



RESPONSE TO QUESTIONS FOR THE RECORD FROM SENATOR TOM COBURN, M.D.

Submitted By: David Hyman, General Counsel, Netflix, Inc.

March 6, 2012

1. Do you believe your consumers benefit when Netflix integrates with social networks in countries outside of the United States? If so, how?

The popularity and use of social networks has grown significantly over the past several years. By integrating our service with social networks, we provide our consumers with the opportunity to leverage the power of their social networks with their content viewing. Our consumers are able to benefit from a richer video watching experience by sharing the content they have watched with their own community of friends, similar to what they can currently do with the music sharing service Spotify. In doing so, our consumers benefit from a new way to engage in dialogue around the content they are watching. Enhancing Netflix by making it more social increases the chances that members will discover movies and TV shows they will love. In this way, social media is the new water cooler around which folks enjoy and share their movie and TV show watching experience. The more readily consumers are able to discover great content, the richer the cultural experience consumers enjoy.

Enabling more robust discovery of movie and TV shows also benefits other participants in the entertainment ecosystem, particularly those individuals who are associated with movies and TV shows that may not have received broad scale promotion or distribution. Independent producers and all the writers, directors and craftspeople that produce this kind of entertainment welcome additional ways to get their content out for viewing. Social integration makes discovering interesting, independent, foreign, or library content easier for consumers, which in turn benefits the creators of that content. Netflix already provides a boost to such content by helping surface it through our recommendation algorithm and user interfaces. Our integration with social media provides yet another vehicle for content discovery, augmenting benefits to our consumers and those that produce such content.

a. What prompted Netflix to develop this sharing app in other countries?

Social media and sharing is a worldwide phenomenon. We wanted to develop our sharing application here in the U.S., but ambiguities in the VPPA prevented us from doing so. We see social video as an important and growing component of our consumers' content viewing experience. We developed our social application (excluding the U.S.) because it is something our consumers want and offering it provides them with a great way to share and enhance their content viewing experience.

b. What has been the consumer response in other countries to Netflix's sharing app?

Over half a million of our international subscribers have opted-in to our social application. In fact, reviews in the UK and Latin America of our service comparing it to other content distribution services have noted our social functionality as a positive competitive differentiator.

2. In your testimony, you asserted it would be good policy for Congress to amend the Video Privacy Protection Act (VPPA) to permit consumers to provide on-going consent to share their viewing histories. Why do you believe this is good policy?

Social media has and continues to rapidly change the way in which we interact with each other and share our daily experiences with our family and friends. The growth and popularity of services like Facebook, Groupon, Zynga, LinkedIn, and Spotify exemplify this trend. Consumers who want to participate in this growing phenomenon and, in a knowing manner, decide to share things they are doing on an ongoing basis, should not be prevented by law from doing so. During oral testimony, several persuasive arguments were made to demonstrate that, while some people may choose not to engage in such a level of sharing, the law should not prohibit individuals who decide to opt-in. Additionally, from a policy perspective, the VPPA is an outlier in privacy law. By singling out video tape service providers, this law treats one type of media, video cassette tapes or similar materials, differently than books, music, and news articles. Such disparate treatment does not seem to have a sound basis in public policy.

a. Why do you believe allowing consumers to give on-going consent, in this context, is preferable to giving consent each and every time?

First, as indicated above, we do not believe the United States Congress should prohibit an individual from electing to engage in ongoing sharing if such individual affirmatively elects to do so. Second, enabling frictionless sharing on social networks is consistent with consumer preferences. Legally forcing a consumer to give consent every time diminishes that consumer's ability to efficiently express

himself with friends and family. The Internet is designed to promote just such efficiency, and social media has harnessed new and exciting ways to do so for consumers. Furthermore, simply because a law permits a consumer to share in an ongoing manner, does not require a consumer to do so. Consumers will always have the option of sharing on social networks on a title-by-title basis by manually doing the sharing themselves. If there is no privacy benefit to prohibiting ongoing consent, but there is diminished enjoyment of a service due to enforced title-by-title consent, then the preferable policy should be one that permits consumers to give ongoing consent.

b. What are the technical difficulties, if any, with providing consumers with the option of whether to share each and every time they view a movie or TV show?

The complication with a title-by-title consent regime as applied to the Netflix service is primarily related to devices. We offer our service on over 700 devices and not all of those devices can be updated in a way that would enable a consumer to make granular choices about sharing. Technological realities limit compliance with per-title sharing requirements.

As new technologies develop, laws that prescribe certain behavior tend to become impediments to effective innovation, because these laws do not properly anticipate future changes. The law should encourage innovation while balancing the interests of consumers by focusing on principles-based rules. Requiring opt-in consent for emerging technologies such as social media sharing will fully protect consumer expectations in this new environment.

3. Do companies providing other types of media such as music or books permit a one-time opt-in for customers?

Yes. Companies such as Spotify, Rdio, Yahoo!News, and others provide one-time opt-in for consumers.

a. What would be the difference, if any, between allowing consumers to opt-in to sharing everything for a set period of time as opposed to choosing not to be asked whether they want to share each and every time for a set period of time (a sort of opt-out, opt-out option)?

Functionally, both methods impose restrictions on a consumer's ability to elect to share. There may be a multitude of ways to implement sharing functionality. In the end, the appropriate public policy should be aimed at empowering consumers to choose, through an opt-in process, how to share information. The marketplace will experiment with a host of controls and options in an effort to find what consumers want and value.

- b. If Congress decided to amend the VPPA to permit customers to opt-in on a continuous basis for a set period of time, what period of time would be reasonable in your mind - three months, six months, a year or some other period of time?**

In general, consumer expectations are that once a person has affirmatively made a decision, that decision will not be overridden—by law or any other force—unless and until the consumer affirmatively makes a change.

- 4. In your testimony, you stated that as a consumer-driven company, Netflix would always provide consumers with an easy method for withdrawing their consent because that is what consumers want. H.R. 2471 requires opt-in consent to be “informed, written consent ... in a form distinct and separate from any form setting forth other legal or financial obligations of the consumer...” However, this legislation does not specify if a company must provide a clear opt-out option. If Congress were to amend the House legislation, would you support language that would ensure bad actors are not able to make withdrawal of consent difficult for consumers?**

Netflix strongly believes in empowering consumers to act as they wish. Not only does that mean allowing consumers to consent to ongoing sharing if they so choose, but also making it easy for them to change their minds. If a consumer wishes to withdraw his consent to sharing of his movie and TV titles, then Netflix would not think to stand in the way. Nonetheless, we understand that there could be a bad actor in the market that fears it cannot succeed unless its audience is tricked or trapped into using its service. To preempt such a phenomenon, Netflix would support an amendment to H.R. 2471 to include a provision stating that the means for a consumer to withdraw consent must be clear and conspicuous.

- 5. In the countries where Netflix already offers their sharing service, can consumers use Netflix’s other services without using the application that shares their viewing histories on Facebook or another social network?**

Yes. Netflix subscribers can use our service to discover content and enjoy watching that content on the device of their choosing without any social component. Even if a consumer chooses to use Netflix in a socially integrated manner, that functionality does not require that the movie titles a consumer has watched be published to her Facebook page. By using Facebook’s privacy controls, a consumer can prevent movie titles from being published to her wall, or remove them after the fact, while still taking advantage of the benefits of social integration on the Netflix user interface.

6. Should Congress extend the VPPA to cover other “streaming” services or types of media? Why or why not?

The VPPA should not be extended to streaming. Using the VPPA to address broader Internet-focused policies is unwise. It would be far better to begin consideration of broader privacy regulation on a clean slate – that is, do not try to fit the square peg of the VPPA into the round hole of Internet streaming.

Underlying our opinion is what we perceive as a fundamental inability to define streaming in a meaningful and effective way. The concept of “streaming” services is amorphous and dynamic. The lines between different kinds of media have already begun to blur. Take the example of the book, Rawhide Down: The Near Assassination of Ronald Reagan (“Rawhide Down”) a detailed documentary of the attempted assassination of President Reagan. Rawhide Down can be read in a bound, paper format purchased from any number of brick and mortar or Internet retailers, all of which may also sell goods in other media formats. Crucially, Rawhide Down is also available as an e-book that has imbedded in its chapters video and audio recordings taken of the attempt itself as well as of interviews of people present that day, and so on. At what point does Rawhide Down become a documentary movie with embedded text versus a book with embedded movies? What if instead of President Reagan’s near assassination, the subject of the e-book was the history of the Rolling Stones as recounted primarily through the band’s music with some explanatory text – is that a song and album liner sold in an innovative format or is it a book? And what if that e-book had a video of one of the Rolling Stones’ concerts – is it then a music video or a movie? In an age of media convergence, attempting to impose the last Millennium’s analog definitions on today’s reality contorts those definitions.

Even if streaming video could be meaningfully differentiated and defined in the digital dimension, bringing other types of media—such as songs, books, or news articles—under the strictures of the VPPA would fly in the face of clearly demonstrated consumer demand. Media, no matter the format, are vehicles for ideas and expression. People wish to communicate by sharing with others the media they consume. Preventing consumers from engaging in the kind of frictionless social interaction they enjoy and have come to expect would be perceived by those consumers as a constraint on their free expression.

Finally, efforts made by some, including Mr. Rotenberg of EPIC, proposing language that would capture or define “streaming” for the purposes of the VPPA is unavoidably overly broad. EPIC’s proposed language would bring within the definition of a “video tape service provider” anyone who disseminates: user generated content, events such as video chat or conferencing, video games, cable or television network content offerings, online education tools and services (which could include educational institutions themselves as the “providers”), and many more. It cannot be the intent of the VPPA to cover an elementary school teacher as a

video tape service provider. Congress should we wary of adopting EPIC's definition into the VPPA because of unintended consequences such as these.

7. Concerns have been raised that passing H.R. 2471 would allow video tape service providers to disclose the movie and TV titles a video renter has watched to any third party of the video tape service provider's choosing. What, if anything, would prevent video tape service providers from doing this?

H.R. 2471 does not allow a video tape service provider to disclose video rental history in any manner not already permitted under the VPPA. H.R. 2471 merely enables a consumer to give permission to share what was otherwise permitted on an ongoing basis. The existing protections under the VPPA as to whom disclosure can be made are still applicable.

a. If the VPPA is amended in a manner consistent with H.R. 2471, could a consumer unknowingly or inadvertently consent to allowing a video tape service provider to sell information about the movie and TV titles that consumer has watched? Why or why not?

Again, H.R. 2471 does not change any substantive protections under the VPPA. All it does is provide for a consumer to give ongoing consent and that such consent may be given over the Internet. In fact, H.R. 2471 goes beyond the requirements of the VPPA in its current form, which requires "informed written consent" and adds that the informed written consent must be "in a form distinct and separate from any form setting forth other legal or financial obligations." In this way, H.R. 2471 actually enhances the protections provided by the VPPA by ensuring that consent cannot be buried in some other terms of agreement.

b. Does current law prevent this?

No. Under current law, consumers can consent to such disclosure. As mentioned above, H.R. 2471 actually enhances protection by ensuring that the form of consent be "distinct and separate" from any form setting forth other legal or financial obligations.

Imagine that a consumer goes to a brick and mortar video tape service provider to rent a movie and pays for that rental with a credit card. Current law might not prohibit the store from including language on its credit card receipts—which require signatures—that states by signing the receipt, the video renter consents to the disclosure, of the title for which she has just paid a rental fee, to a third party of the video tape service provider's choosing. By contrast, H.R. 2471 empowers that consumer to be in control of her decision by ensuring that any consent she provides has been presented to her apart from any other legal or financial obligations, thereby eliminating the possibility of unknowing or inadvertent disclosure.

8. Concerns have been raised that allowing on-going consent could result in consumers accidentally disclosing movie or TV titles to friends or family that a consumer might not actually wish to disclose. Does the Netflix app have any safeguards in place to prevent this?

Yes, the Netflix-Facebook integration currently contains a number of features that serve to limit possible accidental disclosure. First, Netflix provides a “Don’t Share This” button that can be used on PCs and many other devices. The button appears on the screen when a user launches a movie or TV show and then after some amount of playtime, fades away. Secondly, a movie or TV title will not be shared until a viewer has watched more than 50 percent of the title in question. That gives the viewer time to decide whether she does indeed want to share the title that she is watching. Finally, as discussed above, a consumer will always be able to control what she is sharing on her social network through the privacy controls on that network, including not sharing information to her wall at all, while still enjoying the benefits of social integration from the Netflix side of the experience. Netflix is interested in providing a feature that our consumers use and enjoy. As such, we want to provide appropriate controls to protect consumers’ privacy, while also allowing consumers to engage in frictionless sharing, should they elect to so share their video viewing.