Lights, Camera, Action!: Video Privacy in the U.S.

IAPP Privacy Academy
October 1, 2013
Why Are We Here?

A Tale from the *Other* Washington
Why Are We Here?

112th Congress: Not Very Productive

But on the morning of December 21, 2012, we awoke to learn that H.R. 6671—the Video Privacy Protection Act Amendments Act of 2012—was on its way to the President.
Video Privacy Matters

- **Consumers** want to share information about the videos they watch.

- **Businesses** want to learn more about what people are watching, what they like, and what they share.

- **Video privacy laws** in the U.S. make both these activities more complicated than most would imagine.
The Special Place of Video Privacy in the U.S.

- Laws at the state and federal levels that protect the privacy of video viewing data.
  - **Federal:** Video Privacy Protection Act (VPPA)
  - **State:** More than a dozen statutes
The Stakes

- **Netflix** settled VPPA lawsuit for $9 million
- **Facebook** settled VPPA lawsuit for $9.5 million
- **Hulu faces ongoing litigation involving VPPA**
- **Some state laws provide statutory damages**
Key Issues
Video Privacy 101

User

Share Functionality on Your Site/App

Social Networking Service

Video Viewing Information Associated With An Identified User
Video Privacy 101

- Who is covered? (Should your company be concerned?)
  - VPPA
    - “Video tape service provider(s)” = online providers?
    - Other entities (?)
  - State law
    - MA: “persons engaged in the business of leasing or renting videos.”
    - MI: “person . . . engaged in the business of selling at retail, renting, or lending books or other written materials, sound recordings, or video recordings”
Video Privacy 101

• Are you sharing covered information?
  – VPPA
    • “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”
  – State Law
    • MN: “[PII] means information that identifies a person as having requested or obtained specific video materials or services from a videotape service provider or videotape seller”
    • MI: “a record or information concerning the purchase, lease, rental, or borrowing of those materials by a customer that indicates the identity of the customer”
• Does an exception apply that permits otherwise-prohibited sharing?
  – VPPA
    • Consent
    • VPPA Amendments Act
  – State laws
    • States that appear **not** to permit sharing with consent
      – CT and MA
    • States that have specific consent requirements that may be unworkable in the online context
      – MN, NY, TN
# In Focus: The VPPA Amendments Act & Consent

## Consent

<table>
<thead>
<tr>
<th>Can be obtained through electronic means</th>
<th>Can be given at time disclosure sought or in advance for set period</th>
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**Note:** The text in the table cells is filled in as follows:
- Can be obtained through electronic means
- Can be given at time disclosure sought or in advance for set period
- Cannot be obtained through disclosures in form setting forth other legal obligations
- User must be able to withdraw consent on case-by-case basis or from ongoing disclosures
At the time the disclosure is sought
In Focus: The VPPA Amendments Act & Consent

In Advance for a Set Period/Case-by-Case Opt-out

Kristin, share with friends on Netflix?
On Netflix, your friends from Facebook will automatically see what you watch, including your past activity.
Your activity will only be visible on Netflix.
By clicking "Connect and share", you agree to our Social Terms.

Connect and share
Intra-company Practices: Retention

Limits on Retention of Video Data

- MA
- TN
- VPPA
- NY
- MN
But are violations actionable?

Nor would it make a lot of sense to award damages for a violation of the requirement of timely destruction of personally identifiable information, in subsection (e)—the specific issue presented by this appeal. How could there be injury, unless the information, not having been destroyed, were disclosed?

Sterk v. Redbox Automated Retail, LLC, 672 F.3d 535 (7th Cir. 2012) (reversing lower court’s denial of motion to dismiss VPPA retention claim against Redbox).
Intra-company Practices: Affiliate Sharing

- User
- Video Service Provider
- Affiliate

Video Viewing Information Associated With An Identified User
Is this an issue?

*Maybe.*

The Hard Questions

Video Viewing Information
Associated With a Unique Identifier—But Not a Person

User → Video Service Provider → Ad Network
Ad Server → Analytics Provider
Is video viewing information that is associated only with a unique identifier “personally identifiable information”?

- VPPA definition: “includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider”

- Comparisons to other federal privacy statutes

- *In re Hulu*: Question may be decided on summary judgment
The Really Hard Questions

The Platform Perspective
The Really Hard Questions

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Key VPPA Cases:
• *In re Hulu Privacy Litig.*, 2012 WL 3282960 (N.D. Cal. 2012) (meaning of “video tape service provider”).
• *Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535 (7th Cir. 2012) (no private right of action for violations of retention provision).
• *Daniel v. Cantrell*, 375 F.3d 377 (6th Cir. 2004) (who can be liable for violations).


Select State Laws:
• Cal. Civ. Code § 1799.3
• Mass. Gen. Laws Ann. ch. 93, § 106
• Minn. Stat. § 325l.01-.03
• N.Y. Gen. Bus. Law §§ 671-75
• Tenn. Code Ann. §§ 47-18-2201 to 2205