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A New Chapter In Video Privacy Protection Act's History

Law360, New York (June 23, 2014, 10:40 AM ET) -- Plaintiffs traditionally face an uphill battle in class actions alleging misuse of information gathered from Internet cookie tracking or trafficking. "Cookies," of course, are bits of data transferred between users' Web browsers and companies' websites during Web browsing. Cookies allow websites to recall user information — such as login credentials, browsing history and shopping-cart contents — saving users the time and effort of reentering the information every time they visit a website. Courts generally take the view that such browsing information has little to no intrinsic value; plaintiffs thus lack cognizable injury and standing under Article III of the U.S. Constitution to pursue claims for collection or misuse of Internet cookies.[1]

The traditional view may be changing, however, at least in the context of video privacy. The Ninth Circuit Court of Appeals recently held that statutory damages are sometimes sufficient to confer standing under Article III, even in the absence of actual harm.[2] And a Northern District of California court allowed a case against video streamer Hulu to go forward under the Video Privacy Protection Act, 18 USC § 2710, which includes a grant of statutory damages. Just last week, however, the Hulu court denied plaintiff's motion for class certification, quieting the momentum that had been gaining among video privacy proponents. Companies streaming video content over the Web should familiarize themselves the VPPA's history and be prepared for further developments in the case law.

The VPPA has an interesting history, particularly for those who recall the U.S. Supreme Court candidacy of former D.C. Circuit Judge and Solicitor General Robert Bork. Bork, a strict originalist, was already a controversial candidate when the Washington City Paper published an article recounting the movies he rented from a local Washington, D.C., video store. Now, and even then, many assumed that the rental history included salacious or X-rated titles, when in fact, few of the movies were even R-rated. Nonetheless, the videotape controversy became symbolic of the skewering Bork received from his opponents, to the point that numerous dictionaries now recognize "bork" as a verb synonymous with attacking a candidate via the media.

As a judge, Bork believed citizens had only those privacy rights conferred by Congress.[3] Fittingly — some might say ironically — Congress enacted the VPPA in 1988 after the Senate denied Bork's confirmation in October 1987. The VPPA prohibits "video tape service providers" (VTSPs) — those in the business of selling or renting "video cassette tapes or similar audio visual materials" — from knowingly disclosing personally identifiable information, including any information that links a customer to particular video materials or services. The VPPA provides a private right of action and statutory damages of at least $2,500 per violation. The VPPA also requires VTSPs to destroy customer PII no later than one year after a customer account terminates.[4]

In 2011, Congress amended the VPPA to permit disclosure of PII, provided VTSPs first obtain "informed, written consent (including through an electronic means using the Internet)" from the consumer. The consent must be distinct and separate from other customer commitments, may not continue for more than two years, and may be withdrawn pursuant to clear and conspicuous instructions. The VPPA also allows VTSPs to disclose a customer's video information "for the exclusive use of marketing goods and services directly to the consumer" or pursuant to subpoenas, search warrants, or courts orders.

Another exception authorizes disclosures incident to a VTSP's "ordinary course of business," but that term "means only debt collection activities, order fulfillment, request processing, and the transfer of ownership" under the VPPA. The VPPA does not prohibit VTSPs from disclosing customers' names and addresses alone, provided customers have the opportunity to prevent such disclosures.

When video materials were still recorded on cassette tapes and rented from retail stores, there was little litigation under the VPPA. The cases that did arise mostly concerned efforts by law enforcement and government agencies to acquire PII. The advent of streaming video brought the act back into focus, however, with new suits hitting court dockets around 2011.

In an important early decision involving DVD vendor Redbox, the Seventh Circuit Court of Appeals held that no private right of action exists to enforce the requirement that VTSPs destroy PII in a timely fashion.[5] Then, in 2012, a Northern District of California court became the first to consider the VPPA in the context of streaming video. The case, In re Hulu Privacy Litigation, has become a bellwether for VPPA suits.

The history of In re Hulu is nearly as involved as that of the VPPA itself. In July 2012, Magistrate Judge Laurel Beeler determined that the Hulu plaintiffs established injury, and thus Article III standing, merely by alleging a violation of the VPPA, without any actual harm or damages.[6] A month later, Judge Beeler denied a motion to dismiss arguing that the Hulu was not a VTSP. The court declined to limit the VPPA to physical video media, rather than "digital distribution," a term that, according to the judge, "did not exist when Congress enacted the statute."[7]

In April 2014, Judge Beeler granted summary judgment to Hulu on claims it disclosed unique customer identifiers to the market analytics company comScore; the unique IDs did not specifically identify a person or her video habits and were thus not actionable under the VPPA.[8]

But the court denied summary judgment over claims that Hulu violated the VPPA by enabling customers to "like" videos on the Hulu website, which "likes" could then be transferred to Facebook. Cookies (specifically, a "c-user" cookie) allowed Facebook to link streaming video URLs, which often contain a video's title, with Facebook IDs — at least for Facebook users logged in by default settings.

In the court's view, Facebook IDs are often more personal, or more personally identifying, than names and other PII, as they reveal users' marital status, employment, political affiliations, etc. The court could not say, as a matter of law and before the close of discovery, that the transmittal of cookies including video titles from Hulu to Facebook did not violate the VPPA.[9]

The initial In re Hulu decisions reverberated throughout the business world. The use of streaming video and "like"-type buttons on websites and mobile applications is already prevalent and continues to expand. In the wake of the Hulu decisions, numerous VPPA class actions have been filed, targeting videos from ESPN, the Cartoon Network, and the Wall Street Journal, among others.

For example, a Wall Street Journal subscriber filed a putative class action against Dow Jones & Company, alleging that its "WSJ Channel" for digital streaming devices (such as Roku) disclosed subscribers' PII to a market analytics company, including records of every video ever viewed.[10] Dow Jones has moved to dismiss, arguing that its PII is anonymous, that the VPPA does not apply to its free service, and that plaintiff suffered no injury in fact.

Then, just last week, Judge Beeler threw some water on the video-privacy fire, denying the Hulu plaintiff's motion for class certification.[11] The plaintiffs proposed a class of Hulu users who streamed video materials while logged into Facebook, theorizing that the c-user cookie transferred the users' Facebook IDs and video titles to Facebook. Judge Beeler, however, concluded that such a class was not ascertainable by any objective evidence. "Whether the c_user cookie was sent to Facebook" depended "on a number of variables including whether the user remained logged into Facebook, cleared cookies, or used ad-blocking software." The court refused to allow proof of such facts by self-reporting or affidavit, fearing inaccuracy in consumers' memories and false testimony motivated by the VPPA's $2,500 damage figure.

Judge Beeler left open the possibility that the Hulu plaintiffs might be able to certify certain subclasses, meaning the case should remain on companies' radars. More recent VPPA filings bear watching, as well. As the Seventh Circuit observed, "[t]he statute is not well drafted,"[12] and the methods by which information transfers between websites are many and complex. Much remains to be settled under the VPPA, and new chapters are sure to be written in the already interesting history of the statute.

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[1] See, e.g., In re Doubleclick Privacy Litig., 154 F. Supp. 2d 497 (S.D.N.Y. 2001); Low v. LinkedIn Corp., 900 F. Supp. 2d 1010 (N.D. Cal. 2012).

[2] See Robins v. Spokeo Inc., 742 F.3d 409, 412-14 (9th Cir. 2014).

[3] See, e.g., Dronenburg v. Zech, 741 F.2d 1388, 1391-98 (D.C. Cir. 1984) (Bork, J.)

[4] Several states also have enacted laws protecting video privacy, some affording greater consumer protections, and the VPPA expressly preempts only those state laws that "require" disclosures prohibited by the federal act. Connecticut, for example, prohibits the disclosure of video rental information outright, while Michigan's law reaches written materials and sound recording rentals, as well as video recordings. See Conn. Gen. Stat. § 53-540; Mich. Comp. Laws § 445.1712.

[5] Sterk v. Redbox Automated Retail LLC, 672 F.3d 535, 538-39 (7th Cir. 2012) (Posner, J.).

[6] In re Hulu Privacy Litig., (N.D. Cal. June 11, 2012).

[7] In re Hulu Privacy Litig., (N.D. Cal. Aug. 10, 2012).

[8] In re Hulu Privacy Litig., (N.D. Cal. Apr. 28, 2014).

[9] Id.

[10] Locklear v. Dow Jones & Co. Inc., Case No. 14-cv-00744 (N.D. Ga. March 13, 2014).

[11] In re Hulu Privacy Litig., No. C 11–03764 LB (N.D. Cal. June 16, 2014).

[12] Sterk, supra n.5, at 538.
