Courts Continue to Grapple with VPPA Class Actions

By Anjali C. Das

Introduction

Video Privacy Protection Act (VPPA) class actions filed against companies continue to proliferate. Meanwhile, as evidenced by a recent spate of decisions by the Second, Sixth, Seventh, and Ninth circuits, courts remain divided on the application of the VPPA statute to certain businesses and consumers. Although the VPPA was passed in the now bygone era of Blockbuster and video cassette rentals, plaintiffs have seized on this seemingly outdated statute to sue companies that track consumers' online viewing activities using Meta Pixel and other similar tracking technologies.

VPPA Legislative History

Legislation now known as the Video Privacy Protection Act[1] was first introduced when a Washington newspaper published a profile on U.S. Supreme Court nominee Judge Robert Bork, based on the titles of movies he and his family rented from a local video store. At the time, this high-profile episode was dubbed "*The Bork Tapes*" scandal. A 1988 Senate Judiciary Committee Report denouncing the public disclosure of Bork's video rental selections astutely observed that "[Privacy] is not a conservative or a liberal or moderate issue. It is an issue that goes to the deepest yearnings of all Americans that we are free and we cherish our freedom and we want our freedom. We want to be left alone."[2] The VPPA was enacted shortly thereafter.

VPPA Overview

The VPPA states, in pertinent part, that a "video tape service provider who knowingly discloses, to any person, personally identifiable information [PII] concerning any consumer shall be liable to the aggrieved person."

In summary:

- The VPPA applies to a "video tape service provider" engaged in the rental, sale, or delivery of pre-recorded video cassette tapes or similar audiovisual content.
- A "consumer" means a renter, purchaser, or subscriber of goods and services from a video tape service provider.
- The video tape service provider shall not knowingly disclose "personally identifiable information" related to a consumer's video content materials or viewing habits to third parties without the consumer's informed written consent.

In the past few years, the plaintiffs' class action bar has seized upon this statute to bring nationwide class actions against companies that utilize tracking technology – such as Meta Pixel, Google Analytics, and other similar software code embedded on their websites – to collect and analyze consumer habits. This data is commonly shared with third-party tech companies for targeted advertising purposes.

Importantly, the VPPA allows a "private right of action." In other words, individuals can sue companies for alleged violations of the statute and seek recovery of statutory damages, punitive damages, and attorney's fees. This provision has incentivized plaintiffs' attorneys to file hundreds of VPPA class actions in courts nationwide. In 2024, an estimated 250 VPPA class actions were filed against companies – nearly double the number of similar suits filed in 2023.

Recent VPPA Appellate Court Decisions
In a recent spate of decisions, federal appellate courts have addressed whether a named plaintiff is in fact a "consumer" within the meaning of the VPPA statute – reaching contradictory conclusions.

Second Circuit
In ***Salazar v. National Basketball Association***[3], plaintiff Salazar signed up for a complimentary online newsletter offered by defendant National Basketball Association (NBA). To subscribe to the newsletter, the plaintiff had to provide his personal information, including his email and IP addresses. The plaintiff also alleged that he watched videos on the NBA's website, which used Meta Pixel tracking tools. The plaintiff did not pay for the videos, which were accessible to both subscribers and non-subscribers. The plaintiff further alleged that his video-watching history and Facebook ID were disclosed to Meta by the defendant without his permission and in violation of the VPPA.

The defendant NBA argued that the plaintiff was not a "consumer" within the meaning of the VPPA. In particular, it asserted that the plaintiff was not a subscriber of *audiovisual* goods or services, as the newsletter did not constitute pre-recorded audiovisual content. However, the Second Circuit interpreted the definition of consumer broadly, finding that if the plaintiff subscribed to *any* goods or services (newsletter) offered by the defendant – which also provided audiovisual content (videos) on its website – the plaintiff was indeed a consumer protected under the VPPA.

According to the Second Circuit, the VPPA "applies equally to a business dealing primarily in audiovisual materials (think Blockbuster) and one dealing primarily in *non*-audiovisual materials (think a general store that rents out a few movies)." However, in an attempt to install some guardrails around its expansive interpretation, the Second Circuit further observed that, in the example of the general store, it would only be liable under the VPPA for disclosing information pertaining to a customer's video materials – not their "bread-buying habits."

Seventh Circuit
The Seventh Circuit Court of Appeals similarly adopted a liberal interpretation of the term "consumer" under the VPPA in ***Merchant v. Me-TV National Limited Partnership***.[4] Me-TV operated a website where the public could watch classic television shows without providing any personal information, nor were there any costs associated with accessing video content. Me-TV's revenue came from ad sales. In that case, the plaintiffs subscribed to Me-TV by providing their email addresses and zip codes. Me-TV subscribers received additional personalized services, including program schedules, reminders, etc. The plaintiffs viewed content on Me-TV while signed into their Facebook accounts. Me-TV allegedly embedded Meta Pixel into its videos, which enabled Facebook to determine the plaintiffs' viewing habits in order to sell targeted advertising. The plaintiffs allege that Me-TV violated the VPPA by sharing their personal information collected by the Meta Pixel tracking technology with Facebook.

Me-TV argued that the plaintiffs were not "consumers" insofar as they did not specifically subscribe to video content that was available free of charge to everyone on the website. Instead, the plaintiffs merely signed up for ancillary services related to video programming. However, the Seventh Circuit disagreed, finding that the plaintiffs were in fact consumers as contemplated by the VPPA. As the Seventh Circuit observed, the complaint adequately alleged that Me-TV is a video tape service provider. "If plaintiffs had signed up and never watched a video, but had purchased a Flintstones sweatshirt or a Scooby Doo coffee mug" offered on Me-TV's website, "then they would have purchased 'goods' from a 'video tape service provider.' Nothing in the Act says that the goods or services must be video tapes or streams." In other words, as long as the plaintiffs were renters, purchasers, or subscribers of any goods or services offered by a video tape service provider, they qualified as consumers for the purpose of asserting a VPPA claim.

Sixth Circuit

Conversely, in ***Salazar v. Paramount Global d/b/a 247Sports***,[5] the Sixth Circuit adopted a narrow interpretation of the term consumer, which required a subscription to audiovisual content – not just any goods or services – from a video tape service provider. In that case, the plaintiff subscribed to an electronic newsletter from 247Sports.com by providing his email and IP address. In addition, the plaintiff viewed content on 247Sports.com, a website owned by Paramount that covers college sports recruiting, while logged into his Facebook account. The plaintiff alleged that he had a digital subscription to the website, which utilized pixel tracking tools. The plaintiff alleged that the pixel enabled Paramount to track and disclose his viewing history, linked to his Facebook ID, to Facebook without his consent.

The Sixth Circuit explicitly rejected the Second and Seventh Circuits' broad interpretation of a "consumer" under the VPPA. Instead, the Sixth Circuit opined that a person is a consumer under the statute "only when he subscribes to 'goods or services' in the nature of 'video cassette tapes or similar audiovisual materials.'" Here, the plaintiff only subscribed to a newsletter. He did not subscribe to audio-visual content that was available to anyone who visited 247Sports.com's website. Accordingly, the plaintiff was not a consumer under the VPPA.

Ninth Circuit

In yet another recent VPPA decision, the Ninth Circuit explained that a "video tape service provider" only extended to the rental, sale, or delivery of prerecorded (versus live) content. In ***Osheske v. Silver Cinemas Acquisition Company d/b/a Landmark Theaters***,[6] defendant Landmark operated a website where people could watch movie trailers, browse show times, and purchase tickets to view movies in traditional brick-and-mortar theaters. Landmark installed a pixel or web beacon on its website to transmit user information to Facebook whenever someone purchased a movie ticket while logged into their Facebook account. The plaintiff visited Landmark's website and bought a movie ticket, and alleged that the defendant violated the VPPA by sharing his personal information (including the name of the film, the theater location, and his unique Facebook ID) with Facebook without his consent.

The Ninth Circuit agreed with defendant Landmark that it was not a "video tape service provider" under the VPPA. In particular, the court observed that "Landmark does not deliver any prerecorded 'audio visual materials' to the consumer in either its ticket sales or its in-theater experiences," further noting, "Someone late to a theater showing cannot rewind the movie, someone needing to use the facilities or desiring a soft drink cannot pause it, and someone falling asleep cannot stop and start it again later." The Ninth Circuit also stated that despite the fact that movies theaters were in "full swing in the late 1980s," when the VPPA was enacted, "movie theaters were omitted from the Act." While the Ninth Circuit's opinion might be limited in its scope, it nonetheless underscores that the VPPA only applies to the disclosure of personal information concerning pre-recorded audiovisual content.

Conclusion

Recent appellate court rulings involving VPPA class actions demonstrate that the interpretation of the statute's key provisions remains unsettled. The strength of legal defenses available to companies at the pleading stage, when considering a motion to dismiss, is heavily influenced by the court and jurisdiction in which the case is pending. Undoubtedly, plaintiffs will continue to file VPPA class actions against companies that utilize pixel tracking technology, now essentially ubiquitous. The best defense is a good offense in terms of conspicuously disclosing the use of tracking tools and obtaining consumers' prior consent by means of a pop-up banner at the outset of any transactions. Moreover, companies should carefully craft their customer agreements, terms, and conditions to include a class action waiver and limitation of liability provisions.

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Privacy Practice. She routinely defends data breach and other privacy class action lawsuits in state and federal courts around the country, including the successful dismissal of VPPA class actions. In addition, Anjali and her team advise companies on privacy, security, and AI policies and procedures. If you have any questions regarding this article, please contact **Anjali.**

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1 18 U.S. Code § 2710, et seq.

2 Senate Judiciary Committee Report 100-599 accompanying Senate Bill 2361 on the Video Privacy Protection Act of 1988 (Oct. 21, 1998).

3 *Michael Salazer v. National Basketball Assn.*, Docket No. 23-1147 in the U.S. Court of Appeals for the Second Circuit (decided October 15, 2024).

4 *David Vance Gardner and Gary Merchant v. Me-TV National Limited Partnership*, Docket No. 24-1290 in the U.S. Court of Appeals for the Seventh Circuit (decided March 28, 2025).

5 *Michael Salazer v. Paramount Global d/b/a 247Sports*, Docket No. 23-5748 in the U.S. Court of Appeals for the Sixth Circuit (decided April 3, 2025).

6 *Paul Osheske v. Silver Cinemas Acquisition Company d/b/a Landmark Theaters*, Docket No. 23-3882 in the U.S. Court of Appeals for the Ninth Circuit.