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Another Privacy Victory For Video Service Providers

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Over the past year, high-profile streaming media companies or "video service providers" (Netflix Inc., Redbox Automated Retail LLC and Hulu LLC) have been sued for alleged violations of the Video Privacy Protection Act 18 U.S.C § 2710. Generally, courts are ruling in favor of these streaming media companies, limiting their liability under the act.

In line with this trend, the Ninth Circuit recently ruled in Rodriguez v. Sony Computer Entertainment America LLC that an intracorporate disclosure of "personal information" does not violate the VPPA's nondisclosure requirements, and that the act does not provide a private right of action to enforce the VPPA's retention and destruction provisions. Notably, this was the first time the Ninth Circuit addressed the VPPA as it pertains to the retention of customer information.

About the VPPA

Enacted in 1988, the VPPA prohibits a "video tape service provider" from "knowingly" disclosing a viewer's "personally identifiable information" ("personal information" or "PII") to third parties without the viewer's consent. The law defines a "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." The VPPA defines "personally identifiable information" as "information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider." (18 U.S.C. § 2710(a)).

The act creates a private right of action, allowing "any person aggrieved by any act" in violation of the law to bring a civil suit. Under the VPPA, a court can award statutory damages upwards of $2,500 per violation (as well as attorneys' fees). (18 U.S.C. § 2710(c)(2)(A)).

Rodriguez v. Sony Computer Entertainment America LLC

Daniel Rodriguez sued both Sony Computer Entertainment America LLC and Sony Network Entertainment International LLC (collectively, "Sony companies") for retaining his personally identifiable information beyond the VPPA's statutory limits and for sharing his personal information with each other, in violation of the VPPA's retention and non-disclosure provisions. Rodriguez v. Sony Computer Entertainment America LLC, No. 12-17391 (9th Cir. Sept. 4, 2015).

Rodriguez's claim stemmed from when he was a registered user of Sony Computer's PlayStation Network in 2008. As a registered user, Rodriguez provided PlayStation Network, an online streaming service, with his "personal information." Sony Computer also maintained information about the video games that Rodriguez rented and purchased through the service.

Years later, Sony Network assumed control of Sony Computer's PlayStation Network and its associated services. Rodriguez alleged that the Sony Companies violated Section 2710(b) of the VPPA by retaining Rodriguez's personal information and sharing his personal information with each other, during the change in Sony's operations. (18 U.S.C. § 2710(b)).

Agreeing with both the Sixth and Seventh Circuits, the Court of Appeals for the Ninth Circuit found that the "intracorporate" disclosure of personal information between the Sony Companies was exempt from the VPPA's nondisclosure prohibition. Under the act, video service providers are exempt from liability when their disclosure of personal information "is incident to the ordinary course of business." (18 U.S.C. § 2710(b)(2)(E)). This conclusion is somewhat unsurprising since the same Ninth Circuit panel previously ruled in Mollet v. Netflix that "intra-household" disclosures of personally identifiable information do not run afoul of the VPPA. (Mollett v. Netflix Inc., No. 12-17045 (9th Cir. July 31, 2015).

The Rodriguez ruling also is consistent with other cases where courts have held that video service providers are entitled to share personally identifiable information with certain types of third parties, specifically, for services such as "order fulfillment" or "request processing." For instance, in Sterk II, the Seventh Circuit ruled that Redbox may provide customers' personal information to contractor Stream Global Services because Stream Global served Redbox customers on its behalf. (Sterk v. Redbox Automated Retail LLC, 672 F.3d 535, 538-39 (7th Cir. 2012).

The Ninth Circuit also determined that the VPPA did not provide Rodriguez with a private right of action to enforce the VPPA's retention requirement or "failure to purge" claim against video service providers (here, the Sony companies). Generally, the VPPA requires video service providers to destroy personally identifiable information either as soon as practicable or within one year from the date that the information is no longer necessary for the purpose for which it was collected. (18 U.S.C. § 2710(e)).

The VPPA also contains an enforcement provision that allows any person "aggrieved by any act of a person in violation of this section" to bring a private right of action. In line with the Seventh Circuit, the Ninth Circuit confirmed that the VPPA's private right of action only applies to the "unlawful disclosure" of personal information and not to any "unlawful retention" beyond the destruction provisions in the act as Rodriguez claimed.

VPPA Obligations After Rodriguez

As streaming media companies and online services continue to grow in popularity, the trend limiting

businesses' VPPA privacy liability is becoming increasingly important to companies' bottom lines. After Rodriguez, at least within the Sixth, Seventh and Ninth Circuits, it's clear that plaintiffs can only use the VPPA's private right of action to enforce the act's prohibition on unauthorized disclosures, and cannot bring a private right of action for violations of the VPPA's retention and destruction provisions. Through this ruling, the court also reinforces a video service provider's right to share or provide access to its customer database with intracompany entities and to service providers who assist with other aspects of the video service provider's business.

What's Next

While the VPPA cases are lining up in favor of video service providers, it's also clear that privacy remains important to viewers. With that in mind, companies can take basic steps to ensure that they don't run afoul of the VPPA.

Broad Legal Landscape

Video providers should be mindful of all the other privacy and information security laws and regulations that may be applicable, separate from the VPPA. For example, federal regulators, such as the Federal Trade Commission and Federal Communications Commission, consider privacy and data security enforcement a priority, as reflected in the many brand names subject to a consent order or litigation over misrepresenting their data practices, and/or failing to appropriately secure consumer data.

Evolving Business Practices Pose Challenges

Particularly in the technology space, as business practices continue to evolve quickly, companies still must ensure that public representations about their data practices (such as in their privacy policy, advertising disclosures and supporting materials) continue to be accurate. This often means having a clear understanding of the personal information and user data that video service providers (and their service providers) collect from viewers, and how providers share, provide access to, or exchange that data.

No Silver Bullet on Data Security

While no company has infinite resources to devote to information security, the failure to implement reasonable safeguards will result in a data breach. Confirming that a company's existing security program takes into account and addresses previous lessons learned can go far in mitigating such risks, and providing a defense to assertions of lax practices.

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