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PERSPECTIVE

Rulings narrow video privacy actions

By Mary Ellen Callahan and Julie Ann Shepard

The landscape of consumer privacy on the Internet is rapidly evolving, including the standards related to online video viewing. The Video Privacy Protection Act (VPPA) was enacted when VCRs were relatively new and videotape rentals were the rage. In the last few years, starting with the 2011 putative class action *In re Hulu Privacy Litigation* in the Northern District of California, courts across the country have commenced determining when and how the VPPA applies to online video consumption in cases involving streaming services such as Hulu and Netflix as well as entertainment networks providing video clips and episodes of their television shows via websites and mobile apps. Two decisions handed down within the last few weeks add definition to the boundaries of privacy protections under the VPPA in the Internet age.

The VPPA prohibits a disclosure of information connecting a particular consumer to a particular video. It does not ban the disclosure of user and video data altogether. And a video provider is only liable under the VPPA where it "knowingly discloses" the consumer's identity, the specific video material and that the identified person requested or obtained that video material.

The *Hulu* court, which has previously decided numerous novel VPPA issues, tackled yet another one involving what must be proven to establish a knowing disclosure in an Internet-video case. The court examined the paradigmatic fact pattern that prompted enactment of the VPPA (a video store gave a reporter a list of videos rented by U.S. Circuit Judge Robert Bork), as well as related variations, to find an analogy to the Internet-based scenario before the court.

Presenting an online twist, the videos selected by Hulu users were disclosed to Facebook when a user's browser executed code to place Facebook's "like" button on Hulu's "watch" pages (which until mid-2012 included the video's title in the webpage address). Separately, but simultaneously, the like button on the watch page would cause a cookie containing the Hulu user's unique numeric Facebook ID to be sent to Facebook if the user had logged on to Facebook using certain settings within a specific period of time. If Facebook wanted, it could identify the person associated with this Facebook ID.

Hulu contended it did not knowingly send Facebook information that could identify Hulu users and it did not know that Facebook might read the information Hulu sent to yield personally identifiable information.

The *Hulu* court defined the standard: A VPPA plaintiff must prove the video 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 the court's view, if Hulu did not know that Facebook might "read" the cookie and video title together — yielding a list akin to the list of Bork's videos — then there cannot be a violation of the VPPA.

The plaintiffs failed to meet this high standard. The court held the plaintiffs could not avoid summary judgment based on statements from Hulu about how other Facebook features worked and Hulu's privacy policy generally warning users that information may be shared with third-party services. The court rejected the notion that a jury could "be allowed to pass on liability based on broad hand waves toward what we all know, what we all expect about how our personal information moves around, and how things generally work in the age of the Internet." The court drew a clear boundary requiring specific proof of Hulu's actual knowledge of disclosure based on the interplay between the like button, the cookie and Hulu's watch pages.

The other recent decision issued from the Southern District of New York in *Austin-Spearman v. AMC Network Entertainment* (*AMC*). This case brings to the forefront what it means to be a "subscriber" in the Internet context entitled to protection under the VPPA. The VPPA only protects "consumers" defined as "any renter, purchaser, or subscriber of goods and services from a videotape service provider." The *AMC* plaintiff attempted to render the definition of subscriber virtually limitless, arguing she should be considered a "subscriber" simply because, on occasion, she viewed video clips and episodes of "Walking Dead" for free as a guest on AMC's website without signing up, registering for an account, establishing a user ID or profile or downloading an application to any device.

The VPPA does not define "subscriber." Hence, the court examined the term's ordinary meaning to see if "subscriber" could be stretched this far and determined that a subscription typically entails the exchange of money or personal information in order to receive a future or recurrent benefit and a hallmark of a subscription consists of an ongoing relationship. No such relationship was alleged; the complaint only showed that the plaintiff occasionally viewed videos on AMC's website. The court held that "[s]uch casual consumption of web content, without any attempt to affiliate with or connect to the [video] provider," did not suffice to establish that the plaintiff was a "subscriber" under the VPPA. In doing so, the court rejected the notion that any use of a website that gives personal information to a video provider makes the user a "subscriber" because it would effectively read the definition of consumer out of the VPPA.

Although the court granted AMC's motion to dismiss, confirming that "subscriber" has meaning and exposure to liability is not limitless, the saga is not over. Compelled by liberal amendment standards, the court reluctantly granted the plaintiff leave to amend to add allegations that she had registered for a newsletter about "Walking Dead," had provided personal information (e.g., her email address), and had received promotional emails regarding the show from AMC giving her an option to "unsubscribe" (which is required under the federal email marketing law, CAN-SPAM). The court expressed skepticism that the plaintiff would be able to state a VPPA violation even with the additional factual allegations and stated they presented numerous "troubling questions and implications," including whether a plaintiff can be considered a subscriber under the VPPA if she only subscribes to a service like email, which is separate and distinct from the video service.

These twin decisions reveal courts delving deeply into the issues presented by applying the VPPA to the wide variety of Internet video services available and placing meaningful limitations on the statute's reach. That said, these decisions are unlikely to dissuade plaintiffs from continuing to bring VPPA cases. Plaintiffs will likely continue to claim their online video consumption forged a sufficient relationship with the video provider for the user to be considered a "subscriber" while the user also urges the court that discovery will establish the video provider's actual knowledge of its disclosures of personally identifiable information. As a result, despite the boundaries continuing to be set on VPPA claims, it remains imperative that Internet video content providers have systems in place to stay on top of what is known within the provider about the information its systems collect and share with third parties to prevent the provider from running afoul of the VPPA.

PIG Tales

This regular column is devoted to issues of critical importance to the Privacy and Information Governance (PIG) communities. Provided by the former Chief Privacy Officer of the U.S. Department of Homeland Security, PIG Tales discusses cutting edge issues while offering valuable insight and practical advice to companies on how to collect, use, store, protect and share their sensitive data in an efficient, effective, and compliant manner.

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