

United States Senate

Committee on the Judiciary

Testimony before the Subcommittee on Privacy, Technology and the Law

“The Video Privacy Protection Act: Protecting Viewer Privacy in the 21st Century”

January 31, 2012

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Chairman Franken, Ranking Member Coburn, and distinguished members of the Subcommittee. Thank you for the opportunity to testify about video viewer privacy.

Background

My name is Christopher Wolf and I am a privacy lawyer at Hogan Lovells US LLP, where I lead that firm's global privacy practice. I also am the founder and co-chair of the Future of Privacy Forum, a think tank with an Advisory Board from business, consumer advocacy and academia, focused on practical ways to advance privacy.

I have been a privacy law practitioner since virtually the start of the discipline, and I have long been a privacy advocate. One of my earliest privacy law matters was representing *pro bono* a gay sailor about whom the Navy illegally obtained information from AOL in violation of the Electronic Communications Privacy Act in order to oust him under the Don't Ask, Don't Tell law then in effect. The Navy's conduct was declared illegal by a federal judge and the Navy quickly recognized the wrongdoing. That case and others demonstrated to me the perils of personal information being shared without permission.

Through my law practice, I have broad exposure to privacy issues. I regularly represent clients before the Federal Trade Commission on privacy matters, in litigation, in corporate transactions and for compliance counseling. I produced a comprehensive treatise on privacy law for the Practising Law Institute, in addition to other published writings on the subject, and have taught law school courses on Internet law and privacy. I am a member of a volunteer panel of experts that advises the OECD Working Party on Information Security and Privacy and I am on the Advisory Board of the Electronic Privacy Information Center.

I participate in the major discussions of the day concerning the future of privacy. I have presented at the annual International Conference of Data Protection and Privacy Commissioners; I was the only privacy lawyer to speak at the eG8 Forum preceding the 2011 meeting of the G8 in France; I am a regular participant in the Privacy Law Scholars Conference and other academic conferences; I am a regular presenter at programs of the International Association of Privacy Professionals; I maintain a privacy law blog; and this week I am one of four organizer/moderators (along with three privacy law professors) at the annual Privacy Law Salon, a two-day gathering of privacy leaders.

I am pleased to offer my perspectives as a privacy law practitioner, as a participant in policy discussions on the future of privacy and as an advocate of improved privacy protections for video viewers in the 21st century.

Privacy is a Matter of Personal Control and the Pre-Internet VPPA Limits Personal Control to the Extent it Restricts a Durable Sharing Option

In considering how best to protect viewer privacy, it is important to understand that privacy is not the same thing as secrecy. Privacy is about *control*. Indeed, a goal of privacy law and the Fair Information Practice Principles underlying it is to put decisions in the hands of informed consumers.¹

The Video Privacy Protection (VPPA), enacted nearly a quarter of a century ago, was designed to prevent prying into people's video rental history, an issue brought to light through the infamous incident involving a newspaper reporter obtaining video records about Judge Robert Bork at the time he was under consideration for the Supreme Court.

The purpose of the VPPA was *not* to stop people from sharing information about the videos they watched or to stop companies from using that data if consumers consented. Instead, the VPPA's purpose was to put the *control* in the hands of consumers, to let the consumers decide whether to share their video-watching information.

Since the VPPA's passage, technology rapidly has advanced to allow people to watch movies through streaming video services instead of going to a video store, but the privacy law for video rentals hasn't changed in over two decades. The VPPA was passed at a time when streaming video and social network sharing were not remotely contemplated.

So when that pre-Internet-era law is applied to the world of online video and social media, it can be read to frustrate the choice of consumers who want to authorize the disclosure on an ongoing basis of the streaming movies they watch online.² Facebook users commonly utilize a one-time authorization – a durable choice option – to share a wide range of information with their friends. But their ability to use such an authorization to share video-watching experiences arguably is thwarted by the restrictive, outdated language of the statute requiring “consent of the consumer given at the time the disclosure is sought.”³

In the Facebook era, regular sharing of information with friends is routine, accepted and embraced.⁴ People share the music they listen to, the books and newspaper articles they read, the meetings and

¹ The Fair Information Practice Principles are notice, choice, access, security, and enforcement.

² Under the statute, “[a] video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person,” 18 U.S.C. § 2710(b)(1), and “the term ‘video tape service provider’ means any person, engaged in the business, in or affecting interstate or foreign commerce, of rental, sale, or delivery of prerecorded video cassette tapes or *similar audio visual materials*.” *Id.* § 2710(a)(4) (emphasis supplied). “A video tape service provider may disclose personally identifiable information concerning any consumer . . . to any person with the informed, written consent of the *consumer given at the time the disclosure is sought*.” *Id.* § 2710(b)(2)(B) (emphasis supplied).

³ *Id.*

⁴ See Don Reisinger, *Spotify paying subscribers jumps to 2.5 million*, CNET (Nov. 23, 2011), available at http://news.cnet.com/8301-13506_3-57330417-17/spotify-paying-subscribers-jumps-to-2.5-million. Mathew Ingram, *Why Facebook's Frictionless Sharing Is the Future*, BLOOMBERG BUSINESSWEEK (Oct. 3, 2011), available at <http://www.businessweek.com/technology/why-facebooks-frictionless-sharing-is-the-future-10032011.html>.

lectures they attend, the trips they take and so on. But under the VPPA, it can be said that web users cannot share the videos they watch in the same way. This makes no sense.

Imagine a person who is an avid online video watcher, watching 100 short videos per week. She wants to share every video that she watches with her friends, just as she shares every song she listens to on the streaming music service Spotify and just as she shares every item she reads online on the Washington Post through its Facebook social sharing app. But current law inconsistently suggests that she is not fit to make this frictionless sharing decision with respect to the videos she watches. Should this videophile have to opt in 100 times per week? Does making her do so serve any purpose other than to really annoy her and take needless time? The law as embodied in the VPPA can be read to take control away from this hypothetical video fan and dictate how she can share in the social media world.

By contrast, there are no legal restrictions on her ability to socially share every book she downloads onto an e-book reader. This gives rise to the inconsistent result that disclosure from a one-time opt-in that she viewed the movie *The Girl with the Dragon Tattoo* is legally suspect, while a similar disclosure that she read the book *The Girl with the Dragon Tattoo* is perfectly fine.

I am not aware of any other situation where consumers are prevented from opting in to ongoing sharing of their information and are required to consent to disclosures on a per-transaction basis. Even in the European Union, which has the strictest privacy standards in the world, one-time consent is necessary and sufficient to place cookies for the purpose of online behavioral advertising.⁵

Unless the VPPA is amended to specifically allow easier sharing through a durable choice option, which some people do want, the VPPA stands as an obstacle to the free flow of information and to consumer choice, without providing a commensurate privacy benefit in return.

Those Who Don't Want to Share Won't Have to Even if the Durable Sharing Choice is Allowed

Of course, not everyone wants to share their viewing experiences with their friends online, and they don't have to share. And if web users prefer to share their video-watching experiences on a case-by-case basis, they can do so manually, just as people occasionally post news stories they read in the Washington Post on Facebook rather than downloading the app that automatically shares this information. Similarly, a person who chooses to share on a continuous basis can disable the share function before watching a streaming video that he or she wants to exclude from online posting. That addresses one of the primary arguments advanced to oppose amendment of the VPPA: that with the amendment, a user automatically and inadvertently may post a recent viewing experience that allows others to draw unwanted conclusions about that person's religious, political or social viewpoints. But that argument presupposes that web users can't exercise that readily available choice for themselves.

The key to protecting privacy is not to be paternalistic and deny people the right to share information as they wish or to assume they don't know what they are doing online.

⁵ See, e.g., ARTICLE 29 DATA PROTECTION WORKING PARTY, OPINION 16/2011 ON EASA/IAB BEST PRACTICE RECOMMENDATION ON ONLINE BEHAVIOURAL ADVERTISING 10, 02005/11/EN, WP 188 (Dec. 8, 2011) (“[O]nce a user has expressed his/her consent or refusal then there is no need to ask him/her again for consent for a cookie serving the same purpose and originating from the same provider.”).

A good privacy law makes it easy for people to do what they want – either to share or not share. Good privacy regulation makes sure that consumers are informed about their choices and the consequences, but ultimately leaves the decisions in the hands of consumers.

Privacy law is not designed to inhibit information flow, but to empower consumers to control information flow. Amending the VPPA to allow people to have durable choice concerning their sharing preferences will modernize the law to reflect the advent of technology and social media, and to be consistent with the Fair Information Practice Principles. Such an amendment will reflect a proper balance between privacy and the innovative free flow of information. I join the Center for Democracy and Technology in concluding that the proposed amendment to permit the durable choice option does not “undermine[] the fundamental purpose of the law.”⁶

The Durable Sharing Choice Should Be Opt-In and Prominent

To be clear, I favor opt-in as the choice mechanism for ongoing sharing of video viewing under the VPPA rather than an opt-out arrangement where sharing is the default unless the consumer objects. And the opt-in choice mechanism should be prominent, separate and distinct from a site’s general privacy policy and terms of service, as required by the House amendment to the VPPA, H.R. 2471.

Opt-in consent represents the strongest level of choice available in U.S. privacy laws. Thus, with opt-in as the standard, consumers should have the option of saying: “I want to share my video information now and into the future until such time as I change my mind.” If consumers opt in and later decide that they don’t want to share, they simply can withdraw their consent. The VPPA currently does not allow this. Instead, it appears to require consumers to keep opting in, over and over again.

The Other Risks of Not Permitting the Durable Sharing Choice

Indeed, requiring users to choose to share their video-viewing habits on a per-video basis (for example, by requiring users to check another box before sharing can occur) inappropriately elevates the privacy of online videos over the privacy of other information for which the law does *not* require repeated choices. Or, quite possibly, it may lead to the situation where consumers feel inundated by privacy choices to the point that they are numbed by and pay no attention to them, merely clicking through to get on with the online experience.

And with respect to the impact on business, Congress did not intend to pick winners and losers when it passed the VPPA, but the law does exactly that, unintentionally, because it can be read to handicap streaming video companies from taking advantage of social media tools while other media companies can provide their customers with a social media sharing tool.

Permitting the Durable Sharing Choice Consistent with the Evolution of Privacy Law

We are at a consequential time in the development of privacy law, here and abroad. The European Union is considering dramatic revisions to its privacy framework⁷ while the Obama Administration

⁶ Center for Democracy and Technology, *House Tweaks Video Privacy Law for Frictionless Sharing* (Dec. 7, 2011), <http://www.cdt.org/blogs/justin-brookman/712house-tweaks-video-privacy-law-frictionless-sharing>.

⁷ European Commission, Press Release, *Commission proposes a comprehensive reform of the data protection rules* (Jan. 25, 2012), available at http://ec.europa.eu/justice/newsroom/data-protection/news/120125_en.htm.

and the Federal Trade Commission are about to unveil their proposals for a new approach to privacy protection, which have been previewed extensively through drafts.

One clear trend is observable in the movement towards reform and improvement of privacy law around the world, and that is an avoidance of piecemeal, technology-specific rules, what I frequently refer to as a “patchwork quilt” of regulation.

Instead, baseline privacy protections that are technology-neutral represent the modern approach to privacy law. This is a framework that consumers can understand and that businesses can implement easily. Accordingly, an integral component of privacy law reform is revising or repealing laws from the old framework in order to achieve consistency. Amendment of the VPPA to permit full user choice and control fits squarely within the preferred framework.

Thank you for the opportunity to appear before you today.