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THREE YEARS OF CHANGE: RECENT COURT CASES UNDER THE VIDEO PRIVACY PROTECTION ACT

In a world of ever-increasing connectivity the United States continues to adapt its laws to protect privacy rights. With more and more frequency Silicon Valley is spawning new internet companies that profit primarily, or even solely, on their ability to provide third parties with targeted marketing data on their users. Last year saw Facebook post record profits,[1] while Alphabet — Google's parent company — began to rival Apple for the title of World's most valuable company.[2] A notable similarity between Google and Facebook is that they don't actually sell or rent any goods to consumers. Instead, they sell a service to third parties in the form of targeted marketing data on their users. Since 2012 the government and the courts have begun to address another possible provider of such information, video streaming services. These past three years have seen an attempt by all three branches of government to drag the Video Privacy Protection Act (VPPA) into the modern era.

Recent efforts have shown an attempt to bring the thirty-year-old privacy law to the modern era of Internet streaming. Unlike the brick and mortar video stores that existed at the VPPA's inception, the modern marketplace contains millions of sources for paid, free, subscription, and non-subscription based videos. By using such sources of entertainment, the consumer may unwittingly be allowing websites to share and profit from their viewing history. To date, no litigation has progressed to trial on streaming and the VPPA, but the frequency of the cases and their potential ramifications warrant a discussion in the legal community. This paper looks to briefly address the recent cases, determine where the law stands today, and to briefly discuss what this means for consumers as potential future litigants.

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[1] *Facebook Reports Fourth Quarter and Full Year 2015*, FACEBOOK (Jan. 27, 2016), *http://investor.fb.com/releasedetail.cfm?ReleaseID=952040.*

[2] John Shinal, *Alphabet vs. Apple: Two Stocks Enter, One Leaves*, USA TODAY (Feb. 2, 2016), http://www.usatoday.com/story/tech/columnist/shinal/2016/02/02/alphabet-vs-apple-two-stocks-enter-one-leaves/79685542/.

HISTORY OF THE ACT:

The birth of the VPPA dates back to the late 1980's and is entwined with the legal system in an interesting way. During the nomination hearings for Supreme Court candidate Robert Bork a D.C. area newspaper obtained a copy of his family's video rental history and published a profile of Bork based upon the movies on the list. While probably better remembered in the legal community for his scholarly works on antitrust law than for his failed Supreme Court nomination — or any of the unremarkable movies found on his rental history — the newspaper's disclosure of the list prompted swift action to protect consumer privacy in the area of video rentals. Perhaps the journalist that obtained the list and wrote the piece was motivated by Bork's strict constitutionalism approach and felt that the piece spoke out against the jurist's opinion that citizens only had those rights that were provided to it by the constitution and the legislature.[3] Regardless of the motive, Congress passed the VPPA and the President signed it into law in 1988.

The 1988 version of the VPPA protected the viewing histories of consumers by preventing video rental stores from disseminating information about its customers. Originally the law protected against the "wrongful disclosure of video tape rental or sale records" by "Video Tape Service Providers." Congress updated the aging law in 2012 when it drafted and passed amendments to the VPPA in the form of H.R. 6671, which was signed into law by President Obama in January of 2013.[4] Congress added Internet companies to the VPPA's definition of video providers and allowed providers to share viewing history with social networks if the individual gives their written consent.[5] H.R. 6671 has been heavily lobbied for by Netflix, which excluded

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[3] Andrea Peterson, *How Washington's Last Remaining Video Rental Store Changed the Course of Privacy Law*, THE WASHINGTON POST (Apr. 28, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/04/28/how-washingtons-last-remaining-video-rental-store-changed-the-course-of-privacy-law/.

[4] *See* H.R. 6671, 112th Cong. (2012).

[5] *Id.*

the United States from its Facebook sharing feature introduced in 2011.[6]

VPPA'S INTERPRETATION IN RECENT CASE LAW:

Following the passing and signing of the VPPA amendments case were filed on behalf of consumers and have shown the courts' attempts to interpret and apply the decades old law to the modern era. The cases have primarily looked at four areas of the VPPA. First, whether streaming and video sites fall under the definition of "video tape service provider." Second, whether the modern viewer of free or paid online videos fall under the Act's definition of "consumer." Third, what constitutes unlawful disclosure in the modern era. Fourth, what constitutes "personally identifiable information," the information that the Act is intended to protect. Each of these four areas has been applied to the recent cases to handle questions that the 100th Congress could not have imagined in the 1980's while drafting the legislation, but are now beginning to shape a path for the modern litigant to navigate when pursuing VPPA claims against an internet company.

The VPPA can only cover Internet companies if the definition of "video tape service provider" is interpreted to include such non-brick-and-mortar institutions, which provide videos in formats far removed from the videotape. The VPPA defines a video tape service provider as "any person, engaged in the business, in or affecting interstate or foreign commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials. . . ." The Northern District of California

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[6] Peterson, *supra* note 3; Hayley Tsukayama, *Netflix, Facebook switch on sharing feature*, THE WASHINGTON POST (Mar. 13, 2013), https://www.washingtonpost.com/blogs/post-tech/post/the-circuit-netflix-reaps-benefits-of-vppa-lobbying-turns-on-social-feature/2013/03/13/71e1df22-8bf4-11e2-b63f-f53fb9f2fcb4_blog.html; Steven Musil, *Obama signs Netflix-backed amendment to video privacy law*, CNET (Jan. 10, 2013) http://www.cnet.com/news/obama-signs-netflix-backed-amendment-to-video-privacy-law/.

first addressed this definition's relation to internet companies in the 2012 case *In Re Hulu Litigation (Hulu I)*.[7]

In *Hulu I* the court considered the alleged wrongful disclosure of consumer information in a putative class action suit.[8] In its defense Hulu claimed, inter alia, that it was not a videotape service provider as defined by the Act.[9] Specifically, Hulu suggested that the dictionary definition of "materials" meant that the Act was limited to the providers of physical videos.[10] The court rejected this argument in this interpretation in favor of its own interpretation of the statute. First, the court said that the plain language reading of the statute meant that the intent was to cover providers of "video content" regardless of "how that content was delivered (e.g. via the internet or a brick-and-mortar store)."[11] Next, the court considered the dictionary definition of material and found that in addition to the physical meaning put forth by Hulu, the term could be used to show relation to something (i.e. reading material) and that this meaning "comports with the court's ordinary sense of the definition of "audio visual materials" as used in the Act's definition of video tape service provider.[12] Finally, the court looked to the *travaux prepitoire* for evidence of legislative intent. It found a senate report that showed Congress's intent to protect private information on "viewing preferences regardless of the business model or media format involved."[13] To be sure that the VPPA's protections would retain their force even as technology evolved included similar audio-visual material in the definition.[14] Based on this, the court found that Hulu was a "provider" under the Act.[15]

Even if an Internet company is a videotape service provider, the plaintiff must be a "consumer" as defined by the Act

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[7] *In re Hulu Privacy Litig., (Hulu I)*, 2012 U.S. Dist. LEXIS 112916 (N.D. Cal. Aug. 10, 2012).

[8] *Id.* at *2.

[9] *Id.*

[10] *Id.* at *12-4.

[11] *Id.* at *16.

[12] *Id.* at *16-7.

[13] *Id.*, *citing* S. Rep. No. 100-599 at 1.

[14] *Id.* at *18, *citing* S. Rep. No. 100-599 at 12.

[15] *Id.* at *18-9.

in order to have standing. Consumer is defined as "any renter, purchaser, or subscriber of goods or services from a video tape service provider."[16] The court in *Hulu I* also addressed this aspect of the act in its decision. Particularly, the parties and the court looked at "subscriber" because it was undisputed that the plaintiffs had not paid for any of Hulu's services.[17] While the defendant argued that subscriber "implies payment of money" or at the very least something "more than just visiting [the site.]" The plaintiffs claimed, "they signed up for a Hulu account, became registered users, received a Hulu ID, established Hulu profiles, and used Hulu's video streaming services."[18] The court held that the plaintiffs properly plead more than simply visiting the site and that the term subscriber does not imply payment.[19] Therefore the Plaintiffs in Hulu I met the Act's definition of consumer, but the court declined the opportunity to create a bright line rule, leaving the general standard for subscriber to mean something more than a visitor to the site but less than a paid user.

In 2015 the definition of consumer was at the crux of two notable cases where the plaintiff was held not to be a subscriber.[20] First, the Southern District of New York decided the *AMC* case, which illustrated *Hulu I*'s spectrum of users, which placed subscribers somewhere above a simple user of a site but somewhere below requiring a paid subscription.[21] In *AMC*, the plaintiff's use of the website was described as one in which she visited the site to watch various videos but evidenced "no desire to forge ties with... AMC."[22] Later in 2015 the 11th circuit decided the *Cartoon Network* case, where it followed the *Hulu I* spectrum. The court followed a path set forth in the district court case of Yershov, which held that downloading a free app to watch episodes was not enough to make the user a subscriber unless it

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[16] 18 U.S.C. § 2710(a)(1).

[17] *In re Hulu Privacy* at *22.

[18] *Id.* at *22-3.

[19] *Id.* at *23-4.

[20] *Austin-Spearman v. AMC Network Entm't LLC*, 2015 U.S. Dist. LEXIS 45159 (S.D.N.Y. 2015); *Ellis v. Cartoon Network, Inc.*, 2015 U.S. App. LEXIS 17669 (11th Cir. Ga. 2015).

[21] *Austin-Spearman*, at *18.

[22] *Id.* at *17.

involved "payment, registration, commitment, delivery, [] or access to restricted content[.]"[23] *Cartoon Network*'s holding, like that in *AMC*, represent an adoption and a further refinement of the *Hulu I* interpretation of subscriber.

Hulu I's final contribution to the modernization of the VPPA can be found in its discussion of the definition of disclosures "incident to the ordinary course of business." The VPPA creates an exception to the disclosure prohibition in circumstances where the disclosure occurs as a part of the ordinary course of business.[24] This is defined in the Act as "debt collection activities, order fulfillment, request processing, and the transfer of ownership."[25] The court addressed the scope of this definition and created a three-prong approach for properly pleading the inapplicability of this exception. First, the plaintiff must allege what the defendant did (i.e. transmitting personally identifiable information about viewing history to third parties without first obtaining plaintiff's written consent); second, the plaintiff must identify the third parties; and third, the plaintiff should give specific examples regarding the actions relating to at least some of the third parties.[26] So, while the court held that the true determination of whether a disclosure is incident to the ordinary course of business is a question of fact that can't be addressed on a motion, it did provide proper guidance on how to plead this aspect of the claim to help ensure it gets to trial.

The fourth and final definition addressed in the recent cases was the definition of personally identifiable information. The act defines personally identifiable information as including "information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider."[27] In 2004 the court of appeals of Washington held "that the statute applies not only to physical evidence, but all

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[23] *Cartoon Network*, at *12, *citing Yershov v. Gannett Satellite Info. Network Inc.*, 104 F. Supp. 3d 135 (D. Mass. 2015).

[24] 18 U.S.C. § 2710(b)(2)(E).

[25] *Id.* at (a)(4).

[26] *Hulu I*, at *21-2.

[27] 18 USC 2710(a)(3).

information."[28] Thus entering into the period of cases addressed here, the definition was a broad one that included the records themselves and the information contained within them.

In 2015, the Northern District of California looked at what the statute required in order for personally identifiable information to be present. In that case, *Hulu II*, the court discussed consumers' claims regarding Hulu knowingly transmitting personally identifiable information to a third party. The court looked at the question in two parts: first, when is personally identifiable information present; and second, what does the knowledge element of the act entail. The court reasoned that the goal of the VPPA is not "to ban the disclosure of user or video data [but instead] it is to ban the disclosure of information connecting a certain user to certain videos."[29] Therefore the court found that in order for information to be personally identifiable information, it must contain three elements: the consumer's identity, the video material's identity, and the connection between them.[30]

In *Hulu II* the court found that no such nexus existed. Although Hulu transmitted both the consumers' identity and the materials' identity, it did so separately.[31] Despite the fact that these transmissions were simultaneous, there is no disclosure of personally identifiable information if there is no evidence that Hulu helped to establish (or reestablish) a connection between the identities.[32] "At the very least, there must be some mutual understanding [between the provider and the third party] that there has been a disclosure."[33]

The second part of the question on disclosure, the knowledge requirement, was also found to be unmet in *Hulu II*. Hulu transmitted the separate identities to Facebook, but the plaintiff pled no facts to show that Hulu knew the Facebook was using its cookies to reunite those identities and thereby reestablish

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[28] *State v. Walker*, 2004 Wash. App. LEXIS 23 (Wash. Ct. App. Jan. 13, 2004).

[29] *In re Hulu Privacy Litig. (Hulu II)*, 86 F. Supp. 3d 1090, 1095-6 (N.D. Cal. 2015).

[30] *Id.*

[31] *Id.* at 1096.

[32] *Id.*

[33] *Id.* at 1097.

the personally identifiable information. From an application and pleading standpoint, this holding reveals two things about the VPPA. First, in its current form the VPPA does not apply liability to providers that do not knowingly disclose personally identifiable information to a third party. It is not enough to, as in *Hulu II*, provide the third party with the raw ingredients to concoct personally identifiable information. The provider must know that the third party is actually combining those ingredients in order to access the personally identifiable information.[34] Second, from a pleading standpoint, the plaintiff must provide facts to establish knowledge that the defendant knowingly transmitted personally identifiable information to a third party, or the raw ingredients for such information that the defendant knows the third party is using it to recreate personally identifiable information.[35]

SUMMARY OF THE CURRENT STATE

The previous sections provide a clear picture of where the VPPA has been updated and in what ways it still needs clarification. This section will briefly look at current state of the Act and its affect on the parties of future litigation. The Courts have developed sound interpretations for many of the Act's terms rendered ambiguous over the years.

It is generally established that "video tape service provider" includes Internet video providers because of legislative intent and the plain meaning of "video materials" as used in the statute.[36] That interpretation was followed by the same district in

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[34] *Id.*; *see also*, *Mollett v. Netflix, Inc.*, 2012 U.S. Dist. LEXIS 116497 (N.D. Cal. Aug. 17, 2012), *aff'd*, 795 F.3d 1062 (even though Netflix knowingly transmitted personally identifiable information to plaintiff's device where it could be viewed by third parties it did not provide third parties with access to that device and thus did not knowingly disclose protected information, even though it provided the raw ingredients — personally identifiable information and a platform viewable by third parties).

[35] *See Hulu II*, 348 F. Supp. 3d, 1097; *see also Sterk v. Redbox Automated Retail, LLC*, 770 F.3d 618 (7th Cir. 2014); *Netflix*, *supra* note 34 (holding that defendants knowingly distributed personally identifiable information but it did no violate the VPPA because of the disclosure exceptions in 2710(a)(2)).

[36] *See Hulu I, at* *7.

the 2012 Netflix decision[37] and has not yet been expressly addressed by any circuit courts. It is worth noting, however, that all the circuit court cases since Hulu I have addressed other terms, such as subscriber, and have rendered decisions based on the assumption that the defendant was a provider, while omitting discussion of provider.[38] The intent of the Act, as it was interpreted in *Hulu I* and still stands, likely means that all courts will consider downloading or streaming apps, sites, services, and devices to be providers under the VPPA.

The definition of consumer also seems to be well established. Essentially all cases following Hulu I have cited to it or its progeny when defining "consumer" and its offshoot term "subscriber." Most notably are the 9th, 7th, and 11th circuits analyses in four 2015 cases. In *Hulu II* the 9th circuit's analysis of "knowingly disclosed" was only necessary if the circuit agreed with the lower court's decision that Hulu was a provider and the plaintiff was a consumer. Likewise, that same court's holding in *Netflix* rested solely on the fact that the plaintiff was a consumer and therefore allowed to receive disclosures of her own personally identifiable information. In the 7th circuit an analysis of the disclosure of plaintiff's personally identifiable information was only necessary if the court agreed that the plaintiff and defendant were consumer and provider respectively. Finally, the 11th circuit's *Cartoon Network* case saw the appellate court correct the lower court by agreeing with *Hulu I*'s reasoning on the definition of subscriber and distinguishing that case from the facts in *Hulu I.* Like the definition of provider, the definition of subscriber, and therefore consumer, seem to be agreed upon by the various circuits of the United States that have addressed it. In short, a consumer is any renter, buyer, or subscriber; and a subscriber is determined on a case by case basis but definitely requires more than simply using

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[37] *Netflix*, at *6.

[38] *See Mollett v. Netflix*, 795 F.3d 1062 (9th Cir. 2015) (9th circuit case upholding the lower court's finding without addressing the definition of provider); *Cartoon Network, supra* note 20 (where the 11th circuit distinguished that plaintiff's actions from plaintiff's actions in Hulu I in order to find that the plaintiff was not a subscriber, but it did not address whether the defendant was a provider).

a site or downloading and application, and does not require the payment of money.

The definition of personally identifiable information is the least ambiguous definition within the Act and, as such, has only been minimally addressed by the courts. The Act defines personally identifiably information as that which "identifies a person *as having requested or obtained* specific video materials."[39] From that language *Hulu II* developed a bright line test that requires the information disclosed to: (1) identify the consumer, (2) identify the video material, and (3) establish a connection between (1) and (2).[40] As this case has only recently been decided there is no trail of citing cases to support or apply the test, but given that it is simply a distillation of the statutory language it will likely stand and be clearly applied the near future.

Finally, the remaining question is what constitutes a disclosure in the modern era. The 2012 congressional amendments and the House Resolution make it possible for consumers to give prior written informed consent for the disclosure of their personally identifiable information in certain instances.[41] Absent such consent, the parties must look next to the Act in order to determine if the disclosure falls under one of the 2710 exceptions for disclosures in the ordinary course of business (b)(2)(E), which includes "debt collection activities, order fulfillment, request processing, and the transfer of ownership."[42] Finally, the parties need to consider the knowledge requirement, which, under, *Hulu II*, mandated that the defendant either know it was transmitting personally identifiable information to a third party or that the defendant know that the information it was transmitting to the third party was being reassembled into personally identifiable information.

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[39] *Hulu II,* at 1096 (emphasis in original), *citing* 18 U.S.C. § 2710(a)(3).

[40] *Id.* at 1095.

[41] 18 U.S.C. 2710(b)(2)(B).

[42] 18 U.S.C. 2710(a)(4).

CONCLUSION

The current state of the VPPA creates a much clearer pathway for filing claims under the Act, but it still has the potential to result in splits amongst the various circuits. A thorough analysis of the various cases provides a picture of the emerging trend that follows the 2012 *Hulu I* case. From that initial decision we see the beginnings of a three-year slog towards adapting the VPPA to modern use. There has yet to be a large rift in the cases that have emerged, but that may change in the near future as litigants become more aware of what elements are required to get a claim to trial. With such important terms as "subscriber" still being left to a case-by-case interpretation, there could develop a schism between the circuits that would require action by the Supreme Court. Given the number of cases filed in the past three years and the potentially lucrative nature of such putative class actions to plaintiffs and firms, it is likely that the next three years will see a number of cases filed. Whether they will solidify or divide the courts on application of the VPPA's terms must remain to be seen.

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