

VPPA Update: Federal Litigation

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Agenda

- Overview/Status
 - Video Privacy Protection Act
 - Recent litigation
- Highlights of key issues
 - What is PII?
 - Who is a consumer/subscriber?
 - Knowledge requirement
 - Class certification
- Next new development on the horizon

Video Privacy Protection Act (VPPA)

- A “video tape service provider” is liable if it “knowingly” discloses to any person “personally identifiable information” concerning any consumer
- Personally identifiable information “includes information which identifies a person as having requested or obtained specific video materials or services”

VPPA Litigation

Video Tape Service Provider



Video Title

+

Unique Identifier

→

Third Party



Roku ID



IDFA



Android ID



Cookie ID



Google Analytics

comSCORE.

bango

Status of Cases

- Many of the cases are on appeal
 - *Hulu*
 - *Dow Jones*
 - *Nickelodeon*
 - *ESPN*
 - *Cartoon Network* (important hearing last week in the 11th Circuit)



What is Personally Identifiable Information (PII)?

- Positive trend from courts
 - Disclosure of Device or Unique ID + video viewing information **without more** ≠ PII
 - *Cartoon Network, Dow Jones, ESPN, Nickelodeon*
- However, the picture may be more complex
 - Context may matter
 - Facebook ID in the hands of Facebook could = PII (*Hulu*)
 - *Gannett*: Device ID **without more** could = PII
 - Identifying an object could be same as identifying a person (e.g., home address describes an object)
 - No public database linking the ID to a person required (e.g., SSN)

Who is a Consumer/Subscriber?

- Consumer is a “renter, purchaser, or subscriber”
- Downloading/Using an App
 - Trend: App user = Subscriber
 - *Cartoon Network, Dow Jones*
 - BUT *Gannett* is again an exception
 - App user is not a subscriber where there is no payment, registration, commitment, delivery, and/or access to restricted content
- Web Site Visitor
 - Casual site user **without more** ≠ Subscriber
 - Sign up, registration, establishing a user ID or profile
 - Payment for content at free site
 - Effect of newsletter sign up? (*AMC*)

Knowledge is Key

- VTSP must know what it is disclosing and what the recipient can do with it.
 - Transmitting the user's identity separately from video title (even if simultaneously), does not necessarily disclose “a user as having requested or obtained specific video materials.” ||
 - No facts to show Hulu actually knew Facebook might combine (a) information about Hulu users, with (b) information about what the users watch.||

Class Certification

- Hulu case shows challenges of certifying certain VPPA claims
 - In web site cases, are people similarly situated?
 - Cookie blockers/clearing cookies
 - Whether logged in while browsing sites
 - Multiple browsers with different settings
- Would certification be easier in app context?

Coming Soon

- Waiting for Supreme Court ruling in *Spokeo*
 - Important damages/standing issue
 - Is violation of a statute without a separate injury enough to confer standing in Federal Court?
 - What happens to VPPA cases in federal courts?

