2nd Circ. Limits VPPA Liability, But Caveats Remain

By **Caren Decter and Michael Salik** (June 2, 2025)

Caren Decter

Michael Salik

Over the last several years, there has been a wave of lawsuits targeting streamers and digital media companies, alleging that their use of website pixels — e.g., the Meta and TikTok pixels — causes subscribers' video viewing history to be shared with third parties, which is in violation of the Video Privacy Protection Act.

The U.S. Court of Appeals for the Second Circuit previously seemed receptive to these claims. Notably, in October 2024, in Salazar v. National Basketball Association,[1] the Second Circuit took a very broad view of the term "subscriber" under the VPPA — construing it to include anyone who subscribes to any goods or services offered by a provider, even if unrelated to video content — and thus significantly expanded the group of plaintiffs with standing to sue.

However, on May 1, the Second Circuit narrowed the scope of the VPPA significantly in Solomon v. Flipps Media Inc.,[2] holding that personally identifiable information under the VPPA only includes information that would allow an ordinary person — not just sophisticated technology companies — to identify an individual's video-viewing behavior.

The Second Circuit dismissed Solomon's proposed VPPA class action because the Meta pixel allegedly installed by digital streaming provider Flipps Media, d/b/a FITE, did not disclose this sort of personally identifiable information; rather, it merely disclosed, buried deep within 29 lines of dense computer code, the plaintiff's Facebook ID, in conjunction with the titles and URLs of the videos he accessed, which would not permit an ordinary person, with "little or no effort," to identify the plaintiff and his video watching history.

VPPA History

Before we dive further into the Solomon case, it is helpful to provide some relevant background on the VPPA. The VPPA is a federal statute that was enacted in 1988 in response to a newspaper article that published U.S. Supreme Court nominee Judge Robert Bork's video rental records without his consent.

This caused such an uproar that Congress enacted the VPPA in 1988 to "preserve personal privacy with respect to the rental, purchase or delivery of video tapes or similar audio visual materials," as stated in Senate Report No. 100-599.[3]

Under the VPPA, videotape service providers, which include streaming services providing prerecorded video content, are prohibited from knowingly disclosing a consumer's personally identifiable information to a third party.[4]

Although the VPPA states that personally identifiable information "includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider," the statute does not explicitly define or make clear what constitutes personally identifiable information.[5] Accordingly, many VPPA cases

turn on the frameworks that courts use to determine what data or information qualifies as personally identifiable information.

While the Second Circuit had not previously defined what qualifies as personally identifiable information under the VPPA, the U.S. Courts of Appeals for the First, Third and Ninth Circuits have held that personally identifiable information constitutes more than just information that identifies an individual, such as information that can be used to identify an individual.

However, a circuit split has emerged with respect to what information is "capable of identifying an individual" under the VPPA, with appellate courts taking two different approaches: (1) the reasonable foreseeability standard (the First Circuit), and (2) the ordinary person standard (the Third and Ninth Circuits).

Under the First Circuit's reasonable foreseeability standard, personally identifiable information is "not limited to information that explicitly names a person," but also includes information disclosed to a third party that is "reasonably and foreseeably likely to reveal which ... videos [the plaintiff] has obtained," as noted by the court in its 2016 decision in Yershov v. Gannett Satellite Information Network Inc.[6]

On the other hand, as noted in In re: Nickelodeon Consumer Privacy Litigation in 2016 and Eichenberger v. ESPN Inc. in 2017, the Third and Ninth Circuits' ordinary person standard limits personally identifiable information "to the kind of information that would readily permit an ordinary person to identify a specific individual's video-watching behavior."[7]

Solomon v. Flipps Media

In Solomon, the Second Circuit chose sides and adopted the ordinary person standard, much to the relief of digital media companies and content providers.

In this case, the plaintiff alleged that through FITE's use of the Meta pixel, FITE relayed to Meta a unique string of code that, if correctly interpreted, would identify the titles of the videos that the plaintiff accessed on FITE's platform, in addition to the plaintiff's Facebook ID.

FITE moved to dismiss, arguing that the plaintiff failed to state a VPPA claim because the information allegedly transmitted by FITE to Facebook via the Meta pixel does not constitute personally identifiable information. The Second Circuit agreed.

Rejecting the First Circuit's reasonable foreseeability standard, the Second Circuit concluded that personally identifiable information "encompasses information that would allow an ordinary person to identify a consumer's video-watching habits, but not information that only a sophisticated technology company could use to do so."[8]

The court highlighted that the VPPA imposes liability on a videotape service provider that knowingly discloses a subscriber's personally identifiable information to a third party, which means that it "'looks to what information a video service provider discloses, not to what the recipient of that information decides to do with it.'"[9]

Thus, the court reasoned that the ordinary person standard is a more suitable framework because it would "not make sense that a video tape service provider's liability would turn on circumstances outside of its control and the level of sophistication of the third party," particularly given that the statute was enacted in response to a video clerk leaking an

individual customer's video rental history and before the internet transformed how individuals and companies use consumer data.[10]

Here, the Second Circuit found it to be implausible that an ordinary person would look at the following phrase disclosed through the Meta pixel — ("title%22%3A%22-%E2%96%B7%20The%20Roast%20of%- 20Ric%20Flair") — and understand it to be a video title, as opposed to any of the other combinations of words within the surrounding 29 lines of computer code also transmitted via the pixel (e.g., "%9C%93%20In%20the%20last%20weekend%20of%20-July%2C.").[11]

Similarly, the court held that an ordinary person could not, with little or no effort, identify Solomon through his Facebook ID, which was displayed via the phrase "c_user=123456."

In fact, the court noted that an ordinary person would not even plausibly conclude that this "c_user" phrase was Solomon's Facebook ID. Thus, the Second Circuit held that Solomon failed to allege that FITE disclosed his personally identifiable information in violation of the VPPA.

Analysis and Takeaways

Streamers and digital media companies that utilize standard website analytics and marketing pixels on their websites can take significant comfort in the Solomon decision.

The Second Circuit's adoption of the ordinary person standard, and its holding that Facebook IDs are not personally identifiable information under the VPPA, considerably narrows plaintiffs' ability to pursue VPPA claims in the Second Circuit based on the use of the Meta pixel.

This decision will help shield businesses from VPPA liability based solely on the theoretical capabilities of large tech platforms to identify users through technical and complex data points.

Under Solomon, liability under the VPPA cannot be based on what a third party might be able to do with certain transmitted data, but rather is based on what a disclosing party actually reveals to an ordinary person. This offers greater predictability for companies using website pixels and allows them to better assess legal risk when implementing these analytics and marketing tools.

However, Solomon hardly provides a free pass to streamers and digital media companies utilizing website pixels. With the proliferation of tracking technologies, and the various avenues that exist for consumers to allege violations of their privacy, businesses must remain vigilant and take steps to appropriately limit what consumer information they disclose to third parties.

While Solomon holds that Facebook IDs do not constitute personally identifiable information, that does not mean other types of identifiers passed by other pixels will be treated the same. Other pixels may collect different types of information or operate in ways that change the Solomon analysis.

Therefore, businesses that offer prerecorded video content on their platforms and utilize third-party tracking technologies should regularly audit their use of website pixels to ensure they are not inadvertently disclosing personally identifiable information to third parties without user consent, especially in jurisdictions or circuits that take a broader view

of personally identifiable information than the Second Circuit — such as the First Circuit.

Businesses should also consider taking measures to obtain affirmative consent from users prior to firing website pixels and, where feasible, may also want to explore privacy-preserving analytics technologies that reduce reliance on third-party tracking technologies.

Caren Decter is a partner and Michael Salik is an associate at Frankfurt Kurnit Klein & Selz PC.

[1] 118 F.4th 533 (2d Cir. 2024).

[2] 136 F.4th 41 (2d Cir. 2025).

[3] S. Rep. No. 100-599, at 1 (1988) (Judiciary Committee).

[4] 18 U.S.C. § 2710(b)(1).

[5] 18 U.S.C. § 2710(a)(3).

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

[7] In re Nickelodeon Consumer Priv. Litig., 827 F.3d 262, 267 (3d Cir. 2016); see also Eichenberger v. ESPN, Inc., 876 F.3d 979, 985 (9th Cir. 2017) (reasoning that the ordinary person standard was more appropriate because the VPPA "views disclosure from the perspective of the disclosing party" and "looks to what information a video service provider discloses, not to what the recipient of that information decides to do with it.").

[8] Solomon, 136 F.4th at 49.

[9] Id. at 48 (citing Eichenberger, 876 F.3d at 985).

[10] Id. at 52.

[11] Id. at 54.