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Subcommittee on Privacy, Technology, and the Law
The Video Privacy Protection Act in the 21st Century
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Thank you to Chairman Franken, Senator Coburn, and the entire subcommittee and its staff for the opportunity to speak to you about this legislation.

My name is William McGeveran. I am a law professor at the University of Minnesota. My teaching and research focus on internet, data privacy, and intellectual property law. In that context I have written about the Video Privacy Protection Act, which I consider a model for privacy legislation more generally. I am also a member of the Advisory Board of the Future of Privacy Forum.

Unquestionably there are great benefits to the online recommendations we get from friends through sources like Facebook or Spotify – I myself use social media heavily. But the potential problems are serious too. In one article I argued that the key to getting that balance right is securing ***genuine consent***.[1] That means an individual sent a social message intentionally, not by mistake. If we have too many accidental disclosures, we undermine the privacy of personal matters and the accuracy of the recommendations. The VPPA is designed to secure genuine consent.

In this testimony I want to emphasize three principal points:

- First, the VPPA safeguards important interests.
- Second, changes are not needed to keep up with technology.
- Finally, even if Congress does amend the statute, H.R. 2471 does it wrong.

1. "Intellectual privacy" is an important principle that Congress should expand, not constrict

First, the VPPA safeguards important interests. The movies we watch can reveal personal characteristics, from our sexuality to our political views to our medical conditions. Why else did a newspaper reporter think Judge Bork's rental history might be interesting in the first place?

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[1] William McGeveran, *Disclosure, Endorsement, and Identity in Social Marketing*, 2009 U. ILL. L. REV. 1105, available at http://illinoislawreview.org/article/disclosure-endorsement-and-identity-in-social-marketing/.

Unintended disclosure of a user's choice of books, music, films, or web sites can constrain the capacity to experiment and to explore ideas freely. For this reason, we intuitively recognize the interest underlying the VPPA – as well as confidentiality protections for library patrons' records, for example. Data privacy scholar Neil Richards calls this "intellectual privacy."[2] It recognizes the fundamental First Amendment value inherent in leaving individuals alone as they gain exposure to a wide variety of ideas, without necessarily labeling themselves.

In my view, the greatest flaw in the existing VPPA is its limitation to video, which arises from a historical accident around its enactment. If the committee revisits this statute, it should consider extending protection to reading and listening habits as well as viewing. That was part of the intent of the California Reader Protection Act, which took effect at the beginning of the month.[3] In general, the law ought to protect ***private*** access to any work covered by copyright, not just movies.[4]

2. The VPPA Is Flexible and Already Enables Online and Social Media Implementations

Second, the VPPA, ***in its current form***, already allows video companies to implement social media strategies such as integrating with Facebook. There has been commentary suggesting this law is some musty and outdated relic, but that simply is not true.

Now, it ***is*** true that the VPPA requires opt-in consent every time a viewer's movie choices get forwarded to a third party, including a friend in a social network. Blockbuster's original implementation of the disastrous Facebook Beacon initiative failed to do this, and it probably violated the VPPA as a result.[5]

But it's actually ***easier*** to satisfy those requirements online than off. The statute's authors envisioned a video rental store getting the customer to sign a

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[2] *See* Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387 (2008); *see also* Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management in Cyberspace*, 28 CONN. L. REV. 981, 1003–19 (1996).

[3] S.B. 602 (Cal. 2011), http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0601-0650/sb_602_bill_20111002_chaptered.pdf.

[4] *See generally, e.g.*, Stanley v. Georgia, 394 U.S. 557 (1969); Tattered Cover, Inc. v. City of Thornton, 44 P.3d 1044 (Colo. 2002); Richards, supra note 2; American Library Association, Code of Ethics, available at http://www.ala.org/advocacy/proethics/codeofethics/codeethics.

[5] *See* James Grimmelmann, *Facebook and the VPPA: Uh-Oh*, THE LABORATORIUM (Dec. 10, 2007), http://laboratorium.net/archive/2007/12/10/facebook_and_the_vppa_uhoh; William McGeveran, *Beacon Lawsuit Faces Uphill Climb*, INFO/LAW (Sept. 15, 2008), http://blogs.law.harvard.edu/infolaw/2008/09/15/beacon-lawsuit-analysis/.

separate document, in person, for every disclosure. On the internet, by comparison, each time users push the button to play a movie, they could get a "play and share" button right alongside it allowing them to post that information in social networks as well.

I have always agreed with the bill's supporters that different users have different desires about the amount of information they reveal, and that good privacy law allows people to control their own degree of disclosure.[6] The concept of genuine consent gives precisely that control to the user. Constant intrusive pop-up windows asking for permission are not desirable. But the interface I describe above is nothing of the sort. Since the user must take an affirmative act to play the video, I am at a loss to understand how pairing it with privacy consent presents any difficulty.

Some have suggested that the VPPA's "written consent" provision might require pen and paper rather than such online authorization.[7] I disagree. That interpretation would undermine every clickwrap and "I agree" button on the internet. It is contrary to the E-SIGN Act[8] and to all the caselaw I've seen.[9]

A typical user's social networking profile is loaded with personal information, but most of it is there precisely because the user made an affirmative opt-in choice to post it. Status updates, location check-ins, and photos do not ordinarily pop onto your Facebook page without your explicit case-by-case permission. The VPPA-compliant structure described above would make sharing of videos quite similar.

A world with too much passive sharing in social networks places all of us in fishbowls where our intellectual and entertainment choices face scrutiny. Passive sharing inevitably causes accidental disclosures. Where intellectual privacy is at stake, these disclosures can be harmful, and the VPPA does and should protect the individual. Intentional disclosures are great opportunities for

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[6] I so argue in my very first publication about privacy, a law review note. William McGeveran, *Programmed Privacy Promises: P3P and Web Privacy Law*, 76 N.Y.U. L. REV. 1812, 1837-38 (2001).

[7] See, e.g., Jules Polonetsky and Christopher Wolf, *Viewers Should Be Able to Share Their Playlists*, ROLL CALL (Nov. 29, 2011).

[8] 15 U.S.C. §§ 7001-7031.

[9] See, e.g., Campbell v. Gen. Dynamics Gov't Sys. Corp., 407 F.3d 546, 556 (1st Cir. 2005) (holding that E-SIGN Act "likely precludes any flat rule that a contract to arbitrate is unenforceable under the ADA solely because its promulgator chose to use e-mail as the medium to effectuate the agreement"); Berry v. Webloyalty.com, Inc., 2011 WL 1375665 at *7 (S.D. Cal. April 11, 2011) (granting Rule 12(b)(6) motion to dismiss claim because E-SIGN Act means that clicking "yes" button satisfied written consent requirement in another federal statute).

us to recommend to one another great songs (or movies, or newspaper articles) and the VPPA encourages these interactions.

Netflix may wish to integrate with Faceboook using the same structure as Spotify or the Washington Post's Social Reader app. The fact that the VPPA does not allow this structure reflects its demand of genuine consent.

The real objection of the bill's sponsors is not about technology. It's a disagreement with the VPPA's policy choice to get case-by-case consent rather than a one-time authorization. The only reason for Congress to change this law is to weaken its privacy protections.

3. If Congress does amend the VPPA, it needs to fix many problems in H.R. 2471.

Finally, H.R. 2471 has a lot of problems, and it misses some opportunities for reasonable compromise.

First, the problems. To begin with, even though social networking was the impetus for this bill, it is vital to remember the alterations of the VPPA made in H.R. 2471 apply across the board to all disclosures by all video services. By rushing to address Netflix and Facebook, the bill reduces privacy in many settings, from law enforcement to behavioral advertising.

To the extent that Congress decides to make changes inspired by social networking – and I have argued for skepticism about doing so – this would be better accomplished with a particular exception from the VPPA. A tailored social media exception would respond better to the particular concerns Netflix and other bill supporters have raised, without distorting the remainder of the VPPA.

That said, it is important to remember that intellectual privacy interests don't diminish when the disclosures go to our friends and contacts through social media – they ***increase***. That's partly because many "friends" in social networks are half-forgotten high school classmates. But as to true friends and close family, those may be exactly the people who will make judgments about our movie queues. Ask yourself whether you would be more uncomfortable showing your entire movie-watching history to your mother or to a faceless advertising company.

In sum, H.R. 2471 unravels the entire consent structure of the VPPA merely to address a perceived shortcoming in social networking disclosures.

Second, by specifically mentioning the internet, H.R. 2471 may ***foreclose*** electronic consent through other technologies such as cable or satellite. The version of H.R. 2471 passed by the House describes consent as "written consent (including through an electronic means using the Internet)." This text could be read to ***limit*** the VPPA's application of the E-SIGN Act to only those electronic

communications "using the internet," potentially foreclosing current and future technology that bypasses the internet. For example, mobile devices such as the Kindle or satellite radio that might show movies could be forbidden from getting written consent electronically – exactly the opposite of the sponsors' intent. So, too, might the interfaces of cable television companies' on-demand or DVR services. I imagine this was not the drafter's purpose, but it demonstrates the unintended consequences that arise when writing a bill with one particular scenario in mind. It would be better for the bill to remain silent on the issue and rely on the E-SIGN Act's default rule, to refer to the E-SIGN Act, or to repeat its language.

Third, although H.R. 2471 contemplates permanent one-time blanket consent, it also allows a customer to "withdraw" that consent at a later time. Unfortunately, there is no guidance about the nature of this revocation and it may lead to serious complexity and difficulties. For starters, the withdrawal presumably could not be retroactive and would have no effect on disclosures already made. More significantly, there is no indication of ***how*** the customer would revoke consent, and no obligation on the video services provider to explain it to the customer. This lack of specificity in H.R. 2471 will create headaches all around. On one side, since there is no requirement that a withdrawal be written, could an oral request to a telephone customer service representative count as a binding withdrawal, imposing potential liability on the provider for any subsequent disclosures? Conversely, could companies comply with the statute after it was amended by H.R 2471 by making it easy to give consent but difficult to revoke it? It seems that under the bill a video provider might not offer any convenient online mechanism to withdraw consent, or might even specifically require such customers to send a written request to a postal address. These scenarios may seem unlikely, and certainly would be undesirable, but nothing in H.R. 2471 specifies how that process ought to work.

Even more important than these problems are the opportunities unaddressed by the narrow approach of H.R. 2471. If Congress chooses to amend the VPPA, I urge you to do so in a more comprehensive fashion than this bill, which appears to be crafted only to advance one company's business plan rather than to reexamine the VPPA.

Some of the language in the statute could be modernized and made more precise. For example, the statute should update the terminology around "video tape service providers." Even though the VPPA's definition explicitly embraces providers of "similar audio visual materials,"[10] the dated language could mislead a judge into thinking that new technology such as streaming falls outside the VPPA's scope. Simply deleting the word "tape" would ensure that the particular physical medium remains irrelevant, as the VPPA's authors clearly intended.

[10] 18 U.S.C. § 2710(a)(4).

Most significantly, however, H.R. 2471 replaces the robust consent provisions of the VPPA with a very weak alternative. Even as amended by Congressman Nadler in the House of Representatives, the bill allows an unclear request for authorization when a customer signs up – likely worded to encourage agreement – and does nothing to regulate the customer's subsequent modification of permission. This arrangement fails to secure genuine consent.

That said, I certainly do not believe that the model of the VPPA is the ***only*** route to genuine consent. There may be other creative ways. For instance, what about general authorization with a short time limit (say, one month) and granular, clear opt-out for all individual posts? The lack of a hearing on the bill in the House prevented proper exploration of such ideas. Several members of the House committee attempted to explore middle-ground alternatives, but unfortunately the rushed markup process did not allow time for the emergence of carefully considered consent procedures.

In conclusion, the VPPA is a model privacy bill advancing important interests in intellectual privacy. New technology actually makes it easier, not more difficult, to comply with the statute's requirement for case-by-case authorization for disclosures. If the Senate nonetheless pursues a bill to amend the VPPA, I urge the committee and the bill's supporters to seek creative compromises that might update the VPPA for the 21st century without vitiating its protection for individuals' intellectual privacy.

I would be happy to work with you further as the legislative process for this bill continues.