

The VPPA Class Action – Is This Tide Still Coming In? Or Going Out?

The Video Privacy Protection Act (“VPPA”)ⁱ had quite a year in 2023. Building on its newfound stardom and cachet in the hands of the plaintiff class action bar toward the end of 2022, the VPPA just kept growing and growing in early 2023. Case filings were up (in federal and state court). Sectors targeted for litigation kept expanding – from traditional video purveyors to banking, sports, manufacturing, health care, print media and websites with embedded videos accessible for viewing and downloading.

However, by the end of 2023, the tide began to turn against VPPA plaintiffs, with previously agreed settlements subjected to criticism by the courts and defendants obtaining early dismissals on constitutional and statutory grounds. This article will take stock of the turbulence engulfing the VPPA class action lawsuit trend and offer a path forward for companies in search of best practices and the most effective defense strategies headed into 2024.

Background on the VPPA

The VPPA was enacted in 1988 following an incident where a video store clerk disclosed Judge Robert Bork’s video rental records, which were subsequently publicized in the media during his hearing for confirmation to the Supreme Court. Amid public surprise and concern from across the political spectrum, Congress amended the federal code to prohibit, with certain exceptions, the disclosure of video rental records containing personally identifiable information.ⁱⁱ

While the VPPA was initially intended to prevent video rental companies from sharing details regarding those rentals, creative plaintiffs’ attorneys started using the VPPA for liability claims against streaming companies with the rise of online video streaming in the early 2000s. This has helped shape much of the case law regarding applicability of the VPPA to streaming video tracking.ⁱⁱⁱ

The term “consumer” is defined in the VPPA as “any renter, purchaser, or subscriber of goods or services from a video tape service provider.” The case law is split on exactly what makes someone a “subscriber” so as to meet the definition of “consumer” under the VPPA.^{iv} Generally, subscribing involves some type of commitment, relationship or association (financial or otherwise) between a person and an entity but does not necessarily require payment.

In 2022, there was a sharp increase in litigation under the VPPA against websites which had videos available for viewing on their sites which was often coupled with Facebook Pixel/Meta Pixel tracking on the website. At the time, the case law was unclear whether individuals browsing website videos are “subscribers” under the VPPA or if merely putting videos on a website makes the website operator a “video tape service provider” subject to potential VPPA liability.

VPPA Case Developments in 2023

One of the first heavily publicized cases in this new wave of VPPA cases was against the Boston Globe in early 2022.^v The lawsuit alleged the Boston Globe's integration of the Meta pixel tracking functionality onto sections of their website which were only available to Boston Globe subscribers violated the VPPA to the extent that tracking included tracking integrated video views on the website. In the year following the filing of the Boston Globe lawsuit, over 100 class actions were brought against online news outlets, streaming services retailers and others, almost all of which were based on use of the Meta pixel on those websites.

After fiercely litigating the case for over a year, the Boston Globe eventually reached a \$5 million settlement. However, subsequent to the settlement, U.S. District Judge Richard Stearns dramatically reduced an agreed \$1.7 million in plaintiffs' attorneys' fees down to \$750,000.

According to Bloomberg, as of November 2023, of those over 100 cases, 17 had been dismissed by the courts; 29 were voluntarily dismissed by plaintiffs, potentially as a result of private settlements; and only 19 resulted in class-wide settlements or other public settlements.^{vi} The dismissals by court order were led by courts largely agreeing that subscription to a website's newsletter which may have video content is not sufficient to make an individual a "consumer" under the VPPA.^{vii}

In addition to the above examples of attorneys' fees being criticized and reduced in settlements of VPPA cases and dismissals being achieved by defendants by motion, the slowdown in this wave of litigation may also be a result of targeted websites and companies adding compliance plans and reconfiguring their business practices. Additionally, given some of the criticism by courts and commentators, it is perhaps inevitable that Congress and key regulators may start to take renewed interest in how such an ancient, single-purpose pre-internet law could be so dramatically weaponized in 2022 and 2023 as a vehicle to attack and "regulate" e-commerce and routine data analytics.

Also relevant is the newly crowded field of other statutory damage claims under federal and state laws, particularly the California Invasion of Privacy Act and the federal Electronic Communications Privacy Act, as discussed elsewhere in this Tech Transactions & Data Privacy Report: 2024. It remains to be seen if these potentially "greener pastures" will draw attention and energy away from new VPPA class action suits.

Best Practices Moving Forward in 2024

While the more dubious stretches of the VPPA statutory language have tapered off somewhat in newly filed suits, there are still cases being regularly brought against websites which have third-party video tracking services behind subscription login pages.

Going forward, websites that wish to put videos behind a log-in section and track the viewership of those videos through any third-party service should institute a policy of obtaining regular express user consent to such tracking. This is an emerging best practice even if no payment is involved and users merely need to create accounts to have access to those sections of the website.

Companies should also assess their uses of tracking on web pages with integrated video features. Some general good practices include removing all embedded videos from websites and instead redirecting individuals to third-party websites such as Instagram or YouTube to view, configuring website plug-ins (including the Meta pixel) to disable "Content View" or "Page View" function either sitewide or on any landing page with a video, or requiring affirmative acknowledgment by users that they understand the website's tracking functions apply to videos the users view before a user is permitted to view any embedded video on a company's website.

End Thoughts

The journey of the VPPA through 2023 has been quite a roller coaster, marked by a significant rise in class action lawsuits followed by a notable shift in the legal landscape toward the end of the year. This shift saw a reduction in settlements and an increase in early dismissals, signaling a potential decline in the VPPA's role in litigation on a class-wide basis against key sectors and types of websites.

The year's developments highlight the evolving nature of privacy law and its application in the digital age, especially concerning video content and tracking. For companies, this underscores the importance of staying abreast of legal interpretations and adapting their practices accordingly. Instituting policies like obtaining express user consent for video tracking, reassessing the use of embedded videos and reconfiguring website tracking functions is now essential.

As we move into 2024, it is clear that the landscape of privacy law, especially in relation to the VPPA, remains dynamic. Companies must continue to navigate these changes proactively, ensuring compliance and reducing litigation risks in an increasingly digital world.

ⁱ 18 U.S.C. § 2710.

ⁱⁱ The VPPA permits disclosure of such information: (1) to the consumer; (2) with the written consent of the consumer; (3) pursuant to a federal criminal warrant, an equivalent state warrant, a grand jury subpoena or a court order under specified guidelines; (4) to any person if such disclosure is solely the names and addresses of consumers and the consumer has had the opportunity to prohibit such disclosure; (5) to any person if such disclosure is incident to the ordinary course of business of the video tape service provider; or (6) pursuant to a civil court order.

ⁱⁱⁱ See *In re Hulu Privacy Litigation*, No. C 11-03764 LB, 2012 WL 3282960, at *6 (N.D. Cal. Aug. 10, 2012); See *In re Nickelodeon Consumer Privacy Litigation*, 827 F.3d 262, 290 (3d. Cir. 2016) (“companies in the business of streaming digital video are well advised to think carefully about customer notice and consent”).

^{iv} See *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251, 1255-58 (11th Cir. 2015) (“Subscriptions involve some or [most] of the following [factors]: payment, registration, commitment, delivery, [expressed association] and/or access to restricted content” (alterations in original) (citation omitted)).

^v *Ambrose v. Boston Globe Media Partners LLC*, 1:22-cv-10195 (D. Mass. Feb. 5, 2022).

^{vi} Witley, Skye, *Video Privacy Class Action Wave Slowed by High Dismissal Rate*, Bloomberg Law <https://news.bloomberglaw.com/privacy-and-data-security/video-privacy-class-action-wave-slowed-by-high-dismissal-rate> (Nov. 20, 2023)

^{vii} See, e.g., *Salazar v. Paramount Global*, 3:22-cv-00756, Dkt. #33 (M.D. Tenn. July 17, 2023); *Carroll v. The J.M. Smucker Company et al.*, Case No. 3:22-cv-08952, Dkt. #36 (N.D. Cal. June 15, 2023).