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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Sony Deals Latest Blow To Video Privacy Suits At 9th Circ.

By **Allison Grande**

Law360, New York (September 11, 2015, 9:36 PM ET) -- The Ninth Circuit recently refused to allow consumers to sue a pair of Sony Corp. units for alleged violations of the Video Privacy Protection Act's data retention provision, marking the latest in a series of rulings that has greatly curtailed video service providers' liability under the statute.

In a published opinion issued Sept, 4, a three-judge panel held that disclosures of plaintiff Daniel Rodriguez's information between Sony Computer Entertainment America LLC and Sony Network Entertainment International LLC were exempt from the VPPA's nondisclosure requirements and that he had no right of action over their retention of his data.

The opinion marked the first time the Ninth Circuit had addressed the argument that the VPPA's enforcement provision could be read broadly to cover each subsection of the act, with the panel's conclusion falling in line with recent cases both inside and outside the circuit that have declined to entertain plaintiffs' expansive interpretation of the decades-old statute.

"The primary thrust of the VPPA remains: VSPs can't disclose user info to third parties for nonbusiness purposes," Mayer Brown LLP attorney Evan Wooten said. "But attempts to expand VPPA liability beyond the primary thrust have thus far failed."

Although the video privacy statue, Section 2710 of U.S. Code Title 18, was enacted in 1988, plaintiffs in recent years have pushed the envelop by bringing a wave of putative class actions seeking to expand the suit beyond its original purpose of preventing brick-and-mortar stores from disclosing customers' video viewing histories without consent.

"Plaintiffs are looking to see where they can get traction in the statute, but the statute was drafted a long time ago and doesn't expressly address a lot of the situations that come up today," said Venkat Balasubramani, a partner with Internet and media boutique Focal PLLC.

While adhering closely to the original intent of the law provides plaintiffs with the easiest hook, attorneys noted that most video service providers have set up business models that intentionally avoid blatant unlawful disclosures of consumers' personally identifiable information.

"As a result, class action plaintiffs have been forced to try numerous alternative theories of VPPA liability," Wooten said. "[And] one by one, the circuits are striking these theories down."

In the Sony case, the Ninth Circuit was charged with determining whether Congress had intended for the VPPA to provide a private right of action for the unlawful retention of viewers' data.

Subsection B of the law prohibits video service providers from knowingly disclosing consumers' personally identifiable information without their written consent, and Subsection E requires them to destroy personally identifiable information "as soon as practicable, but no later than one year from the date the information is no longer necessary for the purpose for which it was collected" and there are no pending requests or court orders for access.

Wedged between the two at Subsection C is the enforcement provision, which allows any person "aggrieved by any act of a person in violation of this section" to bring a civil action.

Citing the Seventh Circuit's October decision in Sterk v. Redbox Automated Retail that found the data retention provision to be outside the reach of the enforcement section, the Ninth Circuit panel concluded that the enforcement provision applied only to the disclosure prohibition and not the ones that come later in the act.

The Sony decision comes on the heels of another setback that the Ninth Circuit dealt to VPPA plaintiffs in July, when it refused to revive a putative class action accusingNetflix Inc. of violating the statute.

In that case, the Ninth Circuit rejected the argument that Netflix ran afoul of the statute by publicly displaying subscribers' data on devices that their family members, friends or guests could view, finding that plaintiffs' decision to access their accounts on a public forum rather than a computer was beyond the company's control.

"In both instances, the plaintiffs were really pushing the envelop and the bounds of the statute, and in both instances, the court said no," Balasubramani said.

However, despite the recent string of defeats for consumers, the plaintiffs bar remains confident that the statute can still be a valuable tool.

"The facts of each case are distinct in this area, and neither [Ninth Circuit case] preclude viable VPPA claims," said plaintiffs attorney Scott Kamber, a founding member of KamberLaw LLC. "The Ninth Circuit has simply clarified certain requirements for such cases in this circuit."

Defense attorneys agreed that the plaintiffs bar still may have a few arrows left in its quiver.

"The basic crux of the statute is still very much in play, which is that disclosing customer records for third parties is still a no-no," Balasubramani said. "That's not going away anytime soon."

Balasubramani also noted that long-running disputes over the scope of personally identifiable information covered by the statute also had the potential to swing plaintiffs way in the near future.

District courts in both New Jersey and California have shot down the argument that companies such as Google Inc., Viacom Inc., Hulu LLC and ESPN Inc. violated the VPPA by sharing unique identifiers with third-party service providers and social media outlets that are able to link individual subscribers to that data.

But with those cases on appeal to the Third Circuit and Ninth Circuit, respectively, the battleground

could soon shift, attorneys noted.

“Those types of situations are still up in the air,” Balasubramani said. “The courts haven’t been receptive to those arguments so far, but as they wind their way through the appellate process, it will be interesting to see how they pan out.”

The plaintiff in the Sony case is represented by Roger J. Perlstadt, Rafey S. Balabanian, Benjamin S. Thomassen and Ari J. Scharg of Edelson PC.

The Sony units are represented by Michael G. Rhodes, Ray A. Sardo, Lori R. Mason, Michelle C. Doolin, Leo Norton and Nic Echevestre of Cooley LLP.

The case is Rodriguez v. Sony Computer Entertainment America LLC et al., case number 12-17391, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Jeremy Barker and Christine Chun.

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