The Video Protection Privacy Act: Risks And Considerations When Enabling A "Like" Button On Web-Based Video Content

In a recent seminal decision in the action *In re: Hulu Privacy Litigation* ("*Hulu*"), No. C 11-03764 LB (N.D. Cal. filed June 17, 2014), the Northern District of California denied class certification, *without prejudice*, to a putative class alleging that a 'Like' button enabled on Hulu's web-based video viewing page disclosed their video selections and personal information to Facebook in violation of the Video Privacy Protection Act of 1988 (the "VPPA"), 18 U.S.C. § 2710. In denying class certification, the *Hulu* court left open the prospect of certifying a refined class (or subclasses) and it has set a briefing schedule and hearing date for the plaintiffs' renewed motion for class certification.

What is the VPPA?

The VPPA has it origins in the hotly contested debate in 1987 over President Ronald Reagan's nomination of Judge Robert H. Bork for the United States Supreme Court. In the midst of this debate, Judge Bork's video rental history was leaked to the media, and a Washington weekly newspaper published "a profile" of the judge based on the titles of 146 movies that his family rented from a video store. Congress responded to this disclosure by enacting the VPPA.

The VPPA prohibits a "video tape service provider," meaning "any person [] engaged in the business" of "rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials," from knowingly disclosing "personally identifiable information concerning any consumer" to third parties, except under identified exceptions, such as when (i) the consumer consents to the disclosure, (ii) the disclosure is to law enforcement or pursuant to court order or (iii) the disclosure is "incident to the ordinary course of business of the video tape service provider." 18 U.S.C. § 2710(a), (b). "[T]he term 'personally identifiable information' includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider." *Id.* § 2710(a)(3). An "aggrieved" person may sue for wrongful disclosures, *id.* § 2710(b)-(c), and a court may award "actual damages but not less than liquated damages in an amount of $2,500." *Id.* § 2710(c)(2).

Much of the VPPA's litigation history, especially in class actions, has developed over the last two years. This can likely be attributed to two things: first, it is now customary for web-based companies to collect "cookies" and user IDs and to share that information with web analytics companies or advertisers (often for a profit); second, via the aggregation of statutory damages claims in class actions, plaintiffs can allege a potentially enormous recovery. Plaintiffs recently brought class actions under the VPPA against several major video content providers.

How Hulu Allegedly Violated the VPPA

Hulu is a web-based company that provides on-demand streaming video of television shows, movies and other video content licensed from networks and studios. Hulu offers a free service to users that allows them to watch content on their computers, and it also offers a paid service called "Hulu Plus," which includes more content and allows users to view that content on such devices as tablets and smart phones. Hulu makes most of its revenue from advertisers, who pay for Hulu to run commercials at periodic breaks during video playback, and from monthly premiums paid by Hulu Plus members.

The plaintiffs, alleged Hulu users, claim that Hulu violated the VPPA by sharing information with Facebook that identifies the specific videos that they watched. Specifically, the web page where Hulu users watched videos included a Facebook "Like" button. The plaintiffs contend that, when users clicked on the button, Hulu would send to Facebook, among other things, (i) a URL containing the *title* of the video watched by the Hulu user and (ii) a "cookie" identifying the Facebook ID of any user who logged into Facebook in the previous four weeks (using default setting) from the same computer and using the same web browser. Hulu argued that this information was not transmitted for Hulu users who blocked or cleared cookies or who were not logged into Facebook when viewing video content.

No Definite and Ascertainable Class

Although there is no explicit requirement regarding class definition in Rule 23, numerous courts have held that a class must be "adequately defined" and "clearly ascertainable" to be certified. *E.g.*, *Elliott v. ITT Corp.*, 150 F.R.D. 569, 574 (N.D. Ill. 1992); *Marcus v. BMW of N. Am.*, 687 F.3d 583, 592-93 (3d Cir. 2012) ("an essential prerequisite of a class action . . . is that the class must be currently and readily ascertainable based on objective criteria."). An identifiable class exists if its members can be ascertained by reference to objective criteria so that it is "administratively feasible" for a court to determine whether a person is a class member. *Hulu*, Op. at 22.

The *Hulu* plaintiffs asked the court to certify a class of Hulu users who were contemporaneous Facebook members and who watched Hulu's videos during the class period:

> All persons residing in the United States and its territories who … were registered users of hulu.com (including, but not limited to, paying subscribers, also known as Hulu Plus subscribers) while being members of Facebook and requested and/or obtained video materials and/or services on hulu.com during the Class Period.

Id. at 3.

The court held that the proposed class is not ascertainable. But, before reaching the issue of ascertainability, the court considered whether the class could be identified or adequately defined. It said that the class could likely be identified by cross-referencing the records (*e.g.*, email addresses) of Hulu users and Facebook members. However, the court concluded that the class was too broad as presently defined because it included Hulu users whose information may not have been transmitted to Facebook because, for example, they did not use the same browser to watch videos on Hulu and log into Facebook or they set their browser to clear cookies.

The court recommended that the plaintiffs may address this issue by "refining the class definition or designating subclasses." *Id.* at 23. For instance, a potential "class definition is registered Hulu users who at least once during the class period watched a video on hulu.com having used the same computer and web browser to log into Facebook in the previous four weeks using default settings" or subclasses may "account for whether the user manually clears cookies, sets browser settings to clear cookies, or uses software to clear cookies." *Id.*

Although this approach could help define the class, as the court noted, the only way to ascertain who is in the class (or subclasses) is self-reporting by affidavit. It concluded that such self-reporting could be problematic for many reasons. First, the large amount of potential recovery for each class member (*i.e.*, $2,500) creates an incentive for claimants to be dishonest in their affidavits. Moreover, many putative class members certainly do not recall their precise browsing habits during the class period, so they could not reliably "establish by affidavit the answers to the potential questions: do you log into Facebook and Hulu from the same browser; do you log out of Facebook; do you set browser settings to clear cookies; and do you use software to block cookies?" *Id.* at 26. And, of course, this memory problem is compounded by the incentives that putative class members have to associate with a class or subclass.

The court denied the plaintiffs' class certification *without prejudice* and suggested that the problems in ascertaining the class "could be resolved by narrowing the class definition, by defining subclasses, by reference to objective criteria, [or] by a damages analysis that addresses pecuniary incentives[.]" *Id.* Since the court denied class certification based on ascertainability without prejudice, it addressed the remaining Rule 23 requirements.

Consideration of the Rule 23 Requirements

It is well-known that, under Rule 23(a), plaintiffs seeking class certification must show that four prerequisites—numerosity, commonality, typicality and adequacy of representation—are satisfied. Fed. R. Civ. P. 23(a). In addition to this threshold burden, plaintiffs must "show that at least one of the three criteria enumerated in Rule 23(b) is satisfied." Fed. R. Civ. P. 23(b). The *Hulu* plaintiffs invoked Rule 23(b)(3), which requires a finding that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

RULE 23(A) PREREQUISITES

The *Hulu* court found that the Rule 23(a) prerequisites were satisfied. Numerosity and adequacy were not contested. As for the other prerequisites, the court found that common questions of law and fact existed. Namely, "[b]y resolving the issues about whether transmission of the Facebook cookies" "identified a consumer and whether the URLs conveyed video titles, the court can resolve issues central to the viability of the class members' common statutory claim that Hulu violated the VPPA by disclosing their [personally identifiable information] to Facebook." *Hulu*, Op. at 28. The court also determined that the plaintiffs' claims are typical of absent class members because they "involve the same statutory violation and the same injury: disclosure of their [personally identifiable information] (in the form of the Facebook ID cookies) and the name of the video." *Id.* at 30. In considering both commonality and typicality, the court rejected Hulu's argument that factual questions, such as whether the plaintiffs cleared cookies, affected the analysis under Rule 23(a); it addressed those issues in its Rule 23(b)(3) analysis.

RULE 23(B)(3): PREDOMINANCE AND SUPERIORITY

The *Hulu* court held that the plaintiffs could not satisfy predominance or superiority on the present record. Hulu claimed that five issues defeated predominance; the court agreed with Hulu on one. It held that "substantial issues" about "clearing and blocking cookies mean[s] that the court cannot conclude on this record that the common issues predominate over the individual ones." *Hulu*, Op. at 36. The court suggested that subclasses might be used to address the cookie clearing and blocking issue but questioned whether subclasses could cure the issues with ascertainability. Regarding the

other issues that Hulu raised to defeat predominance, the court said that (i) registering with Hulu under a pseudonym is immaterial, (ii) watching videos on Hulu while logged into Facebook or posting that a user "Liked" a video on Facebook does not constitute "informed, written consent" for disclosure required under the VPPA, 18 U.S.C. 2710(b)(2), and (iii) allowing someone to use one's Hulu account does not mean that a Hulu user cannot complain about the disclosure of his or her information in violation of the VPPA.

The court further held, "based on [its] holding that a class is not ascertainable on this record, class treatment is not superior." *Hulu*, Op. at 37. But the court also noted that several factors support superiority, such as the amount of the individual statutory damages and the plaintiffs' common theory of liability—"[e]ither Hulu transmitted [personally identifiable information] by its policy and practice regarding loading of the Like button, or it did not." *Id.*

Conclusion

It will be interesting to see whether the plaintiffs can follow the guidance offered by the *Hulu* court to cure the defects in ascertainability and to satisfy the Rule 23(b)(3) requirements. In any event, individuals and companies that offer web-based video content should consider whether they are transmitting information to analytics companies or social media web sites, which can identify the specific material being viewed by a person, all of which may be in violation of the VPPA.

For more information about the topics addressed here or any issues related to the Video Privacy Protection Act, please contact the author listed below.

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