

Smart TV Manufacturer “Smarting” after \$2.2 Million Privacy Enforcement

Dana B. Rosenfeld, Alysa Z. Hutnik

February 9, 2017

This week, the FTC announced a [settlement](#) with VIZIO, Inc., one of the world’s largest manufacturers of “smart” TVs. The settlement, also with the Office of the New Jersey Attorney General, arises from claims by regulators that VIZIO installed software that collected viewing data for 11 million consumer TVs without consent. The \$2.2 million settlement includes a payment of \$1.5 million to the FTC as consumer redress, and \$1 million to the New Jersey Division of Consumer Affairs, \$300,000 of which is suspended.

In particular, the [complaint](#) alleged that VIZIO sold televisions that continuously track what consumers are watching and transmit that information through automated content recognition (“ACR”) software. It also alleged that VIZIO remotely installed ACR software on previously-sold televisions that did not originally have ACR software installed at the time of purchase. VIZIO allegedly then shared that data and other data such as IP addresses with third parties for purposes of audience measurement, analyzing advertising effectiveness, and targeting advertising to particular consumers.

The complaint alleged three types of violations of the FTC Act and NJ Consumer Fraud Act:

- Unfair Tracking: VIZIO’s collection and sharing of sensitive data without consumers’ consent is unfair, in that it has caused or is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers themselves. According to the complaint, consumers do not expect that TV manufacturers would be engaged in tracking of their viewing data. The FTC complaint pointed, by way of example, to privacy protections for consumers’ viewing history under the Cable Privacy Act. 47 U.S.C. § 551.
- Deceptive Omission: VIZIO failed to adequately disclose that the “Smart Interactivity” feature comprehensively collected and shared consumers’ television viewing activity from cable boxes, DVRs, streaming devices, and airwaves, which Defendants then provided on a household-by-household basis to third parties. The complaint alleged that VIZIO’s representations were not sufficiently clear or prominent to alert consumers to their practices related to data collection and sale of licenses. In particular:
 - Purchasers of TVs with ACR tracking pre-installed received no onscreen notice of the collection of viewing data.
 - Consumers who received the update to install ACR received a pop-up notification, but that notification provided no information about the collection of viewing data or ACR software,

and it did not directly link to the settings menu or a privacy policy.

- In March 2016, VIZIO sent a pop-up notification that referenced television viewing data, but that notification timed out after 30 seconds without input from the consumer who happened to be viewing the screen at the time and did not provide easy access to the settings menu.
- VIZIO televisions with ACR tracking had a setting called “Smart Interactivity” with the description “Enables program offers and suggestions,” but the description did not include information about the collection of viewing data.
- Deceptive Representation: The complaint alleged that VIZIO represented expressly or by implication that it would provide program offers and suggestions to consumers with “Smart Interactivity” enabled on their televisions, but it has not done so for more than two years.

All three commissioners at the time, including former Chairwoman Edith Ramirez and new Acting Chairwoman Maureen Ohlhausen, voted in favor of the complaint and proposed order. Acting Chairwoman Ohlhausen issued a [concurring opinion](#). In her concurring opinion, Acting Chairwoman Ohlhausen reiterated the FTC’s concern as to Count II (deceptive omission). However, she expressed concern as to the implications of the unfairness claim in Count I, which, she argued, alleged for the first time that household or individual television viewing activity is sensitive personal information. She announced plans to launch an effort to further examine what constitutes “substantial injury” in the context of information about consumers.

This case is yet another example of enforcement action alleging privacy violations for “smart” technology. We will continue to monitor developments in this space, particularly in light of the new administration and Acting Chairwoman Ohlhausen’s new leadership.