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LITIGATION 'WAVE'

Widened Circuit Split on Video Privacy Increases Chances of SCOTUS Review, Lawyers Say

This month's D.C. Circuit U.S. Court of Appeals decision in *Pileggi v. Washington Newspaper* further widened the circuit split on the Video Privacy Protection Act (VPPA), increasing the likelihood that the U.S. Supreme Court will review the 1988 federal statute, privacy lawyers said in interviews with *Privacy Daily*. The D.C., 2nd, 6th and 7th circuits have ruled on VPPA cases recently with little uniformity.

"Each new decision that comes in, showing and deepening the appellate court split, is significant," said Ian Ross, an attorney at Sidley Austin. "And it is interesting … that, even as the appellate courts have reached similar holdings, their reasoning and textual analysis [have] had some differences."

"Given the volume of litigation around this statute … district courts and arbitrators likely would benefit from clarification on how these terms should be interpreted," he added.

In the D.C. Circuit case, plaintiff Nicole Pileggi alleged the newspaper shared users' private video viewing information from its online site with Facebook without consent, and since she had a subscription to the paper's newsletter, disclosing her information violated the VPPA. The D.C. Circuit ruled for the *Washington Examiner* and dropped the suit, deciding that Pileggi was not a consumer under the statute.

A concurring opinion from Senior Circuit Judge Raymond Randolph said the VPPA seemed outdated and suggested that consumer was not the only term in the 1988 law that should be narrowly defined (see 2508120030).

"Judge Randolph is a very experienced judge with fantastic credentials, and I thought it was really interesting to see him going there," said Matthew Wolfe, a Shook Hardy privacy attorney. "I have not seen other courts adopt that, but I do think you're certainly going to see defense counsel try to latch onto it, and it very well might get interest from other judges, given his stature as a senior judge on the D.C. Circuit."

"If Judge Randolph's view of it became the law, I think it would pretty much kill off the current wave of VPPA cases relating to website use," he added. "He's basically saying internet transmitters in a video [are] not like video cassette rental, and we should just stop there, and this statute should die off … because it's outdated."

The decision "reminded me of that line from the 2nd Circuit's *Salazar* decision last fall, where the panel" said something like "'Oh, the VPPA, that's no dinosaur of a statute, it's alive and well,'" David Krueger, privacy litigator at Benesch, said, referencing *NBA v. Salazar* (see 2501100009). Many people "on the defense side say, 'Well, that's a little bit of an overstatement to say … a statute written about videotapes from the 1980s is perfectly alive and well today.'"

Wolfe said the D.C. Circuit ruling may only slightly influence the Supreme Court's willingness to consider *Salazar* as part of its review of VPPA, since the NBA's petition focused on standing to grab the high court's attention. "Theoretically, they could issue a ruling that says there's no standing for this kind of claim." He said "that would kill off [lawsuits]," though it's unlikely.

Still, "it's possible they could issue another sort of intermediate standing ruling, where you'd have to look at each case file and see if it met the requirements," he added. Then "all these little definitions

and terms in the act—consumer, videotape service provider, probably the damages provision—they're all going to get litigated one by one over years in the circuits."

"There's definitely a [litigation] wave here, and everybody's got video on their websites, so I don't see it stopping," Wolfe said. "We'll continue to see parties going through the language of the statute piecemeal, and litigating pieces of it one definition at a time."

Ross agreed. "The VPPA is a unique statute in that it uses a number of commonly used terms but, in doing so, defines them in a way that is different from the ordinary use case for those terms," he said. "There has been a lot of litigation around three terms in particular:" consumer, video tape service provider and personally identifiable information.

"'Video tape service provider' at this point is the term that has received the least attention from appellate courts, so for those of us who litigate these cases, it was very interesting to see the concurring opinion focus on that definition," Ross added. The broader reading is that the term "arguably could apply to any website provider that hosts video on their website," but the narrower meaning, "which, defendants frequently advocate for … is it has to be a provider who is in the business of selling, renting and distributing video material on its website."

Potential Supreme Court Review

Besides *Salazar*, any of the other VPPA cases from the D.C. Circuit, 6th U.S. Circuit Court of Appeals (see 2504030064) and 7th U.S. Circuit Court of Appeals (see 2503310018) would be a "good vehicle for the consumer definition to be examined, because the plaintiffs' allegations are arising in a similar context," Ross said.

"In these cases, the plaintiff is not a video subscriber, not a renter of video materials, and not a purchaser of video materials. Instead, they are subscribing to or creating a free account with the website developer and receiving a newsletter or other material that has nothing to do with the video that they are alleging gives rise to their claim."

"The core issue … is whether having a relationship with the defendant, even if formed through a sign-up for a free newsletter or website account, is … enough to create consumer status under the VPPA," Ross added.

Another case, *Hughes v. NFL,* "effectively held: 'Under our reading of the ordinary person standard, there isn't a legal basis for VPPA claims arising out of website pixel disclosures, at least as related to certain social media pixels, because those alleged disclosures are made through website code that can't be read by an ordinary person.'"

"In general, the circuit split underscores the fact that, if this case is reviewed by the Supreme Court, that ruling could provide guidance on issues that will provide a meaningful impact [on] a lot of cases or [on] a lot of parties," Ross said.

Wolfe said that if SCOTUS refuses to take *Salazar*, "I don't think you can read into it that that means they're not interested in the VPPA." Instead, he said, it "might not have been the right case, in the right year, given their docket."

Krueger pointed out that in recent years in non-VPPA cases, the Supreme Court has "emphasized that courts … should not be rewriting or reinterpreting a statute updated for modern technology." Courts have "to apply the statute the way it was written and [apply] the meaning that the terms had at the time the statute was enacted."

An example of this is the *McLaughlin v. McKesson* chiropractic case from June, he said, where SCOTUS ruled 6-3 that courts lack ultimate authority to determine the scope of a federal statute. "These cases

aren't going away," he said. "They're going to continue to increase in frequency, … [so] this would be a good time for the Supreme Court to take up [a VPPA case]."

Ross compared litigation around the VPPA to the Telephone Consumer Protection Act (TCPA), since in both examples, "what happened over the years is [that] the technology changed," and courts were forced to apply an older statute to newer technologies. In recent years, the Supreme Court has "had to issue a number of decisions clarifying what the different terms in the TCPA mean as it applies to newer technologies and practices."

Though Krueger predicted the Supreme Court would strictly stick to the questions outlined in *Salazar* if it chose to review the case, whichever way the justices ruled would be the "the writing … on the wall" for "the lens the Supreme Court is suggesting that the statute should be viewed." So even if the high court only decides if the term "consumer" should be narrowly or broadly defined, it sets a precedent for how the other terms may be defined, too. **— Kara Thompson**