't

sufficient and there has to be something beyond that. But here, the Eleventh Circuit is saying that a violation of the VPPA constitutes a concrete harm, which seems circular in its reasoning and contrary to Spokeo," Benesch Friedlander Coplan & Aronoff LLP partner David Almeida said. "So now, if you're in that part of the country and vulnerable to being sued, then there really is no standing requirement under the VPPA, and a violation of the statute is sufficient to confer standing."

Electronic Privacy Information Center senior counsel Alan Butler, whose group filed an amicus brief in support of Perry, highlighted the standing decision as "significant," noting that the ruling aligns the appellate court with the Third Circuit in "holding that statutory violations of the VPPA give rise to standing without the need to show additional harm" and bucking the effort by defendants in a range of privacy cases "to argue, post Spokeo, that violations of privacy statutes are not concrete injuries."

Defense attorneys expressed disappointment with the standing ruling, predicting that cases based on violations of not only the VPPA but also statutes such as the Fair and Accurate Credit Transactions Act and the Fair Credit Reporting Act will take a stronger hold in the Eleventh Circuit, given the relative ease plaintiffs are likely to have in defeating Spokeo motions.

"This seems to be opening the door to what really are frivolous 'no-injury' claims," Irell & Manella LLP litigation partner Robert Schwartz said.

However, the fact that the court didn't end its analysis with the standing determination provides some hope for companies subject to litigation under the VPPA, defense attorneys say.

While the appellate court found standing, it ultimately concluded that Perry could not move forward with his claims because his "ephemeral" investment in and commitment to the CNN app wasn't enough to create the type of ongoing relationship necessary for him to be considered a "consumer" or "subscriber" covered by the VPPA.

"For VPPA claims arising from app use, the court took a pragmatic view of the statutory definition of 'consumer' ... [and] noted that by merely downloading the app and watching content on a smartphone, there was no ongoing commitment or relationship that rose to the level of a 'subscriber' even if the user had a cable subscription to the same content," said Michael Rhodes, chair of Cooley's privacy and data protection practice group. "In that sense, the case potentially limits the reach of the statute in the mobile context."

The decision hewed closely to the Eleventh Circuit's October 2015 ruling in *Ellis v. Cartoon Network*, which affirmed the dismissal of a similar video privacy suit lodged against CNN sister company Cartoon Network on the grounds that consumers who use free mobile apps don't qualify as "subscribers" under the VPPA.

"It appears to me that the Eleventh Circuit viewed Perry as the opportunity to clarify the boundaries of the misperception — among commentators and lower courts — that its *Ellis* decision turned on the fact that the Cartoon Network mobile app was free," Polsinelli LLP principal Zuzana Ikels said.

However, the ruling departed from the First Circuit's May ruling in *Yershov v. Gannett*, which found that a USA Today app user did qualify as a "subscriber" and could continue with his claims that the paper's parent, Gannett Co., ran afoul of the VPPA by recording what videos USA Today app users watched and sending that information to Adobe for analysis.

In its ruling, the First Circuit called out the Cartoon Network decision and distinguished it by saying that users of the Gannett app made a commitment to the company in the form of their agreement to provide personal information sufficient to form the type of personal relationship with the news service that the Eleventh Circuit found to be lacking in the Cartoon Network case.

The Eleventh Circuit similarly sought to distance itself from the First Circuit's ruling by noting in its decision Thursday that the USA Today app user had provided his mobile device identification number and GPS location to the company, while Perry had admitted that he was never required to register for the CNN app or hand over any data such as his email address or GPS information and therefore failed to demonstrate "that he manifested his relationship with and commitment to CNN in any meaningful way."

"Unlike the Yershov court, the CNN panel seems to understand how apps actually work, which will be helpful going forward," Covington & Burling LLP data privacy and cybersecurity chair Kurt Wimmer said.

Given the split between the circuits on the issue of who qualifies as a "subscriber" under the decades-old statute, which was enacted in 1988, video service providers can't take total comfort in the Eleventh Circuit's ruling, attorneys say.

However, they could work to counter such uncertainty over unsettled questions such as what constitutes "subscriber" and whether information such as media access control addresses and video histories constitute "personally identifiable information" under the statute — a question that was before the Eleventh Circuit but which the circuit ultimately declined to address — by focusing on compliance.

"Companies who serve up online content would be best served to take a conservative approach to dealing with the disclosure of online viewing recording data, and obtaining consent is probably the easiest step that they could take," Balasubramani said.

Circuit Judges Charles R. Wilson and Susan H. Black and U.S. Court of International Trade Judge Jane A. Restani, sitting by designation, decided the appeal.

Perry is represented by Ryan D. Andrews, Roger Perlstadt, J. Aaron Lawson, Jay Edelson, Rafey S. Balabanian, Benjamin H. Richman and J. Dominick Larry of Edelson PC.

CNN is represented by Marc Zwillinger and Jeffrey Landis of ZwillGen PLLC and James Lamberth of Troutman Sanders LLP.

The case is Perry v. Cable News Network Inc., case number 16-13031, in the U.S. Court of Appeals for the Eleventh Circuit.

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