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The Second Circuit Forecloses VPPA Claims Based on Transmission of Information Through the Meta Pixel

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Despite the avalanche of lawsuits and enforcement actions related to tracking technology, companies can take at least some solace in a recent decision curtailing Video Privacy Protection Act (VPPA) lawsuits. On July 28, the U.S. Court of Appeals for the Second Circuit denied a petition for *en banc* review of its May 1, 2025, decision affirming an Eastern District of New York court's order in *Solomon v. Flipps Media, Inc. d/b/a Fite, d/b/a Fite TV*,^[1] dismissing a putative class action alleging violations of the VPPA.

This victory, however, should be read in light of the recent significant increase in California Invasion of Privacy Act claims after efforts to amend the law stalled in the California legislature and after a jury found Meta liable for potentially substantial damages for violating that law. Further, regulators have focused on tracking technologies, including recent enforcement actions by the California Privacy Protection Agency costing entities millions of dollars. These recent developments are a reminder that the decision to implement tracking technologies is no longer just a marketing decision. It is a decision that has significant legal impact that can cost companies millions of dollars.

Nonetheless, the Second Circuit's recent VPPA decision is significant and beneficial for defendants. Below, we provide an overview of the decision and its context.

Background

In *Flipps Media*, plaintiff Detrina Solomon, a subscriber to defendant *Flipps Media*'s streaming service, sued the company claiming it violated the VPPA by deploying the Meta Pixel on its website, and allowing it to share her video viewing information with Meta without her consent. The video viewing information that allegedly was shared consisted of the URL containing the title to a video contained on webpages she allegedly visited along with her Facebook ID number (FID), which identified her Facebook profile. *Flipps Media* filed a motion to dismiss in response to the lawsuit on the basis that the complaint failed to plausibly allege *Flipps Media* disclosed "personally identifiable information" under the VPPA.^[2] *Flipps Media* argued that it did not share "personally identifiable information"^[3] because the information transmitted by the Pixel consisted of lines of code containing a sequence of characters, letters, and numbers which were not interpretable by an ordinary person.

On September 30, 2023, the district court granted the motion and dismissed the complaint. In its ruling, the district court adopted the "ordinary person" standard for determining "personally identifiable information" under the VPPA. Under the "ordinary person" standard, which had been previously adopted by the Third Circuit in *In re Nickelodeon Consumer Priv. Litig.*^[4] and the Ninth Circuit in *Eichenberger v. ESPN, Inc.*^[5] only information "that

would readily permit an ordinary person to identify a specific individual's video-watching behavior" qualifies as "personally identifiable information" under the VPPA. [6] This "ordinary person" standard, has not been followed by the First Circuit. In *Yershov v. Gannett Satellite Info. Network, Inc.*, [7] the First Circuit adopted a "reasonable foreseeability" standard, which simply requires proof that the information being shared was reasonably and foreseeably likely to reveal the identity of an individual and the videos that individual viewed or requested.

In *Flipps Media*, the district court adopted the "ordinary person" standard, rather than the "reasonable foreseeability" standard and found the lines of code containing the URL and FID that were transmitted to Meta could not be interpreted by an ordinary person as disclosing the identity of the plaintiff and the videos she watched. Accordingly, the district court found the complaint could not plausibly allege the sharing of "personally identifiable information" and dismissed the complaint. The district court also denied the plaintiff's motion seeking leave to amend.

Appeal to the Second Circuit

On October 27, 2023, plaintiff appealed the order, dismissing her complaint to the Second Circuit. In her appeal, the plaintiff's primary argument was that the Second Circuit should adopt "a variation of *Yershov's* reasonable foreseeability standard and hold that 'personally identifiable information under the VPPA encompasses specific information about a consumer, disclosed by a video tape service provider to a particular recipient, that the provider knows the recipient can use to personally identify that consumer.'" [8] Alternatively, the plaintiff argued that the information transmitted by the Pixel met both the "reasonable foreseeability" and "ordinary person" standards for "personally identifiable information."

On May 1, 2025, the Second Circuit issued its first opinion interpreting the definition of "personally identifiable information" under the VPPA, affirming the dismissal of the plaintiff's complaint. In the opinion, the Second Circuit examined both the "reasonable foreseeability" and "ordinary person" standards, and concluded that the language, legislative history, and specific context of the VPPA dictate that the statute precludes knowingly disclosing information that would allow an ordinary person to identify a specific person's video-watching behavior, not information "that only a technology sophisticated third-party" could use to identify specific customers. [9] In particular, the Second Circuit held that the VPPA's focus is on what the disclosing party provides, not what the recipient can do with the disclosed information. Applying the "ordinary person" standard, the court found that lines of code displaying the video title, URL, and the plaintiff's FID could not be read by an ordinary person to identify the specific videos on *Flipps Media's* website the plaintiff had watched. In reaching this conclusion, the Second Circuit focused on the characters, numbers, and letters interspersed within the words of the title and ruled it "implausible that an ordinary person would understand, with little or no extra effort ... the video title." [10] As for the FID, the court found that the FID "would be just one phrase embedded in many other lines of code" and therefore it was "not plausible" that an ordinary person would see the phrase, conclude it was a person's FID, and use it to access the person's Facebook profile. [11]

Request for *En Banc* Review

The plaintiff filed a petition for *en banc* review of the Second Circuit's ruling. In the petition, the plaintiff challenged the court's adoption of the "ordinary person" standard as being contrary to the text and purpose of the VPPA. The plaintiff argued that the "reasonable foreseeability" standard, which would focus on whether Meta, as

opposed to an ordinary person, could interpret the information the Pixel transmitted, should be applied. The plaintiff further argued that the review of the court order was necessary because the decision had “effectively shut the door for Pixel-based VPPA claims.”

On July 28, 2025, the Second Circuit denied the plaintiff’s request for an *en banc* review. The plaintiff now has until October 26, 2025, to file a petition for certiorari with the U.S. Supreme Court.

Takeaways

The *Flipps Media* decision is the first circuit court ruling to apply the ordinary person standard to VPPA claims premised on information transmitted by the Meta Pixel. This commonsense approach is welcomed by digital streaming companies, the news media, and entities that offer video clips on their websites. Businesses now have the trio of cases, *Nickelodeon*, *ESPN*, and *Flipps Media*, to combat VPPA claims at the pre-answer motion to dismiss stage. While a petition to the Supreme Court may still occur, the sound reasoning of the Second, Third, and Ninth Circuits should prevail and put an end to VPPA claims premised on the transmission of information through the Meta Pixel.

Despite the *Flipps Media* decision, businesses that employ tracking technologies should understand the technologies being deployed and the various type of data being shared in order to reduce the risks of additional lawsuits being pursued under different theories.

[1] *Solomon v. Flipps Media, Inc. d/b/a Fite, d/b/a Fite TV*, No. 2:22-cv-05508 (E.D.N.Y. 2022).

[2] The defendant also argued that the complaint did not plausibly allege that the plaintiff is a “consumer” of a “video tape service provider” as those terms are defined by the statute. The trial court rejected this argument and it was not substantively addressed on appeal.

[3] The VPPA does not specifically define “personally identifiable information” (PII). Instead, it states that PII under the statute “includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider.” 18 U.S.C. § 2710(a)(3).

[4] *In re Nickelodeon Consumer Priv. Litig.*, 827 F.3d 262, 267 (3d Cir. 2016).

[5] *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 985 (9th Cir. 2017).

[6] *See In re Nickelodeon Consumer Priv. Litig.*, 827 F.3d at 267; *Eichenberger*, 876 F.3d at 985.

[7] *Yershov v. Gannett Satellite Info. Network, Inc.*, 820 F.3d 482, 486 (1st Cir. 2016).

[8] *Solomon v. Flipps Media, Inc. d/b/a Fite, d/b/a Fite TV*, 136 F.4th 41, 51 (2d Cir. 2025).

[9] *Solomon*, 136 F.4th at 52.

[10] *Id.* at 54.

[11] *Id.*

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