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Cutting the Cord on Video Privacy Protection Act Claims – The Emerging Non-Consumer Defense

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Blockbuster Video may be extinct, but an obscure law designed to protect the privacy of video-tape renters is very much alive—the Video Privacy Protection Act ("VPPA"), 18 U.S.C. § 2710, et seq. Enacted in 1988 after The Washington Post published a profile of Supreme Court nominee Robert Bork's video-rental history, VPPA prohibits any "video tape service provider" from knowingly disclosing a consumer's personally identifiable information ("PII") to a third party without the consumer's express consent. The VPPA entitles prevailing plaintiffs to liquidated damages of $2,500 per violation.

In recent months, dozens of companies with an online media presence have faced an onslaught of VPPA lawsuits. The vast majority of VPPA suits follow a similar playbook: plaintiffs with a Facebook account allege they watched a video on defendant's website, and further claim the website transmitted their video-viewing history to Facebook via an embedded tracking pixel on the website. According to these plaintiffs, the tracking pixel discloses information to Facebook that enables an ordinary person to identify a specific person's viewing-viewing activities, including the videos watched. Because VPPA lawsuits are almost always filed as class actions, they present a serious threat to defendants who must contend with VPPA's $2,500 damages provision—multiplied by all similarly situated persons in the United States.

While defendants have repeatedly tried to dismiss these VPPA "pixel" lawsuits at the pleading stage, federal courts have, for the most part, denied motions to dismiss and allowed such claims to proceed to discovery. However, a recent decision from the Northern District of California may signal a new trend that indicates courts will dismiss VPPA claims brought by plaintiffs who are not "consumers" under VPPA. VPPA defines "consumer" as "any renter, purchaser, or subscriber of goods or services from a video tape service provider." 18 U.S.C. § 2710(a)(1).

In Jefferson v. Healthline Media, Inc., 2023 WL 3668522 (N.D. Cal. May 24, 2023), the plaintiff sued the owner of a website that provides articles and video content to users. The plaintiff alleged she is an active Facebook and Instagram user who watches videos on Healthline's website, using the same browser that she uses to login to Facebook. She further alleged Healthline used a pixel to collect the title of each video she viewed on the website and then sent her video-viewing information

to Facebook without her consent. Healthline moved to dismiss the VPPA claim on the ground the plaintiff did not qualify as a “consumer” under the Act.

The court agreed with Healthline and granted its motion to dismiss. Specifically, the court found plaintiff did not adequately allege she is a “consumer” within VPPA because she did not say she is a “renter” or “purchaser” of Healthline’s goods or services. Further, the plaintiff did not plausibly allege she is a “subscriber” of Healthline’s goods or services. Although the plaintiff alleged she gave Healthline her name and email address to subscribe to Healthline’s email list, the court concluded that was not enough. Consequently, the court dismissed the VPPA claim.

PUTTING INTO PRACTICE: The Healthline decision suggests that a VPPA claim will fail if the plaintiff does not plead facts showing some type of business relationship existed with the defendant before viewing videos on the defendant’s website. Simply accessing a website and watching a video—without more—may not suffice to make a person a “consumer” under VPPA. Under the logic of Healthline, there must be some nexus between a would-be subscriber and the defendant’s provision of video content. Time will tell whether Healthline is an outlier or a indication of a more favorable landscape for VPPA defendants. But the “non-consumer” defense could pave the way for defending VPPA claims more vigorously at the pleading stage.

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