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Google, Viacom Ruling Limits Scope Of Video Privacy Actions

By **Allison Grande**

Law360, New York (July 14, 2014, 10:16 PM ET) -- A New Jersey federal judge recently refused to hold Google Inc. and Viacom Inc. liable for violating the Video Privacy Protection Act by tracking minors' video-viewing activities, backing narrow definitions of who and what are covered by the statute that are likely to strike a blow to VPPA suits' popularity.

In a July 2 ruling, U.S. District Judge Stanley Chesler tossed a master consolidated class action complaint accusing Google and Viacom of running afoul of statutes including the VPPA, the Wiretap Act, the Stored Communications Act, the California Invasion of Privacy Act and New Jersey's Computer Related Offenses Act through their alleged surreptitious tracking of the Internet activities of children under 13.

The judge spent a good portion of his 39-page opinion delving into the strength of the VPPA claim asserted against the companies, ultimately concluding that Google could not be considered a video tape service provider under the statute and that the information that Viacom shared could not be considered personally identifiable information under the statute because it could not be used to directly identify a user.

“The trend in VPPA litigation lately has been to sue companies based on disclosures of anonymous identifiers or other device identifiers that don't on their face lead to the identity of a person,” said Marc Zwillinger, the founder and managing member of ZwillGen PLLC. “This ruling indicates that recent trend is not supported by the statute.”

The VPPA, which Congress passed in 1988 after the Washington City Paper published the video rental records of failed U.S. Supreme Court nominee Robert Bork, permits any “aggrieved” person to collect statutory damages of up to $2,500.

The potential for uncapped damages rewards, coupled with the difficulty of applying vague language drafted in the 1980s to unforeseen technological developments such as the widespread prevalence of video-streaming services, has resulted in numerous VPPA class actions over the dissemination of consumer video-viewing habits being filed against companies including Hulu LLC, ESPN Inc., the Cartoon Network and The Wall Street Journal.

“The VPPA has a very distinct and colorful history, and we can all understand the reasons why it was put on the books at the time, but now some 20-odd-years later, streaming video is available on every device and platform conceivable, and that's clearly not what the statute was meant to address,” said Evan Wooten, a civil litigator atMayer Brown LLP. “These early rulings are going to be important in

determining the scope of the statute going forward."

While attorneys don't expect plaintiffs to drop the VPPA fight, they do predict that Judge Chesler's willingness to restrict the types of service providers and information transmissions that can fall within the statute's purview will help stem the tide by resulting in the filing of fewer suits with less ambitious aspirations.

"This is a fairly significant decision as it adopts a very common-sense understanding of the VPPA — that the specific information alleged to be disclosed to make out a violation of the VPPA be information that, without more, is akin to a name," Zwillinger said. "It provides a roadmap for other judges to follow in deciding VPPA cases moving forward."

In the first of two important VPPA determinations in his ruling, Judge Chesler rejected the plaintiffs' attempt to stretch the definition of video tape service provider to cover any party that is in possession of personally identifiable information that had been obtained through a disclosure prohibited by the statute.

Although courts have generally been willing to apply the statute to companies such as Hulu that provide video-streaming services, extending it to companies such as Google that don't offer video services as their main business would have set a dangerous precedent in an era where there are few online services that don't incorporate videos to some extent, according to attorneys.

"The holding forecloses an expansion into technology that supports video delivery," Zwillinger said.

In dismissing the VPPA claim against Google with prejudice, the judge also aided companies' ability to defend video privacy suits by making clear that the statute applies to online videos and not online advertising practices, although Wooten noted that plaintiffs were likely to continue to challenge the distinction in looking for ways to hold companies liable for their data-sharing practices.

"While the judge drew a distinct line between online advertising and online video, that distinction is going to be more difficult to draw in actual practice, so it would be expected that future class actions will continue to push the boundaries of what can be considered a video tape service provider," he said.

Besides tackling who should be drawn in by the statute, Judge Chesler also dove into the issue of what type of conduct should be covered by the statute in dismissing the other VPPA claim against Viacom without prejudice.

While the judge concluded that Viacom, unlike Google, could be considered a covered video tape service provider, he based his decision to release Viacom from the VPPA claim on his finding that the information collected by the company — namely, anonymous user IDs, a child's gender and age and information about the computer used to access Viacom's website — could not be used to directly identify a user.

"The court made clear that it is not sufficient for plaintiffs to allege that the information that may be disclosed along with a video title could, after further investigation, lead to the identification of a specific person," Zwillinger said. "Instead, the disclosed information itself, standing alone, must be akin to a name, and must provide a 'tangible, immediate link.'"

The decision coincides with and builds on another significant VPPA ruling issued by a Northern District of

California magistrate judge in April, which found that unique IDs that Hulu LLC shared with metrics company comScore Inc. did not fall under the VPPA because they were presented in a generalized way that was linked to a device rather than a user, but that cookies used to send data to Facebook Inc. were covered by the statute because they contained information about users' actual identity.

Taken together, the decisions provide a view of how courts on both coasts are likely to sketch the line between personally identifiable information covered by the statute and data that is too far removed from a user to trigger a statutory violation, attorneys say.

“Both rulings indicate that the VPPA can't incorporate every conceivable disclosure, and that it needs to be linked with an outing like Judge Bork's, which was akin to identifying an individual by name,” Zwillinger said.

Although Judge Chesler did give plaintiffs in the New Jersey case a chance to amend their VPPA claim against Viacom, attorneys say that the judge's initial holdings on the scope of the statute are likely to provide helpful ammunition in warding off overly broad claims.

“The ruling provides a better understanding of how courts will interpret this statute,” Wooten said. “It is certainly not going to eliminate these types of class actions, but it may send them in a particular direction.”

The plaintiffs are represented by Barry R. Eichen and Evan J. Rosenberg of Eichen Crutchlow Zaslow & McElroy LLP and James P. Frickleton, Edward D. Robertson Jr., Mary D. Winter and Edward D. Robertson III of Bartimus Frickleton Robertson & Goza PC.

Google is represented by Jeffrey J. Greenbaum of Sills Cummis & Gross PC and Colleen Bal and Michael Rubin of Wilson Sonsini Goodrich & Rosati PC. Viacom is represented by Stephen M. Orlofsky of Blank Rome LLP and Bruce P. Keller, Jeremy Feigelson and Kristin Lieske Bryan of Debevoise & Plimpton LLP.

The case is In re: Nickelodeon Consumer Privacy Litigation, MDL number 2443, in the U.S. District Court for the District of New Jersey.

--Editing by Jeremy Barker and Chris Yates.
