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112TH CONGRESS, 1st Session } HOUSE OF REPRESENTATIVES { REPORT 112–312

TO AMEND SECTION 2710 OF TITLE 18, UNITED STATES CODE, TO CLARIFY THAT A VIDEO TAPE SERVICE PROVIDER MAY OBTAIN A CONSUMER'S INFORMED, WRITTEN CONSENT ON AN ONGOING BASIS AND THAT CONSENT MAY BE OBTAINED THROUGH THE INTERNET

DECEMBER 2, 2011.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary, submitted the following,

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 2471]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2471) to amend section 2710 of title 18, United States Code, to clarify that a video tape service provider may obtain a consumer's informed, written consent on an ongoing basis and that consent may be obtained through the Internet, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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19–006

The Amendment

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. AMENDMENT.

Section 2710(b)(2) of title 18, United States Code, is amended by striking subparagraph (B) and inserting the following:

"(B) to any person with the informed, written consent (including through an electronic means using the Internet) in a form distinct and separate from any form setting forth other legal or financial obligations of the consumer given at one or both of the following times—

"(i) the time the disclosure is sought; and

"(ii) in advance for a set period of time or until consent is withdrawn by such consumer;".

Purpose and Summary

H.R. 2471 amends section 2710 of title 18, United States Code, to clarify that a video tape service provider may obtain a consumer's informed, written consent on an ongoing basis and that consent may be obtained through the Internet.

Background and Need for the Legislation

In 1988, Congress enacted the Video Privacy Protection Act to prohibit video service providers from disclosing personally identifiable information except in certain, limited circumstances. As a general rule, personally identifiable information may only be disclosed with the prior written consent of the consumer.

The impetus for this legislation occurred when a weekly newspaper in Washington published a profile of Judge Robert H. Bork based on the titles of 146 films his family had rented from a video store.[1] At the time, the Senate Judiciary Committee was engaged in hearings on Judge Bork's nomination to the Supreme Court. Members of the Judiciary Committee denounced the disclosure.

The law prohibits video stores from disclosing "personally identifiable information" that links the customer or patron to particular materials or services. In the event of an unauthorized disclosure, an individual may bring a civil action for damages.[2]

The law permits the disclosure of personally identifiable information under certain limited circumstances. For example, information may be disclosed in response to a court order, and companies may sell mailing lists that do not disclose the actual selections of their customers. The law also allows disclosure with the prior, written consent of the customer and preserves the rights of customers and patrons under state and local law.[3]

When this law was originally enacted in 1988, consumers rented movies from brick-and-mortar videos stars such as Blockbuster. Today, not only are VHS tapes obsolete, so too are traditional video rental stores. The Internet has revolutionized how consumers rent and watch movies and television programs. Video stores have been replaced with "on-demand" cable services or Internet streaming services that allow a customer to watch a movie or TV show from their laptop or even their cell phone.

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[1] *The Bork Tapes,* CITY PAPER, Sept. 25–Oct. 1, 1987, at 1.

[2] 18 U.S.C. § 2710.

[3] *Id.*

The Internet has also revolutionized how we share information about ourselves with others. In the 1980's, when one wished to recommend a movie to friends, they would likely call them on the telephone. In the 1990's, they would send an email. Today, they post their opinions on their social networking page.

Since 1988, Federal law has authorized video tape service providers to share customer information with the "informed, written consent of the consumer at the time the disclosure is sought."[4] This consent must be obtained each time the provider wishes to disclose. No similar restriction exists for disclosure of consumer information relating to book or music preferences. Requiring consumers to consent to disclosure every time it is sought prevents consumers from sharing information about their movie preferences through social media sites on an ongoing basis.

H.R. 2471 remedies this restriction by amending 18 U.S.C. § 2710 to allow consumers to provide their informed, written consent once so they can—if they so choose—to continuously share their movie or TV show preferences through their social media sites. The legislation does not eliminate the requirement that consumers "opt-in" to this information sharing and it maintains the requirement of informed written consent. The bill simply allows for a one-time "opt-in" with the option for the consumer to "opt-out" of this sharing agreement at any time.

This legislation does not change the scope of who is covered by the Act, the definition of "personally identifiable information," or the privacy standard adopted by Congress when the Act was first enacted. Specifically, it preserves the requirement that the user affirmatively provide informed, written consent.

The Committee does not intend for this clarification to negate in any way existing laws, regulations and practices designed to protect the privacy of children on the Internet. As always, however, the first line of defense to protecting a child's privacy while online is the parents. Social networking websites allow users to share personal information about themselves with their friends. But used inappropriately, personal information can be shared beyond a user's friends. Just as parents are responsible for teaching their children not to talk to strangers, the Committee expects parents to play an act active role in ensuring their children's' proper use of social networking or any other websites on the Internet.

Website operators also share in the responsibility to protect consumer privacy, particularly the privacy of children. To facilitate this goal, Congress enacted the Children's Online Privacy Protection Act[5], effective April 21, 2000, which applies to the online collection of personal information from children under 13. Compliance with the Act is overseen by the Federal Trade Commission (FTC), which enacted rules governing web site operator compliance, including a privacy policy, when and how to seek verifiable consent from a parent, and what responsibilities an operator has to protect children's privacy and safety online.[6]

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[4] 18 U.S.C. § 2710(b)(2(B).

[5] Pub. L. No. 105–277, 112 Stat. 2581–728, codified at 15 U.S.C. §§ 6501–6506, Oct. 21, 1998.

[6] How to Comply with the Children's Online Privacy Protection Rule, Bureau of Consumer Protection Business Center, FEDERAL TRADE COMMISSION, Dec. 2006, available at http://business.ftc.gov/documents/bus45-how-comply-childrens-online-privacy-protection-rule.

An operator of commercial website or online service directed to children under 13 that collects personal information from children or operator of a general website with actual knowledge that it is collecting personal information from children must comply with the Act.[7]

To determine whether a website is directed to children, the FTC considers several factors, including the subject matter, visual or audio content, the age of models on the site, language, whether advertising on the website is directed to children, information regarding the age of the actual or intended audience, and whether a site uses animated characters or other child-oriented features.[8]

To determine whether an entity is an "operator" with respect to information collected at a site, the FTC will consider who owns and controls the information, who pays for the collection and maintenance of the information, what the pre-existing contractual relationships are in connection with the information, and what role the Web site plays in collecting or maintaining the information.[9]

The Act and its regulations apply to individually identifiable information about a child that is collected online, such as full name, home address, email address, telephone number or any other information that would allow someone to identify or contact the child. The Act and Rule also cover other types of information—for example, hobbies, interests and information collected through cookies or other types of tracking mechanisms—when they are tied to individually identifiable information.[10]

Hearings

The Committee on the Judiciary held no hearings on H.R. 2471.

Committee Consideration

On October 13, 2011, the Committee met in open session and ordered the bill H.R. 2471 favorably reported, with an amendment, by voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 2471.

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

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[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2471, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 25, 2011.

Hon. LAMAR SMITH, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2471, a bill to amend section 2710 of title 18, United States Code, to clarify that a video tape service provider may obtain a consumer's informed, written consent on an ongoing basis and that consent may be obtained through the Internet.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mark Grabowicz (for Federal costs), who can be reached at 226–2860, and Paige Piper/Bach (for the impact on the private sector), who can be reached at 226–2940.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 2471—A bill to amend section 2710 of title 18, United States Code, to clarify that a video tape service provider may obtain a consumer's informed, written consent on an ongoing basis and that consent may be obtained through the Internet.

As ordered reported by the House Committee on the Judiciary on October 13, 2011

Current law permits businesses that rent, sell, or deliver audio visual materials to disclose personal information about customers to other persons if the customer grants written consent. H.R. 2471 would clarify that such consent may be given beforehand through the use of the Internet. CBO estimates that implementing the bill would have no significant cost to the Federal Government. Enacting the bill would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 2471 contains no intergovernmental mandates as defined in the Unfunded Mandated Reform Act (UMRA) and would not affect the budgets of State, local, or tribal governments.

H.R. 2471 would impose a private-sector mandate, as defined in the UMRA, by requiring providers of video tape services and other entities to use "distinct and separate" forms when obtaining consent to disclose a consumer's personally identifiable information. At the same time the bill would benefit providers and other entities by allowing them to obtain consent via the Internet, in advance, and only once until consent is withdrawn. Current law requires written consent each time discloser of a consumer's information is sought. Based on information from industry sources, CBO estimates that there would be no significant net costs to comply with the mandate; thus any costs would fall well below the annual threshold established in UMRA for private-sector mandates ($142 million in 2011, adjusted annually for inflation).

The CBO staff contacts for this estimate are Mark Grabowicz (for Federal costs) and Paige Piper/Bach (for the impact on the private sector). The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 2471, clarifies that a video tape service provider may obtain a consumer's informed, written consent on an ongoing basis and that consent may be obtained through the Internet.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 2471 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Sec. 1: Amendment.

Section 1 amends section 2710(b)(2) of title 18 to authorize consumers, in a form distinct and separate from any form setting forth other legal or financial obligations, to provide informed, written consent for the sharing of personally identifiable information related to movie rentals either (1) at the time the disclosure is sought, or (2) in advance of the disclosure for a set period of time or until consent is withdrawn by the consumer.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

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PART I—CRIMES

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CHAPTER 121—STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS ACCESS

* * * * * * *

§ 2710. Wrongful disclosure of video tape rental or sale records

(a) * * *

(b) VIDEO TAPE RENTAL AND SALE RECORDS.—(1) * * *

(2) A video tape service provider may disclose personally identifiable information concerning any consumer—

(A) * * *

[(B) to any person with the informed, written consent of the consumer given at the time the disclosure is sought;]

(B) to any person with the informed, written consent (including through an electronic means using the Internet) in a form distinct and separate from any form setting forth other legal or financial obligations of the consumer given at one or both of the following times—

(i) the time the disclosure is sought; and

(ii) in advance for a set period of time or until consent is withdrawn by such consumer;

* * * * * * *

Additional Views

There is no denying that the computer age has revolutionized our world. Over the past 20 years we have seen remarkable changes in the way each one of us goes about our lives. Our children learn through computers. We bank by machine. We watch movies in our living rooms. These technological innovations are exciting and as a Nation we should be proud of the accomplishments we have made.

Yet as we continue to move ahead, we must protect time honored values that are so central to this society, particularly our right to privacy. The advent of the computer means not only that we can be more efficient than ever before, but that we have the ability to be more intrusive than ever before. Every day Americans are forced to provide businesses and others personal information without having control over where that information goes . . . These records are a window into our loves, likes, and dislikes.[1]

[1] Statement of Senator Paul Simon, 134 Cong. Rec. S 5401 (May 10, 1988) (quoted in S. Rep. No. 100–599 (1988), The Video Privacy Protection Act of 1988, at 6–7)

Because I believe these words, spoken by Senator Paul Simon during debate on the Video Privacy Protection Act (VPPA),[2] are equally applicable today I cannot support H.R. 2471 in its current form. The VPPA was passed in 1988 following bipartisan outrage over the disclosure and publication of Supreme Court nominee Judge Robert Bork's video rental records. Proponents of the bill argue that the VPPA is outdated and that changes in the commercial video distribution landscape beg for modernization. Although the commercial distribution landscape has changed the underlying concerns that inspired passage of the VPPA are timeless. Indeed, as reflected in the opening quote, Congress carefully weighed the interests in furthering technological advancement and consumer privacy at the time the Act was passed. Privacy and liberty go hand-in-hand and, through considered action, may be advanced by technology.

Though well-intentioned, in my opinion H.R. 2471, falls short of preserving the time-honored right to privacy embodied by the VPPA by surrendering to technological expediency without carefully weighing and evaluating the potential consequences of the bill's provisions. First, the debate on H.R. 2471 myopically focused on the online experience of consumers with social media like Facebook, neglecting that (a) the bill will apply both in the physical and online environments and (b) disclosures will be authorized "to any person," not only "friends" on Facebook. Second, there was no evidence presented to support the assertion that the public hungers for the "service" the bill seeks to provide. Third, despite claims that the VPPA is outdated, only a single provision was "updated," leaving more consumer oriented provisions untouched. Fourth, no consideration was given to the effect of the changes to the VPPA on state laws that afford similar protections to consumers. Fifth, I believe that there are collateral yet important intellectual property enforcement issues under the surface of this debate. Finally, because this bill was brought to markup without the benefit of a hearing, I believe it is premature to move forward without further consideration of these issues. Each of these concerns is discussed in greater detail below.

I. H.R. 2471 WILL APPLY TO ALL "VIDEO TAPE SERVICE PROVIDERS" AS DEFINED BY VPPA AND DISCLOSURES WILL BE AUTHORIZED TO "ANY PERSON"

During the discussion on H.R. 2471, much emphasis was placed on allowing technology to provide a seamless process to share video viewing habits on social media in the same manner currently in use for music, books and news articles.[3] But the bill, by its own terms, would apply to new and old distribution methods alike. Therefore, the consumer could unwittingly become the victim of the very scenario that prompted passage of the VPPA in the first place. There is nothing in the bill that would prevent a newspaper reporter from obtaining the rental or viewing history of a consumer

[2] 18 U.S.C. § 2710.

[3] Much has been made about the presumed disparity in treatment of video history as opposed to a consumer's reading lists or musical consumption habits. At the time the VPPA was enacted there were no comparable commercial music or book rental entities. The Committee Report did note, however, that the Senate subcommittee considered and "reported a restriction on the disclosure of library borrower records . . . [but] was unable to resolve questions regarding the application of such a provision for law enforcement." S. Rep. No. 100–599 (1988), at 8.

who has opted-in to an enduring, universal consent to have their viewing records disclosed "to any person." Admittedly, a consumer may have the presence of mind to reject such an expansive disclosure at her local brick-and-mortar video store, but her privacy may nonetheless be compromised should she grant such permission online. In other words, nothing in the bill mandates that the disclosure be limited to social media integration. The bill gives carte blanche to the video tape service provider, whether online or not, to determine who the "any person" may be so long as they obtain the "informed" consent in a conspicuous manner.

My concerns are not assuaged, and indeed are exacerbated, when consent is sought in the online environment. At a time when the broader privacy debate is trending towards establishing some baseline privacy protections for consumers online[4], this bill moves in the opposite direction. Although there is an opt-out provision in the bill, I do not believe that it will adequately address the realities of privacy in this age of instant and widespread information dissemination and consumption.

Facebook—the largest social media network –boasts 800 million users, with the average user having 120 "friends." But because Facebook, and most social mediums, are dynamic with a user's roster of friends constantly in flux, a consumer's consent today to allow ongoing access to their viewing history is clearly not informed by who will be their "friend" tomorrow. Today when online bullying of teen and young adults can lead to depression or even suicide, where online predators can learn otherwise confidential, private information about their prey, I believe we should employ a more deliberative process. "[M]ovie and rating data contains information of a more highly personal and sensitive nature. The member's movie data exposes a . . . member's personal interest and/or struggles with various highly personal issues, including sexuality, mental illness, recovery from alcoholism, and victimization from incest, physical abuse, domestic violence, adultery, and rape."[5] We should not cavalierly grant access, even if the public demands it.

II. THERE IS NO EVIDENCE THAT THERE IS BROAD PUBLIC SUPPORT FOR THESE LIMITED AMENDMENTS TO THE VPPA

Although it is not my practice to publicly name specific stakeholders that support or oppose a particular piece of legislation, one company has placed itself squarely in the center of this debate and its business model, its aspirations to integrate with Facebook, and its online history with some of the issues at the core of the privacy concerns require specific reference. That company is Netflix. I will say at the outset that Netflix is a legitimate and reputable company that provides a valuable service to its customers. Founded in 1997, Netflix is the world's leading Internet subscription service. It provides movies and television shows through mail order DVD and

[4] A Preliminary Federal Trade Commission Staff Report on Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers (Dec. 1, 2010), available at http://www.ftc.gov/os/2010/12/101201privacyreport.pdf

[5] Ryan Singed, "Netflix Spilled Your *Brokeback Mountain* Secret, Lawsuit Claims," WIRED, December 17, 2009, *available at:* http://www.wired.com/threatlevel/2009/12/netflix-privacy-lawsuit.

online streaming services. With 900 employees, Netflix has 25 million subscribers worldwide.[6]

In September 2011, Netflix launched a public campaign in support of H.R. 2471, urging its members to contact Congress to help bring Facebook sharing to Netflix USA.[7] Chairman Goodlatte suggested during the markup that if I "go online and read the blog posts and so on that exist, the gentleman will find that there is a lot of popular public support for this because they don't understand why their freedom to do this for music and books and a whole host of other types of information that they share online is restricted in this case."[8] I did. And far from the overwhelming outcry for Netflix-Facebook integration, I found skepticism and outright rejection of the proposed innovation. Three representative comments follow:

> *Blogger #1:* "How about we have Congress deal with more important matters than whether I can share what I'm watching on Netflix through Facebook."[9]
>
> *Blogger #2:* "I agree, who cares! I am not going to watch movies on my [Facebook]. FB has lots of security issues don't need the head aches. [sic] . . . "[10]
>
> *Blogger # 3:* "Dislike. Facebook already weasels too much information from people without asking permission and without giving the option to say no. I want NOTHING about me and my online video watching behaviors shared with anyone, especially Facebook of all places."[11]

These comments should have come as no surprise to Netflix. Several years ago the company introduced a "Friends" feature on its site which allowed Netflix users to connect with other Netflix members accounts in order to share viewer lists and recommend movies to one another. The feature ultimately proved unpopular and was discontinued in 2010 after 6 years with only 2% of subscribers participating.[12] Even during its pendency, the feature was met with opposition from Netflix account holders causing a member of the Netflix technological team to concede on the Netflix blog:

> "I'm with y'all. I watch a lot of movies, and I love the Friends features, but I'll admit that there are titles i [sic] watch that i'm [sic]—how you say—less than thrilled to announce are in my Queue. At Netflix we try to have this *deep* honesty policy: we generally say whatever we're thinking to whoever needs to hear it. And this pervasive attitude has crept into Friends, such that the thinking was

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[6] Netflix Company Facts, https://account.netflix.com/MediaCenter/Facts last visited Nov. 29, 2011).

[7] Netflix has integrated user accounts in Canada and Latin America with Facebook, but advised its American customers that the VPPA "creates some confusion over our ability to let U.S. members automatically share the television shows and movies they watch with their friends on Facebook." Posting of Michael Drobac to The Netflix Blog, "Help us Bring Facebook Sharing to Netflix USA," (Sept. 22, 2011), http://blog.netflix.com/2011/09/help-us-bring-facebook-sharing-to.html.

[8] Transcript of Full Committee Markup Report of H.R. 2471, et seq., at 16 (Oct. 13, 2011), available at http://judiciary.house.gov/hearings/pdf/10%2013%2011%20HR%202471.pdf

[9] The Netflix Blog, *supra* note 7.

[10] *Id.*

[11] Posting of T. Willerer, The Netflix Blog, "Watch this now: Netflix & Facebook," (Sept. 22, 2011), http://blog.netflix.com/2011/09/watch-this-now-netflix-facebook.html.

[12] Posting of Todd Yellin, The Netflix Blog, "Friends Update," (March 17, 2010), http://blog.netflix.com/2010/03/friends-update.html.

> "if you're REALLY friends, then you should be okay showing them what you're *really* watching." But you (and I) know this is lousy. I'm happy to reveal pretty much anything about myself, but there is a level of scrutiny that makes even an open guy like me pretty uncomfortable. Once in awhile you just need to hide a movie from your friends, or parents . . ."[13]

Additionally, Netflix attempted a second route into the social networking scene: a Facebook program that allowed users to rate movies and television shows, and share the ratings with "friends" on Facebook. The program was unsuccessful and unceremoniously discontinued earlier this year. [14]

While public support alone should not dictate whether Congress passes a piece of legislation, the total lack of evidence that the American people need or desire a new law certainly relieves any pressure to rush this bill towards enactment.

III. ONLY A SINGLE PROVISION OF THE VPPA IS "UPDATED" BY H.R. 2471, LEAVING MORE CONSUMER ORIENTED PROVISIONS UNTOUCHED

In the inexplicable rush to bring this bill before the Committee, I believe important consumer protection issues were overlooked. The VPPA was enacted to protect consumer interest, specifically, to prevent wrongful disclosures of personally identifiable records containing an individual's video rentals. Yet, H.R. 2471 singularly focuses on facilitating disclosure, not preventing or limiting it. The bill's exclusive aim is to provide a safe haven for wide-scale disclosures made possible by technological innovation. The goal of insulating personal information from unwanted disclosure is practically forgotten, and none of the additional consumer oriented provisions of the underlying Act are given the slightest consideration. For example, the VPPA requires destruction of records "as soon as practicable, but no later than 1 year from the date the information is no longer necessary for the purpose for which it was collected."

Record retention and destruction plans reinforce policies designed to deter the abuse or misuse of personally identifiable material. They generally provide guidelines to those with access to an individuals' personal information that prohibit saving documents beyond their usefulness or discarding them prematurely. The rationale embodied in the provision in the VPPA that requires the destruction of video records no later than a year after the record was established is clearly driven by the desire to prevent stockpiling of

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[13] Posting of Rubin, The Netflix Blog, "Hiding Movies," (June 28, 2007); see also Posting of Rubin, The Netflix Blog, "Movie Privacy (the sequel to "Hiding Movies"), (July 7, 2007) (acknowledging members "overwhelming response" and desire to keep "Friends from seeing those pesky embarrassing titles").

[14] Posting by Tom Willerer, The Netflix Blog, "Connecting with your Friends on Netflix" (Jan. 11, 2011), http://blog.netflix.com/2011/01/connecting-with-your-friends-on-netflix.html ("Two years ago we launched a program for Netflix members to share their ratings on Facebook. Very few of you have signed on for this so we're pulling it back today to regroup . . .").

Apple Inc. also tried its own foray into social networking, meeting with equal disappointment. See, Posting by Jared Newman, "In Sign of Ping Flop, Apple Pleas for Users," Technologizer (Nov. 5, 2010), http://technologizer.com/2010/11/05/apple-ping-flop

"I've got a few guesses why social efforts from Apple and Netflix's don't work: . . . and watching a movie or listening to music is often a personal thing, and only folks who are really confident in their tastes will care to share." [Posting by Jared Newman, "Netflix Quits Social Networking—Again," Technologizer (Jan. 13, 2011), http://technologizer.com/2011/01/13/netflix-quits-social-networking-again/]

old and outdated data on any person. True modernization of the VPPA would have considered the applicability of that provision in the online environment.

Many Internet companies have been found to track, retain, market and mine information on their customers at an alarmingly high rate.[15] Conventional wisdom teaches that once information is posted on or over the Internet, it remains stored there forever. Thus, while record destruction in the physical world is easily effected and verifiable, the same is not the case in the virtual world. The question arises then whether different requirements should be fashioned in this bill to make sure that the policy objectives of the destruction of old records requirement in the VPPA are met in the online environment.[16]

Finally, while easing the restrictions on video service providers disclosing consumers' video histories, the bill does nothing to "update" the damages provision for consumers harmed by violations of the VPPA. In 1988 when the VPPA was passed, Congress determined that a minimum of $2,500 in actual damages was an adequate deterrent to discourage violations of the Act. Certainly that figure, although a floor is outdated today where revenues earned by companies online can reach the billions.

IV. NO CONSIDERATION WAS GIVEN TO THE EFFECT OF THE CHANGES TO THE VPPA ON STATE LAWS THAT AFFORD SIMILAR PROTECTIONS TO CONSUMERS

According to the Electronic Privacy Information Center (EPIC), many states have laws that extend greater protections to consumers and their video records than does the VPPA. Among the states that have adopted comparable or stronger measures are: Connecticut, Maryland, California, Delaware, Iowa, Louisiana, New York, Rhode Island and Michigan. Michigan's law actually applies to book purchases, rental and borrowing records, as well as to video records. What practical impact H.R. 2471 would have on those states laws is unknown. The VPPA expressly preserves state law that establishes more robust safeguards for consumers in their relationships with video rental services. The Act, however, preempts state law that requires the disclosures banned by the VPPA.

V. SIGNIFICANT INTELLECTUAL PROPERTY (IP) ENFORCEMENT ISSUES EXIST

As noted above, Netflix's business model consists of a dual delivery method for movies and television. The company provides a mail order service for physical copies of DVDs, and a streaming service to watch movies directly over the Internet. Application of the amendments to the VPPA provided in H.R. 2471 make no distinction, however, as to which viewing history is covered. There is little doubt that Netflix's DVD by mail service is considered a videotape service provider under the statute. But no Internet streaming service has ever been determined to be covered by the statute. The only court that has considered the issue rejected the argument that an

[15] See, "The Web's New Gold Mine: Your Secrets," WSJ Julia Angwin (July 30, 2010).

[16] Netflix is currently in class action litigation over claims that the company's practice of keeping the rental history and ratings "long after subscribers cancel their Netflix subscription," violates the VPPA. http://www.huntonprivacyblog.com/2011/03/articles/netflix-sued-for-allegedly-violating-movie-renters-privacy/

online streaming service was prohibited (in an action alleging copyright infringement against the service), from producing its video history in discovery to enable the rights holder to determine whether the content was infringing.[17] Left unresolved and confusing by H.R. 2471 is whether dual service companies like Netflix should be considered a video tape service provider covered by the VPPA for social networking purposes but fall beyond the statutes' reach for IP enforcement purposes.

VI. BECAUSE THE BILL WAS BROUGHT TO MARKUP WITHOUT THE BENEFIT OF A HEARING, IT IS PREMATURE TO MOVE FORWARD WITHOUT FURTHER CONSIDERATION

During markup, I offered two amendments, both designed to give Internet businesses the necessary flexibility to obtain electronic consent from consumers, while simultaneously safeguarding privacy rights. While there may be other more precise and effective means to balance these objectives, I believe that the above discussion makes clear that H.R. 2471 is not that alternative. Far from providing a commonsense solution to an ill-defined problem, H.R. 2471 raises a mountain of issues of its own. For the reasons discussed above, I cannot support H.R. 2471 in its current form and urge its proponents to seek regular order to provide ample opportunity find a constructive resolution.

MELVIN L. WATT.

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[17] Viacom International, Inc. v. YouTube, Inc., No. 07 Civ. 2103 (S.D.N.Y., June 23, 2010).