CLIENT ALERTS & INSIGHTS

VPPA In Flux: Circuits Split on Who Counts as a VPPA "Consumer"

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The question of who qualifies as a "consumer" under the Video Privacy Protection Act (VPPA) is no longer academic. In late March and early April 2025, two federal appellate courts issued starkly conflicting rulings in Gardner v. MeTV National Ltd. Partnership (7th Cir.) and Salazar v. Paramount Global (6th Cir.), with the Second Circuit having taken a similarly expansive position in Salazar v. NBA in October 2024, as we previously reported. Together, these decisions tee up a critical interpretive battle over the VPPA's scope-one with significant implications for companies operating ad-supported streaming sites, video-enabled platforms, or even content-focused email newsletters.

This growing divide has immediate consequences for forum selection, compliance strategy, and motion practice in digital privacy litigation.

What is the VPPA?

The history of the VPPA began with Robert Bork's Supreme Court nomination in 1987 when a reporter persuaded the clerk at Bork's local video store to provide him with a list of video tape titles that Bork and his family had rented. Congress found that to be an "outrageous invasion of privacy" (notwithstanding that Bork's nomination was ultimately rejected for other reasons).

In response, Congress passed the VPPA, which makes it unlawful for a "video tape service provider" to "knowingly disclose, to any person, personally identifiable information concerning any consumer of such provider." The statute defines "consumer" as "any renter, purchaser, or subscriber of goods or services from a video tape service provider."

When a person subscribes to a company for the purpose of obtaining audio-visual material-like a Netflix subscription-it is not a controversial proposition that such a person constitutes a "consumer" within the scope the VPPA.

But that's not where the lawsuits are being filed. Instead, plaintiffs' attorneys are targeting retailers where an individual may subscribe to a non-video service-such as an online newsletter-but the retailer has videos available on its website. In such cases, is an individual a "consumer" under the VPPA? The Circuit courts are now split.

***Gardner v. MeTV* (7th Cir.): A Broad View of "Consumer"**

In *Gardner*, the Seventh Circuit reversed the dismissal of a VPPA claim brought by plaintiffs who had signed up for free user accounts on MeTV's website. The plaintiff alleged that MeTv embedded the "Meta Pixel" on its website, which transmitted his personally identifiable video viewing information (PII) to third-party Facebook for purposes of displaying targeted advertisements. By providing an

email address and zip code, the plaintiffs unlocked additional features such as programming alerts and comment capabilities-though the videos themselves were freely accessible to all site visitors.

The Seventh Circuit concluded that this account-based access created a qualifying "subscriber" relationship under the VPPA. Crucially, the court held that:

- The statute **does not require payment** to become a "subscriber"-providing personal data in exchange for service suffices.
- The "goods or services" to which a plaintiff subscribes need **not be video-related**, so long as the defendant qualifies as a "video tape service provider."

In short, the Seventh Circuit adopted a textual but expansive view of § 2710(a)(1), treating *any* exchange of value with a video-enabled platform as sufficient to create "consumer" status under the statute.

***Salazar v. Paramount* (6th Cir.): A Narrower, Contextual Reading of "Consumer"**

Just days later, the Sixth Circuit went the other way. In *Salazar v. Paramount*, the plaintiff signed up for a daily email newsletter from 247Sports.com, a Paramount-owned site that publishes articles and embedded videos. Salazar alleged that his newsletter registration, combined with on-site video viewing while logged into Facebook, allowed Paramount to transmit his video-viewing history and Facebook ID to Meta via the "Meta Pixel" without consent.

The court agreed Salazar had standing, but dismissed on the merits, holding that:

- The "goods or services" in question **must be audio-visual in nature**, based on the VPPA's statutory structure and its limitation to businesses engaged in the "rental, sale, or delivery of prerecorded video cassette tapes or similar audio-visual materials."
- Subscribing to a non-audio-visual service (like a newsletter) does not qualify a plaintiff as a VPPA "consumer," even if the provider also delivers video content elsewhere on the site.

The Sixth Circuit rejected the idea that simply signing up for a general-purpose service from a video-enabled website is enough. Instead, it emphasized contextual interpretation, noting that the phrase "goods or services" could not be read in a vacuum but instead must be tethered to the VPPA's original concern-video privacy.

***Salazar v. NBA* (2d Cir.): No Longer an Outlier (For Now)**

The Second Circuit's decision in *Salazar v. NBA* (2024) served as a precursor to *Gardner*. There, the court ruled that a user who subscribed to the NBA's email newsletter (which also linked to video content) was a "consumer" under the VPPA. The Second Circuit emphasized the breadth of the term "goods or services" and found that it need not be limited to audiovisual materials.

Importantly, the *NBA* panel placed the burden of limiting VPPA scope on the definition of "personally identifiable information" rather than narrowing the "consumer" definition. That framing provided a foundation that the Seventh Circuit expressly followed-and the Sixth Circuit expressly rejected.

Circuit Split: Two Interpretations, One Statute

These cases collectively mark a distinct split in how courts interpret the threshold question of who qualifies as a "consumer" under the VPPA. Here's how the Circuits currently break down:

This split isn't academic. It directly impact the viability of pixel-based class actions and how far the VPPA can stretch into modern digital advertising ecosystems. In the Sixth Circuit, plaintiffs must tie their "subscription" to actual video content; in the Second and Seventh, simply registering for *any* service from a video-enabled site may suffice.

A future cert petition to the Supreme Court seems inevitable. Until then, plaintiffs are likely to forum-shop aggressively by seeking clients in favorable Circuits, while defendants will have strong incentive to challenge personal jurisdiction or seek transfers to more defense-friendly venues.

Looking Ahead

These decisions are reshaping VPPA litigation in real time. What was once a niche statute rooted in VHS-era concerns has become a key tool for plaintiffs targeting modern adtech ecosystems. The question of who counts as a "consumer" may determine whether the next wave of class actions survives Rule 12. And now, that answer depends entirely on where the case is filed.

Until the Supreme Court intervenes, or Congress amends the statute, the VPPA will remain a battleground where seemingly innocuous services-like a nostalgic TV website or a sports recruiting newsletter-can trigger high-stakes litigation over digital surveillance and data disclosure. Given the clear split and stakes for digital privacy law, the Supreme Court may soon be asked to resolve the issue.

Implications for Businesses

For companies operating websites or apps that stream video-whether directly or incidentally-the practical takeaways are clear:

- Segment video access from non-video services wherever possible. This may support stronger defenses in narrow-reading circuits like the Sixth.
- Evaluate your pixel and SDK configurations. If account-linked viewing activity is passed to third parties like Meta, you are in potential VPPA territory.
- Be mindful of registration flows. If users create accounts or receive content (newsletters, alerts, etc.), consider whether that data could be used to link video access-**even in free environments**, as the Second and Seventh Circuits will consider almost any provision of information by users to a website as sufficient to constitute a "subscription."
- Obtain consent. This is the easiest way to ensure compliance, though be mindful that the VPPA has specific requirements and limitations for "informed, written consent."

Making necessary changes to websites sooner rather than later is key. Statutory damages are significant under the VPPA at $2,500 per violation, and companies face significant class action

exposure from potential missteps. Making changes now can mitigate the risk of substantial liability down the line. As the legal landscape continues to evolve, staying informed and proactive is the best defense.

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