9th Circuit Finds a Substantive—and Valuable Privacy Right

On November 29, 2017, a 9th Circuit Panel affirmed a dismissal of a case against ESPN under the Video Privacy Protection Act (VPPA). In doing so though, the Panel recognized the Act created a substantive right of privacy and that, for standing purposes, that right had value. This could have far reaching implications in the 9th Circuit for so called non-damage cases stemming out of alleged privacy violations or data breach.

The VPPA

Interestingly, the VPPA was enacted in the 1980s by Congress in response to a video store giving *The Washington Post* a list of videos that Supreme Court then-nominee Robert Bork had rented. The VPPA was designed, in part, to protect consumers against the disclosure of personally identifiable information (PPI) by video providers. The basic provisions of the Act provide:

- A prohibition against knowing disclosure of "personally identifiable information" of a "consumer" who rents or otherwise obtains video materials
- Liability for a breach and the ability for an "aggrieved person" to bring a civil action
- Statutory damages of not less that $2500 per violation as well as punitive damages
- Recovery of attorney's fees and other litigation costs

The Allegations

In the ESPN case (Eichenberger v. ESPN), Eichenberger alleged that ESPN

had disclosed videos he was watching on ESPN3 by sharing the serial number of his Roku device (Roku allows users to view videos and content on their TVs)and the events he was watching with the analytics firm, Adobe. Based on this information, Adobe was able to use information it had obtained from other sources to identify persons viewing ESPN3 and what they had viewed. Adobe then gave this information back to ESPN in an aggregated fashion and ESPN then sold to advertisers the demographic information from that material. Eichenberger argued that this constituted a violation of the VPPA since ESPN knew that Adobe would use the information to identify him.

The ESPN Response

ESPN's response was : where's the damage? Eichenberger suffered no real monetary loss as a result of its activities and ESPN itself did not disclose any personally identifiable information. Hence no standing and no violation

Standing is a Hot Topic

Standing in privacy cases and in many data breach cases has been a hot issue upon which Circuits have not agreed. The Supreme Court attempted to weigh in on this issues in Spokeo v. Robins which involved standing in the context of the revelation of

an individual's credit reports. The Supreme Court recognized that Article III of the U.S. Constitution "requires a concrete injury even in the context of a statutory violation" but that a "bare procedural violation, divorced from any concrete harm" was not enough to supply this standing. Since this ruling courts have not agreed on what it actually meant. Not long ago, for instance, the 2nd Circuit ruled that *NBA 2K* video game players lacked standing to sue Take-Two Interactive over biometric collection because the plaintiffs had failed to show injuries or at least a real risk of harm.

The 9th Circuit Found a Substantive Privacy Right

In reaching the conclusion that Eichenberger did have standing, the Panel, composed of 3 Circuit judges, held that the VPPA is a "substantive provision that protects concrete interests," and that the statute protects privacy interests more generally by ensuring that consumers retain control over their personal information.

The Panel went on to hold, "Privacy torts do not always require additional consequences to be actionable," that the VPPA codifies a *substantive* right to privacy and that it protects a consumers tight to privacy for his or her video viewing history.. Implicit in this holding is that this right has value and the breach of it creates actual damage: "plaintiff need not allege any further harm to have standing."

The Panel went on to hold though that since the information ESPN provided Adobe was not itself personally identifiable information but only became such due to its

combination with information Adobe—not ESPN—had, there was no violation of the ACT. (a holding that, itself is the subject of differing interpretation, see **HULA AND THE CARTOON NETWORK: KEEPING RULE 23 VPPA CLASS ACTIONS AT BAY**), there was no violation of the Act or breach of Eichenberger's privacy rights. The Court reasoned: "In 1988, the Internet had not yet transformed the way that individuals and companies use consumer data — at least not to the extent that it has today. Then, the VPPA's instructions were clear. The manager of a video rental store in Los Angeles understood that if he or she disclosed the name and address of a customer — along with a list of the videos that the customer had viewed — the recipient of that information could identify the customer. By contrast, it was clear that, if the disclosure were that 'a local high school teacher' had rented a particular movie, the manager would not have violated the statute. That was so even if one recipient of the information happened to be a resourceful private investigator who could, with great effort, figure out which of the hundreds of teachers had rented the video." The panel then 9th Circuit concluded "that an ordinary person could not use the information that [ESPN] allegedly disclosed to identify an individual. Plaintiff has therefore failed to state a claim ... ."

What's the So-What?

So why is this important? In means in the 9 Circuit at least and perhaps elsewhere, standing can be found based on the mere breach of privacy without more or without any monetary loss. It means privacy and personally identifiable information by itself have requisite value to provide standing. This could open the proverbial Pandora's box for privacy and data breach claims unless and until the Supreme Court –or perhaps Congress-provides a better answer.