

Response of Christopher Wolf
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to Written Questions of Senator Tom Coburn, M.D., U.S. Senate Committee on the Judiciary
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1. 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?

Technology has advanced rapidly to permit individuals to communicate in ways previously unimagined – for example, through social media – and to share information about themselves and their interests. There are people who want automatically and on an ongoing basis to share with their friends through social media what streaming movies they are watching online. The current structure of the VPPA effectively prevents individuals from making an on-going sharing choice that would allow them to share automatically information about the online streaming videos they watch. This is because the major online streaming video providers do not provide that on-going sharing choice for fear of being found in violation of the VPPA. (As discussed at the hearing, there are language ambiguities in the statute that arguably prohibit an online streaming video provider from implementing a consumer's choice to share information about videos watched on an on-going basis.)

The law should be changed to allow consumers to make a choice to share streaming video-watching information on an ongoing basis. Thus, it should be made clear that online streaming video providers will not face legal penalties for providing consumers with that choice.

I am not aware of any other privacy law that restricts what information individuals can choose to share and restricts how, technologically, choices can be made by people to share information. That is the effect of the VPPA today because of its ambiguities and why an amendment clarifying the situation and empowering consumers to make choices they may want to make is called for. Such an amendment removing the potential legal liability for online video services offering consumers an ongoing sharing option would align the VPPA with the preferred technology-neutral and consumer-empowering approach to privacy laws today.

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

I do not believe that allowing consumers to give on-going consent is preferable to giving consent each and every time. This should not be an either/or situation, in my view. Some people may want to share on an on-going basis information about the online videos they watch, and some people may want to make the decision to share on a per video basis. Both choices should be available to consumers. Again, the key to privacy is control and choice, and so long as consumers have the options available to them, they will have control and the ability to choose.

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

Yes. Two recent, prominent examples that have been integrated into social media include the streaming music service Spotify, which permits users to share the music they listen to via the service, and the Washington Post Social Reader, which permits users to share the articles they read. Both of these web applications permit users to provide a one-time opt-in to share their media-consumption preferences through the service.

c. 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)?

As I understand it, this question asks about an opt-in for on-going sharing that expires and needs to be renewed, and a default of a per-video sharing choice with an option to make an ongoing sharing choice (rather than a per-video sharing choice) for a set period of time. The preconception here is that consumers need to be reminded they are sharing, because sharing is potentially embarrassing or revealing. As I mentioned at the hearing, if Congress gets into the business of enacting laws to remind consumers when sharing might be embarrassing and revealing, the potential scope is very broad, from web cams to cell phones and beyond.

For a consumer that wants to make a persistent, on-going sharing choice, there is no difference between the mechanisms referenced in the question as each interferes with the consumer's desired outcome and choice. If the suggestion is that the law should require these mechanisms, then I think that is a bad idea, for the reasons previously stated about interfering with the ability of individuals to make choices they want to make, and because of the slippery slope of lawmaking to prevent people from making choices about sharing that could embarrass them or reveal more information about themselves than they may have contemplated. In addition, technologies change, and along with them, choice mechanisms change. A law prescribing choice mechanisms based on today's technology could become outmoded and archaic very quickly. It also could inhibit the development of privacy-enhancing choice mechanisms by imposing strictures.

2. Would every Netflix customer have to use an application that shares their viewing histories on Facebook or another social network if Netflix was able to offer this service in the U.S.?

No. The ability of Netflix or other online video providers to *offer* an on-going sharing choice does not mean that a customer has to use the application to share. There are many people who do not want to share information about the videos they watch online, and merely because an application is available, does not mean those people have to use it. They have a choice *not* to share, just as people who want to share have a choice, and should not be limited in that choice.

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

The VPPA today is plagued by ambiguity precisely because it attempted to anticipate technological developments but failed to do so effectively. An amendment to cover “streaming” services could result in restrictions on people sharing information about books, magazines or newspapers they have read (or other media not yet in existence) because of the availability of streaming video contained in those media. As Congress considers whether to legislate in the area of privacy, a focus on specific technologies as opposed to broad principles seems ill-advised and inconsistent with global trends.

4. 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?

This is not the case. H.R. 2471 retains the requirement that video tape service providers obtain the opt-in consent of their customers prior to sharing video-watching information. If the video tape service provider wishes to share video-watching information of a customer with a third party, it must first seek out and obtain the consent of the customer, who is not required to provide such consent. The opt-in consent must be “informed consent,” that is, it must be based on a clear, specific disclosure of the scope of the consent. Any provider that fails to provide such a disclosure would not be complying with the law, in my view.

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?

Under H.R. 2471, consent to share video-watching information must be informed and consumers must provide an affirmative manifestation of that consent. By virtue of these requirements, consumers cannot “unknowingly or inadvertently” consent; if a consumer gives informed consent, she is not unknowing. Again, misleading a consumer would be a violation of the law.

H.R. 2471 also requires consumers to provide consent in a form separate from other notices setting forth other legal or financial obligations. This bolsters consumer understanding by ensuring that, consistent with privacy best practices, consumers are not “unknowingly” providing consent to the disclosure of their sensitive information by blindly agreeing to a lengthy legal disclosure that happens to contain a provision authorizing the sharing of their information. The notice of sharing under H.R. 2471 must be separate and distinct.

b. Does current law prevent this?

Currently, the VPPA permits video tape service providers to disclose video-viewing information “to any person with the informed, written consent of the consumer given at the time the disclosure is sought.” Again, “informed, written consent” should guard against unknowing or inadvertent consent because it must be informed. H.R. 2471, however, provides an extra protection: the consent must be separate and distinct from other legal notices. In that regard,

H.R. 2471 provides an additional safeguard for consumers by ensuring that their “consent” is not buried in a longer disclosure that they might overlook.

c. Does anything prevent the same concern being raised with other sharing apps such as for book[s] or [music]?

Currently, there is no privacy law expressly preventing businesses from disclosing a consumer’s book-reading or music-listening habits to third parties, although reputable businesses routinely disclose these information-sharing practices in privacy policies that consumers can review prior to engaging with those businesses.

5. Is it easy for customers to discontinue using other sharing apps such as Spotify and Washington Post Social Reader?

Reputable social networking platforms provide simple mechanisms to enable consumers to discontinue the use of social sharing apps such as Spotify and Washington Post Social Reader (as they would be able to delete any other app). For example, Facebook users can delete an app by clicking on the “Account Settings” link from any Facebook page, clicking on the “Apps” link, and then selecting apps to delete. For standalone applications not integrated into a social networking platform, the Federal Trade Commission has required such applications to provide a straightforward mechanism enabling consumers to uninstall the application, such as through the operating system’s standard “Add or Remove Programs” feature.

a. To your knowledge, have there been any customer complaints regarding the difficulty of opting out or terminating service with any of these sharing apps?

I am not aware of any customer complaints regarding the difficulty of opting out or terminating service with Spotify or Washington Post Social Reader.