



Privacy & Security/Class Action ADVISORY ■

JUNE 19, 2014

Hulu: The Northern District of California Denies Class Certification Without Prejudice on Grounds Class Not Ascertainable

By Cari Dawson, Dominique Shelton, David Venderbush, Kim Chemerinsky and Kristy Brown

Data privacy practices and related class action litigation continue to be super-hot topics that require close attention. Brand damage, governance shakeups, and congressional inquiries because of data practices should provide sufficient motivation to stay up-to-the minute in these critical areas.

The most recent news involves allegations that ordinary video hosting and social media engagement permit the disclosure of personally identifiable information in violation of federal video privacy law. In the wake of the **comScore** class certification and [recent settlement](#), a California federal district court has [denied certification of a class of Hulu video service users](#). The plaintiff users claimed that Hulu disclosed their video viewing selections and personal identification information to Facebook simply by enabling the “Like” button functionality on Hulu’s website. The court held that it could not certify the proposed class both because the class was not sufficiently ascertainable and because individual issues regarding actual transmission of private information (injury) predominated over common issues.

The **Hulu** class action provides a fascinating example of the intersection of class action defenses and strategies, substantive privacy law, and a technical evidentiary record. To defeat this type of case, a company’s affirmative story—both on the merits and for class—must take complex technical concepts and distill them into a simple, yet compelling narrative. A coordinated (and potentially simultaneous) strategy to limit the size and scope of the class through both merits and class arguments will be needed. On the merits, a defendant must explain to the court the specific conduct or actions that are illegal under the Video Privacy Protection Act (VPPA) and demonstrate why its actions do not run afoul of the statute. A technical tutorial for the court in advance of substantive motions is all but necessary and recommended.

This understanding of the technical issues, the elements of the cause of action, and the proof necessary to establish those elements and the defenses thereto is directly relevant to class certification arguments. On the class issues, a company must demonstrate that a class action cannot be manageably tried without depriving the company of its due process rights and/or devolving into a series of mini-trials on liability-determinative issues, and trying the case of the class representatives will not establish a right of recovery for

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

any other member of the class. While many courts have experience applying rigorous analysis to consumer protection, warranty, and antitrust class theories and the Rule 23 principles are the same, the VPPA class and other data privacy theories are new and open to interpretation.

From a class litigation perspective, Hulu did a good job at using summary judgment practice to eliminate an additional class whose data was communicated to a different company (comScore). Summary judgment motions are part of a triple-threat strategy that can be a powerful tool in defeating class actions: oppose class certification, move for summary judgment, and utilize defense class experts while filing targeted strategic Rule 702 motions to exclude important portions of plaintiffs' Rule 23 evidence.

The text of Hulu's opposition relied primarily on the plaintiffs' lack of evidence to support the Rule 23 factors. Companies facing similar litigation can strengthen their opposition to class certification by presenting affirmative evidence—such as their own expert testimony and declarations from absent class members not associated with the named plaintiffs. Companies can also take full advantage of the Ninth Circuit requirement that plaintiffs submit a trial plan. A defendant's response to a trial plan is a great way to highlight and bring to life due process and constitutional arguments—which the class trial plaintiffs propose here violates the United States Supreme Court's rejection of "trial by formula," in *Walmart v. Dukes*. (The California Supreme Court has recently articulated the importance of trial plans at the certification stage in *Duran v. U.S. Bank Nat. Assoc.*)

The greatest insight from the *Hulu* decision is the need for companies to highlight problems with ascertainability, an increasingly important Rule 23 issue on which the *Hulu* court asked for special briefing. The court ultimately ruled that the proposed class was not ascertainable because the plaintiffs "offered no way to identify individual class members other than broad notice and a self-reporting affidavit," which was not sufficient given the relatively high dollar value of each claim (\$2,500) and the difficulty in establishing and verifying claims.

Significantly, while Hulu succeeded in defeating the class on ascertainability and predominance grounds, the court left open the possibility for plaintiffs to re-file their motion for class certification and re-define the class and utilize Rule 23(c) subclasses to present a class capable of certification. The denial of the plaintiffs' motion was without prejudice, and the court rejected Hulu's arguments regarding commonality, typicality, and adequacy. The court focused on the record *currently before it* and left open the possibility that, with a different record, a different result may lie.

Accordingly, from a class action perspective, the *Hulu* decision demonstrates, once again, the importance of developing a factual and expert record that is credible, persuasive and robust. In addition to more refined class definitions, defendants should anticipate plaintiffs' use of sub-classing, expert reports that will attempt to nullify predominance defenses, their own consumer survey data and reports, and creative trial plans focusing on what they will describe as the single, central issue of liability. Plaintiffs' counsel will double-down on their continued public policy attacks against the ascertainability defense—i.e., it will spell the demise of consumer class actions and insulate corporate wrongdoing—and in the short term, will attempt to identify jurisdictions hostile to ascertainability arguments and target companies whose records may support self-reporting by members of the class.

From a privacy and data best practices perspective, this case highlights the need for companies to consider whether it is necessary to include specific video titles in the URLs where their videos are posted. The *Hulu* plaintiffs' claims centered around the capture of the watch-page URL (which contained video titles) into web beacons and cookies shared with third parties. The VPPA prohibits the disclosure of personal information – a disclosure identifying a person as having requested or obtained specific video viewing materials. The plaintiffs' proposed class definition (covering the April 2010 to June 7, 2012, period) ended on the precise date when Hulu removed specific video titles from its URL referrer headers. If companies choose to keep video titles in their watch pages, they should strongly consider seeking informed written consent to ensure compliance with the VPPA.

Finally, companies will want to pay special attention to the type of records they maintain regarding individual users. The *Hulu* court specifically distinguished the *comScore* case, in which the Northern District of Illinois certified the proposed plaintiff class, holding that, unlike *comScore*, identification of email addresses alone is insufficient to determine whether a user deployed ad blockers or cleared cookies so that the Facebook cookie could not obtain the user's video viewing data. Had Hulu kept more detailed records (as was the case in *comScore*), the outcome of this case could have been different.

For more background on the *Hulu* case and further recommendations for privacy best practices, please see Alston & Bird's series of client alerts on the action: [Privacy & Security Advisory: Northern District Court Grants Summary Judgment in Favor of Hulu as to the comScore Claims but Denies Summary Judgment as to the Facebook Claims](#) (April 28, 2014); [Northern District of California to Decide in the *In re Hulu Privacy Litigation* Whether Disclosing Anonymized Data to a Web Analytics Company and Use of the Facebook "Like" Button Violate the Video Privacy Protection Act](#) (February 27, 2014); and [2013 Ends with a Bang – Northern District of California Denies Hulu's Motion for Summary Judgment in Video Tracking Case](#) (January 7, 2014).

Alston & Bird prides itself on its expertise in both class action litigation and substantive privacy and data management. We welcome the opportunity to share that expertise with our clients.

If you have any questions or wish to discuss further, please contact any of the following members of Alston & Bird's Privacy & Security or Class Action Groups:

Heather Adams 919.862.2262 heather.adams@alston.com	Marianne Roach Casserly 202.239.3379 marianne.casserly@alston.com	Peter K. Floyd 404.881.4510 peter.floyd@alston.com	Kara F. Kennedy 404.881.4944 kara.kennedy@alston.com	Rodrigo E. Salas 650.838.2025 rodrigo.salas@alston.com
Joshua L. Becker 404.881.4732 joshua.becker@alston.com	Lisa H. Cassilly 404.881.7945 lisa.cassilly@alston.com	Brian D. Frey 202.239.3067 brian.frey@alston.com	Michael P. Kenny 404.881.7179 mike.kenny@alston.com	Karen M. Sanzaro 202.239.3719 karen.sanzaro@alston.com
Kelley Barnaby 202.239.3687 kelley.barnaby@alston.com	Roger A. Cerda 213.576.1156 roger.cerda@alston.com	Michelle D. Fuerstman 213.576.2520 michelle.fuerstman@alston.com	J. Thomas Kilpatrick 404.881.7819 tom.kilpatrick@alston.com	Bruce Sarkisian 404.881.4935 bruce.sarkisian@alston.com
Michael J. Barry 404.881.7158 mike.barry@alston.com	Whitney Chelgren 213.576.2506 whitney.chelgren@alston.com	Daniel Gerst 213.576.2528 daniel.gerst@alston.com	W. Scott Kitchens 404.881.4955 scott.kitchens@alston.com	Sheila Shah 213.576.2510 sheila.shah@alston.com
Teresa T. Bonder 404.881.7369 teresa.bonder@alston.com	Kimberly K. Chemerinsky 213.576.1079 kim.chemerinsky@alston.com	Jonathan M. Gordon 213.576.1165 jonathan.gordon@alston.com	John L. Latham 404.881.7915 john.latham@alston.com	Dominique R. Shelton 213.576.1170 dominique.shelton@alston.com
Brian D. Boone 704.444.1106 brian.boone@alston.com	Stephanie D. Clouston 214.922.3403 stephanie.clouston@alston.com	James A. Harvey 404.881.4724 jim.harvey@alston.com	Paul G. Martino 202.239.3439 paul.martino@alston.com	Eric A. Shimp 202.239.3409 eric.shimp@alston.com
Kacy Brake 404.881.4824 kacy.brake@alston.com	Charles W. Cox 213.576.1048 charles.cox@alston.com	Elizabeth Helmer 404.881.4724 elizabeth.helmer@alston.com	Peter E. Masaitis 213.576.1094 peter.masaitis@alston.com	Paula M. Stannard 202.239.3626 paula.stannard@alston.com
Edward Britan 202.239.3364 edward.britan@alston.com	James S. D'Ambra, Jr. 212.210.9465 james.dambra@alston.com	Katherine E. Hertel 213.576.2600 kate.hertel@alston.com	Dawnmarie R. Matlock 404.881.4253 dawnmarie.matlock@alston.com	Nicholas Stamos 213.576.2515 nick.stamos@alston.com
Kristen K. Bromberek 404.881.4928 kristen.bromberek@alston.com	Cari K. Dawson 404.881.7766 cari.dawson@alston.com	John R. Hickman 404.881.7885 john.hickman@alston.com	Richard McAvoy 919.862.2284 rich.mcavoy@alston.com	Brian Stimson 404.881.4972 brian.stimson@alston.com
Elizabeth Broadway Brown 404.881.4688 liz.brown@alston.com	Julia Dempewolf 404.881.7169 julia.dempewolf@alston.com	Frank A. Hirsch, Jr. 919.862.2278 frank.hirsch@alston.com	Todd S. McClelland 404.881.4789 todd.mcclelland@alston.com	Jeffrey R. Sural 202.239.3811 jeff.sural@alston.com
Alexander G. Brown 404.881.7943 alex.brown@alston.com	Louis S. Dennig, IV 202.239.3215 lou.dennig@alston.com	Donald Houser 404.881.4752 donald.houser@alston.com	Ryan T. McCoy 213.576.1062 ryan.mccoy@alston.com	Daniel G. Taylor 404.881.7567 dan.taylor@alston.com
Kristine McAlister Brown 404.881.7584 kristy.brown@alston.com	Maki DePalo 404.881.4280 maki.depalo@alston.com	Susan E. Hurd 404.881.7572 susan.hurd@alston.com	Matthew P. McGuire 919.862.2279 matt.mcguire@alston.com	Andrew J. Tuck 404.881.7134 andy.tuck@alston.com
Lisa R. Bugni 404.881.4959 lisa.bugni@alston.com	Derin B. Dickerson 404.881.7454 derin.dickerson@alston.com	Brett D. Jaffe 212.210.9547 brett.jaffe@alston.com	Tina Mehr 650.838.2047 tina.mehr@alston.com	Amanda Waide 404.881.4409 amanda.waide@alston.com
Angela T. Burnette 404.881.7665 angie.burnette@alston.com	Daniel F. Diffley 404.881.4703 dan.diffley@alston.com	John A. Jordak, Jr. 404.881.7868 john.jordak@alston.com	Jenny A. Mendelsohn 404.881.4977 jenny.mendelsohn@alston.com	Katherine M. Wallace 404.881.4706 katherine.wallace@alston.com
Gidon M. Caine 650.838.2060 gidon.caine@alston.com	Clare H. Draper, IV 404.881.7191 clare.draper@alston.com	William H. Jordan 404.881.7850 202.756.3494 bill.jordan@alston.com	Micah D. Moon 404.881.4383 micah.moon@alston.com	Kyle G.A. Wallace 404.881.7808 kyle.wallace@alston.com
Megan K. Callahan 404.881.4283 megan.callahan@alston.com	Scott A. Elder 404.881.7592 scott.elder@alston.com	Matthew D. Justus 404.881.4630 matt.justus@alston.com	Zachary Neal 404.881.4968 zach.neal@alston.com	Jonathan E. Wells 212.210.9594 jonathan.wells@alston.com
Lindsay G. Carlson 213.576.1038 lindsay.carlson@alston.com	Ryan P. Ethridge 919.862.2283 ryan.ethridge@alston.com	David C. Keating 404.881.7355 202.239.3921 david.keating@alston.com	Kimberly Kiefer Peretti 202.239.3720 kimberly.peretti@alston.com	Amber Wessels-Yen 212.210.9594 amber.wessels.yen@alston.com
David Carpenter 404.881.7881 david.carpenter@alston.com	James R. Evans, Jr. 213.576.1146 james.evans@alston.com	Amanda Kelley 214.922.3420 amanda.kelley@alston.com	Tiffany L. Powers 404.881.4249 tiffany.powers@alston.com	Sean M. Whyte 214.922.3445 sean.whyte@alston.com
			Jason Rottner 404.881.4527 jason.rottner@alston.com	Michael R. Young 404.881.4288 michael.young@alston.com

ALSTON & BIRD LLP

WWW.ALSTON.COM

© ALSTON & BIRD LLP 2014

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
 BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
 CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
 DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
 LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213-576-1100
 NEW YORK: 90 Park Avenue ■ 12th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
 RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260
 SILICON VALLEY: 1950 University Avenue ■ 5th Floor ■ East Palo Alto, California, USA, 94303-2282 ■ 650-838-2000 ■ Fax: 650.838.2001
 WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.756.3300 ■ Fax: 202.756.3333