

Sixth Circuit Creates Circuit Split on Who is a “Consumer” Under Video Privacy Protection Act

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The Video Privacy Protection Act (VPPA) is a federal law aimed at prohibiting the unauthorized disclosure of a person’s video viewing history. While the VPPA was originally enacted to prevent disclosure of information regarding an individual’s video rental history from businesses like Blockbuster in 1988, the explosion of the internet in the decades since has greatly expanded its potential reach, giving rise to countless lawsuits targeting businesses’ websites. One such case, involving the alleged disclosure of the plaintiff’s video viewing history through use of Meta’s data-tracking Pixel, was recently decided by the United States Court of Appeals for the Sixth Circuit, in a decision that serves to narrow the reach of the VPPA.

In a [published opinion](#), the Sixth Circuit addressed the issue of who can be considered a “consumer” – and thus able to bring a claim – under the VPPA. The VPPA defines the term “consumer” to mean “any renter, purchaser, or subscriber of goods or services from a video tape service provider.” Citing longstanding canons of statutory construction, the Sixth Circuit reasoned that, when read in context of its surrounding text, the phrase “goods and services” is limited to audiovisual goods and services. The plaintiff, a subscriber to 247Sports.com’s newsletter which contained links to videos that were accessible to anyone on the website, failed to allege that the newsletter itself was audiovisual material, and thus was not protected under the VPPA.

Notably, the Sixth Circuit’s decision was contrary to the conclusions previously reached by other Federal Courts of Appeals, specifically the Second and Seventh Circuits. Those courts had endorsed a broader interpretation of the term, considering a subscriber of any of the provider’s goods or services to be a “consumer” under the VPPA, regardless of whether the subscription was specifically for audiovisual materials. By defying this trend, the Sixth Circuit creates a circuit split that may be resolved by the Supreme Court of the United States. The defendant in the Second Circuit case on this issue has [petitioned](#) the Supreme Court to review the decision. Now, with a circuit split apparent, the Supreme Court may be more likely to intervene.

Against this uncertain backdrop, and with the wave of Meta Pixel and similar lawsuits continuing, businesses will need to carefully evaluate the operation of their websites and whether they may be subjected to a VPPA claim. The review should also include an analysis of the effectiveness of any

consent provisions that the business may be relying on to avoid liability. Businesses should be aware of the risks presented by the entities they acquire or merge with whose data sharing practices may implicate the VPPA. To mitigate the risk of liability, due diligence in any such transaction should include a thorough review of the target company's data practices, compliance with privacy regulations, and any ongoing or potential lawsuits tied to the use of tracking technology.

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