



Court Sides with Hulu in VPPA Case, Grants Summary Judgment with Prejudice



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After a four-year battle that has helped define the parameters of the Video Privacy Protection Act's (VPPA's) application to new technologies, on March 31, Magistrate Judge Laurel Beeler dismissed the plaintiffs' claims with prejudice. The crux of the court's rationale is summarized by her statement on the front page of [the order](#):

"the court finds dispositive the absence of any issue of material fact that Hulu actually knew that Facebook might combine information that identified Hulu users with separate information specifying which video that user was watching, so as to identif[y] a person as having requested or obtained specific video materials. The court therefore dismisses the Second Amended Complaint (ECF No. 83) with prejudice."

The court further recognized that as a threshold matter:

"To state an actionable claim under the VPPA, a plaintiff must prove that the video-service provider actually knew that it was disclosing: 1) a user's identity; 2) the identity of the video material; and 3) the connection between the two—i.e., that the given user had 'requested or obtained the given video material.' In terms of this case, if Hulu did not actually know that Facebook might 'read' the c_user cookie and video title together (yielding something akin to the list of Judge Bork's videos), then there cannot be a VPPA violation."

The *Hulu* case is important because it is the most detailed analysis of the VPPA—a 1988 statute—in the context of today's Internet streaming video technologies. Further, given that the VPPA contains liquidated damages provisions of \$2,500 per violation and the alleged disclosures could happen millions of times per day depending upon the website or mobile app, the exposures could be significant—particularly for publicly traded companies. While the *Hulu* court ultimately dismissed this case, it was only after four years of litigation and several decisions that elucidated the parameters of VPPA exposure in this digital age.

Background of the Parties' Arguments on the Knowing Disclosure Summary Judgment Issue

With regard to the briefing on the "knowing disclosure" summary judgment issue at the heart of the court's March 31 decision, the parties made the following arguments.

Hulu filed its motion for summary judgment on August 26, 2014, arguing there is no evidence that it "knowingly" disclosed consumers' personally identifiable information in violation of the VPPA. The crux of Hulu's argument was that there is no evidence that it knew Facebook's c_user cookie contained personally identifiable data under the VPPA, i.e., the Facebook User ID combined separately with video titles received from Hulu's watch page URL.

Prior to her ruling, Judge Beeler acknowledged and reiterated that a violation of the VPPA requires a video service provider's knowing disclosure of PII. For purposes of the VPPA—as Hulu noted—that means actual knowledge that PII is being disclosed, a heightened standard more stringent than "willfulness" or "recklessness."

The plaintiffs opposed Hulu's motion, arguing that it did in fact have the VPPA's requisite knowledge. Specifically, the plaintiffs asserted that Hulu's argument ignores the colloquy of documents unearthed in discovery, and the standard of knowledge under the VPPA and subsequently embraced by the court. In the plaintiffs' eyes, nothing tipped the scales back in Hulu's favor since the court denied their previous motion for summary judgment. Indeed, the plaintiffs argued that even without reasonable time to review the documents Hulu produced, they believed they had assembled sufficient evidence to demonstrate Hulu knew what information it shared, received legal advice concerning information sharing and assumed the risk of sharing information.

The Ruling

The court's ruling was based upon the technology: The court first acknowledged how the technology worked such that Facebook's cookies, enabled through the "Like" button functionality, would automatically connect a user's video viewing with a Facebook ID before the "Like" button was hit by the user. The court noted that:

"Hulu did not send Facebook the Hulu User ID or the Hulu user's name when the user's browser executed the code to load the Like button ... The two items most salient for this lawsuit, then—the c_user cookie and the watch-page URL—were sent to Facebook before the Hulu user did anything other than load the Hulu watch page."

In so doing, the court relied upon a three-part test for actionable claims under the VPPA based upon the plain language of the statute. The plaintiffs must prove that a Video Tape Service Provider (VTSP) has knowingly disclosed

1. The consumer's identity,
2. The video material's identity and
3. The connection between them.

The three-part test yielded no actionable claim, which the court found particularly compelling in this Internet video streaming case. Specifically, the court adopted Hulu's arguments in its explanation:

"Neither the watch page URL nor the Facebook c_user cookie by itself constitutes PII as defined by the VPPA. Hulu's watch page URL contains no user data at all, let alone identifying information; the URL is the same for every user who requests that same video. (See Wu Decl. ¶¶ 27-30.) And the Facebook c_user cookie does not contain any video watch information. Thus, even if Hulu knew that the c_user cookie transmitted the Facebook User ID to Facebook ... Hulu could not have 'knowingly disclosed PII' to Facebook unless it knew that Facebook was combining the Facebook User ID with the video title embedded in Hulu's watch page URL. (ECF 230 at 9-10.) Because there is no evidence of the last element, there is no genuine issue of material fact on that element, and the court grants summary judgment in Hulu's favor." (*Emphasis added*)

The court rejected the plaintiffs' argument that they need not prove knowledge of Facebook's activities: In reaching its decision, the court specifically rejected the plaintiffs' argument that they need not prove how Facebook would use the data sets in its c_user cookie, accordingly, the plaintiffs' argument that they "need only demonstrate that Hulu voluntarily provided user-specific information and videos watched to a third party" was unsuccessful and did not carry the day.

The court rejected the plaintiffs' arguments based upon prior rulings: The court rejected the plaintiffs' assertion that it had already concluded Hulu disclosed video viewing together with identifying information, saying:

"the evidence has always shown and the court has always understood that, although both were sent to Facebook, the `c_user` cookie and the watch-page address are distinct things. Whether the transmission is actionable depends on whether the connection of the two creates the disclosure of PII that VPPA requires."

The court looked to the historical underpinnings of the VPPA: The court noted that the Internet streaming nature of the Hulu technology was a far cry from the origins of the statute and relied upon the fundamental difference between the technology of streaming and the human interactions involved with disclosures of video viewing back in 1988 pertaining to video stores.

The technical arguments raised by plaintiffs did not raise a triable issue of fact: In language that will make a successful appeal highly unlikely for the plaintiffs, the court undertook a detailed discussion of technical issues associated with the Facebook "Like" functionality that reads more like a computer programming manual than the typical legal decision.

Facebook's show faces option within its code did not create genuine issues: In a point-by-point analysis, the court rejected each of the factual arguments asserted by the plaintiffs in connection with Facebook's "show faces" functionality. Plaintiffs argued that the show faces functionality made it clear that Hulu understood that user's identity could be tied to video viewing. The court noted that:

"It is, after all, obvious that `show_faces=true` enables Facebook to determine which videos a specific user is watching; otherwise, it could not display that user's friends as having liked that video."

In nevertheless rejecting the plaintiffs' arguments, the court reasoned that:

- The show faces feature allows a company to learn whether the friends of a user have also liked a page. As the court noted: Hulu's code reflected that they opted for the "`show_friends_ = false`" setting. Accordingly, "[t]he `show_faces` feature does not raise a genuine fact issue on the plaintiffs' VPPA claims."
- To the degree Hulu ever used the `show_faces = true` setting, the evidence revealed that this was implemented only in Japan, not the U.S.
- Emails between employees commenting on the functionality that would permit revelations of users were based upon the `show_faces = true` setting (never used) and not the "Like" button generally.
- In sum, the court concluded that "In the end, though, the `show_faces` evidence suggests at most what Hulu should have known generally about how `show_faces=true` worked. The evidence does not show that (under the plaintiffs' hypothesis) Hulu knew it was sending Facebook information connecting an identified user to identified videos."

Hulu's "internal testing" and "session captures" did not raise genuine issues of material fact: Session captures record the actual data sent between a browser and the web pages on a publisher site. While there were some session captures that revealed Facebook IDs with video watch pages, they're not associated with the Facebook "Like" button, and required additional research for even the plaintiffs' expert to discern as Facebook IDs. Accordingly, no triable issues of fact were raised.

The Nielsen ad tracking agreement between Hulu and Nielsen did not reflect knowledge that video viewing would be shared with Facebook using the "Like" button: The plaintiffs relied upon Hulu's

agreement with Nielsen and its apparent recognition that Facebook's cookie could be used to identify users. The court distinguished that situation given that it was unrelated to the "Like" button:

"This evidence shows Hulu's knowledge that a Facebook cookie, sufficient to identify a Hulu user, could be triggered by ads that Nielsen was monitoring for Hulu. It does not show that Hulu knew that a user-identifying cookie would be sent to Facebook when the Like button loaded; nor does it show that that cookie might be connected to a watch-page URL."

The court's prior rulings regarding emails reflecting Hulu's assumption of VPPA risks did not raise triable issues: The court noted that the prior emails were too general—referring to VPPA risks in general and vendor capabilities to identify users to reflect knowledge that the c_user cookie activated by the "Like" button would share the Facebook ID and users video viewing with Facebook.

Hulu's privacy policy could not be turned against it to raise triable issues: The court rejected the plaintiffs' attempt to argue that triable issues of fact were created by disclosures in the policy that vendors may combine data sets.

In Dicta Guidance on Disclosure in the New Tech World

The court commented on natural language disclosures of video viewing that are encrypted and shared with a mutual method for reviewing the code:

"No one would deny that I would violate the VPPA by passing someone an encrypted list of Judge Bork's video rentals—if my recipient and I both understood that we would use a mutually intelligible code."

It distinguished purely encrypted natural language disclosures with disclosure of encrypted video viewing where the code was not mutually readable:

"If, instead, I hand someone only a garbled collection of alphanumeric strings (which I alone understand to contain someone's encrypted video-rental history), there is likely no actionable disclosure. For a disclosure to arise in the latter scenario, there generally must be proof of further action by the recipient; they must know that I have used a code and they must at least have the capacity to decode and read the contents. At the very least, there must be some mutual understanding that there has been a disclosure."

And it appears to leave open the possibility that a VTSP could, under certain circumstances, be liable for Facebook "Like" button disclosures if there was evidence of actual knowledge that Facebook's cookies would tie the data sets together:

"The plaintiffs do not go beyond their legal arguments on this point to offer proof that Hulu knew that Facebook might combine the c_user and watch-page data to construct information that would identify a user as having requested or obtained specific video materials or services. Without that proof, there is no knowing disclosure of PII."

Will the existence of this *Hulu* case and the detailed discussion of the operation of Facebook's c_user cookie create the requisite "knowledge" for future disclosures associated with that cookie down the road for other companies using the "Like" button on their sites? The court seemed to leave this possibility open in stating by comparing the vague allegations in the complaint with the detailed analysis in the decision:

"[While] the complaint is too general to supply the —knowledgell proof that the plaintiffs' existing legal theory would need. The plaintiffs' extant legal theory involves the several

specific components that the court has **discussed throughout this order**: the Like button; the c_user cookie; and the title-bearing watch-page URLs. None of the plaintiffs' complaints mentions these things." (emphasis added)

It will be interesting to see how the Hulu case is used by the plaintiffs' bar in future VPPA litigation and whether it will be argued that it confers implied knowledge on a company.

Conclusion

The Hulu litigation is the most robust discussion of the VPPA in the Internet streaming context. The four-year litigation has elucidated certain guiding posts that companies can consider in practices going forward regarding the use of web analytics, ad networks and other third-party vendors enabling review, analysis and monetization from websites or mobile apps.

- Unique identifiers coupled with video viewing, and nothing else, will likely not rise to the level of VPPA violations. This was established in the Hulu Court's April 2014 decision and followed in decisions subsequent to that.
- Social networking plugins that share social networking IDs with a vendor may create issues for a company *if* the company has *actual knowledge* that the social networking ID will be coupled with video viewing.
- Titles of videos that are contained in a video watch page URL string, may create issues if they are knowingly disclosed *with identifying information* (e.g., names, email addresses or social networking IDs) with a vendor.
- If a company does not know how a vendor's cookies work, they may not have the requisite knowledge, but issues of willful blindness could creep into VPPA language.
- After the big data reports and data broker reports issued by the White House and the FTC, companies are facing increasing pressure to understand how third party trackers are used on their websites and mobile apps. How will this impact future VPPA litigation?
- Many third party social networking companies may be reluctant to share how their tracking technologies work, for fear this will create a chilling effect against their use.
- The detailed discussion of the c_user cookie that emerged from the Hulu litigation may prompt plaintiffs' counsel to try to use that decision as evidence of implied knowledge.

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