

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
San Francisco Division

IN RE: HULU PRIVACY LITIGATION

Case No. 11-cv-03764-LB

**ORDER GRANTING SUMMARY  
JUDGMENT**

[Re: ECF No. 230]

**INTRODUCTION**

The plaintiffs are viewers of online video content through Hulu, LLC’s Internet-based service. They allege that Hulu wrongfully disclosed their video viewing selections and personal-identification information to a third party: specifically, the social-networking website, Facebook. The plaintiffs claim that Hulu thereby violated the Video Privacy Protection Act of 1988 (“VPPA”), 18 U.S.C. § 2710. (See generally 2d Am. Compl. – ECF No. 83.)<sup>1</sup> The VPPA prohibits a “video tape service provider” from “knowingly” disclosing a user’s “personally identifiable information” to third parties (with certain exceptions that do not apply here). See 18 U.S.C. § 2710. “The term ‘personally identifiable information’ includes information that identifies a person as having requested or obtained specific video materials or services from a video tape

<sup>1</sup> Record citations are to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the tops of the documents.

1 service provider.” 18 U.S.C. § 2710(a)(3).

2 Hulu has moved for summary judgment. (ECF No. 230.) It argues, in sum, that it did not  
3 “knowingly” send Facebook information that could identify Hulu users, and it did not know that  
4 Facebook might read the information that Hulu sent so as to yield “personally identifiable  
5 information” under the VPPA.

6 For the reasons elaborated below, the court grants Hulu’s motion for summary judgment. In  
7 particular, the court finds dispositive the absence of any issue of material fact that Hulu actually  
8 knew that Facebook might combine information that identified Hulu users with separate  
9 information specifying which video that user was watching, so as to “identif[y] a person as having  
10 requested or obtained specific video materials.” The court therefore dismisses the Second  
11 Amended Complaint (ECF No. 83) with prejudice.

## 12 STATEMENT

13 The basic facts about the parties, and how Hulu’s and Facebook’s services and software work  
14 and interact, are undisputed. The parties’ disagreement concerns what Hulu knew, or did not  
15 know, about information that passed between Hulu and Facebook.

### 16 I. THE PARTIES

17 Hulu provides on-demand, online access to television shows, movies, and other pre-recorded  
18 video content from networks and studios through its website, www.hulu.com. (See generally 2d  
19 Am. Compl. – ECF No. 83, ¶¶ 1, 17.) It offers a free service at hulu.com that allows users to watch  
20 video content on their computers. (See ECF No. 178 – Joint Statement of Undisputed Facts  
21 (“JSUF”) #1.)<sup>2</sup> It also offers a paid service called “Hulu Plus” that has more content and allows  
22 viewers to watch Hulu content on other devices such as tablets and smart phones. (Yang Decl. –  
23 ECF No. 125-6, ¶¶ 2, 6.) Plaintiffs Joseph Garvey, Sandra Peralta, Paul Torre, Joshua Wymyczak,  
24 and Evan Zampella each are all registered Hulu users. (See 2d Am. Compl. ¶¶ 1-6.)

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27 \_\_\_\_\_  
28 <sup>2</sup> This JSUF was submitted to support Hulu’s previous summary-judgment motion (ECF No. 130).  
The court uses it here to discuss descriptive background facts that apply equally to the present  
motion.

1 **II. HOW HULU WORKS**

2 Hulu pays license fees to studios, networks, and other rights holders to obtain the video  
 3 content that it offers to its users. (See Yang Decl. – (Yang Decl. – ECF No. 125-6, ¶ 10.) Hulu  
 4 allows users to register for a free Hulu account. (See JSUF #1.) A Hulu user does not need to  
 5 register for a Hulu account to watch videos on hulu.com using a personal computer. (See id. ¶ 4.)  
 6 To register for a Hulu account, the user enters a first and last name, birth date, gender, and an  
 7 email address. (JSUF #1.) Users are not required to provide their legal first and last name during  
 8 registration. (JSUF #2.) In fact, Plaintiff Joseph Garvey registered for his Hulu account in a name  
 9 other than his legal name. (See JSUF #3.) Hulu does not verify the accuracy of the identifying  
 10 information but stores it in a secure location. (Yang Decl. – ECF No. 125-6, ¶ 6.) To register for  
 11 Hulu Plus, the user must provide the same information as a registered Hulu user, along with  
 12 payment information and a billing address. (Id., ¶ 7.) Hulu assigned each new registered Hulu user  
 13 a “User ID,” which is a unique numerical identifier (e.g., 50253776). (JSUF #6; see Tom Dep. –  
 14 ECF No. 157-11 at 37:9-38:12.)

15 Videos on hulu.com are displayed on a video player that appears on a webpage. Hulu calls  
 16 these webpages “watch pages.” (See Yang Decl. – ECF No. 125-6, ¶ 3; JSUF #24.) Hulu wrote  
 17 and deployed the code for its watch pages. (Tom Dep. – ECF No. 157-11 at 108:23-109:8, 175:9-  
 18 16; Wu Dep. – ECF No. 157-6 at 80-84.) The code downloaded to registered Hulu users’ browsers  
 19 when they visited a watch page so that the browser could display the requested web page or video  
 20 content. (Tom Dep. – ECF No. 157-11 at 112:19-113:5.) As described in more detail below, the  
 21 code also allowed information to be transmitted to Facebook. Until June 7, 2012, the URL  
 22 (uniform resource locator, meaning, the web address) of Hulu’s watch pages included the name of  
 23 the video on that page. For example, a watch-page URL might look like this:

24 <http://www.hulu.com/watch/426520/saturday-night-live-the-californians-thanksgiving>  
 25 The number 426520 in this URL is the video ID. (JSUF #24.)

26 In March 2009, Hulu began providing each registered user with a profile web page. (JSUF #9.)  
 27 The first and last name the user provided during registration appears on the page and in the page  
 28 title. (JSUF #10.) Hulu did not allow registered users to decline to share their first and last names

1 on their public profile pages. Until August 1, 2011, a user’s profile-page URL included the user’s  
2 unencrypted Hulu User ID. (JSUF #12.) An example is:

3 [http://www.hulu.com/profiles/u/\[User ID\]](http://www.hulu.com/profiles/u/[User ID])

4 where “[User ID]” is the Hulu User ID. Id. After August 1, 2011, the Hulu User ID was encrypted.  
5 (JSUF #13.) An example is:

6 [http://www.hulu.com/profiles/u/wxu2RqZLhrBtVjYKEC\\_R4](http://www.hulu.com/profiles/u/wxu2RqZLhrBtVjYKEC_R4)

7 (Id.) Hulu did not provide a separate search function (for example, through a search box) to allow  
8 a user to use a Hulu User ID to find the profile page of another user. (JSUF #11.) On May 30,  
9 2013, Hulu discontinued the user profile pages. (JSUF #14.)

10 Hulu makes money from advertising revenue and from monthly premiums paid by Hulu Plus  
11 members. (Yang Decl. – ECF No. 125-6, ¶ 11.) Its main source of income is advertising revenue.  
12 (Id.) Advertisers pay Hulu to run commercials at periodic breaks during video playback. (Id. ¶ 12.)  
13 Advertisers pay Hulu based on how many times an ad is viewed. (Id. ¶ 13.) Hulu must thus gather  
14 information about its “audience size.” (Id.)

### 15 **III. HOW HULU INTERACTS WITH FACEBOOK**

16 Facebook collects information and processes content “shared by its users,” and it provides that  
17 information to marketers (See generally ECF No. 157-12 at 4, 6-9.) Facebook shares its members’  
18 information with marketers so that they can target their ad campaigns. (See id.) Marketers can  
19 “specify the types of users they want to reach based on information that users choose to share.”  
20 (Id.) Advertisement revenue is how Facebook makes money. (See id.)

21 In April 2010, Facebook launched its “Like” button; that August, Hulu added a Facebook Like  
22 button to each hulu.com watch page. (JSUF #18-19.) Certain information was transmitted from  
23 hulu.com to Facebook via the “Like” button. (JSUF #18.) Hulu wrote code for its watch pages that  
24 specified where the “Like” button should be located on the page and where (from facebook.com)  
25 to obtain the code that loads and operates the button. (JSUF #20.) When the user’s browser  
26 executed this code, the browser sent the request to Facebook to load the Like button on the watch  
27 page. (JSUF #21.) Hulu sent Facebook the watch page’s address, so that Facebook knew where to  
28 send code for the Like button so that it could be downloaded, displayed on the watch page, and

1 used. (See Wu Decl. – ECF No. 230-5, ¶¶ 16-20, 25.) From April 2010 to June 7, 2012, the  
2 address for each watch page included the title of the video displayed on that watch page. (See  
3 JSUF #18.) An example is the address containing the Saturday Night Live episode that was  
4 mentioned in the preceding section.

5 If the Hulu user had logged into Facebook using certain settings within the previous four  
6 weeks, the Like button would cause a “c\_user” cookie<sup>3</sup> to be sent to Facebook; c\_user contains  
7 (among other things) the logged-in user’s Facebook user ID expressed in a numeric format. (JSUF  
8 #22; Calandrino Decl. – ECF No. 280-7, ¶ 71.) An example is “c\_user=55431124”; Facebook can  
9 identify this number as a particular Facebook user. (Richard Decl. – ECF No. 287-3, ¶ 40.) Hulu  
10 did not send Facebook the Hulu User ID or the Hulu user’s name when the user’s browser  
11 executed the code to load the Like button. (JSUF #23.)

12 There is no evidence that Facebook took any action with the c\_user cookie. (See, e.g., JSUF  
13 #25.) That said, from April 2010 until June 7, 2012, when the Like button loaded, it would prompt  
14 the user’s browser to send Facebook both the user’s numeric Facebook ID (from the c\_user  
15 cookie) and the title of the video that the user was watching (contained in the Hulu watch-page  
16 address). (Id., §§ 20-22, 24.) The plaintiffs’ expert opines that this transmission enabled Facebook  
17 to link information identifying the user and the user’s video choices to other information about the  
18 particular user. (See Calandrino Decl. – ECF No. 280-7, ¶¶ 57-81.) Again, when a Hulu watch  
19 page loaded with the Facebook Like button, the page prompted a user’s web browser to transmit  
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21 <sup>3</sup> A “cookie” is a file on a user’s computer. (Wu Decl. – ECF No. 230-5, ¶ 13.) Cookies contain  
22 information that identifies the domain name of the webserver that wrote the cookie (e.g., hulu.com  
23 or facebook.com). (Id. ¶ 18.) Cookies have information about the user’s interaction with a website.  
24 (Id.) Examples include how the website should be displayed, how many times a user has visited  
25 the website, what pages he visited, and authentication information. (Id. ¶ 13.) Each web browser  
26 on a computer (e.g., Internet Explorer or Chrome) stores the cookies that are created during a  
27 user’s use of the browser in a folder on the user’s computer that is unique to that browser. (Id.  
28 ¶ 14.) When a user types a website address into her browser, the browser sends: (a) a request to  
load the page to the webserver for that website address; and (b) any cookies on the user’s  
computer that are associated with the website (such as the cookies for hulu.com or facebook.com).  
(Id. ¶ 15.) The remote website server returns the requested page and can update the cookies or  
write new ones. (Id.) The only servers that can access a particular cookie are those associated with  
the domain that wrote the cookie. (Id. ¶¶ 18, 21.) In other words, Hulu can read only hulu.com  
cookies, while Facebook can read only facebook.com cookies; the companies cannot read or write  
to cookies associated with the other service. (Id.)

1 the watch-page address and Facebook c\_user cookie to Facebook-controlled servers. (Id. ¶ 58.)  
2 This happened with the initial Hulu-prompted request from the user’s browser to Facebook before  
3 the browser received any information from Facebook. (Id. ¶ 59.) The two items most salient for  
4 this lawsuit, then — the c\_user cookie and the watch-page URL — were sent to Facebook before  
5 the Hulu user did anything other than load the Hulu watch page.

## 6 GOVERNING LAW

### 7 I. SUMMARY JUDGMENT

8 The court must grant a motion for summary judgment if the movant shows that there is no  
9 genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of  
10 law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Material  
11 facts are those that may affect the outcome of the case. *Anderson*, 477 U.S. at 248. A dispute about  
12 a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for  
13 the non-moving party. *Id.* at 248-49.

14 The party moving for summary judgment has the initial burden of informing the court of the  
15 basis for the motion and identifying those portions of the pleadings, depositions, answers to  
16 interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material  
17 fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To meet its burden, “the moving party  
18 must either produce evidence negating an essential element of the nonmoving party’s claim or  
19 defense or show that the nonmoving party does not have enough evidence of an essential element  
20 to carry its ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*,  
21 210 F.3d 1099, 1102 (9th Cir. 2000); see *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir.  
22 2001) (“When the nonmoving party has the burden of proof at trial, the moving party need only  
23 point out ‘that there is an absence of evidence to support the nonmoving party’s case.’”) (quoting  
24 *Celotex*, 477 U.S. at 325).

25 If the moving party meets its initial burden, the burden shifts to the non-moving party, which  
26 must go beyond the pleadings and submit admissible evidence supporting its claims or defenses  
27 and showing a genuine issue for trial. See Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324; *Nissan*  
28 *Fire*, 210 F.3d at 1103; *Devereaux*, 263 F.3d at 1076. If the non-moving party does not produce

1 evidence showing a genuine issue of material fact, the movant is entitled to summary judgment.  
2 See *Celotex*, 477 U.S. at 323.

3 In ruling on a motion for summary judgment, inferences drawn from the underlying facts are  
4 viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith*  
5 *Radio Corp.*, 475 U.S. 574, 587 (1986).

6 **II. THE VIDEO PRIVACY PROTECTION ACT**

7 The VPPA in relevant part states: “A video tape service provider who knowingly discloses, to  
8 any person, personally identifiable information concerning any consumer of such provider shall be  
9 liable to the aggrieved person . . . .” 18 U.S.C. § 2710(b)(1) (emphasis added). The court has  
10 already determined that Hulu is a “video tape service provider,” and that the plaintiffs were  
11 “consumers,” within the VPPA’s meaning. (ECF No. 68 at 7-9, 11-12.) “Personally identifiable  
12 information” (PII) under this statute “includes information which identifies a person as having  
13 requested or obtained specific video materials or services from a video tape service provider . . . .”  
14 18 U.S.C. § 2710(a)(3).

15 This basic VPPA standard requires two elaborative points. First, the term “knowingly”  
16 connotes actual knowledge. It is not enough, as the plaintiffs suggest, that a disclosure be merely  
17 “voluntary” in the minimal sense of the defendant’s being “aware of what he or she is doing and . .  
18 . not act[ing] because of some mistake or accident.” (See ECF No. 279 at 17-20.) The court has  
19 already decided that “‘knowingly’ means consciousness of transmitting the private information. It  
20 does not merely mean transmitting the code.” (ECF No. 194 at 23.) This is consistent with cases  
21 that have explained the knowledge requirement under the Electronic Communications Privacy Act  
22 of 1986, on which the VPPA was modeled. See *Freedman v. Am. Online, Inc.*, 329 F. Supp. 2d  
23 745 (E.D. Va. 2004); *Worix v. MedAssets, Inc.*, 857 F. Supp. 2d 699 (N.D. Ill. 2012); see also  
24 *Mollett v. Netflix, Inc.*, 2012 WL 3731542 (N.D. Cal. Aug. 17, 2012) (defendant did not  
25 knowingly violate VPPA by streaming video-watching history to devices that bystanders might  
26 view).

27 The second point is to notice that, apart from its knowledge requirement, the VPPA has three  
28 factual components. For there to be an actionable VPPA violation, the video provider must have

1 knowingly disclosed: 1) a consumer’s identity; 2) the identity of “specific video materials”; and 3)  
2 the fact that the person identified “requested or obtained” that material. See 18 U.S.C.  
3 § 2710(a)(3). There are, in other words, three distinct elements here: the consumer’s identity; the  
4 video material’s identity; and the connection between them. The point of the VPPA, after all, is  
5 not so much to ban the disclosure of user or video data; it is to ban the disclosure of information  
6 connecting a certain user to certain videos. Or, in the statute’s exact terms, what is barred is  
7 disclosing information that “identifies a person as having requested or obtained specific video  
8 materials.” 18 U.S.C. § 2710(a)(3) (emphasis added). This may seem obvious. It is nonetheless  
9 worth drawing out, to show exactly how the videotape-era VPPA applies to the Internet service  
10 involved here — and to clearly establish what a triable VPPA claim must include in a situation  
11 like this.

12 The nature of the third element — the connection — distances this Internet-streaming case  
13 from the situations for which the VPPA was enacted. The paradigmatic case, the case that  
14 prompted the VPPA, involved a video store’s giving a Washington Post reporter a list of the  
15 videos that Circuit Judge Robert Bork had rented. (See ECF No. 194 at 12-13 (discussing Judge  
16 Bork case).) In that type of case, the connection between a specific user and the material that he  
17 “requested or obtained” is obvious. If I hand someone a slip of paper with John Doe’s name above  
18 a list of recently rented videotapes, the connection between the two will generally be apparent.  
19 This is all the more so because the information is passed between humans in a natural language.  
20 The recipient can immediately read the note and see the connection. There is an immediate  
21 disclosure of PII.

22 This case is different. The user’s identity and that of the video material were transmitted  
23 separately (albeit simultaneously). By sending those two items Hulu did not thereby connect them  
24 in a manner akin to connecting Judge Bork to his video-rental history; that is, Hulu did not  
25 disclose information that “identifie[d] a person as having requested or obtained specific video  
26 materials.” Unlike in the paradigmatic Judge Bork case, the connection here would be established,  
27 if at all, by an act of the recipient. This means that, even if both elements were sent to Facebook,  
28 they did not necessarily disclose a user “as having requested or obtained specific video materials”



1 unless Facebook combined the two pieces of information. Without Facebook forging that  
2 connection there is no “disclosure” of “personally identifiable information” under the terms of the  
3 VPPA.

4 That a connection is needed for a PII disclosure becomes clearer when we notice that the  
5 connection can break down even in the paradigmatic older case. Let us say that a video-store clerk  
6 gives a local reporter a slip of paper showing only someone’s name. Weeks later, someone else  
7 hands the reporter a list of video titles. There is no obvious connection between the two. In the  
8 VPPA’s terms, no one has tied a person to specific videos. There is consequently no actionable  
9 disclosure of PII. Unless, that is, additional evidence reestablishes the link between name and  
10 titles. If extrinsic proof shows that the reporter and video provider had agreed to separate the  
11 disclosures in place and time, so that the clerk would hand over only the renter’s name, while the  
12 video titles would arrive later by a third-party courier — but that both parties understood how the  
13 name and titles were related — that would supply the connection. The connection in any case must  
14 exist. It is a necessary element of the VPPA — maybe somewhat implicit, as the statute is written,  
15 but still indispensable.

16 Consider too the role of natural language. No one would deny that I would violate the VPPA  
17 by passing someone an encrypted list of Judge Bork’s video rentals — if my recipient and I both  
18 understood that we would use a mutually intelligible code. If, instead, I hand someone only a  
19 garbled collection of alphanumeric strings (which I alone understand to contain someone’s  
20 encrypted video-rental history), there is likely no actionable disclosure. For a disclosure to arise in  
21 the latter scenario, there generally must be proof of further action by the recipient; they must know  
22 that I have used a code and they must at least have the capacity to decode and read the contents. At  
23 the very least, there must be some mutual understanding that there has been a disclosure. Moving  
24 away from natural language, in other words — as we do in this case — requires the recipient to  
25 more actively participate to yield a VPPA-actionable “disclosure.”

26 The upshot of all this describes the VPPA plaintiff’s burden in an Internet-video case like this  
27 one. To state an actionable claim under the VPPA, a plaintiff must prove that the video-service  
28 provider actually knew that it was disclosing: 1) a user’s identity; 2) the identity of the video

1 material; and 3) the connection between the two — i.e., that the given user had “requested or  
2 obtained” the given video material. In terms of this case, if Hulu did not actually know that  
3 Facebook might “read” the c\_user cookie and video title together (yielding something akin to the  
4 list of Judge Bork’s videos), then there cannot be a VPPA violation. This is the conclusion that the  
5 court earlier reached. (See ECF No. 194 at 23-24.)

### 6 ANALYSIS

7 The dispositive point in this case lies in the connection between a user’s identity, sent in the  
8 c\_user cookie, and the title of the videos that that user watched, contained in the watch-page  
9 address. Or, rather, the dispositive point lies in the lack of a known connection between those  
10 things. More precisely, there is no evidence that Hulu knew that Facebook might combine a  
11 Facebook user’s identity (contained in the c\_user cookie) with the watch-page address to yield  
12 “personally identifiable information” under the VPPA. There is consequently no proof that Hulu  
13 knowingly disclosed any user “as having requested or obtained specific video materials or  
14 services.” See 18 U.S.C. § 2710(a)(3).

15 The Governing Law section, above, explains why the VPPA requires proof that three things  
16 were disclosed: a consumer’s identity; the identity of “specific video materials”; and a connection  
17 between the two — that is, that the consumer “requested or obtained” those videos. Before  
18 reviewing the evidence and the parties’ arguments, it may be worth stating that three-part  
19 requirement even more concretely in the terms of this particular case. Hulu’s motion for summary  
20 judgment does this well, and the court borrows Hulu’s explanation:

21 Neither the watch page URL nor the Facebook c\_user cookie by  
22 itself constitutes PII as defined by the VPPA. Hulu’s watch page  
23 URL contains no user data at all, let alone identifying information;  
24 the URL is the same for every user who requests that same video.  
25 (See Wu Decl. ¶¶ 27-30.) And the Facebook c\_user cookie does not  
26 contain any video watch information. Thus, even if Hulu knew that  
27 the c\_user cookie transmitted the Facebook User ID to Facebook . . .  
28 Hulu could not have “knowingly” disclosed PII to Facebook unless  
it knew that Facebook was combining the Facebook User ID with  
the video title embedded in Hulu’s watch page URL.

(ECF 230 at 9-10.) Because there is no evidence of the last element, there is no genuine issue of  
material fact on that element, and the court grants summary judgment in Hulu’s favor.

1 **I. THE PLAINTIFFS OFFER NO PROOF ON THE CONNECTION ELEMENT**

2 The plaintiffs do not establish a genuine issue of material fact showing either that Facebook  
3 combined the c\_user and watch-page information to yield PII, or (more important) that Hulu knew  
4 that Facebook might combine those discrete things to reconstruct PII. The plaintiffs indeed  
5 identify no proof in this regard. They instead argue that they do not have to prove this. (ECF No.  
6 279 at 19-21.) They write: “Plaintiffs need only demonstrate that Hulu voluntarily provided user-  
7 specific information and videos watched to a third party; there is no requirement that Plaintiffs  
8 allege — much less prove that Hulu knew — what that third party might do with that  
9 information.” (Id. at 19.)

10 The plaintiffs first argue that the court has already “expressly rejected” the idea that Hulu must  
11 have known that Facebook would combine the user- and video-identifying data. (Id. at 20.) Their  
12 underlying point seems to be that transmitting both components to Facebook was itself enough.  
13 They write: “this Court has previously held that . . . the data transmitted to Facebook was not ‘two  
14 separate pieces of data.’” (Id. at 20 (citing ECF No. 194 at 22).) They then quote the court’s  
15 statement that, “if a video store knowingly hands a list of Judge Bork’s rented videos to a  
16 Washington Post reporter, it arguably violates the VPPA even if the reporter does not look at the  
17 list.” (ECF No. 279 at 20 (quoting ECF No. 194 at 23).)

18 The plaintiffs are mistaken in two ways. First, the plaintiffs misunderstand the court’s point  
19 when it suggested that, “[i]n contrast to comScore” — another vendor previously relevant in this  
20 case — “where the user was not tied to the video in one transmission, the transmission to  
21 Facebook included the video name and Facebook user cookies.” (See ECF No. 194 at 22.) The  
22 court did not “reject” the idea that a connection between user and video identification is a  
23 necessary element under the VPPA, or assert that “the data [that Hulu] transmitted to Facebook  
24 was not ‘two separate pieces of data.’” (Strictly speaking, the court’s order did not use the term  
25 “two separate pieces of data”; the source of that quotation is unclear.) In reasoning through the  
26 parties’ arguments, and the available facts, the court meant only to contrast the data that had been  
27 supplied to comScore with that supplied to Facebook. Unlike the transmission to comScore, the  
28 court wrote, the “transmission to Facebook included the video name and Facebook user cookies,”

1 so that in the Facebook situation “the link between user and video was more obvious.” (ECF No.  
2 194 at 22.) The court did not say that that link had been conclusively established. To the contrary,  
3 the court immediately observed that whether the link between the two was “disclosed” under the  
4 VPPA “depends on the facts,” facts that the court said had not yet developed because discovery  
5 was still open. (Id. at 22, 26.) The court also noted Hulu’s countervailing point: “that the  
6 information really was not disclosed to Facebook in the sense that the information about Judge  
7 Bork’s video viewing was disclosed to the Washington Post.” (Id.) More simply, the evidence has  
8 always shown and the court has always understood that, although both were sent to Facebook, the  
9 c\_user cookie and the watch-page address are distinct things. (See, e.g., id.) Whether the  
10 transmission is actionable depends on whether the “connection” of the two creates the “disclosure”  
11 of PII that VPPA requires.

12 Second, even in the “arguably” actionable, hypothetical case in which the Washington Post  
13 reporter “does not look” at the list of Judge Bork’s rentals (id. at 23), the posited list contains all  
14 three VPPA elements: the user’s identity; the identity of the videos; and the connection between  
15 them (that is, the fact that the consumer has “requested or obtained” the listed videos). The court  
16 did not “expressly reject” a connection requirement under the VPPA.

17 This ties in to the plaintiffs’ next point. The plaintiffs write: “Hulu’s argument” — i.e., that the  
18 plaintiffs must prove that Hulu knew that Facebook might combine the c\_user and watch-page  
19 data — “is nearly identical to the argument rejected in” *Senne v. Village of Palantine, Ill.*, 695  
20 F.3d 597 (7th Cir. 2012) (en banc). In *Senne*, the Seventh Circuit held that placing “personal  
21 information” on parking tickets that were then placed on windshields, and were thus in public  
22 view, was a disclosure violating the Driver’s Privacy Protection Act, regardless of whether anyone  
23 actually viewed the ticket. But nothing in *Senne* indicates that, in a VPPA case like this one, a  
24 plaintiff need not prove that the consumer’s identity was linked to “specific” videos as those that  
25 she “requested or obtained.” Again, as the court wrote in its earlier order, “disclosure[s] of  
26 information on traffic tickets in public view,” like the one in *Senne*, “transmit obvious PII.” (ECF  
27 No. 194 at 23.) Like the list of Judge Bork’s videos, but unlike the ultimately separate c\_user and  
28 watch-page data here, the connection between the plaintiff driver and his “personal information”

1 was immediately apparent in *Senne*: both were written together on one parking ticket. See *Senne*,  
2 695 F.3d at 599.

3 The plaintiffs do not go beyond their legal arguments on this point to offer proof that Hulu  
4 knew that Facebook might combine the `c_user` and `watch-page` data to construct information that  
5 would identify a user “as having requested or obtained specific video materials or services.”  
6 Without that proof, there is no knowing disclosure of PII. For its part, Hulu has offered affirmative  
7 proof that it did not know what, if anything, Facebook would do with the user-identifying  
8 information in the `c_user` cookie, on the one hand, and, on the other, the video title that could be  
9 gleaned from `watch-page` addresses. (Tom Dep. – ECF No. 230-7 at 130-31, 283, 285-86; Wu  
10 Dep. – ECF No. 280-8 at 96.)<sup>4</sup> For this reason alone, the plaintiffs do not have a triable claim  
11 under the VPPA.

## 12 **II. FACTS CONCERNING HULU’S TRANSMISSION OF USER IDENTITIES**

13 The plaintiffs cite various facts to show, more basically, that Hulu knew that it was sending  
14 Facebook users’ identities through the `c_user` cookie. (ECF No. 279 at 21-28.) Hulu denies that it  
15 knew this. (E.g., ECF No. 285 at 7.) Again, there is no dispute that from April 2010 to June 2012  
16 the titles of videos being watched appeared in Hulu’s `watch-page` addresses. The plaintiffs do not  
17 cite the facts discussed below to show Hulu’s knowledge that Facebook might combine these  
18 things to yield PII under the VPPA. They marshal these facts to show only that Hulu knew that,  
19 when the Like button loaded, the `c_user` cookie would send user-identifying information to  
20 Facebook. (See ECF No. 279 at 21-28.) That is, again, only one element of an actionable VPPA  
21 claim. The court addresses these facts to fully account for the evidence before it, and so to fully  
22 consider whether — apart from the issue of a connection between the `c_user` and `watch-page` data  
23 — those facts somehow raise a triable claim under the VPPA.

### 24 **A. Show\_Faces**

25 The plaintiffs first point to the “`show_faces`” attribute of the Like button. (ECF No. 279 at 21-  
26 23.) `Show_faces` is a Facebook-designed feature within the Like button that Hulu could set to  
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28 <sup>4</sup> These citations are to the original page numbers of the Tom and Wu depositions.

1 either show\_faces=true or show\_faces=false. (See id. at 21-22; Richard Decl. – ECF No. 280-8 at  
2 9-10, ¶ 23.) When the Like button loads, if show\_faces=true, then “Facebook identifies the  
3 logged-in user” and “identifies which of the user’s Facebook friends have like[d] the web page”  
4 (ECF No. 279 at 21-22), which necessarily means that they liked the specific video that the user  
5 was watching. Facebook then sends to the Hulu user’s web page the Like button along with  
6 pictures of the user’s Facebook friends who have liked the page. (Id. at 22.) Having been aware of  
7 this feature, the plaintiffs’ argument essentially runs, Hulu must have known that Facebook could  
8 identify Hulu users through the Like button; that is inherent in locating the user’s friends. (See id.  
9 at 22-23.) Moreover, say the plaintiffs, whether this feature is set to true or false is “not relevant.”  
10 (Id. at 22.) Facebook would identify the user in either case. The true or false setting “merely  
11 affected how Facebook used [the] identifier in responding to the Like button request” — meaning,  
12 whether Facebook sent a user’s friends’ pictures to load alongside the Like button. (See id.;  
13 Richard Decl. – ECF No. 287-3 at 11, ¶ 28.1.)<sup>5</sup>

14 The show\_faces feature does not raise a genuine fact issue on the plaintiffs’ VPPA claims. The  
15 only proof of how Hulu implemented this feature lies in Hulu’s source code. That code shows that  
16 Hulu set show\_faces not to true but to false. (Richard Decl. (Ex. 43) – ECF No. 280-51 at 2.)  
17 There is no evidence of what gets sent to Facebook when show\_faces=false. There is no evidence,  
18 in particular, that, when this feature is set to false, Hulu sends Facebook both the user’s and a  
19 video’s identity. Even if that information is sent when show\_faces is set to false, there is no proof  
20 that Hulu knew this.

21 The plaintiffs argue that whether Hulu set show\_faces to true or false is “not relevant.” (ECF  
22 No. 280-4 at 22.) Citing an assertion by their expert, they suggest that user- and video-identifying  
23 information would have been sent to Facebook whether this feature was set to true or false. (Id.;  
24 see Richard Decl. – ECF No. 280-8 at 11, ¶ 28.1.) But the plaintiffs’ expert never shows this. He  
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26 <sup>5</sup> Hulu makes numerous objections to the testimony of the plaintiffs’ expert, Dr. Golden Richard,  
27 on the topic of the show\_faces feature and other items. (See ECF No. 285 at 10-11, 13 nn. 2-3, 15  
28 nn. 5-6, 17-18 nn. 7-8.) The court does not rule on these objections. Even considering Dr.  
Richard’s testimony, for the reasons given throughout this order, the court holds that the plaintiffs  
have not raised a genuine issue for trial.

1 does not empirically prove that show\_faces=false would send Facebook information amounting to  
 2 a disclosure of PII. He does not identify documentation stating that show\_faces=false would send  
 3 user-identifying information to Facebook. He did not test the false setting to determine what Hulu  
 4 would send Facebook in that configuration. (See id. at 10-11, ¶¶ 26-28.2.) He asserts that the  
 5 setting “merely affected how Facebook used [a user’s] identifier in responding to the Like button  
 6 request.” (Id. at 11, ¶ 28.1.) (That is, the false setting would tell Facebook not to display a user’s  
 7 friends’ pictures — but Facebook would still combine the user’s and video’s identifying  
 8 information.) Assert, however, is all that the plaintiffs’ expert does on this point. (See id.) Raw  
 9 assertion does not raise a genuine issue under Rule 56. See, e.g., Taylor v. List, 880 F.2d 1040,  
 10 1045-46 (9th Cir. 1989) (“A summary judgment motion cannot be defeated by relying solely on  
 11 conclusory allegations unsupported by factual data.”); Hardwick v. Complete Skycap Servs., Inc.,  
 12 247 F. App’x 42, 44 (9th Cir. 2007) (“unsupported assertions” insufficient to overcome summary-  
 13 judgment motion); see also Warren v. Shaw Grp., Inc., 825 F. Supp. 2d 1052, 1053 (D. Nev.  
 14 2011) (“A principal purpose of summary judgment is ‘to isolate and dispose of factually  
 15 unsupported claims.’” (quoting in part Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986))).  
 16 There is no proof that goes the necessary — indeed, pivotal — further step of showing that Hulu  
 17 knew that show\_faces=false would disclose that a specific user had watched a specific video.

18 The plaintiffs, through their expert, next point to three exhibits that they say show that “Hulu  
 19 implemented the Like button with the attribute of show\_faces=true.” (Richard Decl. – ECF No.  
 20 280-8 at 11, ¶ 29.) This constitutes part of the evidence showing that “Hulu had direct knowledge  
 21 that its request to Facebook [to load the Like button] included users’ identifiers.” (ECF No. 280-4  
 22 at 21.) The exhibits in question (ECF Nos. 280-14 to -16) reproduce lines of Hulu code within  
 23 which appears the element, show\_faces=true. (E.g., ECF No. 280-14 at 5.) All three documents  
 24 carry the appellation “site-tf.” Hulu has explained that this “tf” tag shows that the code applies to  
 25 Hulu’s Japanese website (ECF No. 285 at 13); the plaintiffs have not contradicted that assertion.  
 26 These documents do not prove that Hulu set show\_faces to true for the U.S. services involved in  
 27 this case.

28 The plaintiffs also point to an email thread in which Hulu employees appear to discuss the

1 aesthetic effects of loading a user’s friends’ faces around the Like button. (See ECF No. 280-8 at  
2 11-12, ¶¶ 30-31; ECF No. 280-11 (exhibit).) But, as the plaintiffs’ expert himself describes  
3 matters, these emails “discuss[] the display” of “the Like button with show\_faces=true.” (ECF No.  
4 280-8 at 11, ¶ 30.) The only evidence, again, is that when it implemented this feature Hulu set it to  
5 false. These emails do not show that Hulu knew anything about what information would be sent to  
6 Facebook under the false configuration. These emails do show that Hulu employees were  
7 generally aware of how the Like button would display “with show\_faces=true,” and, to that  
8 extent, the court considers them.

9 The plaintiffs insist that the show\_faces evidence permits a “reasonable inference” that Hulu  
10 knew that it was sending Facebook PII. It is, after all, obvious that show\_faces=true enables  
11 Facebook to determine which videos a specific user is watching; otherwise, it could not display  
12 that user’s friends as having like that video. More broadly, the plaintiffs urge, “we all know” how  
13 these sorts of Internet services work: personal information is constantly shared and connected. The  
14 court agrees that it would take willful ignorance to pretend otherwise. But a jury cannot be  
15 allowed to pass on liability based on broad hand waves toward what we all know, what we all  
16 expect about how our personal information moves around, and how things generally work in the  
17 age of the Internet. Triable claims must still be rooted in reasonably specific proof about what in  
18 fact was done here, what information was sent and connected here, and what Hulu actually knew  
19 about these things. The plaintiffs’ efforts to prove a prima facie claim — through the source code,  
20 for example, or the quotidian emails among Hulu employees — show that they understand the  
21 need to ground their claims in concrete and particular facts. In the end, though, the show\_faces  
22 evidence suggests at most what Hulu should have known generally about how show\_faces=true  
23 worked. The evidence does not show that Hulu actually implemented show\_faces=true. It does not  
24 show what show\_faces sends Facebook when set to false. And it does not show that Hulu actually  
25 knew, when it implemented show\_faces=false, that (under the plaintiffs’ hypothesis) it was  
26 sending Facebook information connecting an identified user to identified videos. The show\_faces  
27 evidence therefore does not yield a genuine issue for trial.

28



1           **B. Hulu’s “Internal Testing” And “Session Captures”**

2           The plaintiffs next contend that “session captures” from Hulu’s internal testing show that  
3           “Hulu knew that Facebook maintained one or more cookies that identified logged-in Facebook  
4           users.” (ECF No. 279 at 23-24.) (“Session captures” record the actual data sent between a browser  
5           and the Web pages on Hulu.) “For example,” the plaintiffs write, in preparing to launch a “social”-  
6           integration feature with Facebook in 2011, a Hulu tester “captured requests sent from his browser  
7           while he visited a Hulu web page.” (Id. at 23.) “The traffic captures show the Hulu developer’s  
8           own Facebook ID being sent to Facebook in a c\_user cookie when he was logged in to Facebook.”  
9           (Id. at 23; see Richard Decl. – ECF No. 280-8 at 14-16, ¶¶ 37-42.)

10          The court has carefully considered this point and finds Hulu’s responsive analysis in all  
11          respects correct. (See ECF No. 285 at 15-16.) First, at least two of the exhibits that the plaintiffs’  
12          expert cites do not involve the Like button on Hulu’s watch pages; they involve the company’s  
13          different Facebook Connect feature. (ECF No. 280-19 at 2; ECF No. 280-20 at 2.) This feature is  
14          what Hulu was preparing to launch and what it was testing when it generated the subject session  
15          captures. The plaintiffs have excluded the Facebook Connect feature from this litigation; the court  
16          recognized this when it ruled on class certification. (See ECF No. 211 at 30.)

17          Furthermore, the session data do not show that the c\_user cookie contained a user’s Facebook  
18          ID. As Hulu rightly observes, the session captures that the plaintiffs rely upon “include the value  
19          ‘c\_user=55431124.’” (ECF No. 285 at 16; see Richard Decl. 280-8 at 14-16, ¶¶ 39-39.2, 40-41.)  
20          As it happens, “55431124” is a Facebook user ID. There is no proof that anyone at Hulu saw this,  
21          knew generally what c\_user signified, or recognized “55431124” as a Facebook ID — the latter  
22          two things being far from obvious from the face of the data. The plaintiffs’ expert himself had to  
23          conduct additional investigation, though a third website, to determine what “55431124” signified.  
24          (Richard Decl. – ECF No. 280-8 at 15-16, ¶ 40.) There is no proof that anyone at Hulu had reason  
25          to, or actually did, pursue this determination.

26          Finally on this point, nothing about the Facebook Connect session-captures suggests — or  
27          creates an issue of triable fact — that Hulu knew that the c\_user cookie would be sent to  
28          Facebook, and would carry user-identifying information, when the Like button loaded on Hulu’s

1 watch pages. This is true even as the plaintiffs themselves describe this information. (See ECF No.  
2 279 at 23-24.)

3 **C. Hulu and Nielsen Ad-Tracking**

4 The plaintiffs contend that Hulu’s work with the Nielsen Company “show[s] that Hulu knew  
5 that [users’] personal identifiers were being transmitted to Facebook.” (ECF No. 279 at 24.) The  
6 plaintiffs explain:

7 In early 2012, Hulu contracted with the Nielsen Company for  
8 services to help measure the effectiveness of Hulu’s ad delivery.  
9 Richard Decl. [ECF No. 287-3 at 17], ¶ 43. Nielsen informed Hulu .  
10 . . . that the ads being measured would cause requests to be routed to  
Facebook through users’ browsers, so Facebook could use its  
“logged-in cookie” to identify users and provide demographic  
information about them.

11 (ECF No. 279 at 24-25.) The plaintiffs continue: “Hulu’s understanding of the role of the  
12 Facebook cookies in identifying users is confirmed” by the fact that Hulu then “touted” to an  
13 advertiser its ability to track advertising effectiveness through Facebook’s logged-in cookie. (Id. at  
14 25.)

15 This probably does show that Hulu knew that a Facebook cookie could be used to identify  
16 Hulu users. But it shows this in connection with Nielsen-tracked ads. It does not involve the Like  
17 button that is at issue here. This evidence shows Hulu’s knowledge that a Facebook cookie,  
18 sufficient to identify a Hulu user, could be triggered by ads that Nielsen was monitoring for Hulu.  
19 It does not show that Hulu knew that a user-identifying cookie would be sent to Facebook when  
20 the Like button loaded; nor does it show that that cookie might be connected to a watch-page  
21 URL.

22 **D. Previously Submitted Evidence**

23 The plaintiffs also argue that the court has already found — and Hulu has “not rebutted” —  
24 sufficient “fact issues” to warrant submitting their VPPA claim to a jury. (ECF No. 279 at 26-27;  
25 see ECF No. 194 at 24-26.) “For instance,” the plaintiffs correctly write, the court’s previous order  
26 pointed to Hulu emails establishing that “Hulu knew that vendors can place cookies on the user’s  
27 computer.” (ECF No. 279 at 26.) Additionally, “[t]he Court also noted that ‘[e]mails also show  
28 [that] Hulu knew that cookies with identifying information were sent, [and] Hulu’s awareness that

1 vendors could collect data and use it . . . to . . . ‘identify a user in the real world.’” (Id. (quoting in  
2 part ECF No. 194 at 25).) Finally in this vein, and as the court recognized, Hulu’s internal emails  
3 “suggest that Hulu knew that using beacon technology to disclose user data could result in  
4 identification of actual users,” that Hulu “recognized the VPPA implications” of this, and yet  
5 chose to “accept the legal risk of passing identifying data” because of “the business benefits of  
6 these analytics,” at least “so long as it is not passing unique, identifying information . . . .” (ECF  
7 No. 279 at 26-27 (quoting ECF 194 at 25).)

8 The court does not think that these items raise a genuine issue of material fact on the plaintiffs’  
9 specific VPPA claims, however, for several reasons. Primarily, these emails are too general. They  
10 are too general in that they discuss “vendors” in the abstract, and what vendors “can” do; they do  
11 not specifically name Facebook and what Hulu actually did or knew vis-à-vis Facebook. They are  
12 too general again in that none of this information supplies proof of the specific elements involved  
13 in the plaintiffs’ actual claim for relief. They do not address the Like button, the c\_user cookie, the  
14 watch-page URLs, or any connection among these things.

15 With respect to Hulu’s recognizing the possible “VPPA implications” of some of its conduct  
16 and deciding nonetheless to “accept the legal risk,” as Hulu correctly points out, the relevant email  
17 exchange “concerned Nielsen and comScore,” vendors who are “not part of the [plaintiffs’]  
18 remaining VPPA claim.” (ECF No. 285 at 12.) The “beacon technology,” too, had to do with the  
19 earlier claims concerning comScore; it had nothing to do with sending any information to  
20 Facebook. (See ECF No. 194 at 5-6 (explaining comScore’s use of “beacon technology”).) And to  
21 the extent that loading the Like button is akin to beacon technology, again, there is no evidence of  
22 a connection to the watch-page URLs.

23 The court continues to adhere to its previous statement that these emails “suggest[ed] fact  
24 issues” about Hulu’s knowledge. The court made that point, however, in the context of an earlier  
25 motion made before discovery was closed and while other claims were still in play. The court did  
26 not mean to suggest that these items, taken by themselves, would yield a triable claim under any  
27 specific theory of liability — and certainly not under the plaintiffs’ remaining theory, which  
28 makes specific allegations about the Like button, Facebook’s c\_user cookie, and the watch-page

1 URLs. The plaintiffs urge the court not to dismiss these facts as “too general or not specific to  
2 Facebook.” (ECF No. 279 at 27.) In “fact-intensive inquiries involving questions of ‘knowledge,’”  
3 the plaintiffs write, “there will seldom be direct evidence of knowledge . . . and other types of . . .  
4 circumstantial evidence come into play.” (Id.) If this observation is unobjectionable as a general  
5 point, it is nonetheless unconvincing here. The emails to which the plaintiffs point are not  
6 “circumstantial” proof of the specific allegations that remain in play; they are, at best, general  
7 contextual evidence of what Hulu knew, and what steps it took, in other areas that also involved  
8 user-identifying information. In the precise context of the claims before the court, these emails do  
9 not establish a genuine issue of material fact that allows the court to put the plaintiffs’ claims —  
10 which, again, make specific assertions about the Like button, the c\_user cookie, and the watch-  
11 page URLs — before a jury.

12 **E. Hulu’s Privacy Policy**

13 The plaintiffs next point to the following language in Hulu’s “privacy policy”:

14 In addition, if you [i.e., the Hulu user] visit Hulu.com while logged  
15 into one of these services, the third-party service provider may be  
16 able to identify you and to associate the technical information  
provided by your web browser with other information the service  
already has about you.

17 (ECF No. 279 at 26.) “Hulu included [this] statement in a section about connecting with  
18 Facebook,” the plaintiffs write, and it constitutes “Hulu’s public admission that logged-in users”  
19 — meaning those logged into Facebook — “may be recognized by Facebook.” (Id. (emphasis  
20 added).) This fact “alone,” and certainly when “taken together” with the facts discussed above,  
21 sufficiently prove Hulu’s knowledge. (Id.)

22 This policy might help depict a context generally showing Hulu’s knowledge about what sorts  
23 of information “may” be transmitted when a Hulu user is connected to Facebook. But it is  
24 preliminary evidence, which does not establish anything conclusively (save for garden-variety  
25 caution on Hulu’s part), and is too general to “alone” raise a genuine issue of material fact on the  
26 plaintiffs’ specific claims. Neither does it combine with other facts that have been adduced here to  
27 create a genuine issue that Hulu knew that the c\_user cookie would be sent to Facebook, and  
28 would contain information that could identify that user, when the Like button loaded on a Hulu

1 watch page. In the context of what has actually been proved here, this excerpt from Hulu’s privacy  
2 policy does not erect a triable VPPA claim.

3 **F. Filed Complaint**

4 Finally, the plaintiffs urge that Hulu “cannot legitimately argue that it did not have  
5 ‘knowledge’ of its VPPA violations after Plaintiffs filed suit . . . .” (ECF No. 279 at 27.) For this  
6 reason, the court “cannot grant summary judgment as to any claims raised after Plaintiffs’ initial  
7 complaint in this matter was filed.” (Id. at 27-28.) The plaintiffs’ implication seems to be that, if  
8 nothing else did, their complaint gave Hulu knowledge that it was (now speaking broadly)  
9 violating the VPPA.

10 The court finds this somewhat unusual argument unavailing. First, the plaintiffs have not cited  
11 any authority suggesting that the filing of a complaint can itself provide sufficient evidence of an  
12 element necessary to claims raised within that complaint. The court is not aware of any such  
13 authority. Maybe a complaint can supply adequate proof of its own allegations. If it can, though,  
14 the court would need to see clear precedent allowing that. Absent such authority, the court is not  
15 inclined to sign on to this theory.

16 Second, the complaint is too general to supply the “knowledge” proof that the plaintiffs’  
17 existing legal theory would need. The plaintiffs’ extant legal theory involves the several specific  
18 components that that the court has discussed throughout this order: the Like button; the c\_user  
19 cookie; and the title-bearing watch-page URLs. None of the plaintiffs’ complaints mentions these  
20 things. (See ECF Nos. 1, 13, 37, 83.) All other concerns aside, generally suing Hulu for a “VPPA  
21 violation[.]” does not itself yield knowledge that, when the Like button loaded, the c\_user cookie  
22 sent Facebook information that amounted to a disclosure of PII under the VPPA.

23 **CONCLUSION**

24 There is no genuine issue of material fact that Hulu knew that Facebook might link the user-  
25 identifying information in the c\_user cookie with title-bearing watch-page addresses so as to  
26 construct “personally identifiable information” as defined by the VPPA. For this reason, the court  
27 grants Hulu’s motion for summary judgment. The Second Amended Complaint (ECF No. 83) is  
28 dismissed with prejudice.

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This disposes of ECF No. 230.

**IT IS SO ORDERED.**

Dated: March 31, 2015



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LAUREL BEELER  
United States Magistrate Judge