

Hulu Scores a Victory (at least temporarily) in Avoiding Class Certification

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Another important decision has been rendered in the ongoing *In re: Hulu Privacy Litigation* saga pending in the United States District Court for the Northern District of California, this time denying – without prejudice – the proposed certification of a class of Hulu users pursuing claims involving Hulu’s allegedly wrongful disclosure of “cookies.” This class certification decision comes hot on the heels of the *Hulu* court’s denial of summary judgment in favor of Hulu back in April, when the court found there to be a material issue of fact on the issue of whether the disclosure of a video name tied to an identified Facebook user was a prohibited disclosure under the Video Privacy Protection Act, 18 U.S.C. §2710 (“VPPA”), which prohibits a “video tape service provider” from knowingly disclosing “personally identifiable information of a consumer of the provider” to third parties.

The key factual allegations in this case are as follows. Plaintiffs allege that at all times relevant to their claims, Hulu included a Facebook “Like” button on the “watch” page of Hulu’s users, and that under certain circumstances, the code that loaded and operated this “Like” button caused the browser of the Hulu user to send to Facebook, among other things, a URL of the user’s watch page (which would indicate the name of the video that the Hulu user accessed) and under certain circumstances, a cookie called the “c_user” cookie that enabled Facebook to link information identifying the Hulu user with that Hulu user’s video choices.

But there was also an additional factual wrinkle, and one that ultimately proved critical to the *Hulu* court’s denial of plaintiffs’ proposed class: the c_user cookie would only be transmitted to Facebook if the Hulu user used the same computer and same browser to log into Facebook within the four previous weeks and selected Facebook’s “keep me logged in” option.

In addition, the c_user cookie would not be transmitted to Facebook if the Hulu user deleted, blocked or otherwise cleaned his or her cookies after using Facebook and prior to accessing Hulu.

In denying class certification, the *Hulu* court concluded that the proposed class articulated by the plaintiffs satisfied the numerosity, commonality,

typicality and adequacy of representation requirements for class certification but did *not* meet the class action prerequisites of ascertainability or predominance. The *Hulu* court made quite clear, however, that it would willingly entertain the possibility of certifying subclasses of plaintiffs, and even mused, in dicta, about some possible subclasses for plaintiffs to consider exploring.

The *Hulu* court closely focused on the impact that individual practices of the proposed class members would necessarily have on the requirements of ascertainability and predominance. For example, because Hulu users could only qualify as class members if they actually had their PII transmitted to Facebook (meaning that the user's c_user cookie was sent by Hulu to Facebook), to meet the ascertainability requirement, the plaintiffs needed to (and did not) propose an adequate method of identifying a class of users who accessed Facebook within a month of using Hulu, checked the "keep me logged in" button, and did not clear cookies, either manually or otherwise. The *Hulu* court specifically rejected the plaintiff's suggested method of ascertaining class members through the combined use of broad notice and a self-reporting affidavit, noting concerns with both reliability of that data and the incentives inherent in a per-violation penalty of \$2,500. The *Hulu* court concluded that at least on the current record, it could not tell how potential class members reliably could establish by affidavit the answer to questions such as whether they looked at Facebook and Hulu from the same browser, whether they logged out of Facebook or whether the user's cookies were cleared, manually or otherwise. Similarly, on the baseline class action requirement that common questions of fact or law "predominate" over questions affecting only individual class members, the *Hulu* court concluded that the plaintiffs' main stumbling block was cookie clearing or cookie blocking, because the record was clear that if the c_user cookie was cleared, then it could not be transmitted to Facebook when the Like button was loaded. After noting these potential challenges, the *Hulu* court again suggested the possibility of overcoming these hurdles through narrower subclasses, or through the use of reference to objective criteria or an approach to damages that abated the risk of undue pecuniary incentives.

In light of the *Hulu* court's signaling of its willingness to consider subclasses or other approaches that would permit class certification, we would expect to see the plaintiffs try for another bite at the apple. We will be watching this closely, and will keep readers posted on any important developments as they unfold.

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