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Just You and Me and Netflix Makes Three: Implications for Allowing "Frictionless Sharing" of Personally Identifiable Information Under the Video Privacy Protection Act

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JUST YOU AND ME AND NETFLIX MAKES THREE: IMPLICATIONS FOR ALLOWING “FRICTIONLESS SHARING” OF PERSONALLY IDENTIFIABLE INFORMATION UNDER THE VIDEO PRIVACY PROTECTION ACT

*Kathryn Elizabeth McCabe**

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I. INTRODUCTION

It's a weeknight, and you're working late. To make it a little less painful, you turn on your favorite online music-streaming site. It's on shuffle because you're tired of your playlists right now and because you're not in the mood for anything in particular. The latest Katy Perry song comes on. You bob your head for a second or two. You don't hate it until—Oh, no! You forgot that your songs get automatically shared on your Facebook wall, and you didn't put your profile on "private"! Your indie friends are going to judge you. Hardly. What are you going to do? As you start to formulate excuses, you realize that three or four minutes of your life is not the end of the world. Plus, you can always blame it on shuffle.

Now imagine a similar scenario, only this time, you're surfing through your Netflix queue. What should you watch? *Breaking Bad*? Nope, seen them all. *Friends*? Eh. *Katy Perry: Part of Me*? You've been curious about this movie for a while—maybe you'll watch it. There's nothing else on; there's no one else around. When Netflix asks you if you want to "share" that you just watched this on Facebook, you confidently (and thankfully) click "No thanks."

The Video Privacy Protection Act (VPPA) generally prohibits video tape service providers from disclosing personally identifiable information about the videos that people watch without the viewer's explicit consent.¹ In passing the VPPA, Congress expressed an intention to protect information linking personally identifiable information to individuals' viewing habits in order to preserve privacy and autonomy of choice.² At the time of the VPPA's passage, physical video cassette formats, primarily video home system (VHS) tapes, were the dominant viewing format.³ Today, however, the vast majority of consumers no longer use this as a medium for watching videos.⁴ While physical formats like digital video discs (DVDs) are still common, many consumers also utilize purely digital formats to watch video and audiovisual materials.⁵ Because the language of the VPPA does not explicitly contemplate such intangible video-viewing methods, some now argue that the law is too ambiguous to adequately regulate the disclosure of individuals' information, and that the law should be

¹ Video Privacy Protection Act, 18 U.S.C. § 2710 (2013).

² S. REP. NO. 100-599, at 8 (1988).

³ *It's Unreel: DVD rental overtake videocassetts*, WASH. TIMES (June 20, 2003), <http://www.washingtontimes.com/news/2003/jun/20/20030620-113258-1104r/?page=all>.

⁴ *The Cross-Platform Report: Quarter 2, 2012—US*, NIELSEN, 6 (2012), <http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2012-Reports/Nielsen-Cross-Platform-Report-Q2-2012-final.pdf>.

⁵ *Id.*

updated to reflect society's pervasive use of social media.⁶ Social media websites like Facebook and Twitter seem to have created a public paradigm of openness. Through these and other social websites, individuals regularly and voluntarily share their activities and information about personal preferences with "friends" and acquaintances online.⁷ Because of the potential for far-reaching virtual "word-of-mouth" that social media sites provide, companies and industries take advantage of individuals' use of social media for advertising purposes by asking if consumers would like to "share" or inform friends when they have used services and products.⁸

The VPPA, however, makes it harder for video companies to take advantage of this potential advertising gold mine. The VPPA's prohibition on releasing personal consumer information applies to companies who sell or rent "prerecorded video cassette tapes [or] similar audio visual materials."⁹ Until very recently, the issue of whether or not the VPPA applied to digital videos as well as physical copies of videos was unclear.¹⁰ As a result, nonphysical or digital service providers have been able to avoid the law's purview by maintaining that they are not "video service providers" because they do not provide physical videos to subscribers. Thus, these companies have faced fewer legal hurdles in sharing personal consumer information with third parties and have enjoyed greater freedom in pursuing online and social media marketing through the use of Internet applications or "apps."¹¹ Companies that utilize physical formats, however, have been hesitant to launch online applications that automatically share personal information because of the VPPA's explicit prohibition against doing so when dealing with physical video materials.

The legal issue presented by this paradox concerns whether or not the VPPA creates a useful and meaningful distinction between video formats that are tangible and those that are not. Citing this statutory language as "ambiguous" and a potential liability for online social media marketing,¹² video rental companies that provide physical VHS and DVD services argue that they are left out of the social media marketing frenzy.¹³

⁶ Julianne Pepitone, *Why Netflix's Facebook App Would Be Illegal*, CNN MONEY (Mar. 27 2012, 5:45 AM), <http://money.cnn.com/2012/03/27/technology/netflix-facebook/index.htm>.

⁷ *Id.*

⁸ Christine Moorman, *Measuring Social Media ROI: Companies Emphasize Voice Metrics*, FORBES (May 21, 2013, 3:07 PM), <http://www.forbes.com/sites/christinemoorman/2013/05/21/measuring-social-media-roi-companies-emphasize-voice-metrics/>.

⁹ 18 U.S.C. § 2710(a)(4) (2013).

¹⁰ Pepitone, *supra* note 6.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

Netflix, a video rental company giant that provides both DVD and streaming services, made this very argument when it lobbied Congress to allow companies to share customers' video histories on social media websites.¹⁴ Netflix operates video rental services in forty countries.¹⁵ In each of those countries, Netflix also has a Facebook application that allows consumers to automatically share the titles they view. However for fear of being prosecuted under the VPPA for sharing information without customers' contemporaneous consent, the company purposefully did not launch its Facebook application in the United States until January of 2013.¹⁶

Meanwhile, Hulu, a competing website that only streams prerecorded online videos for its subscribers, launched a Facebook application in the United States in 2011 under the aegis of the VPPA's ambiguous definition of "video tape service provider."¹⁷ However, a recent class action suit may have circumvented this physical versus digital dichotomy by allowing a plaintiff class to sue Hulu for wrongfully disclosing personal information under the VPPA.¹⁸ In allowing the suit to proceed, a federal district court ruled that the definition of "video tape service provider" does in fact include all video service providers, both physical and nonphysical.¹⁹

Netflix also argues that because of the "ambiguous" language of the VPPA, users are being denied their individual right to choose what to share online.²⁰ As a video service provider that has not been able to advertise on Facebook due to the prohibitions of the VPPA, Netflix has now taken the helm in raising awareness about the "need" to update the VPPA.²¹ Having successfully lobbied Congress to produce and pass legislation on the issue, Netflix can now obtain a one-time, blanket consent from its users that enables it to share titles viewed on their website without having to seek expressed permission each time the viewer watches a video.²²

But is this a solution or a pretext? The answer brings two legal questions concerning privacy rights in a technological world to the forefront: (1) does the VPPA apply to both physical and nonphysical videos, (2) if so, does frictionless sharing promote the spirit of the VPPA's protection of individual video viewing

¹⁴ *Id.*

¹⁵ NETFLIX, <http://ir.netflix.com>.

¹⁶ *Id.*

¹⁷ Pepitone, *supra* note 6.

¹⁸ *In re* Hulu Privacy Litig., No. C 11-03764 LB, 2012 U.S. Dist. LEXIS 112916, at *13-14 (N.D. Cal. Aug. 10, 2012).

¹⁹ *Id.* at *19.

²⁰ Pepitone, *supra* note 6.

²¹ *Id.*

²² H.R. 6671, 112th Cong. (2012) (enacted).

history? First, this Note argues that the VPPA, in light of new common law interpretation, does in fact apply to both digital and physical video media. Secondly, this Note argues that the VPPA, in its original form, was intended to prevent easy access to individuals' history. Lastly, this Note argues that the recent action by Congress in passing an amendment allowing companies to obtain a one-time consent to disclose users' video viewing history on social media sites is inconsistent with Congress's original intent in passing the VPPA. This Note further argues that frictionless sharing has potentially disastrous consequences for individual privacy and far-reaching implications for individual digital due process with regard to social media in the future.

Part II of this Note provides a background of the VPPA and privacy rights against a backdrop of the increased prevalence of social media. It also gives a background to H.R. 6671 the amendment allowing frictionless sharing. Part III gives a legal analysis of whether, the VPPA was still adequate in today's social media market, before the amendment and whether H.R. 2471 enhances or detracts from the VPPA's purpose. Part IV argues that the amendment passed by Congress only stands to benefit video tape service providers at the expense of the individual privacy and the due process rights of online video subscribers.

II. BACKGROUND

A. HISTORY OF THE RIGHT TO PRIVACY AND COMPETING VIEWS

When one thinks of compelling legal issues from the 1890s, privacy rights may not be the first to spring to mind. However, Justices Samuel Warren and Louis Brandeis co-authored *The Right to Privacy*, the seminal article on privacy law in that early period of legal history.²³ As early as 1890, the justices prophesied the importance that individual privacy protection would have in the face of societal development:

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law . . . grows to meet the demands of society.²⁴

²³ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

²⁴ *Id.*

Throughout the twentieth century, American courts followed the lead of Justices Warren and Brandeis, embracing privacy laws as a judicial priority. As a result, citizens today enjoy privacy rights in many forms, including the right to confidentiality with regard to individual educational records,²⁵ personal information stored by federal agencies,²⁶ access to and disclosure of credit records and tax returns,²⁷ and personal electronic communications,²⁸ among other protections. These statutes demonstrate Congress's commitment to maintaining privacy as a fundamental right with the force of law.

However, there is another competing view of informational privacy: that what we share is an individual choice.²⁹ With the rise of social media technology, many believe individuals should be able to choose what they share with others. According to this view, laws that regulate when and how information may be disclosed limit individuals' autonomy of choice.³⁰

In 1988, Congress continued to legislate privacy protection by passing the VPPA.³¹ The VPPA generally makes it a crime for video service companies to disclose customers' rental history to third parties without their consent at the time the information is sought or disclosed.³² However, in light of the increase in Internet and social media usage, a legal issue has arisen as a result of the ambiguous language of the law that may force Congress to address the same questions they addressed in 1988 and in 1890: how much privacy protection is too much?

B. HISTORY BEHIND THE VPPA

The story behind the passage of the VPPA is both an interesting and an ironic one. It came about in the wake of the failed Supreme Court nomination of Robert Bork, a conservative legal scholar. In addition to being known in legal circles as "the leading 'originalist'" and founding advisor to the Federalist Society,³³ Bork is probably best known publicly for his fantastically failed

²⁵ Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (1974).

²⁶ Privacy Act of 1974, 5 U.S.C. § 552a (1974).

²⁷ Fair Credit Reporting Act, 15 U.S.C. § 1681 (1970); Tax Reform Act, 26 U.S.C. § 6103 (1976).

²⁸ Electronic Communications Privacy Act, 18 U.S.C. §§ 2510–2522 (2002).

²⁹ Pepitone, *supra* note 6.

³⁰ *Id.*

³¹ Electronic Communications Privacy Act, 18 U.S.C. § 2710(b).

³² *Id.*

³³ JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 13, 15 (2007).

Supreme Court nomination in 1987.³⁴ Indeed, his may be the only judicial nomination that has spawned an actual verb.³⁵ To this day, to be “Borked” means “to [be] attack[ed] . . . systematically, especially in the media.”³⁶ Most abhorrent to his opponents during his nomination process was Bork’s view that the Constitution does not guarantee the right to privacy. Rather, he acknowledged a right to privacy only if it was explicitly conferred by congressional legislation.³⁷ This controversial view led to a litany of criticism from the press.³⁸ It was this barrage from critics that actually prompted freelance writer Michael Dolan to obtain the judge’s video rental history and write a satirical article on the judge’s views.³⁹ Dolan got the idea to inquire into Bork’s video rental records from a colleague whose daughters had joked about “what a kick it would be to find out what he rents.”⁴⁰ A neighbor of Bork’s and a patron of the same video store, Dolan was able to simply ask the clerk for a list of the videos Bork had rented, to which the clerk replied: “There sure are a lot of them . . . Is it okay if I make a Xerox copy?”⁴¹

In a post-hoc commentary about the article, Dolan explains that he did not intend the article to incite debate about federal electronic privacy laws or even to embarrass Bork at all.⁴² Rather, he meant for the article to be merely a “poke” at Bork and his critics over their polemic stances on the privacy rights issue.⁴³ Despite his innocent intentions, Dolan’s publication of Bork’s video rental history in the *Washington City Paper* in September 1987 galvanized

³⁴ *Supreme Court Nomination Battles*, TIME, http://www.time.com/time/specials/packages/article/0,28804,1895379_1895421_1895437,00.html (last visited Apr. 6, 2013) (listing the Bork nomination as the eighth fiercest “bench battle” in American history).

³⁵ *Id.*

³⁶ “Borked” Definition, DICTIONARY.COM, <http://dictionary.reference.com/browse/Borked?s=t> (last visited Sept. 8, 2012).

³⁷ Michael Dolan, *The Bork Tapes Saga*, AMERICAN PORCH, <http://www.theamericanporch.com/bork3.htm> (last visited Apr. 6, 2013).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at <http://theamericanporch.com/bork4.htm> (last visited Apr. 6, 2013).

⁴² *Id.*

⁴³ See *supra* note 37 (“‘The Bork Tapes,’ which I conceived as a poke at the judge . . . but also as a poke at the judge’s critics, who seemed to me to be derangedly zealous in their efforts to smear Bork with the ink of his own writings, including and especially a much-publicized opinion in *Griswold v. Connecticut* that the U.S. Constitution guarantees no right to privacy.”).

Congress to quickly enact legislation prohibiting video rental entities from sharing personal customer information.⁴⁴

C. WHAT IS IN THE STATUTE AND STATUTORY LANGUAGE

The Video Privacy Protection Act (VPPA), codified as 18 U.S.C. § 2710, prohibits video tape service providers from disclosing personally identifiable information to third parties without the consent of the individual consumer, except in a few limited circumstances.⁴⁵ This prohibition was meant to embody the central principle of the Privacy Act of 1974, that “information collected for one purpose may not be used for a different purpose without the individual’s consent.”⁴⁶ Today the VPPA is said to “stand[] as one of the strongest protections of consumer privacy against a specific form of data collection.”⁴⁷ The “teeth” of the legislation come from the private right of civil action afforded to individuals harmed by unauthorized dissemination of their personal information.⁴⁸ This includes liability for “a video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider. . . .”⁴⁹ Plaintiffs may seek actual and punitive damages, equitable and declaratory relief, and attorneys’ fees and costs.⁵⁰ The statute defines “Consumer,” for the purposes of the Act, as “any renter, purchaser, or subscriber of goods or services from a video tape service provider.”⁵¹ Similarly, “‘personally identifiable information’ includes information which identifies a person as having requested or obtained specific video

⁴⁴ Kenneth B. Noble, *New Views Emerge of Bork’s Role in Watergate Dismissals*, N.Y. TIMES (July 26, 1987), <http://www.nytimes.com/1987/07/26/us/new-views-emerge-of-bork-s-role-in-water-gate-dismissals.html>.

⁴⁵ S. REP. NO. 100-599, at 5 (1988); Video Privacy Protection Act, 18 U.S.C. § 2710 (2013) (exceptions: § 2710(b)(2)(A) directly to the consumer; (B) to any person with the informed written consent of the consumer given at the time the disclosure is sought; (C) to a law enforcement agency pursuant to a valid warrant or subpoena; (D) if the disclosure is solely of the names and addresses of consumers and only discloses subject matter-not specific titles-and the consumer has the right to refuse; (E) disclosures incident to the ordinary course of business for video service providers; or (F) pursuant to court order in a civil action upon showing of compelling need).

⁴⁶ S. REP. NO. 100-599, at 8 (1988).

⁴⁷ *Video Privacy Protection Act: Introduction*, ELEC. PRIVACY INFO. CTR. [hereinafter *VPPA: Introduction*], <http://epic.org/privacy/vppa/> (last visited Apr. 6, 2013).

⁴⁸ 18 U.S.C. § 2710(c)(1) (2013); see S. REP. NO. 100-599, at 8 (1988) (“The civil remedies section puts teeth into the legislation, ensuring that the law will be enforced by individuals who suffer as the result of unauthorized disclosures.”).

⁴⁹ 18 U.S.C. § 2710(b)(1) (2013).

⁵⁰ S. REP. NO. 100-599, at 8 (1988).

⁵¹ 18 U.S.C. § 2710(a)(1) (2013).

materials or services from a video tape service provider.”⁵² In layman’s terms, this includes individuals’ names, addresses, and the billing information that connects them with the actual titles they have bought or rented. In its analysis of the language of the statute, the Senate Judiciary Committee Report on the VPPA states that the word “includes” was intentionally used to imply a “minimum, but not exclusive, definition” that narrows the scope of the law to only personal information relating to videos.⁵³ The report emphasizes that the type of information Congress intended to protect was specifically “transaction-oriented.”⁵⁴ Thus, the statute does not restrict the disclosure of information that does not result from a transaction, such as a disclosure of personal information to a law-enforcement agency.⁵⁵ The Act defines “video tape service provider” as “any person, engaged in the business . . . of rental, sale, or delivery of prerecorded video cassette tapes *or similar audio visual materials*. . . .”⁵⁶ The Senate Report seeks to clarify this definition of such “materials” as including: “laser discs, open-reel movies, or CDI [*whole words here*] technology.”⁵⁷ While it is clear that the committee, when drafting the VPPA, attempted to keep other video-viewing methods in mind, some argue that this language only covers physical video sale and rental information.⁵⁸

While the Act generally prohibits the disclosure of any personally identifiable information, the statute does allow video tape service providers to disclose personal consumer information in six specific circumstances.⁵⁹ The first of these exceptions is that information may, of course, be released directly to the consumer.⁶⁰ Similarly, consumers may consent to the dissemination of their personal information in writing.⁶¹ This must be done on a continuing basis at the time each disclosure is sought.⁶²

The Act allows for information to be disclosed to law enforcement with impunity, provided that a warrant, grand jury subpoena, or court order is issued

⁵² *Id.* § 2710(a)(3) (emphasis added).

⁵³ S. REP. NO. 100-599, at 12 (1988).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 18 U.S.C. § 2710(a)(4) (2013) (emphasis added).

⁵⁷ S. REP. NO. 100-599, at 12 (1988).

⁵⁸ See discussion regarding *In re Hulu Privacy Litig.*, No. C 11-03764 LB, 2012 U.S. Dist. LEXIS 112916 (N.D. Cal. Aug. 10, 2012), *infra* notes 145–57.

⁵⁹ 18 U.S.C. § 2710(b)(2)(A)–(E).

⁶⁰ *Id.* § 2710 (b)(2)(A); see also S. REP. NO. 100-599, at 12 (1988) (stating that consumers should be allowed to inspect any personal information held by third parties, and that this right is in accord with a “primary tenet” of the 1974 Privacy Act).

⁶¹ 18 U.S.C. § 2710(b)(2)(B) (2013).

⁶² *Id.*; see *VPPA: Introduction*, *supra* note 47 (outlining exceptions to the Act).

for the information.⁶³ Court orders authorizing such disclosure must give prior notice to the consumer and also require probable cause that the information is relevant to the court proceeding for which the information is sought.⁶⁴ The disclosure is subject to lawfulness under applicable state law and reasonableness of the volume of the request.⁶⁵ Court orders in the civil context require a “compelling need” for the information, and also, that the court give consumers (i) reasonable notice of the court proceeding, and (ii) the opportunity to contest the civil claim.⁶⁶

The Act also allows video tape service providers to disclose personally identifiable information concerning any consumer “if the disclosure is solely of the names and addresses of consumers,” provided that: (i) consumers have the opportunity to prohibit the disclosure or “opt out” of the provision in a “clear and conspicuous manner”;⁶⁷ and (ii) “the disclosure does not identify the title, description, or subject matter” of the videos one has rented from the provider.⁶⁸ They may, however, disclose the subject matter of the titles you have rented for marketing purposes if the disclosure is for the “exclusive use of marketing goods and services directly to the consumer.”⁶⁹ This provision is what allows companies to disclose the “genre preferences” of consumers, including names and addresses, for marketing purposes without their express consent (and also how consumers wind up on marketing lists they did not sign up for).⁷⁰

The Act’s definitions are central to the function of the VPPA in today’s digital age and serve as the crux of the debate over privacy concerns with respect to digital video materials. With the rise of digital viewing methods and the prevalence of social media, these definitions have become particularly important in determining whether the VPPA applies to privacy rights over the Internet, and, even further, whether or not it should apply.

⁶³ 18 U.S.C. § 2710(b)(2)(C) (2013).

⁶⁴ *Id.* § 2710(b)(3).

⁶⁵ *Id.*

⁶⁶ *Id.* § 2710(b)(2)(F).

⁶⁷ *Id.* § 2710(b)(2)(D).

⁶⁸ *Id.* § 2710(b)(2)(D)(i).

⁶⁹ *Id.*

⁷⁰ *Id.* § 2710(b)(2)(D)(i)–(ii); *VPPA: Introduction*, *supra* note 47.

D. STATE LAWS AND VIDEO PRIVACY

Though the VPPA is a federal statute, three states have chosen to enact their own laws concerning video privacy: Connecticut, Maryland, and Michigan.⁷¹ Connecticut's statute creates a private cause of action for "any person who has been injured by a violation" against "any person renting videotape cassettes who has committed the violation."⁷² It is important to note that this law is clearly limited to videotape cassettes only, and therefore does not have the potential to extend to other audiovisual materials like the VPPA might. Further, Connecticut does not have a provision that seeks to mimic the "video service provider" definition of the VPPA.

Maryland and Michigan, the other two states with their own video privacy legislation, have taken a more comprehensive approach than Connecticut. Similar to the VPPA definition, Maryland defines a "video tape distributor" as "a retail establishment operating for profit that sells, rents, or loans video tapes, video discs, or films."⁷³ The law's protection extends to "any numerical designation used by the video tape distributor" to identify customers, and "any listing of video tapes, video disks, or films bought, rented, or borrowed."⁷⁴ Likewise, Michigan issues a misdemeanor for disclosure of personal information by any person "engaged in the business of selling at retail, renting, or lending books or other written materials, sound recordings, or video recordings."⁷⁵ The penalty in Maryland can be harsher than in Connecticut, as the penalty for wrongful disclosure can include up to six months imprisonment.⁷⁶ Additionally, where the fines for each violation in Connecticut or Maryland do not exceed \$500,⁷⁷ an award for actual damages in Michigan can be as high as \$5,000.⁷⁸ The VPPA specifically states that it does not preempt state laws unless the laws "require disclosure prohibited by this section."⁷⁹ Preemption has not been an issue with respect to video privacy litigation (presumably because only three states have even passed any sort of legislation).

⁷¹ CONN. GEN. STAT. § 53-450 (1988); MD. CODE ANN., Crim. Law § 3-907 (LexisNexis 2002); MICH. COMP. LAWS § 445.1712 (1989).

⁷² CONN. GEN. STAT. § 53-450(b) (1988).

⁷³ MD. CODE ANN., Crim. Law § 3-907(a)(4) (LexisNexis 2002).

⁷⁴ *Id.* § 3-907(b)(1)-(2).

⁷⁵ MICH. COMP. LAWS § 445.1712 (1989).

⁷⁶ MD. CODE ANN., Crim. Law § 3-907(c).

⁷⁷ CONN. GEN. STAT. § 53-450; MD. CODE ANN., Crim. Law § 3-907(c).

⁷⁸ MICH. COMP. LAWS § 445.1715(a).

⁷⁹ 18 U.S.C. § 2710(f) (2013); *see Dirkes v. Borough of Runnemede*, 936 F. Supp. 235, 238 n.2 (D.N.J. 1996) (distinguishing between federal causes of action under the VPPA and state causes of action not preempted by the VPPA).

It is also worthwhile to note what is not in the VPPA. The statute does not include protections for library or music records.⁸⁰ The Senate Judiciary Committee Report on the VPPA indicates that the committee originally considered including library borrower records.⁸¹ The committee “recogniz[ed] . . . a close tie between what one views and what one reads.”⁸² One representative described this connection between people’s choice of books and films they watch as the “intellectual vitamins that fuel the growth of individual thought” noting that “[t]his intimate process should be protected from the . . . intrusion of a roving eye.”⁸³ While these statements suggest a strong sentiment that library records should be entitled to legal protection as they contain a similar personal signature as a video viewing history, this argument did not appear in the final version of the law. Tellingly, the Senate Report did not elaborate on why but only states that “the committee was unable to resolve questions regarding the application of such a provision for law enforcement.”⁸⁴

E. THE VPPA: THEN AND NOW

Congress could not have foreseen the digital revolution that would ensue after passage of the VPAA. At that time, the most advanced technological system that consumers came into contact with was probably an office computer system or a computer register at a department store.⁸⁵ It is clear from the language of the statute that Congress tried to legislate for the future when they drafted the VPPA.⁸⁶ However, a provision for “prerecorded video cassette

⁸⁰ See generally 18 U.S.C. § 2701.

⁸¹ S. REP. NO. 100-599, at 8 (1988).

⁸² *Id.*

⁸³ *Id.* at 7 (quoting *Video and Library Privacy Protection Act of 1988: J. Hearing on H.R. 4947 and S. 2361 Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary & the Subcomm. on Tech. & the Law of the S. Comm. on the Judiciary*, 100th Cong. 27-30 (1988) (statement of Rep. Alfred A. McCandless)).

⁸⁴ *Id.* at 8.

⁸⁵ See Dennis Lim, *Instant Nostalgia? Let’s Go to the Videotape*, N.Y. TIMES (Jan. 27, 2008), http://www.nytimes.com/2008/01/27/movies/27lim.html?pagewanted=all&_r=0 (citing Andy Hain & David Browne, *VHS: Video Home System*, TOTAL REWIND, <http://totalrewind.org/vhs.htm> (last visited Apr. 7, 2013)).

⁸⁶ See S. REP. NO. 100-599, at 5–6 (1988) (for Senator Leahy’s statements concerning the need for passing the VPPA in the face of “computer checking and check-out counters, of security systems and telephones, all lodged together in computers . . .”); see also *Video Privacy Protection Act: Protecting Viewer Privacy in the 21st Century: Hearing Before the Subcomm. on Privacy, Tech. & the Law of the S. Comm. on the Judiciary*, 112th Cong. (2012) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary).

tapes or similar audio visual materials” was the best they could envision for a post-VHS world.⁸⁷

Now, it is difficult to even find a VHS in many homes, much less a VCR to play them on.⁸⁸ Most consumers watch their video and audiovisual materials using digital formats, namely the Internet.⁸⁹ These formats include downloading and streaming videos on personal computers, handheld devices, and even smartphones.⁹⁰

That is to say nothing of the rise of social media, through which many people share their activities and preferences with friends online.⁹¹ Applications on websites, such as Facebook and Twitter, allow consumers to share all sorts of personal information, whether it is what song they just listened to or what restaurant they “like.”⁹² Conversely, they are able to see what their friends are listening to and “liking.”⁹³

This social media phenomenon has become a springboard for marketing in several big industries.⁹⁴ Popular examples include digital music, proliferated in particular by sites like Spotify and Pandora (for internet radio),⁹⁵ online newspapers, including the Washington Post,⁹⁶ and the dark horse—online scrapbooking—through the success (and addictive quality) of Pinterest.⁹⁷ These and other examples⁹⁸ show that the physics of social media networking can be

⁸⁷ Pepitone, *supra* note 6.

⁸⁸ WASHINGTON TIMES, *supra* note 3.

⁸⁹ *TVs Overtake PCs as the Primary Screen for Home Viewing of Online Video: Quarter 2, 2012*, NDPGROUP (Sept. 26, 2012), <https://www.npd.com/wps/portal/npd/us/news/press-releases/tvs-overtake-pcs-as-the-primary-screen-for-home-viewing-of-online-video/>.

⁹⁰ *Id.*

⁹¹ *The Cross-Platform Report: How and Where Content is Watched*, NIELSEN (Sept. 11, 2012), <http://www.nielsen.com/us/en/newswire/2012/the-cross-platform-report-how-and-where-content-is-watched/>.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See *State of the Media: The Social Media Report 2012*, NIELSEN (2012), <http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2012-Reports/The-Social-Media-Report-2012.pdf> (stating that while 33% of people are annoyed by social media site ads, 26% are still more likely to pay attention to them).

⁹⁵ SPOTIFY, <http://www.spotify.com/us/> (last visited Apr. 7, 2013); PANDORA RADIO, <http://www.pandora.com/profile/pandora-rad> (last visited Apr. 7, 2013).

⁹⁶ WASHINGTON POST, <http://www.washingtonpost.com> (last visited June 1, 2013).

⁹⁷ *The State of the Media: Social Media Report 2012*, *supra* note 94; PINTEREST, <http://pinterest.com> (last visited Apr. 7, 2013).

⁹⁸ See Craig Smith, *How Many People Use the Top Social Media, Apps, & Services?*, DIGITAL MARKETING RAMBLINGS (June 1, 2013), <http://expandedramblings.com.inex.php/resource-how-many-people-use-the-top-social-media/> (citing other examples of sites with millions of users: Twitter (500M), Foursquare (3.7M), YouTube (1B), Huffington Post (1.7M), Hulu (1.1M), Yelp

applied successfully in a myriad of markets. But what is the common thread among all of these social marketing winners? They each have their very own application on Facebook.⁹⁹ Through potential access to Facebook's 1 billion users, having an application on Facebook is an incredibly valuable resource for any company.¹⁰⁰

F. THE PROBLEM

In this context of instant updates and open sharing of individual activity, some argue the VPPA has become an antiquated law.¹⁰¹ The language of the statute, as it relates to videos viewed in electronic formats other than cassette tapes, leaves gaping ambiguities for the purpose of interpreting the legality of information disclosure.¹⁰² Principally, issues have arisen concerning the applicability of the statute to modern viewing formats such as DVDs and digitally streamed videos.¹⁰³ Where does digital material fall into the definitional provisions of the VPPA? If a company or website streams digital videos, does that company qualify as a "video service provider"?

At the heart of these issues is the threshold question: Is there a meaningful difference between digital video materials and physical ones? Netflix is perhaps the best example of a company that is caught in the middle of this legislative gray area. A giant in the video rental industry calling itself "the leading internet subscription service for enjoying movies and TV programs," Netflix provides streaming services to 27 million members in the United States, Canada, Latin America, the United Kingdom, and Ireland.¹⁰⁴ As a result, Netflix wants to launch a Facebook application that will allow them to share what titles their users watch with others via social media outlets in order to increase advertising revenues.¹⁰⁵ However, while other industry leaders have been able to utilize social media advertising, primarily through Facebook, as a marketing tool for

(8.9M), Draw Something (8.7M), Washington Post Social Reader (5.8M), Spotify (10 M), ESPN (1.6M), Words With Friends (12M), Pinterest (16M), Yahoo! Social Bar (29M), Instagram (27M), Trip Advisor (16M), ChefVille (41M)).

⁹⁹ *Id.*

¹⁰⁰ NIELSEN, *supra* note 94; *see also* Moorman, *supra* note 8.

¹⁰¹ Pepitone, *supra* note 6.

¹⁰² *See* S. REP. NO. 100-599, at 14–15 (1988) (stating that a trier of fact should consider all relevant facts in determining whether a person wrongfully disclosed another's personally identifiable information).

¹⁰³ *See id.* at 6 (statement by Senator Simon that "[t]here is no denying that the computer age has revolutionized our world").

¹⁰⁴ *Company Facts*, NETFLIX, <https://signup.netflix.com/MediaCenter/Facts> (last visited Apr. 7, 2013).

¹⁰⁵ Pepitone, *supra* note 6.

their respective products, Netflix and the rest of the video rental industry have been wary of launching a Facebook application for fear of prosecution under the VPPA's "ambiguous language."¹⁰⁶

As a company that provides physical video materials through its at-home DVD delivery service, Netflix argues that it falls into the interpretive limbo the language of the VPPA creates.¹⁰⁷ Principally, according to the holding in the recent case *In re Hulu Privacy Litig.*, Netflix almost certainly qualifies as a "video tape service provider" according to the interpretation ascribed to thus far.¹⁰⁸ As a consequence, the VPPA as written before the Netflix amendment might have prohibited Netflix from launching a lawful Facebook application because the company would be regularly sharing video titles with third parties without the explicit and timely consent of the customer.¹⁰⁹

This was a big problem for Netflix and other big-name DVD providers desperately trying to break into the social media ad market, such as Blockbuster, Red Box, and Amazon. However, the distinction had apparently not been a problem for companies that only offer streaming services. Enter: Netflix's "Hulu problem."¹¹⁰

Hulu is a web-based video company that offers digital streaming services to online subscribers by compiling videos from other popular video sites across the Internet.¹¹¹ Hulu offers subscribers two options: a free version, which limits the content that subscribers can access on the website, and a paid subscription option, which allows access to all of Hulu's content of shows, clips, and movies.¹¹²

Unlike Netflix, Hulu does not have a DVD delivery component to its business.¹¹³ Rather, Hulu provides only digital streaming services.¹¹⁴ Thus, Hulu does not have the physical aspect that, under traditional interpretation of the VPPA definition of "video tape service provider," would probably subject it to the same prohibitions as those to which distributors of physical video cassettes and DVDs, like Netflix, are subject.¹¹⁵

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *In re Hulu Privacy Litig.*, No. C 11-03764 LB, 2012 U.S. Dist LEXIS 112916, at *13-19.

¹⁰⁹ Pepitone, *supra* note 6.

¹¹⁰ *Id.*

¹¹¹ *Overview*, HULU, <http://www.hulu.com/about> (last visited Apr. 7, 2013).

¹¹² *Id.*

¹¹³ *Distribution*, HULU, <http://www.hulu.com/about> (last visited June 7, 2013).

¹¹⁴ *Id.*

¹¹⁵ For Hulu's argument for why they do not qualify as "video tape service providers" under the VPPA, see *In re Hulu Privacy Litig.* discussion, *infra* notes 139-56.

Yet, aside from the practice of housing and mailing physical copies of videos, it is hard to find significantly substantive differences between Netflix and Hulu in the corporate sense: they both provide video services, they both offer digital services, and they both do so via the Internet. It may be surprising to learn, then, that Hulu launched a Facebook application in 2011.¹¹⁶ To date, *In re Hulu Privacy Litigation* is the only judicial obstacle that Netflix seems to have faced. This fact begs the question: do both companies qualify as video tape service providers? If so, should Netflix be allowed to launch a Facebook application, like Hulu has? If not, should Hulu be made to take their application off Facebook? Also, if these two companies can be differentiated on the basis of their offering physical versus nonphysical video materials, does that mean the UPPA protects information regarding physical video formats from being wrongfully disclosed, but not information pertaining to digital video services?

G. LEGAL INTERPRETATION OF THE VPPA

Though the VPPA was passed in 1988, it was not until 1996 that the first case, *Dirkes v. Borough of Runnemede*, actually brought under the statute.¹¹⁷ In this foundational case, plaintiff and former police officer Chester Dirkes brought suit under the VPPA against another police officer, his employer, and his city for using his video rental history during the course of an internal disciplinary investigation.¹¹⁸ After Dirkes's attempt to get an injunction to keep the rental history out of the investigation failed, the rental history, which contained pornographic videos, was used in his disciplinary action, which ultimately resulted in his termination from employment at the police department.¹¹⁹ Looking to legislative history, the U.S. District Court of New Jersey made a strong statement for upholding broad protections of individual privacy rights in rejecting a narrow reading of the VPPA.¹²⁰ Citing the 1890 Harvard Law Review article by Justices Samuel Warren and Louis Brandeis,¹²¹ the court emphasized the importance of its role in protecting individuals' rights in the face of "recent inventions and business methods."¹²² The *Dirkes* court ruled

¹¹⁶ Pepitone, *supra* note 6.

¹¹⁷ 936 F. Supp. 235 (D.N.J. 1996).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 236–37.

¹²⁰ *Id.* at 240.

¹²¹ See discussion *supra* note 23.

¹²² *Dirkes*, 936 F. Supp. at 238 (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890)).

that because the investigating officer had failed to secure a warrant, subpoena, or court order when obtaining the video history, the information was protected by the VPPA. As a result, Dirkes was entitled to a private right of action.

Another case that gave strength to the VPPA is *Camfield v. City of Oklahoma City*.¹²³ This case involves a German film called *The Tin Drum* that won an Academy Award in 1979 for its depiction of a child who decided to stop growing at the age of three in order to protest the rise of Nazi Germany.¹²⁴ In 1997, an Oklahoma City citizen complained to his local state judge that the movie violated the state's child pornography law.¹²⁵ After personally viewing the film and deciding that it did qualify as child pornography under the state statute,¹²⁶ the judge notified the Oklahoma City Police Department, which proceeded to remove all available copies of the film from video stores across the city.¹²⁷ In addition, for copies that were checked out, the department obtained the names and addresses of the renters.¹²⁸ Officers then went to the homes of the renters (without warrants or court orders) and asked that they voluntarily surrender the copy of the tape.¹²⁹ One such renter, plaintiff Michael Camfield, brought suit under the VPPA and won.¹³⁰ The court held that the officers clearly violated the Act when they obtained the plaintiff's name and address without a warrant or court order.¹³¹ Further, because the officers were acting within the scope of their employment for the Oklahoma City Police Department, the city was also liable for damages.¹³² While the plaintiff only received \$2,500 in actual damages (the minimum amount allowed under the statute),¹³³ many see this case, now nicknamed the "*Tin Drum Case*," as a coup for individual civil liberties.¹³⁴

¹²³ 248 F.3d 1214 (10th Cir. 2001).

¹²⁴ *Id.* at 1218.

¹²⁵ *Id.*

¹²⁶ Oklahoma state law prohibits persons from knowingly possessing or procuring obscene material "wherein the minor is engaged in or portrayed . . . as engaging in any act of sexual intercourse." OKLA. STAT. ANN. tit. 21, § 1021.2 (West Supp. 1997) (cited in *Camfield*, 248 F.3d at 1221).

¹²⁷ *Camfield*, 248 F.3d at 1219.

¹²⁸ *Id.* at 1220.

¹²⁹ *Id.* at 1219.

¹³⁰ *Id.* at 1214, 1214–28.

¹³¹ *Id.* at 1220.

¹³² *Id.* at 1220–21.

¹³³ *Video Privacy Protection Act: Cases*, ELEC. PRIVACY INFO. CTR., <http://epic.org/privacy/vppa/> (last visited Apr. 7, 2013).

¹³⁴ Tanya Cox, *ACLU Remembers Michael Camfield*, ACLU OF OKLA. (Nov. 11, 2011, 11:44 AM), <http://acluok.org/2011/11/aclu-remembers-michael-camfield/>; *Video Privacy Protection Act: Cases*, ELEC. PRIVACY INFO. CTR., <http://epic.org/privacy/vppa/cases> (last visited Apr. 7, 2013).

Considering the wide-reaching effect the VPPA has on the video industry, there has been surprisingly little guidance on how to interpret and identify violations of the law from secondary legal sources. One source—Eleanor Grossman, writing for the National Legal Research Group—attempts to articulate what constitutes a violation of one’s rights under the law.¹³⁵ According to Grossman: “individuals who are in possession of personally identifiable information as a direct result of the improper release of such information are subject to suit.”¹³⁶ This summary of the topic suggests that possession of personally identifiable information is a strict liability offense.¹³⁷ This view would be supported by the ruling in *Camfield*, where Oklahoma City was found liable for damages even though officials believed they had a legal right to remove copies of the *Tin Drum* film pursuant to their own state law.¹³⁸

One recent case—*In re Hulu Privacy Litigation (In re Hulu)*—has had a groundbreaking effect on the applicability of the VPPA to digital formats via the internet, namely purely streamed videos.¹³⁹ In this consolidated action¹⁴⁰ which is still pending before the Northern District of California, a putative class of Hulu subscribers alleged a knowing violation of the VPPA in that the company wrongfully disclosed their personally identifiable information to third parties, including online ad networks, data tracking companies, and social networks.¹⁴¹ Hulu moved for summary judgment on three grounds: (1) that Hulu is not a “video tape service provider” as defined under the VPPA, and thus, is not liable under the Act; (2) that any disclosures were incident to the ordinary course of Hulu’s business and not covered by the Act; and (3) that plaintiffs are not “consumers” within the meaning of the Act.¹⁴² Importantly, the court struck down each of these defenses.¹⁴³

¹³⁵ 62A AM. JUR. 2D *Privacy* § 123 (2005).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Camfield*, 248 F.3d at 1221.

¹³⁹ *In re Hulu Privacy Litig.*, No. C 11-03764 LB, 2012 U.S. Dist. LEXIS 112916 (N.D. Cal. Aug. 10, 2012).

¹⁴⁰ *In re Hulu* consists of two separate cases: *Garvey v. Kissmetrics*, No. C 11-03764 LB (filed July 29, 2011), and *Couch v. Space Pencil*, No. C 11-05606 LB (filed Sept. 14, 2011 in the C.D. Cal.; transferred to N.D. Cal. Sept. 14, 2011); see *In re Hulu*, 2012 U.S. Dist. LEXIS 112916, at *4–6 (for further details on original complaints).

¹⁴¹ *In re Hulu*, 2012 U.S. Dist. LEXIS 112916, at *3; see first amended consolidated class action complaint at 18, *Hulu Privacy Litigation*, No. C 11-03764 LB (N.D. Cal. Feb. 15, 2012), ECF No. 37 (providing additional facts).

¹⁴² *In re Hulu*, 2012 U.S. Dist. LEXIS 112916, at *3 (citing Motion to Dismiss, *In re Hulu Privacy Litigation*, No. C 11-03764 LB (N.D. Cal. Mar. 30, 2012, ECF No. 49)).

¹⁴³ *Id.* at *13–24.

Hulu's first argument, that the VPPA did not apply to its business because it is not a video service provider as defined under the statute, failed on the merits.¹⁴⁴ Hulu contended that the statute only regulated businesses that sell or rent prerecorded (physical) video cassettes or "other similar audio visual materials," and therefore, did not regulate businesses that did not use physical formats, namely digital services.¹⁴⁵ The court rejected this argument on two grounds. First, using the third edition of the Oxford English Dictionary, which defines "material" as "[t]ext or images in printed or electronic form," the court reasoned that digital content comports with the definition of "materials" as stated in the statute.¹⁴⁶

The court also looked to the legislative history behind the drafting of the VPPA itself.¹⁴⁷ The court noted Congress's concern with protecting the confidentiality of individuals' viewing preferences "regardless of the business model or media format involved."¹⁴⁸ These efforts to protect individual choices, paired with the analysis of "similar audio visual materials" in the Senate Report, compelled the court to reject Hulu's argument that this provision should be construed narrowly.¹⁴⁹ On the contrary, the court read in congressional intent to cover new technologies for pre-recorded video content.¹⁵⁰ In other words: the court ruled that the VPPA applies to purely streamed content as well as more traditional, physical video formats.¹⁵¹ As a result, the motion to dismiss/dismissal was not granted on this ground, and plaintiffs were allowed to proceed to trial.¹⁵²

Hulu made similar arguments on its two other claims for dismissal—that any disclosures on Hulu's part were "incident to the ordinary course of business" as defined under the VPPA, and thus, were not violations of the statute;¹⁵³ and that plaintiffs were not "consumers" as covered by the statute.¹⁵⁴ Interestingly, the court interpreted these two provisions of the statute narrowly. As to disclosures "incident to the ordinary course of business," the court denied dismissal because the "ordinary course of business" is narrowly defined in the statute to mean only "debt collection activities, order fulfillment, request

¹⁴⁴ *Id.* at *13–19.

¹⁴⁵ *Id.* at *13–14.

¹⁴⁶ *Id.* at *17.

¹⁴⁷ *Id.* at *17–18.

¹⁴⁸ *Id.* at *17.

¹⁴⁹ *Id.* at *18–19.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at *19–20.

¹⁵⁴ *Id.* at *22–23.

processing, and the transfer of ownership and Hulu's disclosure fell outside of these enumerated categories."¹⁵⁵ Furthermore, the court found that in order for plaintiffs to be "consumers" under the statute, they need not have been paying members of the service; rather, it was sufficient that they were subscribers of the service and viewers of the content.¹⁵⁶

H. THE NETFLIX-BACKED AMENDMENT

Netflix and companies like it claim that the time has come to update the VPPA to reflect the current state of technology, which is more open with personal information.¹⁵⁷

Michael Drobac, director of government relations at Netflix, appealed to Netflix customers to help support the amendment.¹⁵⁸ In a post on the company's blog¹⁵⁹ announcing the Netflix-Facebook application for Canada and Latin America, Drobac cited the VPPA as the reason for Netflix's not offering the Facebook sharing feature in the United States.¹⁶⁰ Drobac characterized the VPPA as "a 1980's [sic] law [that] creates some confusion over our ability to let U.S. members automatically share the television shows and movies they watch with their friends on Facebook."¹⁶¹ Drobac ends the post by characterizing the amendment as pro-consumer choice: "If you want the choice to share with your friends, please email Congress to urge them to pass this modernizing legislation."¹⁶²

In response to industry support for such an update in 2011, Congress introduced H.R. 6671 to amend the UPPA's consent provision.¹⁶³ In addition to the law's original form, which allowed consumers to have their personal information disclosed per their written consent at the time the disclosure is sought, the amendment allows consumers to give a blanket consent for disclosure of viewer information through the Internet, and "in advance for a set

¹⁵⁵ *Id.* at *19 (citing 18 U.S.C. § 2710(a)(4)).

¹⁵⁶ *Id.* at *23–24.

¹⁵⁷ Pepitone, *supra* note 6.

¹⁵⁸ Michael Drobac, *Help Us Bring Facebook Sharing to Netflix USA*, NETFLIX US & CANADA BLOG (Sept. 22, 2011, 8:01 AM), <http://blog.netflix.com/2011/09/help-us-bring-facebook-sharing-to.html>.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ H.R. 2471, 112th Cong. (2011); *see also* H.R. 6671 (112th): *Electronic Communications Privacy Act Amendments of 2012*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/hr2471/text> (last visited Apr. 7, 2013).

period, not to exceed 2 years or until consent is withdrawn by the consumer, whichever is sooner.”¹⁶⁴ Netflix could then automatically disclose the titles that subscribers watch without prompting the consumer each time. This process is sometimes referred to as “frictionless sharing.”¹⁶⁵

Representatives who support the amendment cite the changing views of the public with respect to their own personal information and individuals’ right to choose whether or not they want to share personal information publicly.¹⁶⁶ “This is how people do it now for books and articles, and they don’t need the government’s approval,” the amendment’s sponsor quoted to a CNN Money reporter in March 2012.¹⁶⁷ “The only reason there’s a distinction is because the government took control of the issue in 1988.”¹⁶⁸

The amendment passed relatively quickly through the House by a clean a vote of 303–116, but has met opposition in the Senate from Democratic leadership.¹⁶⁹ Senator Patrick Leahy, the sponsor of the original VPPA, spoke against the amendment at a Senate Subcommittee on Privacy, Technology and the Law hearing about the amendment, stating: “I worry about a loss of privacy because of the claimed benefit of ‘simplicity.’”¹⁷⁰ Targeting Netflix specifically and referencing a \$9 million class action settlement Netflix just disclosed in the face of a VPPA violation,¹⁷¹ Leahy rebuked: “Netflix announced a simpler billing practice a few months ago regarding its various services, and its customers rebelled.”¹⁷²

Other interest groups such as the Electronic Privacy Information Center (EPIC) argued that the amendment’s blanket disclosure provision would give

¹⁶⁴ H.R. 6671: *Electronic Communications Privacy Act Amendments of 2012*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/hr2471/text> (last visited Apr. 7, 2013); see also S. REP. NO. 100-599, at 8 (1988).

¹⁶⁵ Kurt Opsahl, Lee Tien & Yana Welinder, *A California District Court Holds that the Video Privacy Protection Act Applies to Online Video*, ELEC. FRONTIER FOUND. (Aug. 17, 2012), <https://www.eff.org/deeplinks/2012/08/california-district-court-holds-video-privacy-protection-act-applies-online-video>.

¹⁶⁶ Pepitone, *supra* note 6.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Video Privacy Protection Act: Protecting Viewer Privacy in the 21st Century: Hearing Before the Subcomm. on Privacy, Tech. & the Law of the S. Comm. on the Judiciary*, 112th Cong. (2012) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary).

¹⁷⁰ *Id.*

¹⁷¹ Michael Liedtke, *Netflix Class Action Settlement: Service Pays \$9 Million After Allegations of Privacy Violations*, HUFFINGTON POST (Feb. 10, 2012), http://www.huffingtonpost.com/2012/02/11/Netflix-class-action-settlement_n_1270230.html.

¹⁷² *Id.*

companies too much access to personal information.¹⁷³ According to the EPIC, a one-time consent from users would allow Netflix to disclose any titles viewed by that user on Netflix via its Facebook application.¹⁷⁴ After obtaining the blanket consent, Netflix would have the power to automatically post viewer information, regardless of whether the user has consented to the specific disclosure or not.¹⁷⁵ As a consequence, H.R. 2471 would severely limit the control that viewers currently have over what titles are shared.

The American Civil Liberties Union (ACLU) also opposed the amendment because it would make it easier for law enforcement officials to invade individual privacy using electronic sources.¹⁷⁶ Under the VPPA before it was amended, courts issuing orders compelling video tape service providers to produce personally identifiable information were required to have probable cause and give consumers prior notice.¹⁷⁷ But the ACLU argues that even though the amendment did not technically change those requirements, it still makes it easier for law enforcement to have access to an individual's video history. They argue that while courts hold themselves to these requirements, "it is unlikely that a court would require a third party (such as Facebook) to abide by these rules."¹⁷⁸ Meanwhile, law enforcement entities regularly use Facebook and other similar social media sites as tools to collect information on suspects during investigations.¹⁷⁹ Thus, the unintended consequence, the ACLU contends, will be easier access to more personal information for authorities and less due process for accused individuals.¹⁸⁰

¹⁷³ See *Video Privacy Protection Act: 2011 Netflix-Backed Amendment*, ELEC. PRIVACY INFO. CTR., <http://epic.org/privacy/vppa/#2011Netflix-BackedAmendment> (last visited Apr. 7, 2013) (citing arguments against H.R. 6671).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Letter from Laura W. Murphy, Director of the D.C. Legislative Office, ACLU, and Christopher Calabrese, Legislative Council, ACLU, to Chairman, S. Subcomm. on Privacy, Tech. & the Law, and Tom Coburn, Ranking Member, S. Subcomm. on Privacy, Tech. & the Law (Jan. 31, 2012), available at http://www.aclu.org/files/assets/fnal_statement_hr_2471_013112_4.pdf.

¹⁷⁷ 18 U.S.C. § 2701(b)(3).

¹⁷⁸ ACLU Letter from Laura W. Murphy, *supra* note 176, at 3.

¹⁷⁹ See Rocco Parascandola, *NYPD Forms New Social Media Unit to Mine Facebook and Twitter for Mayhem*, N.Y. DAILY NEWS (Aug. 10, 2011, 4:00 AM), http://articles.nydailynews.com/2011-08-10/local/29887819_1_social-media-facebook-and-twitter-kamisha-richards (highlighting how policemen use social media to identify targets during riots).

¹⁸⁰ Letter from Murphy and Calabrese to Franken and Coburn, *supra* note 176, at 2–3.

III. ANALYSIS

What videos we watch, what music we listen to, and what articles we read are all elements of a First Amendment that have been interpreted to include broad Fourth Amendment privacy protections. In the following pages, this Note argues that the Netflix argument that the VPPA must be updated due to ambiguity is a mere pretext for the company to circumvent the prohibition on the frictionless sharing of movie titles, and that VPPA should not be updated to allow users to give a one-time, blanket consent to allow companies to automatically publish what users do on the website. Consequently, Congress's vote allowing the Netflix-backed amendment in January of 2013 will have negative and lasting consequences for individual internet privacy in the future.¹⁸¹ Though companies that supported the amendment argue the VPPA restricts consumers' choice to control what personal information gets shared,¹⁸² this argument fails because: (1) legislative history suggests that Congress had other First Amendment rights in mind when it passed the VPPA in the first place, (2) in light of the *In re Hulu* decision, the VPPA should no longer be considered "ambiguous," (3) today's ubiquitous digital environment already makes it extremely easy to share information should consumers want to, and (4) an amendment allowing for frictionless sharing of personally identifiable information relating to video titles will put individuals at risk of extreme violation of their digital due process rights.

A. LEGISLATIVE HISTORY SUGGESTS MORE PROTECTION, NOT LESS

Many groups that commented on the Netflix-backed amendment discussion have also weighed in on personally identifiable information for video titles as compared to other types of personal information shared online, especially music and news sharing.¹⁸³ Of course, it is helpful to know what Congress thought about this question when it passed the VPPA in 1988.

In their Senate Report on the bill, legislators seemed to put video titles and book titles in the same category of personal information that should be protected.¹⁸⁴ In several places in the report, each time the term "videos" is mentioned, the term "books" is mentioned in close proximity.¹⁸⁵ This indicates

¹⁸¹ Joan Chrverie, *Senate Passes Video Privacy Protection Act Amendment*, EDUCAUSE (Jan. 4, 2013), <http://www.educause.edu/blogs/cheverij/senate-passes-video-privacy-protection-act-amendment>.

¹⁸² Pepitone, *supra* note 6.

¹⁸³ *Id.*

¹⁸⁴ S. REP. NO. 100-599, at 12 (1988).

¹⁸⁵ *Id.* at 5-6, 7.

that both books and videos were being thought of in conjunction with materials that allowing access to one's rental history would be an invasion of one's right to privacy.¹⁸⁶ At a hearing for the bill discussing the "video section," one representative called books and films the "intellectual vitamins" necessary for individuals to grow intellectually.¹⁸⁷

Legislators at the same hearing also heard testimony describing the importance of preserving privacy for both reading and viewing materials to avoid a "big brother" effect from an over-eager government. A spokesperson of the ACLU, in describing the government's use of "reading lists" for intelligence purposes, stated that "[t]he danger here is that a watched society is a conformist society, in which individuals are chilled in their pursuit of ideas"¹⁸⁸ These testimonials by congressmen and the ACLU suggest that any rental material, whether it is written or audiovisual, could be used to violate one's right to privacy if not vigilantly protected.

So why were "reading lists" and library rental records not included in the VPPA? Why was the VPPA not in fact named the "Video and Library Privacy Protection Act"? Indeed, according to the Senate Report, there was originally supposed to be a "Library Section" included.¹⁸⁹ The Report states that the bill's sponsors included the protection for library borrower records, "recognizing that there is a close tie between what one views and what one reads."¹⁹⁰ The Report even indicates that the bill provision made it out of subcommittee with the provision still included.¹⁹¹ However, the report goes on to state "the committee was unable to resolve questions regarding the application of such a provision for law enforcement."¹⁹² What is telling is that the report does not include any detail whatsoever on why legislators were unable to agree on the library section, past that the disagreement supposedly hinged on law enforcement. However, the Report still serves as evidence that Congress at least made a connection between rental history and other types of personal information in the VPPA when they were drafting the law.¹⁹³

¹⁸⁶ *Id.* at 5–6.

¹⁸⁷ *Id.* at 7 (quoting Video and Library Privacy Protection Act of 1998: J. Hearing on H.R. 4947 and S. 2361 Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary & the Subcomm. on Tech. & the Law of the S. Comm. on the Judiciary, 100th Cong. 29 (1988) (statement of Rep. Alfred A. McCandless)).

¹⁸⁸ *Id.* (testimony of Janlor Goldman, Counsel, ACLU).

¹⁸⁹ *Id.* at 8.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

B. HULU PRIVACY IS A GAME CHANGER

Now that *In re Hulu* has indicated that the VPPA applies to digital materials as well as physical ones, privacy protection for video titles may very well be a whole new ball game. Because this case holding makes clear the protections for personally identifiable information include digital materials, as well as physical ones,¹⁹⁴ the protection of the law before amendment would have been that much stronger.

Prior to the *In re Hulu* ruling, it was unclear whether the VPPA applied to nonphysical formats. This was the case for several reasons. First, the definition of “video tape service provider” seemed to only include providers whose services included actual physical video cassette tapes, because the definition specified “video cassette tapes or similar audio visual materials.”¹⁹⁵ As a result, digital video streaming sites whose services did not include at-home video tape or DVD delivery services were able to convincingly argue that they were not “video tape service providers” under the VPPA definition. In *In re Hulu*, Hulu presented several arguments for why this construction of the video tape service provider definition was a logical one. First, they argued that legislative history confirmed a focus on “physical stores selling goods.”¹⁹⁶ Hulu argued that this made sense because “unlike bricks-and-mortar businesses that can provide videos directly to customers, video-streaming businesses like Hulu necessarily rely on third parties to ‘facilitate many aspects of their businesses’”¹⁹⁷ Hulu went on to argue that if Congress wanted to regulate digital content, they would have defined “video tape service provider” to include “businesses that ‘traffic in audio-visual information or data.’”¹⁹⁸

The U.S. District Court for the Northern District of California used a plain language interpretation of the statute to reject Hulu’s arguments deciding that Congress’s legislative intent worked toward including digital materials in the definition.¹⁹⁹ The court held that “Congress’s concern with privacy and protecting the confidentiality of an individual’s choices” together with the Senate Report’s discussion of “similar audio visual materials” suggest Congress’s intent was to cover more, not fewer emerging technologies.²⁰⁰ In so

¹⁹⁴ *In re Hulu Privacy Litig.*, No. C 11-03764 LB, 2012 U.S. Dist. LEXIS 112916, at *19–20 (N.D. Cal. Aug. 10, 2012).

¹⁹⁵ 18 U.S.C. § 2710(a)(4) (2013).

¹⁹⁶ *In re Hulu Privacy Litig.*, No. C 11-03764 LB, 2012 U.S. Dist. LEXIS 112916, at *13 (N.D. Cal. Aug. 10, 2012).

¹⁹⁷ *Id.* at *14.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at *16.

²⁰⁰ *Id.* at *18.

holding, the district court sent a message to businesses like Hulu: that the VPPA applies to all videos, whether digital or physical, and that businesses are no longer be able to make semantic arguments in order to circumvent VPPA protection.

The *In re Hulu* decision also puts Hulu in an awkward position with respect to their Facebook application. Hulu's Facebook application utilizes frictionless sharing when users watch shows and videos on the Hulu website. At the very least, the *In re Hulu* decision effectively means that Hulu and Netflix are not different from each other for the purposes of subjection to privacy protection laws.

C. EASE OF SHARING IS A WEAK ARGUMENT

It is already extremely easy to share activities on the Internet. Virtually every website and every online activity provides the option of "sharing" that activity with others online via social media outlets.²⁰¹ Websites do this by prompting users with a screen that asks whether the user would like to "share" that activity on the social media website of their choice and providing a link to that website.²⁰² This requires a conscious and positive action by the user. However, the Netflix amendment takes away even this last choice for consumers by automatically sharing the activities they engage in on social media sites, starting with Facebook.²⁰³

The "frictionless sharing" aspect of the UPPA as amended is problematic, first, because users are not always clear about what they are agreeing to when they sign up for the automatic sharing feature. Indeed, users may often be unaware that they have opted into the frictionless sharing feature and that their information is currently being automatically shared. This sort of thing can happen very easily. In the context of online news articles, it apparently happens quite often: when one comes across an article, the news site lets the user know that a Facebook friend has also read the article.²⁰⁴ If one decides they want to read the article, too, and they click on the article, they may be accidentally accepting to share the fact on their Facebook wall.²⁰⁵ Once such application

²⁰¹ Robert Wright, *Back Off, Mark Zuckerberg!*, ATLANTIC (May 11, 2012, 12:51 AM), <http://www.theatlantic.com/technology/archive/2012/05/back-off-mark-zuckerberg/256906/>.

²⁰² *Id.*

²⁰³ *Video Privacy Protection Act: Protecting Viewer Privacy in the 21st Century: Hearing Before the Subcomm. on Privacy, Tech. & the Law of the S. Comm. on the Judiciary*, 112th Cong. (2012) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary).

²⁰⁴ Wright, *supra* note 201.

²⁰⁵ *Id.*

that uses this tactic is the Washington Post Social Reader.²⁰⁶ The application invites people to “opt in” by providing a link to an article that the user wants to read.²⁰⁷ By simply clicking the link to read the article, the user is also accepting the terms of a frictionless sharing agreement that goes along with the Social Reader application.²⁰⁸ Many users do not even realize they have agreed to anything at all, much less that what they are reading is now being shared with their Internet acquaintances.²⁰⁹ This could go on until a friend alerts them of the fact much later.²¹⁰ Another common tactic companies employ to entice consumers to “opt in” to a frictionless sharing feature is to present their “opt out” provision in along with the invitation to join the feature, hoping consumers will feel they have nothing to lose by adding the feature because they can always opt out if they want to.²¹¹

The fact that many users don’t even realize they are opting into a sharing application is evidence that users are not given adequate information when presented with the choice of whether to engage in frictionless sharing or not. And yet, the new version of the VPPA makes it even easier for companies to get users to engage in frictionless sharing.

Further, statistics show that users are catching on to companies pulling this type of “fast one,” and that these types of frictionless sharing applications, especially in the “social reader” category, are getting less and less popular.²¹² Continuing with the Washington Post Social Reader as an example, in May of 2011, the app claimed about 8 million users monthly.²¹³ That same application today, however, that same application, as of June 7, 2013, only cites about 100,000 users monthly.²¹⁴ This decrease in user activity for applications utilizing frictionless sharing suggests that consumers may be catching on to the fact that they were accidentally or submissively opting into an application that automatically shares the articles they read. In turn, this decrease may suggest

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Nick Bilton, *Disruptions: Seeking Privacy in a Networked Age*, N.Y. TIMES BITS BLOG (Oct. 14, 2012, 12:00 PM), <http://bits.blogs.nytimes.com/2012/10/14/seeking-privacy-in-a-networked-age/>.

²¹² John Herrman, *Facebook Social Readers Are All Collapsing*, BUZZFEED.COM (May 7, 2012, 3:17 PM), <http://www.buzzfeed.com/jwherrman/facebook-social-readers-are-all-collapsing>. For other applications that are losing users, see AppData.com’s “Top Losers This Week” list.

²¹³ Wright, *supra* note 201.

²¹⁴ Washington Post Social Reader, <http://help.socialreader.com/faqs> (last visited June 7, 2013); *see also* Facebook.com App Center: Washington Post Social Reader, <http://apps.facebook.com/wpsocialreader/> (last visited June 7, 2013).

that consumers do not appreciate the frictionless sharing feature, or an application that allows it.

D. ANYTHING YOU SAY (ON FACEBOOK) CAN AND WILL BE USED AGAINST YOU IN A COURT OF LAW

Perhaps the most alarming danger of allowing video tape service providers to frictionlessly share titles and post them to social media sites is the potential for such information to be used as evidence against defendants in court. Posts to social media sites are considered to be in the public domain²¹⁵ and are not protected as electronic communications under the Electronic Communications Privacy Act (ECPA).²¹⁶ Consequently, law enforcement officials do not have to obtain warrants to peruse sites for information on individuals and potential suspects.²¹⁷ As a result, law enforcement officials have begun to use these sites to gather evidence during investigations more and more often.²¹⁸ Furthermore, private Internet companies can be compelled to share personal information for police investigations. In a London riot in August of 2011, Twitter assisted London police by allowing them to monitor the site for potential rioters and looters.²¹⁹ This is just one example of how information posted on a social site can later be used as probable cause for arrest.

Even if probable cause is required under a state statute or under the VPPA, the process of showing probable cause for online information can often be easily averted due to statutory exceptions and exemptions for law enforcement officials.²²⁰ Furthermore, social media posts often get admitted for evidence at trial.²²¹ Indeed, from divorce cases to criminal proceedings, social media postings have become a staple for attorneys in the discovery stage.²²² This is because online postings often easily satisfy the trial test for admissibility of evidence. To be admissible at trial, courts look to whether the person had

²¹⁵ Parascandola, *supra* note 179.

²¹⁶ 18 U.S.C. §§ 2522–2710 (1986).

²¹⁷ Parascandola, *supra* note 179.

²¹⁸ Liz Klimas, *Police Increasingly Using Social Media to Catch Criminals*, BLAZE (Aug. 11, 2011, 10:37 AM), <http://www.theblaze.com/stories/police-increasingly-using-social-media-to-catch-criminals/>; see also Parascandola, *supra* note 179.

²¹⁹ Kit Chellel, *Blackberry, Twitter Probed in London Riots*, BLOOMBERG (Aug. 9, 2011, 10:00 AM), <http://www.bloomberg.com/news/2011-08-09/blackberry-messages-probed-in-u-k-rioting-as-police-say-looting-organized.html>.

²²⁰ Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions*, 111 MICH. L. REV. 485, 503–07 (2013).

²²¹ Denise G. Callahan, *Social Media Posts Admissible In Court*, J. NEWS (Oct. 8, 2012, 5:00 AM), <http://www.journal-news.com/news/news/social-media-posts-admissible-in-court/nSWR3/>.

²²² *Id.*

“reasonable expectation of privacy” when posting the information. Because online forums are viewed as “such a seemingly public domain” information posted to a social media website such as Facebook or Twitter will probably not be afforded the “reasonable expectation privacy” protection.²²³

Scarier still are the ramifications that frictionless sharing applications on social media sites could potentially have on an individual’s legal case should some viewing history happen to corroborate a prosecutor’s depiction of a defendant or encourage a harsher punishment. One prosecutor bragged to an Ohio-based newspaper that he had recently used photos and posts of a teenager accused of murder to demonstrate that the defendant “liked violence.”²²⁴ Such evidence can also be used to destroy witness credibility.²²⁵

However, photos are just one visual medium from which juries can make assumptions—videos and movies are quite another. When a jury looks at a photo of a defendant, those jurors are looking at a person committing an actual act. Of course there is the potential for incorrect assumptions; any conclusions or assumptions made would be based on what the person in the photo is actually doing. Posts to a site are the same: whatever conclusions one may draw from a written post at least the post was drafted by the defendant and posted consciously for a purpose.

A video rental history, however, does not provide a coherent line of thought or emotion the way that a test or a picture does. In this way, video rental histories differ in this in a small but extremely crucial respect: because a judge, jury, or any other person who sees the list of videos or movies has no anchor from which to base his or her assumptions about the titles. Where some will watch certain videos for documentary or educational value, others would view the same videos as uncouth or offensive. Further, videos and movies can often be controversial, but educational. Additionally, individuals often watch movies from many different genres. Thus, a video viewing history presented as evidence at trial could potentially be molded to fit almost any legal theory.

Finally, allowing automatic sharing of titles would circumvent the very purpose for which the VPPA itself was enacted. The law specifically states that for law enforcement to be allowed access to video titles without the user’s consent, the viewer must be given notice and the law enforcement official must show probable cause before a video tape service provider may disclose the information.²²⁶ In a civil proceeding, law enforcement must also show a

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ 18 U.S.C. § 2710(b)(2)(C), (b)(3) (2013).

compelling need for the information.²²⁷ However, now that companies are allowed to frictionlessly share video titles on social media sites, and if law enforcement continues to have free access to and continues to use those sites as shortcuts around criminal procedure, then those VPPA protections meant to protect individual due process will break down. In practice, law enforcement will have even more access to personally identifiable information that has the potential to be misinterpreted and used against individuals.

IV. CONCLUSION

Congressional intent behind the Video Privacy Protection Act (VPPA) was to protect individual privacy with regard to personal information and video viewing history by prohibiting video rental companies from sharing their personal information with third parties without explicit consent.²²⁸ With the rise of the digital age, however, there is enormous revenue to be had from sharing personal information via social media websites.²²⁹ While many consumers today use social media to “share” what products and services they “like” and purchase, there has been a developing boom in “frictionless sharing,” where companies automatically post that a consumer has used a product or service via the consumer’s social media outlet.²³⁰ Due to the sensitive nature of personal viewing history and the VPPA’s prohibitions on third party information disclosures, the video industry has been precluded from this automatic sharing tactic in the past.²³¹ Because of the ambiguity in the VPPA’s definition of “video tape device provider,” Netflix has not been able to compete with digital streaming—only websites, such as Hulu, in the video advertising market. Netflix cites the reason for wanting this update as a desire to clear up an ambiguity in the VPPA’s definitional language pertaining to physical as opposed to digital viewing formats.²³² However, this argument is merely a pretext for the company to launch a social application that will allow it to increase its viewer base, and thereby increase its revenues. Further, the case of *In re* Hulu has already produced precedent rendering digital video viewing formats subject to the same limitations as physical viewing methods. Consumers, on the other hand, do not gain from the new version of the VPPA that allows frictionless sharing of video viewing histories. On the contrary,

²²⁷ *Id.* § 2710(b)(2)(F).

²²⁸ *Id.* § 2710.

²²⁹ *The Cross-Platform Report*, *supra* note 89.

²³⁰ *State of the Media: The Social Media Report 2012*, *supra* note 94.

²³¹ Pepitone, *supra* note 6.

²³² *Id.*

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allowing companies to share personal video viewing history frictionlessly only results in a loss of individual choice, privacy, and due process rights. The effects of this change will have a negative and lasting impact for individuals, especially with respect to the use of video rental lists as evidence in court.

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