

[1st Circ. Revives USA Today App User's Privacy Class Action](#)

By **Daniel Siegal**

Law360

Los Angeles (April 29, 2016, 10:50 PM ET) -- The First Circuit on Friday revived a USA Today smartphone app user's putative class action alleging the paper's parent Gannett illegally collected his browsing data to sell to advertisers, ruling the app user, unlike a website user, is a "subscriber" protected by federal privacy law.

In a published decision, a three-judge panel including retired [U.S. Supreme Court Justice David Souter](#) reversed U.S. District Judge Dennis Saylor's ruling dismissing named plaintiff Alexander Yershov's suit alleging [Gannett Co. Inc.](#) violated the federal Video Privacy Protection Act by recording what videos he watched on the USA Today App and sending the information to Adobe for analyzing.

The panel disagreed with Judge Saylor's finding that Yershov was not a "subscriber" of USA Today, and thus not a "consumer" under the VPPA, which bars video providers from disclosing their consumers' personal information.

The panel noted that USA Today intentionally created the app separate from the website — and that Yershov had to agree to provide his mobile operating system identification when using — and held that an app user is a subscriber under the privacy law.

"Yershov established a relationship with Gannett that is materially different from what would have been the case had USA Today simply remained one of millions of sites on the Web that Yershov might have accessed through a Web browser," the panel wrote. "And it is by no means self-evident that the version of USA Today one accesses with a browser is identical in all respects to the electronic version one accesses with the app."

Yershov filed suit in July 2014, alleging Gannett was violating the VPPA by recording what videos he watched on the USA Today App, his location and other personal browsing information, and sending the information to Adobe, its analytics vendor, without his permission.

In May 2015, Judge Saylor dismissed the suit, ruling that Yershov's mere use of the USA Today app did not make him a subscriber, and thus he was not a consumer covered by the VPPA, as he had not paid any money, registered any information or received any delivery in order to access the app.

On Friday, the appellate court disagreed, holding that monetary payment was not a necessary condition for Yershov to be a subscriber, noting that a customer in 1988 that obtained several videos at no charge in an introductory deal would still have been protected by the VPPA, and reversed the ruling and remanded the case.

“Because we think that Congress cast such a broadly inclusive net in the brick and-mortar world, we see no reason to construe its words as casting a less inclusive net in the electronic world when the language does not compel that we do so,” the panel held.

The panel did rein in the impact of its ruling, noting that it was on a motion to dismiss, and that their ruling is limited to holding that the specific transaction alleged by Yershov plausibly pleads a case under the VPPA.

The ruling comes at the end of the week in which Gannett unveiled its [latest takeover target](#) confirming a \$815 million unsolicited buyout offer, including debt, for [Tribune Publishing Co.](#), the company behind major dailies such as the [Los Angeles Times](#) and the Chicago Tribune.

Gannett will pay \$12.25 in cash per Tribune share and absorb roughly \$390 million of its target’s outstanding debt, according to a statement.

Representatives for the parties did not immediately respond to requests for comment on Friday.

Circuit Judges O. Rogeriee Thompson and William J. Kayatta Jr. sat on the panel that issued Friday’s argument with retired U.S. Supreme Court Justice David Souter sitting by designation.

Yershov is represented by Ryan D. Andrews and Roger Perlstadt of [Edelson PC](#).

Gannett is represented by Marc J. Zwillinger, Jeffrey G. Landis and Jacob A. Sommer of [ZwillGen PLLC](#) and Heather B. Repicky of [Nutter McClennen & Fish LLP](#).

The case is Alexander Yershov v. Gannett Satellite Information Network Inc., case number [15-1719](#), in the U.S. Court of Appeals for the First Circuit.

--Additional reporting by Chelsea Naso. Editing by Philip Shea.