

## Legal Sidebar

# 1st Circuit Green Lights Suit against Mobile App for Violating Video Privacy Law

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On April 29, 2016, in *Yershov v. Gannet, Inc.*, a three-judge panel of the First Circuit Court of Appeals departed from several [district](#) and an [appellate](#) court rulings when it permitted a smart phone app user, who had streamed videos, to sue under the [Video Privacy Protection Act](#) of 1988 (VPPA) for the nonconsensual disclosure of his mobile phone's unique ID, his GPS coordinates, and information about the videos he had watched.

Increasingly, class action [plaintiffs are attempting to sue under the VPPA](#) for the nonconsensual disclosure of their personal information when they use video streaming services. Subject to exceptions, the VPPA prohibits a video tape service provider from knowingly disclosing personally identifiable information (PII) concerning any consumer of such provider. The VPPA allows aggrieved consumers to recover actual or liquidated damages of at least \$2,500, punitive damages, attorneys' fees and costs, and other appropriate preliminary and equitable relief.

Since the VPPA was written before consumers used smart phones to view videos, courts have grappled with two issues with mixed results in considering the VPPA's relevance to mobile phones and apps: 1) who qualifies as a "subscriber" (and therefore a consumer) under the VPPA; and 2) [what PII is protected](#) by the Act. The statute provides that the term "personally identifiable information" includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider. "Consumer" means any renter, purchaser, or subscriber of goods or services from a video tape service provider. The VPPA does not define the term "subscriber," and district courts appear to be divided on the issue. [Several cases](#) have addressed whether the term "subscriber" applies to a person who uses free apps and whether the scope of PII covers a device's unique ID or must identify a specific person by name.

In *Yershov v. Gannet, Inc.*, the First Circuit reversed the federal district court's dismissal of the plaintiff's complaint which alleged that USA Today's mobile app for Android phones disclosed Yershov's PII without his consent to Adobe Systems, Inc., a data analytics company. The complaint further alleged that when Yershov watched video clips on the free USA Today app, Gannett (the parent of USA Today) disclosed his device's unique Android ID and records of the videos that he viewed. Adobe then allegedly identified the user and linked his video records to Adobe's database of consumer profiles compiled from other sources. Data aggregators, like Adobe, then sell the profiles to advertisers, retailers, and government agencies for a profit. Yershov alleged that Gannett violated the VPPA by disclosing information that identified him as a person who had obtained video services. Gannett moved for dismissal on the grounds that 1) the defendant did not disclose "personally identifiable information" within the meaning of the statute because the Android ID defines an object rather than a person; 2) the plaintiff was not a "consumer" within the meaning of the statute; and 3) the plaintiff lacked standing.

The First Circuit Court of Appeals agreed with the lower court that information about Yershov that Gannett sent to Adobe (the Android ID, GPS coordinates, and titles of videos) fit the definition of PII based on its reading of the statute, rules of statutory construction, and the legislative history. The court concluded that the statute reasonably conveyed that PII is not limited to information that explicitly names a person, and that the information about Yershov that Gannett disclosed effectively revealed the name of the video viewer and was reasonably and foreseeably likely to reveal the videos viewed. However, the appellate court disagreed with the district court's conclusion that Yershov was

not a “subscriber” because of the absence of a subscription fee. The First Circuit examined several dictionary definitions of the terms “subscriber” and “subscribe,” and the court found the broader [American Heritage Dictionary](#) definition to be technologically on point — defining subscribe as “[t]o receive or be allowed to access to electronic text or services by subscription.” Although the court recognized that common definitions of the term “subscribe” include payment as an element, it declined to interpret the statute as incorporating payment as a necessary element, and interpreted subscriber to encompass the broader definition of the term. The First Circuit concluded that Yershov was a “subscriber” (and therefore a consumer) in relation to Gannett within the meaning of the VPPA and that the lawsuit could go forward.

In doing so, the First Circuit disagreed with a recent Eleventh Circuit ruling, the only other federal court of appeals ruling to address whether the VPPA applies to mobile apps, in a case with facts similar to the *Yershov* case, which held that PII must be linked to a specific person and that a person who downloads a free app on a mobile device is not a “subscriber.” In [Ellis v. Cartoon Network, Inc.](#), the Eleventh Circuit examined whether the Cartoon Network app’s transmission of a user’s video history along with the user’s Android ID to third-party data analytics company (Bango), violated the VPPA. The Eleventh Circuit ruled that PII is that which, in its own right, without more, links an actual person to actual video materials; that the Android ID does not identify a specific person without the third party taking extra steps; and that disclosure of an Android ID alone does not qualify as PII. In *Ellis*, although the Eleventh Circuit concluded that one can be a “subscriber” without making monetary payment, it followed the reasoning of the district court in the *Yershov* case, which held that a person who downloads a free app on a mobile device is not a “subscriber.” The Eleventh Circuit analogized the downloading of an app to bookmarking a website’s address. The court construed the term “subscriber” to involve some greater type of commitment or relationship (financial or otherwise) between the user and the entity which owned and operated the app. The appellate court affirmed the dismissal of the plaintiff’s complaint.

Congress last revisited the VPPA in 2012, [amending the law](#) to provide greater flexibility for consumers to provide consent via the Internet. The increased focus of consumers, [media and tech companies](#), [online ad networks](#), and the courts on the VPPA is likely to be of continued interest to Congress.

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