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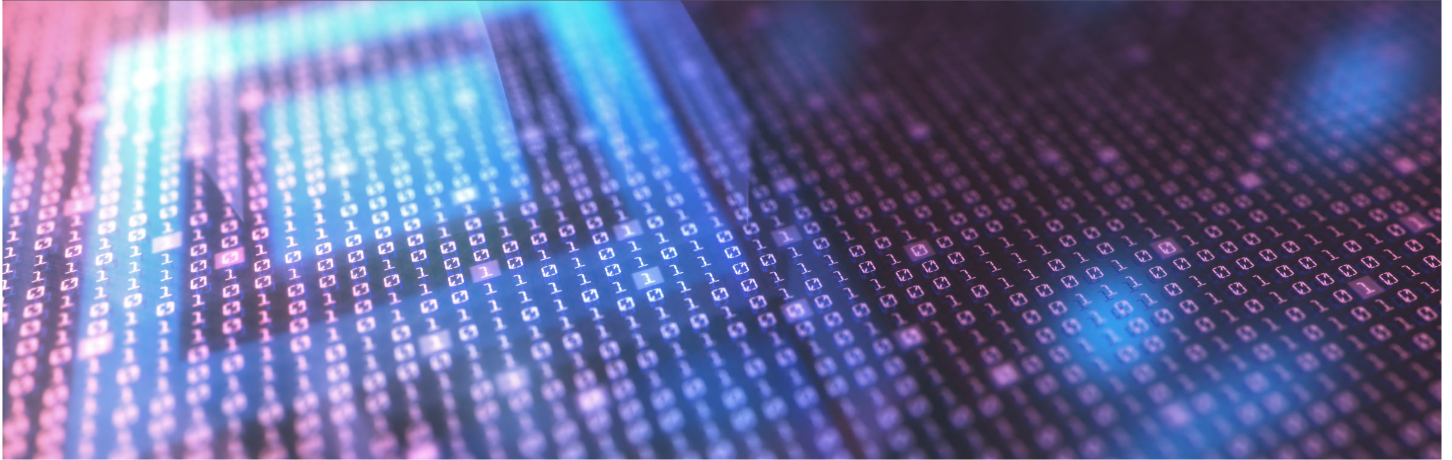

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Second Circuit's Broad Reading of VPPA May Spark New Wave of Litigation

The Second Circuit recently issued a ruling in a class action under the Video Privacy Protection Act ("VPPA") that departs considerably from other federal courts on several key issues. The Court's recent decision in *Salazar v. NBA* adopts a broad reading of the VPPA, holding that the definition of "consumer" under the law includes individuals who bought, rented, or subscribed to *any* "good and services" provided by a "video tape service provider," ("VTSP") regardless of whether the service rendered involved audio-visual materials. The Court's ruling is markedly different from the narrow reading of the VPPA that other federal courts have adopted and has the potential to expand the class of individuals and defendants subject to the law.

BACKGROUND

The VPPA dates back to 1988 and was passed by Congress in the wake of Judge Bork's contentious Supreme Court nomination hearing. During those hearings, *The Washington Post* obtained Judge Bork's video rental records, which at the time was considered an outrageous privacy violation and led directly to the passage of the VPPA. The law requires that VTSPs obtain the written consent of "consumers" prior to sharing their video viewing history with third parties. The VPPA has a liquidated damages clause and has lately become a magnet for class action litigation, as plaintiffs have attempted to apply the law to website operators using online tracking technologies, in particular Meta Pixel.

The plaintiff, and putative class representative in *Salazar,* subscribed to receive an online newsletter from the National Basketball Association ("NBA"). As part of the subscription process, the plaintiff provided the NBA with his name and other personal information but did not pay a fee. The newsletters themselves did not contain any audio-visual materials, but the plaintiff did watch videos on the NBA website after subscribing to the newsletter. The plaintiff alleged that unbeknownst to him, when he watched videos on the NBA website, a pixel installed on his browser via code on the NBA website caused his video viewing history to be automatically shared with Meta. According to the plaintiff, this sharing constituted an unauthorized disclosure of his video viewing history, triggering liquidated damages of $2,500 per consumer.

STATUS OF VPPA LITIGATION GENERALLY

The fact pattern is a familiar one in VPPA litigation, which increased significantly in 2022 and 2023, but has slowed down in 2024—in large part because of a growing consensus among federal courts as to who constitutes a "consumer" under the law as well as the meaning of "video tape service provider." Federal courts have increasingly read these provisions narrowly and held that a VTSP must be exclusively in the business of selling, renting, or providing audio-visual materials and a consumer must buy, rent, or subscribe to audio-visual materials.

This narrow reading has led to the dismissal of many VPPA defendants that provide videos on their websites but aren't otherwise in the business of selling or renting videos. For example, many newspapers and other media organizations that maintain websites have been able to escape VPPA liability because courts have held that these organizations were in the business of selling news and not exclusively in the business of providing audio-visual materials.

THE SECOND CIRCUIT EXPANDS THE DEFINITION OF CONSUMERS AND VTSPS

The Second Circuit, however, took a much different view of the scope of the VPPA. The Court began its analysis by focusing on the definition of "consumer," which the VPPA defines as individuals who "rent, purchase, or subscribe to *goods and services* from a [VTSP]." The Second Circuit noted that the law doesn't define "good and services." Most federal courts that have looked at this issue have focused on the "from a [VTSP]" language, and required that the individual actually rent, purchase, or subscribe to receive audio-visual materials since the provision of these audio-visual services is fundamental to the definition of a VTSP. The Second Circuit disagreed. Using various principles of statutory construction, the Court reasoned that the term "good and services" should be applied broadly and not cabined to audio-visual materials. So long as an individual subscribed to receive any good and services from a VTSP, he or she is a consumer under the law.

At the same time, the Second Circuit addressed the question of what companies constitute a VTSP, which the VPPA defines as any entity in the "business of rental, sale, or delivery of pre-recorded video cassette tapes or similar audio-visual materials." Although arguably dicta, the Second Circuit held that the delivery of audio-visual materials merely has to be a part of the company's business—not the exclusive focus of the business, as other federal courts have held—for the entity to qualify as a VTSP. Applying this logic, the Second Circuit held that the plaintiff is a consumer, and the NBA is a VTSP under the VPPA.

These twin rulings have the potential to greatly expand the scope of the VPPA, at least in the Second Circuit. Any company that sells, rents, or delivers any audio-visual materials to consumers may face potential liability under the VPPA if they share consumer's video viewing history without consent. In its briefing, the NBA noted the potential consequences of the Court's expansive reading of the VPPA, pointing out that a hardware store that sold hammers to a customer could be liable under the VPPA if it also provided an online video.

The Second Circuit not only accepted the possibility that the VPPA would apply in the scenario, it signaled that this was a logical and correct reading of the law. The Court's concluding language makes clear that the Court embraces a broad reading of the VPPA: "The VPPA is no dinosaur statute. Congress deployed broad language in defining the term "consumer" showing it did not intend the VPPA to gather dust next to our VHS tapes. Our modern means of consuming content may be different but the VPPA's privacy protections remains robust today as they were in 1988."

POTENTIAL IMPACT

For now, the Second Circuit is the only Circuit Court in the country to adopt such a broad reading of the VPPA. Whether other Circuit Courts adopt the Second Circuit's reading of the law remains to be seen. Two other Circuit Courts—the Sixth and Seventh—are scheduled to hear oral argument in VPPA cases raising the same issues. Privacy litigators should pay close attention to how those Courts address these issues, as a Circuit Court split on these issues could be in the offing.

In the meantime, for defendants that offer online videos and are subject to jurisdiction within the Second Circuit, the Court's ruling in *Salazar* is a red warning light. The Court's opinion may breathe new life into a litigation that had been slowing.

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