

## Class Certification Denied to Hulu Users in Video Privacy Claim

JUNE 25, 2014

A California federal judge disallowed the certification of a class action which had accused Hulu LLC of violating the Video Privacy Protection Act by sharing viewers' information with third parties. Finding a "lack of ascertainability", the judge concluded that there was no clearly objective way to determine which users' data could have been obtained by a third-party, namely Facebook.

U.S. District Judge Laurel Beeler denied class certification, without prejudice, to plaintiffs seeking to represent all U.S. residents who, from April 21, 2010 through June 7, 2012, were registered users of Hulu.com, including Hulu Plus subscribers, and who requested and/or obtained video materials and/or services on Hulu.com.

The lawsuit had accused the company of illegally tracking users' online activity via "zombie cookies" that re-spawned even when users cleared their Internet browsing histories and, consequently, disclosing what they watched to third parties without prior consent. According to the plaintiffs, such behavior violates the Video Privacy Protection Act (VPPA), which prohibits Videotape Service Providers from knowingly disclosing "personally identifiable information" that "identifies a person as having requested or obtained specific video materials or services." The plaintiffs alleged that such information was transmitted to Facebook.

To certify the class, the plaintiffs made the argument that class members could self-report whether they had been logged into Facebook during the class period and if they had taken steps such as clearing their browsing history or using ad-blocking software to negate the cookie, but Judge Beeler determined that the approach was unlikely to yield accurate results. Based on these difficulties, the judge maintained that the class was not ascertainable.

"On this record, the court cannot tell how potential class members reliably could 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?" the judge ruled. Based on this lack of ascertainability the judge also found that, "In the end, the substantial issues about remaining logged into Facebook and clearing and blocking cookies mean that the court cannot conclude on this record that the common issues predominate over the individual ones." Similarly, the court held the plaintiffs did not meet their burden of proving superiority because, "based on the court's holding that a class is not ascertainable on this record, class treatment is not superior."

Finally, the court maintained that, “The affidavit seems prone to ... subjective memory problems.” The judge’s concerns relate to the economic incentive presented by the possibility for the class to recover \$2,500 per person in statutory damages for the alleged violations of the VPPA. She added that such economic incentives could further exacerbate the plaintiffs’ “memory problems.”

Despite her doubts, Judge Beeler left available the possibility for the plaintiffs to narrow their class definition to overcome some of the difficulties in proving that Hulu users had established an open link to Facebook that would have facilitated the allegedly unlawful data disclosures.

The case is *In re: Hulu Privacy Litigation*, no.3:11-cv-03764, in the U.S. District Court for the Northern District of California.

**Tip: Consumer class actions are fraught with problems associated with identifying class members in a proposed class action making the ascertainability defense indispensable.**

2 Min Read

---

## Related Locations

Chicago

## Related Topics

Online Privacy

## Related Capabilities

Privacy & Data Security

*This entry has been created for information and planning purposes. It is not intended to be, nor should it be substituted for, legal advice, which turns on specific facts.*