Resuscitating a Dinosaur: The Second Circuit Breathes New Life into the VPPA

To date, comprehensive U.S. state privacy laws, with limited exception, do not provide private rights of action. Enterprising plaintiffs' lawyers, however, have invoked the federal Video Privacy Protection Act ("VPPA") with increasing frequency as an alternative method to bring individual and class action privacy-related claims against companies that disclose the viewing history of consumers who have accessed video content on their websites.More

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Lower courts have issued numerous opinions, often with divergent stances on what constitutes a "consumer" or "subscriber" under the statute, where online video viewing histories were shared with third parties. Many such matters involve the use of Meta's "Facebook pixel," a tracking technology that captures and transmits detailed viewing histories and related personal data, which may be used for targeted advertising and analytics. While plaintiffs have gained traction using the VPPA in several jurisdictions, other courts have dismissed such claims on various bases.

The Second Circuit's recent opinion in *Salazar v. National Basketball Association*, __ F.4th __, 2024 WL 4487971 (2d Cir. Oct. 15, 2024), may significantly inform the outcome of many pending and future VPPA actions. The case involved a putative class action filed in the Southern District of New York by

Michael Salazar, on behalf of himself and other persons. Salazar asserted that after signing up for an NBA email newsletter through the NBA's website, he viewed video content on that site while logged in to his Facebook account, which triggered the sharing of his video viewing history through the Facebook pixel installed there. The district court dismissed the claim based on its view that simply signing up for an NBA newsletter that contained, among other things, links to widely available audiovisual content did not render Salazar a "consumer" under the statute because he did not "rent, purchase, or subscribe" to *audiovisual* goods or services. The lower court reasoned that Salazar visited the NBA's website in the manner as did other users who had not signed up for the newsletter, and any videos referenced in links in the newsletter were also available to visitors generally.

On appeal, the Second Circuit took a far broader view of the term "consumer" under the VPPA than the district court's interpretation. The appeals court found that a user who subscribes to any product or service supplied by a person or entity that provides any audiovisual content or services—even subscriptions to non-video related services or products—is a "subscriber," and therefore a "consumer," within the meaning of the VPPA. Notably, the court made it clear that, while the VPPA arose during a bygone era of movie rentals from brick-and-mortar stores, it "is no dinosaur statute" but rather very much alive with "robust" provisions applicable to current technology.

The outcome of this matter, currently on remand to the district court, remains to be seen. The Second Circuit's view of the VPPA's scope of coverage—including Meta's Facebook pixel, Google Analytics, and other common video tracking technologies used for targeted advertising—may open the door to increased lawsuits under the statute, with considerable hurdles to motions to dismiss. Companies that provide video content on their websites should take heed of this opinion and review their privacy practices to ensure the best defenses should they be subject to a VPPA claim. Review and, where needed, modification of consumer-facing privacy notices and terms of service are a fundamental step in this direction, with particular attention to cookie banners, conspicuous consent mechanisms, and related disclosures following close behind.

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