

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

Ballard v. Insomniac Holdings, LLC

Ballard · No. 25-cv-00811-SI · Decided June 17, 2025

OPINION

1 2 3 4 UNITED STATES DISTRICT COURT 5 NORTHERN DISTRICT OF CALIFORNIA 6 7
AUSTIN BALLARD, Case No. 25-cv-00811-SI 8 Plaintiff, ORDER DENYING MOTION TO 9
v. DISMISS 10 INSOMNIAC HOLDINGS, LLC, Re: Dkt. No. 14 11 Defendant. 12 13 Before the
Court is defendant’s motion to dismiss.

The court held a hearing on June 6, 2025. 14 For the reasons discussed below, the motion to
dismiss is DENIED. 15 16 BACKGROUND 17 Plaintiff Austin Ballard brings this proposed class
action against defendant Insomniac 18 Holdings LLC (“Insomniac”), asserting one claim under
the Video Privacy Protection Act 19 (“VPPA”), 18 U.S.C. § 2710.

The complaint alleges that defendant knowingly and intentionally 20 disclosed its users’
personally identifiable information (“PII”) to unauthorized third parties, namely 21 Facebook and
TikTok. Dkt. No 1, Compl. Plaintiff alleges the following facts, which are taken as 22 true for the
purposes of a motion to dismiss. See *Mollett v. Netflix, Inc.*, 795 F.3d 1062, 1065 (9th 23 Cir.

2015). 24 Insomniac is an “event management company” that “produc[es] and promot[es]”
electronic 25 dance music festivals and events. Compl. ¶ 1. It owns and operates a website and
mobile app 26 entitled www.insomniac.com and “Insomniac Events,” respectively. *Id.* Insomniac
also offers a 27 newsletter which, among other things, “provides access to exclusive ticket presale
codes, festival 1 giveaways.” *Id.* ¶ 6 n.1.

Through its website, newsletter, and app, Insomniac “showcases trailers, 2 recaps, and Insomniac
TV prerecorded video content[.]” *Id.* ¶ 14. Creating an account on the 3 Insomniac mobile app or
signing up for its promotional newsletter requires providing one’s email. 4 *Id.* ¶ 15. 5 Plaintiff
alleges that he “has had a subscription to Insomniac’s newsletter..., which he has 6 used to stay
informed of the upcoming events, promotions and shows advertised by Defendant.” *Id.* 7 ¶ 6.

Plaintiff also has accounts with both TikTok and Facebook. *Id.* ¶ 7. He alleges that he regularly 8
visited defendant’s website to “watch prerecorded videos” and to purchase event tickets, from the
9 same web browser that he used to maintain his Facebook account. *Id.* ¶¶ 6-7.

The complaint alleges 10 that Insomniac “caused Plaintiff Ballard’s video consumption to be sent
along with his personally 11 identifiable information (‘PII’) to Facebook and TikTok without his
knowledge or consent each time 12 he requested and viewed video content through the Website.”

Id. ¶ 8; see also id. ¶ 28. 13 According to the complaint, defendant installed tracking tools via lines of codes from 14 Facebook, the “Facebook pixel,” and from TikTok, “TikTok Pixels,” on Insomniac’s website and 15 app.

Id. ¶ 18. These tracking tools function to transmit tracked information, including the titles of 16 specific videos that users requested and/or viewed, to Facebook, TikTok, and “other unauthorized 17 third parties.” Id. ¶¶ 16, 21.

The information transmitted to Facebook identifies subscribers based 18 on their “unique and persistent” Facebook IDs (“FID”), which any ordinary person can use to 19 identify an individual and their corresponding Facebook profile. Id. ¶¶ 23, 25. Similarly, the 20 information transmitted to TikTok via the pixel identifies subscribers “based on their unique and 21 persistent TikTok identifiers” together with the title of the video content viewed or requested by the 22 subscriber.

Id. ¶¶ 26-27. Plaintiff alleges that defendant “controlled which data was tracked, 23 recorded, and transmitted when its subscribers requested or viewed its prerecorded video content.” 24 Id. ¶ 17. Plaintiff further alleges that defendant uses these tracking tools for “marketing purposes” 25 and that their use “financially benefits Defendant through advertising and information services that 26 Defendant would otherwise have to pay for.” Id. ¶¶ 20, 22.

27 Defendant moves to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6). 1
LEGAL STANDARD 2 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if 3 it fails to state a claim upon which relief can be granted.

To survive a Rule 12(b)(6) motion to 4 dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” 5 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard requires 6 the plaintiff to allege facts that add up to “more than a sheer possibility that a defendant has acted 7 unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

While courts do not require “heightened 8 fact pleading of specifics,” a plaintiff must allege facts sufficient to “raise a right to above the 9 speculative level.” *Twombly*, 550 U.S. at 555, 570. 10 In deciding whether to grant a motion to dismiss, the Court must assume the plaintiff’s 11 allegations are true and must draw all reasonable inferences in his favor.

See *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the Court is not required to accept as true 13 “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable 14 inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

As a general rule, 15 the Court may not consider any materials beyond the pleadings when ruling on a Rule 12(b)(6) 16 motion. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).

However, pursuant to Federal Rule of Evidence 201, the Court may take judicial notice of “matters of public record,” such as prior court proceedings. *Id.* at 688-89.

The court may also consider “documents attached to the complaint [and] documents incorporated by reference in the complaint... without converting the motion to dismiss into a motion for summary judgment.” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 21 2003). 22 DISCUSSION 24 “[T]o plead a plausible claim under section 2710(b)(1) of the VPPA, a plaintiff must allege 25 that (1) a defendant is a ‘video tape service provider,’ (2) the defendant disclosed ‘personally 26 identifiable information concerning any customer’ to ‘any person,’ (3) the disclosure was made 27 knowingly, and (4) the disclosure was not authorized by section 2710(b) (2).” *Mollett*, 795 F.3d at 1 Defendant argues that plaintiff failed to plausibly allege that: (a) Insomniac is a video tape 2 service provider, (b) that plaintiff is a “consumer” under the VPPA, and (c) that defendant 3 “knowingly” disclosed personally identifiable information.

The Court takes these arguments in turn. 4 5 I. Video Tape Service Provider 6 Defendant argues that it is not a video tape service provider as defined by the VPPA. Dkt. 7 No. 14, Mot. at 5. The VPPA defines “video tape service provider” (“VTSP”) in relevant part, to 8 mean “any person, engaged in the business, in or affecting interstate or foreign commerce, of rental, 9 sale, or delivery of prerecorded video cassette tapes or similar audio visual materials....” 18 10 U.S.C. § 2710(a)(4).

Defendant argues that plaintiff failed to sufficiently allege that Insomniac is 11 “engaged in the business” of renting, selling, or delivering video content. Mot. at 7-8. Defendant 12 contends, rather, that “the only reasonable inference” supported by the complaint is that the 13 conveyance of “audio visual materials” is “no more than peripheral” to Insomniac’s core business 14 of “operating live music festivals.” *Id.* at 8.

Plaintiff argues that these assertions pose factual 15 questions “ill-suited for resolution” at the motion to dismiss stage. Dkt. No. 22, Opp’n at 4. The 16 Court agrees with plaintiff’s argument 17. “In interpreting the statute’s definition of “video tape service provider,” district courts have 18 held that the term “engaged in the business” of renting, selling, or delivering video content “connotes 19 ‘a particular field of endeavor,’ i.e., a focus of the defendant’s work.” *In re Vizio, Inc.*, Consumer 20 Privacy Litigation, 238 F. Supp. 3d 1204, 1221 (C.D.

Cal. 2017) (citations omitted). Thus, courts 21 have held that “peripherally or passively” “hosting and creating” prerecorded videos for marketing 22 purposes does not suffice to qualify an entity as a VTSP. See *id.* at 1221-22; *Cantu v. Tapestry, 23 Inc.*, 697 F. Supp. 3d 989, 993 (S.D. Cal 2023). Instead, “[t]he plaintiff must sufficiently allege that 24 the defendant’s products are specifically tailored to serve audiovisual material.” *Cantu*, 697 F. 25 Supp. 3d at 993 (citation and internal quotation marks omitted).

26 At this stage, defendant’s argument raises a factual dispute into the role prerecorded video 27 content plays in its business model and is thus premature. While district courts within the Ninth 1 done this where no reasonable inference could be made that the videos in question were “more than 2 peripheral” to the defendant’s business. See, e.g., *Cantu*, 697 F. Supp. 3d at 994-95 (Coach 3 handbags).

Conversely, a court in this district held that plaintiffs had plausibly alleged that the 4 social network Facebook is a video tape service provider where the plaintiffs had alleged “that 5 Facebook ‘regularly delivers’ video content to users and maintains a cache of videos and visual 6 materials, including from content providers like Netflix, for their delivery to users.” In *re Facebook, 7 Inc., Consumer Priv.*

User Profile Litig., 402 F. Supp. 3d 767, 799 (N.D. Cal. 2019). In another 8 case, this Court held that it was reasonable to infer from the complaint that the defendant was a 9 VTSP, where the plaintiff alleged the defendant’s website offered “articles and videos” about sports 10 and sports culture. See *Sellers v. Bleacher Rep., Inc.*, No. 23-cv-368-SI, 2023 WL 4850180, at *1, 11 6 (N.D.

Cal. July 28, 2023). 12 In their papers and at the hearing, defendant relies on *Tawam v. Feld Entertainment Inc.*, 13 684 F. Supp. 3d 1056, 1061 (S.D. Cal. 2023). In *Tawam*, the defendant was a corporation that “owns 14 and promotes monster truck events and rallies” across the country. *Id.* at 1057.

The company’s 15 website delivered promotional video content and the plaintiffs alleged that they viewed two videos 16 on the website. *Id.* In finding the complaint did not plausibly allege the defendant was a VTSP, the 17 court observed that “the allegations in the FAC concerning the volume and role of the video content 18 at issue in this case do not support an inference that the videos viewed by Plaintiffs are more than 19 peripheral to Defendant’s business or that Defendant’s website is significantly tailored to the 20 purpose of conveying those videos.” *Id.* at 1061.

Here, the line is less clear. Plaintiff has alleged 21 that *Insomniac* “offers a massive library of prerecorded videos showcasing *Insomniac* TV, trailers 22 for upcoming events, and recaps of past events.” Compl. ¶ 1. He alleges that he watched this 23 prerecorded video content from his computer on a regular basis. *Id.* ¶ 6.

For purposes of a motion 24 to dismiss, the Court finds plaintiff has sufficiently alleged that the video content he watched on 25 *Insomniac*’s website was more than peripheral to the business model of a company that manages 26 music festivals—an audio visual experience. 27 1 II. Consumer 2 The VPPA defines “consumer,” to mean “any renter, purchaser, or subscriber of goods or 3 services from a video tape service provider[.]” 18 U.S.C. § 2710(a)(1).

Defendant argues that plaintiff fails to allege he is a consumer under the VPPA and that the statutory context of the VPPA specifically requires that plaintiff be a renter, purchaser, or subscriber of audio visual content from Insomniac. Mot. at 8, 11.

Thus, defendant argues, plaintiff's claim fails because his subscription to the Insomniac newsletter and his ticket purchases are not sufficiently tied to the video content he viewed while visiting Insomniac's website. Id. at 10. Plaintiff counters that the VPPA's plain language does not impose such a requirement and that he qualifies as a consumer because the Insomniac newsletter he subscribed to is a "good or service" provided by the defendant.

Opp'n at 11-13. Payment is not a necessary element of subscription under the VPPA's "consumer" section, although courts have emphasized that subscription "involves some type of commitment, relationship, or association." *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251, 1256 (11th Cir. 2015); see also *Yershov v. Gannett Satellite Information Network, Inc.*, 820 F.3d 482, 489 (1st Cir.

2016) (finding the plaintiff adequately alleged that he was a subscriber as he "established a relationship with [the defendant] that [wa]s materially different" than if he had not downloaded the app). This "commitment," however, can be shown through factors beyond payment such as registration, delivery, or access to restricted content. See *Ellis*, 803 F.3d at 1256-57 (holding that the plaintiff was not a consumer under the VPPA, because he failed to "establish an account" with or "provide any personal information" to the defendant to use its app).

22 Circuits are split, however, and the Ninth Circuit has not yet spoken, on whether the VPPA requires that a user be subscribed directly to the audio visual content from the VTSP in question, or whether the term "good and services" within the statute covers subscriptions of any goods and services from the VTSP. See *Salazar v. Paramount Glob.*, 133 F.4th 642 (6th Cir.

2025) (holding that a person is only a subscriber under the VPPA when he subscribes to goods or services "in the nature of 'video cassette tapes or similar audio visual materials'"); see also *Heather v. Healthline* 1 VPPA claim in which the plaintiff had only subscribed to a newsletter "comprised primarily of text and occasional external hyperlinks to video content").

But see *Salazar v. Nat'l Basketball Ass'n*, 318 F.4th 533 (2d Cir. 2024) (finding the plaintiff plausibly pled he was a "subscriber of goods or services" under the VPPA even though the newsletter he signed up for was not audio visual in nature). Courts that adopt the interpretation of "consumer" which cabins the term "goods and services" to audio visual material point to statutory context and the associated words canon.

In *Paramount Global*, the Sixth Circuit held that the plaintiff erred by "reading the terms 'good or services' 'in isolation.'" *Paramount Glob.*, 133 F.4th 642 at 649 (quoting *Dublin v. United States*, 599 U.S. 110, 110 (2023)).

The court affirmed the district court's dismissal of the plaintiff's claim, reasoning that the complaint failed to allege that he "accessed videos through the newsletter" he had signed up for. *Id.* at 652. The court further held that the "the most natural reading" of the term 'goods and services' accounts for the context of the statute's definitions of both "VTSP" and "consumer," as the latter only "encompass[es]" consumers of goods and services from a VTSP.

Id. at 650. As the definition of a VTSP is qualified by "prerecorded video cassette tapes or audio visual material[.]" the Sixth Circuit, and other courts following this interpretation, reason that the term "consumer" is similarly qualified. See *id.* (citing *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 459 (2022)). On the other hand, courts which have declined to read an "audiovisual limitation" into the definition of "consumer" point to the plain language of the statute.

See *Nat'l Basketball Ass'n*, 118 F.4th at 547. The Second Circuit noted that Congress "chose to deviate from any parallelism" to the definition of a VTSP by omitting the phrase "prerecorded video cassette tapes or similar audio-visual materials" from the consumer definition. See *id.* at 548.

In *Gardner v. Me-TV National Limited Partnership*, the Seventh Circuit followed the Second Circuit's interpretation, holding that the plaintiffs had sufficiently pled they were "subscribers" within the meaning of the VPPA, as they provided the defendant personal information (email address and zip code) in exchange for a subscription to its newsletter.

132 F.4th 1022, 1024-25 (7th Cir. 2025). While the defendant there could watch videos on the website without supplying information[.]" the Seventh Circuit held that the plaintiffs had adequately alleged that they had subscribed to services from a VTSP. *Id.* The court emphasized that the definition of consumer "does not say 'subscriber of ... video services'; it says, 'subscriber of ... services from a video tape service provider.' The complaint adequately alleges that MeTV is a video tape service provider.

What more is required?" *Id.* at 1025. The court went on, "Any purchase or subscription from a 'video tape service provider' satisfies the definition of 'consumer', even if the thing purchased is clothing or the thing subscribed to is a newsletter." *Id.* Judges in this district have come out on different sides of the question of who qualifies as a consumer under the VPPA, in decisions that pre-date the rulings of the Second, Sixth, and Seventh Circuits.

In *In re Hulu Privacy Litigation*, the court reiterated that "while the terms 'renter' and 'buyer' necessarily imply payment of money, the term 'subscriber' does not." No. C 11-03764-LB, 2012 WL 3282960, at *8 (N.D. Cal. Aug. 10, 2012).

The Hulu court reasoned that if Congress wanted to limit the word "'subscriber' to 'paid subscriber,' it would have said so." *Id.* Similarly, some courts in this district have found a

plaintiff to be a subscriber under the VPPA where the 15 plaintiff had “signed up[,]” or been subscribed, directly to a website that contains video content, 16 even where these subscriptions are not paid.

See *Jackson v. Fandom*, No. 22-cv-04423-JST, 2023 WL 4670285 (N.D. Cal. Jul. 20, 2023); see also *Ghanaat v. Numerade Labs, Inc.*, 689 F. Supp. 3d 18 714, 722-23 (Judge Gonzalez Rogers finding that in providing their name and email address to 19 register for accounts with defendant’s website, the plaintiffs had plausibly alleged that they were 20 subscribers within the meaning of the VPPA.).

In *Heather*, however, the district court rejected the 21 notion that providing one’s email address in order to subscribe to a newsletter qualifies one as a 22 “subscriber” under the VPPA. *Heather* more squarely addressed the question presented on this 23 motion, whether the service subscribed to must be a “video-related” one. See *Heather*, 2023 WL 24 8788760, at *1-2.

Where the *Heather* plaintiffs alleged they subscribed to a newsletter “comprised 25 primarily of text and occasional external hyperlinks to video content,” the court dismissed the VPPA 26 claim, reasoning that “the ‘services’ a subscriber receives are presumptively the same ‘services’ that 27 would render [the defendant] a ‘video tape service provider.’” *Id.* at *2.

1 Defendant again relies on the district court’s decision in *Tawam*, which involved an owner 2 and promoter of monster truck rallies. The plaintiff alleged that after viewing video content on the 3 defendant’s website, the plaintiff signed up for the defendant’s email “list serve.” 684 F. Supp. 3d 4 at 1058. Much like the case before us, the defendant in *Tawam* argued that the plaintiff was not a 5 qualifying consumer under the VPPA, as he merely subscribed to an email list separate and distinct 6 from the “free video” content.

Id. The *Tawam* court rejected the notion that the plaintiff’s 7 subscription to the list serve rendered him a subscriber under the VPPA. Relying on the district 8 court case that the Seventh Circuit later reversed, the *Tawam* court reasoned that the VPPA required 9 a “factual nexus” between the plaintiff’s subscription and the “allegedly actionable video content.” 10 *Id.* at 1061 (quoting *Gardener v. MeTV*, No. 22 CV 5963, 2023 WL 4365901, at *4 (N.D.

Ill. July 11 6, 2023), rev’d 132 F.4th 1022 (2025)). The *Tawam* court also relied on case law that has since 12 been implicitly overruled in the Second Circuit. Compare *Carter v. Scripps Networks, LLC*, 670 13 F.Supp.3d 90, 99 (S.D.N.Y. Apr. 24, 2023) (“Plaintiff’s Newsletter Subscriptions Do Not Make 14 them ‘Subscribers’ Covered by the VPPA”) with *Salazar v. Nat’l Basketball Ass’n*, 118 F.4th 533 15 (2d Cir.

2024) (finding the plaintiff’s subscription to the NBA newsletter to “satisfy the [subscriber] 16 requirement[.]”). 17 This Court agrees with the Second and Seventh Circuits’ plain reading of the statute and 18 finds that the definition of “consumer” in the VPPA is not cabined to “audio visual”

goods and 19 services, as Congress chose to omit an “audio visual” clause from the consumer definition.

20 Accordingly, plaintiff has plausibly pled that he is a subscriber under the VPPA. The personal
21 information he provided defendant in order to sign up for the newsletter—his name and email
22 address—established a materially different relationship between him and Insomniac which
gave him 23 access to “exclusive or restricted content.” See *Ellis*, 803 F.3d at 1257; *Yershov*, 820
F.3d 482 at 24 489; Compl. ¶ 6 n.1 (“signing up for Insomniac’s newsletter provides access to
exclusive ticket 25 presale codes, festival announcements and information, new music releases,
playlists...”).

Under 26 the Second and Seventh Circuits’ reading of the term “goods and services” in the
“consumer” 27 definition, plaintiff’s subscription to Insomniac’s newsletter renders him a
consumer under the 1 *Gardner*, 132 F.4th 1022, 1024-25; see *Nat’l Basketball Ass’n*, 118 F.4th
533 at 550; Compl. ¶ 49. 2 The Court holds at this stage that, regardless of any lack of connection
between the Insomniac 3 newsletter and the video content plaintiff viewed, his newsletter
subscription brings him within the 4 definition of “consumer” under the VPPA.

5 In so ruling, the Court notes this issue is developing rapidly as courts are being asked to 6 apply
the VPPA to new technology. As noted above, many of the district court decisions ruling on 7 the
“consumer” question issued before the Second, Sixth, and Seventh Circuits’ decisions, and the 8
Heather decision is currently on appeal to the Ninth Circuit. See *Heather v. Healthline Media, Inc.*,
9 No. 24-4168 at Dkt.

No. 29 (9th Cir. filed July 8, 2024). As discussed at the hearing, should 10 controlling law change
on this point, defendant may request that the Court revisit the matter. 11 At this time, the Court
holds that plaintiff has sufficiently alleged that he is a subscriber of 12 the newsletter, which
constitutes a “good[] or service[] from a video tape service provider,” as 13 required by the VPPA.

Id. at 1025 (emphasis omitted).1 2 14 15 III. Knowing Disclosure 16 Finally, defendant argues
that plaintiff failed to plausibly allege that it knowingly disclosed 17 his PII. The VPPA defines
“personally identifiable information,” to include “information which 18 identifies a person as
having requested or obtained specific video materials or services from a video 19 tape service
provider.” 18 U.S.C. § 2710(a)(3).

The VPPA punishes disclosures only when they 20 are made “knowingly.” 18 U.S.C. § 2710(b)
(1). Defendant argues, inter alia, that plaintiff’s claim 21 is deficient because he did not include
facts regarding whether defendant knew that plaintiff had a 22 Facebook account or that defendant
“knew or had access” to his Facebook identifier. See Mot. at 23 24 1 Plaintiff alternatively
contends that he is a “purchaser” within the meaning of the VPPA, 25 as he used the Website to
purchase event tickets.

The Court need not and does not reach that alternative argument. 26 2 As the Court does not find that plaintiff was required to allege he subscribed directly to the 27 audio visual material, whether or not Insomniac’s video content is publicly available is not 1 16. Defendant further argues that it did not have “actual knowledge” that it was disclosing PII.

See 2 || id. at 15. 3 Defendant relies, in part, on a Ninth Circuit opinion which affirmed a dismissal where the 4 || defendant did not disclose information it “apparently never even possessed.” See *Eichenberger v. 5 || ESPN, Inc.*, 876 F.3d 979, 986 (9th Cir. 2017).

The present case is distinguishable, as here plaintiff 6 || alleged that “defendant controlled” the tracked and recorded data, which included users’ “[p]ersonal 7 || viewing information” as well as “unique identifiers[.]” See Compl. J] 16-17, 23,27.

The complaint 8 || further alleges that Insomniac purposely installed the Facebook Pixel and TikTok Pixels on its 9 website and apps, and that it controlled the information that was tracked, recorded, and transmitted. 10 || *Jd.* 7416.

Moreover, the complaint alleges that any ordinary person can use the Facebook and TikTok 11 identifiers that Insomniac discloses to identify individuals. *Jd.* 4/25. These factual allegations are 12 || enough at this stage for the Court to reasonably infer that defendant knowingly disclosed personally 13 identifiable information. See *Ghanaat*, 689 F. Supp. 3d at 722-23 (holding plaintiff plausibly 14 alleged scienter requirement). a 16 CONCLUSION 3 17 For the foregoing reasons and for good cause shown, the Court hereby DENIES defendant’s 18 || motion to dismiss.

19 20 IT IS SO ORDERED. 21 Dated: June 17, 2025 Site WU tee 22 SUSAN ILLSTON 23 United States District Judge 24 25 26 27 28