

Recent Privacy Class Action Lawsuits Challenge Retailers' Retention of Consumers' Viewing History Information

Class Action Alert

April 2011

By: [David Almeida](#)

It is becoming nearly impossible to keep track of the various laws, regulations and legal theories that plaintiffs' lawyers employ to file increasingly novel privacy-related lawsuits. The United States has historically favored a topical or sectoral approach to privacy regulation that has resulted in a morass of laws and regulations, each designed to protect only certain types of information or classes of individuals, such as data about medical histories, personal finances or minors. A recent spate of class action lawsuits attempts to utilize one such law, the Video Privacy Protection Act (VPPA), 18 U.S.C. § 2710, to challenge several prominent retailers' practice of retaining information relating to their consumers' video programming viewing history.

Congress passed the VPPA in 1988 following concerns raised by the release of Supreme Court justice nominee Robert Bork's video rental records during his confirmation hearings. The VPPA affords consumers significant protections with respect to the storage, confidentiality and (ultimately) destruction of any "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)(4). While the VPPA primarily prohibits the knowing disclosure of such personally identifiable information, the recent lawsuits challenge the defendants' alleged failure to destroy personally identifiable information "as soon as practicable, but no later than one year from the date the information is no longer necessary for the purpose for which it was collected."

Best Buy, Netflix and Redbox are among those recently hit with putative class action lawsuits under the VPPA. The suits, filed in federal district courts in Chicago and San Francisco, allege that the defendants maintain "digital record systems" that detail the purchase or rental history of every movie purchased, rented, streamed or viewed by their customers. See *Sterk v. Best Buy Co., Inc.*, Case No. 11-cv-1894 (N.D. Ill. Mar. 18, 2011), *Comstock v. Netflix, Inc.*, Case No. 11-cv-1218 (N.D. Cal.

Mar. 11, 2011) and *Boesky v. Redbox Automated Retail, Inc.*, Case No. 11-cv-1729 (N.D. Ill. Mar. 3, 2011). According to the plaintiffs, the retention of these digital records violates the VPPA because the information is retained for more than a year from the date by which their retention is no longer necessary.

The central theme in all of these cases is that the rental or purchasing history information is no longer needed once the time for returns or refunds has expired or the membership in question is canceled. For instance, plaintiff Blake Boesky alleges that Redbox's policy is "to charge customers the cost of the rented DVD if it is not returned within 25 days" and Redbox does not provide refunds to any customer for charges that are more than 90 days old. Similarly, plaintiff Kevin Sterk contends that Best Buy's corporate policy is not to provide refunds to any consumer for purchases more than 30 days old and thus there is no reason to retain personally identifiable information beyond that time.

Plaintiff Peter Comstock sets forth a related but somewhat different theory, contending that Netflix obtains personally identifiable information by tracking its users' viewing habits of both streaming videos watched over the Internet and physical movies watched at home while encouraging "subscribers to rank the videos they watch." Once that information is captured, the complaint alleges, Netflix retains that information, along with confidential subscriber payment information, "in its database long after subscribers cancel their [] subscriptions, which they can do at any time." Whereas Best Buy and Redbox plaintiffs assert only a single claim for alleged VPPA violations (albeit on behalf of a putative class), Comstock (a Virginia resident) asserts other statutory and common law claims, including some premised on allegations that Netflix sold information about the plaintiff and members of the class.

These novel lawsuits are perhaps motivated – at least, in part – by the potential for significant damage awards provided the suits can be maintained on a class basis. The VPPA provides for the recovery of "actual damages but not less than liquidated damages in an amount of \$2,500," as well as for potential recovery of punitive damages, attorneys' fees, costs and injunctive relief. Historically, the VPPA has not been utilized to bring class action lawsuits; rather, it has typically been used to remedy (and to prevent future) disclosure of an individual's viewing history. For

instance, in *Camfield v. City of Oklahoma City*, the plaintiff was awarded statutory damages of \$2,500 because Oklahoma City obtained the plaintiff's video store rental history without a warrant. See 248 F. 3d 1214 (10th Cir. 2001).

Plaintiffs may have significant legal hurdles to clear prior to obtaining any damages, including establishing that the VPPA applies to online or digital records. The VPPA defines videotape providers as companies that sell or rent videocassette tapes or similar audio visual materials. Although VPPA claims have been asserted against companies that stream video or rent DVDs – including against Blockbuster and Facebook stemming from the now-discontinued Beacon program – those cases settled without any judicial ruling as to the VPPA's applicability. To date, no cases have interpreted the language.

Moreover, it is not clear that the damages provision of the VPPA applies to its retention and destruction requirements. As the VPPA was designed to address unauthorized disclosures of consumers' viewing history, courts may well resist the plaintiffs' invitation to extend the VPPA's private right of action and damages provisions to the "destruction of old records." Finally, the plaintiffs may struggle to establish that a class action is a superior method of adjudicating these disputes due to the factually specific inquiry necessary to determine the "date the information is no longer necessary" for each putative class member. Regardless, companies are well advised to audit their records to determine what information they are storing – electronically as well as in other formats – and to consider whether there is a continuing business need for such information.

Related Practices:

[Class Action](#)

[Commercial Practices](#)

[Complex Litigation](#)