



**Michelle W. Cohen** Member  
michelle@ifrahlaw.com  
Ifrah PLLC, Washington DC

# Vizio settles with FTC over Smart TV data collection and faces class action suit in California

In February 2017, Vizio settled a case brought by the U.S. Federal Trade Commission and the Office of the New Jersey Attorney General, in which Vizio agreed to pay \$2.2 million to resolve charges that it installed software on its TVs to collect viewing data without obtaining consumer consent. The company is also facing a consumer class action lawsuit in a California federal court in which Vizio is accused of purposely concealing tracking software from customers.

Vizio, the second largest manufacturer of Smart TVs, recently sought to dismiss a large class against it based on alleged violations of the federal Video Privacy Protection Act ("VPPA"). A federal district court judge in California recently denied Vizio's motion to dismiss various causes of action in that case. This decision means that the VPPA claims in the consolidated class action will proceed, presenting widespread ramifications for Vizio and other companies offering video content that may collect consumer data. This is not the first of Vizio's problems associated with data collection. In February 2017, Vizio settled a case brought by the U.S. Federal Trade Commission and the Office of the New Jersey Attorney General. In that case, Vizio agreed to pay \$2.2 million to resolve charges by those agencies that Vizio installed software on its TVs to collect viewing data on 11 million consumer TVs without obtaining those consumers' knowledge or consent<sup>1</sup>.

## Background

Congress enacted the VPPA in 1988, following the disclosure of the video tape rental history of a U.S. Supreme Court nominee, Robert Bork. Congress sought "[t]o preserve personal privacy with respect to the rental, purchase or delivery of video tapes or similar audio visual materials<sup>2</sup>." The VPPA imposes liability on "[a] video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of

such provider [...]<sup>3</sup>.' The term 'video tape service provider' means 'any person, engaged in the business, in or affecting interstate or foreign commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials [...]<sup>4</sup>.' Congress further defined 'personally identifiable information' to 'include[s] information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider.' Prior to the advent of the internet, the Law's coverage was relatively clear. Consumers could rest assured that the VPPA would protect them from disclosure of their video viewing by video providers such as Blockbuster video rental stores. If a consumer experienced a VPPA violation, he or she could bring a civil action. The VPPA allows for actual damages (a minimum of \$2,500), punitive damages, and attorneys' fees and litigation costs. The VPPA did not result in significant litigation but was generally relegated to the topic of 'sector-specific' privacy protections in US legal publications.

Due to technological developments, we no longer make a trip to the video rental store. Rather, we can easily access films, television series, and other programming through various online services, such as Netflix and Amazon, whether via laptops, tablets, Smart TVs, and even on our smartphones. The changes in how consumers access video programming have resulted in new

uses of the VPPA by plaintiffs who are concerned that video content providers and equipment manufacturers may be disclosing their 'personally identifiable viewing information' to third parties, such as advertisers. Vizio, a manufacturer of smart TVs, now faces a lawsuit filed by several plaintiffs which were consolidated in a California federal court.

## VPPA allegations

Through Vizio Smart TVs, consumers can watch television programmes and can access the internet and on-demand services like Netflix, Hulu and Pandora (all through integrated software). The software is often preinstalled on the Smart TVs or gets installed via software upgrades. Plaintiffs allege that Vizio's software collects and reports consumers' content viewing history, and that this feature is automatically enabled on the TVs. Plaintiffs further claim that Vizio also collects "detailed information about a consumer's digital identity, such as consumer IP addresses, zip codes, MAC addresses, product model numbers, hardware and software version, chipset IPs, region and language settings, as well as similar information about other devices connected to the same network<sup>5</sup>." Plaintiffs allege that the software transmits the personal information to Vizio's 'Inscape' platform, which can identify the content a consumer watched by comparing 'viewing data points' to a database of existing content. Further, according to the Complaint, Vizio does

1. VIZIO to Pay \$2.2 Million to FTC, State of New Jersey to Settle Charges It Collected Viewing Histories on 11 Million Smart Televisions without Users' Consent, <https://www.ftc.gov/news-events/press-releases/2017/02/vizio-pay-22-million-ftc-state-new-jersey-settle-charges-it>
2. See S. Rep. No. 100-599, at 1 (1988), reprinted in 1988 U.S.C.C.A.N. 4342-1 ('Senate Report'), also available at 1988 WL 243503.
3. 18 U.S.C. § 2710(b)(1).
4. 18 U.S.C. § 2710(a)(4).
5. In Re: Vizio, Inc., Consumer Privacy Litigation, Order Granting in Part and Denying in Part Defendants' Motion to Dismiss (C.D. Cal., Case No. 8:16-ml-02693-JLS-KES) (March 2, 2017) ('Motion to Dismiss Order') at 2 (quoting Complaint),

- available at <https://assets.documentcloud.org/documents/3482792/Vizio-Motionorder.pdf>
6. Motion to Dismiss Order at 17.
7. *Ibid.*
8. *Ibid.* at 18.
9. *Ibid.* at 19.
10. *Ibid.* at 20.
11. 827 F.3d 262, 290 (2016).
12. 104 F. Supp. 3d 135, 140 (D. Mass 2015), rev'd in part on other grounds, 820 F.3d 482 (1st Circ. 2016).
13. 820 F.3d at 486.
14. Motion to Dismiss Order at 24.
15. *Ibid.* at 24 (quoting Yershov, 820 F.3d at 486).

not just collect this information. Rather, it sells the information to advertisers and other media content providers who use the information to deliver targeted advertisements back to those Vizio Smart TVs and to any devices connected to the same network.

Plaintiffs brought several claims against Vizio. In addition to the VPPA claim, the Plaintiffs also alleged violations of the federal Wiretap Act, and state law claims including common law fraud, negligent misrepresentation, unjust enrichment, and state consumer protection claims. The court denied Vizio's Motion to Dismiss Plaintiffs' VPPA claims, but granted the motion as to certain of the other causes of action (with leave to amend the complaint - which the plaintiffs recently filed).

**The Court's VPPA analysis**

Vizio focused on three main arguments in seeking to dismiss the VPPA claims. First, that Vizio, a manufacturer is not a 'video tape service provider' under the statute. Second, that the plaintiffs are not 'consumers' under the VPPA, and finally that Vizio does not disclose 'personally identifiable information.' Regarding the video tape service provider issue, the Court noted that Congress's use of the terms "rental, sale or delivery of prerecorded video cassette tapes or similar audio visual materials" indicated "unmistakably [...] that Congress intended to cover more than just the local video rental store<sup>6</sup>." The Court reasoned that the use of the term "delivery" meant that the law applies beyond renters and sellers of video content. In addition, the statutory term "similar audiovisual materials" meant that the VPPA is not limited to video tapes (or even DVDs), and the video content "need not be in a particular format<sup>7</sup>." The Court also found that Vizio is engaged in the delivery of video content here, even if there are others who also participate in the delivery of the same content. The court concluded that not every entity or person who delivers video content is covered (for instance, a letter carrier delivering a package

containing a videotape would not be covered). Rather, "for the defendant to be engaged in the business of delivering video content, the defendant's product must not only be substantially involved in the conveyance of video content to consumers but also significantly tailored to serve that purpose<sup>8</sup>." Following this reasoning, the Court found that plaintiffs allegations were sufficient to survive a motion to dismiss: "Plaintiffs allege that Vizio has developed a product intimately involved in the delivery of video content to consumers, has created a supporting ecosystem to seamlessly deliver video content to consumers [...] and has marketed its product to consumers a 'passport' to this video content<sup>9</sup>."

Vizio also claimed that the plaintiffs were not 'consumers' under the VPPA. The law defines the term 'consumer' as 'any renter, purchaser, or subscriber of goods or services from a video tape service provider.' Plaintiffs did not contend that they were renters or purchasers. Therefore, they had to be 'subscribers' for the statute to apply. The Court analysed recent precedent in the First and Eleventh Circuits about what constitutes 'subscribership.' Here, it concluded that "Plaintiff's plausibly allege an association with Vizio that is sufficiently substantial and ongoing to constitute a subscription<sup>10</sup>." These allegations included that Vizio charges a premium for the Smart TVs due to the video content that can be accessed and software updates provide additional features.

Finally, Vizio asserted that the VPPA did not apply because it did not disclose 'personally identifiable information.' Vizio claimed that the types of information plaintiffs alleged Vizio disclosed was device identifying information, not personal information. The Court concluded that the term 'identifiable' means "capable of," which (in turn) extends beyond identification of a person by name. The court reasoned that Congress could have limited the VPPA to the disclosure of an individual's name and viewing history but did not so

limit the law. Again, the Court analysed precedent from other courts - the First Circuit and the Third Circuit. The Third Circuit, in *In re Nickelodeon*, held that IP addresses do not constitute personally identifiable information under the VPPA<sup>11</sup>. In contrast, in *Yershov v. Gannett Satellite Info. Network, Inc.*<sup>12</sup>, the Court held that 'personally identifiable information' embraces "information reasonably and foreseeably likely to reveal which [...] videos [the plaintiff] has obtained<sup>13</sup>." The court found *Yershov* more persuasive and distinguished *In re Nickelodeon*, finding that Plaintiffs here alleged Vizio disclosed additional aspects of their digital identities - such as MAC addresses and information about other devices in the home connected to the same network. Plaintiffs further claimed that MAC addresses are "frequently linked to an individual's name and can be used to acquire highly specific geolocation data<sup>14</sup>." Thus, the Vizio plaintiffs alleged more than just the disclosure of IP addresses.

**Other hurdles**

While the Court denied Vizio's motion to dismiss on the VPPA claims, it stressed that the plaintiffs would ultimately have to demonstrate that Vizio's disclosures are "reasonably and foreseeably likely to reveal" what video content Plaintiffs had watched<sup>15</sup>. That issue is not one this Court would resolve at the motion to dismiss stage. The Plaintiffs will get an opportunity to make this demonstration as the case progresses, including by conducting factual discovery on Vizio and its processes. Companies providing access to video programming should review their practices concerning the collection and use of consumer information. The VPPA generally requires prior consent for disclosure of personally identifiable information (with limited exceptions). With the increase in video content offerings across platforms comes the potential for VPPA actions, including costly class actions, as Nickelodeon, Gannett and Vizio have experienced.