



January 31, 2012

Chairman Al Franken  
U.S. Senate Committee on the  
Judiciary  
Subcommittee on Privacy,  
Technology and the Law  
224 Dirksen Senate Office  
Building  
Washington, DC 20510

Ranking Member Tom Coburn  
U.S. Senate Committee on the  
Judiciary  
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RE: ACLU opposes expanded unwarranted law enforcement access to private rental records and broader privacy implications in H.R. 2471

Dear Chairman Franken and Ranking Member Coburn:

On behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to the principles of individual liberty and justice embodied in the U.S. Constitution, we are writing today to express serious concerns regarding H.R. 2471, which curtails the privacy protections of the Video Privacy Protection Act (VPPA). If these concerns are not addressed, we will oppose the bill. The VPPA represents a model of good consumer privacy law and should be mirrored in other statutes rather than undermined. In addition, H.R. 2471 exposes sensitive personal information to greater law enforcement scrutiny. The committee should not consider such targeted special interest legislation when it is actively debating broad new protections for digital privacy, particularly when these changes are unnecessary.

H.R. 2471 amends the VPPA to allow consumers to grant a perpetual consent to the sharing of their video rental records (including movies rented online through companies like Netflix). Currently the VPPA requires consumer's consent each time a company discloses a record. The practical effect of H.R. 2471 would be to reduce consumer control over a sensitive category of personal information, namely video and movie rentals and sales.

The VPPA was enacted in response to the Supreme Court confirmation hearings of Judge Robert Bork. During the course of the confirmation process, a reporter from the *City Paper* gained unauthorized access to Judge Bork's video rental records and attempted to use his personal viewing habits to shape judgments about his character. While the incident involving Judge Bork's records was the most high profile example, testimony from the time demonstrated that video rental records were also

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wrongly used for other purposes, including as part of divorce proceedings.<sup>1</sup> At that time, many senators expressed outrage over this practice.<sup>2</sup> Senator Leahy characterized the disclosure of the tapes as “an issue that goes to the deepest yearning of all Americans that we are here and we cherish our freedom and we want our freedom. We want to be left alone.”<sup>3</sup>

These incidents proved to be only a precursor to the massive information use and misuse that would follow over the next two decades. We now live in a world of records. Every communication online, every credit card transaction, every borrowed library book creates a record. Our travels are frequently recorded; from EZ Pass to subway fare to cell phone tracking, we leave a trail, frequently an unwilling trail. All of this information can be used in ways we did not intend.

H.R. 2471 exacerbates this problem by reducing consumer control over another category of sensitive, personal information and creates four specific problems.

**It will reduce the efficacy of the VPPA.** As it is currently drafted, the VPPA is in many ways a model statute. While it only covers a narrow class of records, it does so in an exemplary fashion. In addition to the protections against inappropriate law enforcement access discussed below, the statute carefully governs how video records may be released in a variety of situations. Tricky issues are carefully delineated including sharing information during the ordinary course of business (a defined term under the statute), addressing record requests from civil proceedings, and creating marketing lists.

Violations of the act can be enforced through a civil action, one that includes liquidated damages, punitive damages and reasonable attorneys’ fees. Unlawfully obtained information may not be introduced into any court proceeding. Finally, old records must be destroyed within one year after they are no longer necessary for the purpose for which they were collected.

More privacy statutes, especially those governing records, should mirror the VPPA. Undermining it sends the wrong message about privacy protections for transactional records.

**It will bypass key protections against law enforcement access.** The VPPA contains strong protections against unregulated access to video rental records by law enforcement. Under 18 U.S.C. 2710 (b)(2)(C):

“A video tape service provider may disclose personally identifiable information concerning any consumer-- ... to a law enforcement agency pursuant to a warrant issued under the Federal Rules of

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<sup>1</sup> *Video and Library Privacy Protection Act of 1988: Hearing before the Senate Committee on Judiciary*, 100th Cong. 65 (1988) (testimony of Janlori Goldman).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

Criminal Procedure, an equivalent State warrant, a grand jury subpoena, or a court order...”

And then under 18 U.S.C. 2710 (b)(3):

“Court orders authorizing disclosure under subparagraph (C) shall issue only with prior notice to the consumer and only if the law enforcement agency shows that there is probable cause to believe that the records or other information sought are relevant to a legitimate law enforcement inquiry.”

Even with the passage of H.R. 2471, these protections would continue to apply to video providers (including those renting movies online). However, it is unlikely that a court would require a third party (such as Facebook) to abide by these rules.

Given this fact, and given that sites like Facebook are routinely monitored by law enforcement, the unintended consequence of this legislation will be to give much greater access to this class of records than was intended by Congress when the statute was drafted.<sup>4</sup>

**Electronic privacy law is currently in flux.** A broad coalition of businesses, consumer and civil liberties groups from across the political spectrum, academics, and others have called for reforms to the Electronic Communication Privacy Act. These groups, known collectively as the Digital Due Process (DDP) coalition, recognize that our electronic privacy laws are badly out of date.<sup>5</sup> Such obsolescence harms civil liberties, prevents businesses from fully exploiting new technologies, and creates confusing and antiquated rules for law enforcement. Current legislation before the committee, including S. 1011, the “Electronic Communications Privacy Act Amendments Act”, is aimed at remedying some of these problems. Because H.R. 2471 implicates both business practices and core privacy issues, it is squarely part of that larger debate.

As we described recently to the full committee in a statement regarding S. 1011, transactional records of the type covered by the VPPA must be part of the discussion. Records of where consumers go online, what they read and purchase, and with whom they communicate are often more sensitive than the actual contents of their communications.<sup>6</sup> Microsoft similarly argued that it has a vital interest in another technology, cloud computing. According to Mike Hintz, Associate General Counsel at

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<sup>4</sup> Morran, Chis. “”NYPD Forms New Unite to Monitor Facebook and Twitter for Signs of Criminal Activity.” *The Consumerist*, 10 Aug. 2011.  
<http://consumerist.com/2011/08/nypd-forms-new-unit-to-monitor-facebook-and-twitter-for-signs-of-criminal-activity.html>

<sup>5</sup> A complete list of DDP members can be found here:  
<http://digitaldueprocess.org/index.cfm?objectid=DF652CE0-2552-11DF-B455000C296BA163>

<sup>6</sup> *The Electronic Communications Privacy Act: Promoting Security and Protecting Privacy in the Digital Age: Hearing before the Senate Committee on Judiciary*, 111th Cong. 47-56 (2010) (written statement of the American Civil Liberties Union).

Microsoft, “Users of cloud services must have confidence that their data will have privacy protections from government and from providers,” and his company “regularly hears from enterprises that moving data to the cloud affects privacy.”<sup>7</sup>

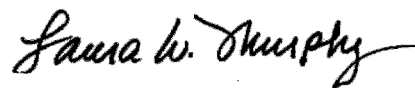
Committee Chairman Patrick Leahy eloquently stated in recent comments, “I introduced legislation to update the Electronic Communications Privacy Act, so that this law remains viable in the digital age. Congress must now do its part to enact this legislation, so that our federal privacy laws keep pace with technology and protect the interests of our nation’s citizens, law enforcement community, and thriving technology sector.”<sup>8</sup> Passing piecemeal legislation runs completely counter to that objective and will likely result in the perpetuation of an uneven playing field both for privacy and new technologies.

**It is unnecessary.** Sharing of personal information, like video rental records or other transactions, is currently extremely easy. For example, after consumers complete a transaction on the web retailer Amazon.com, they are presented with a screen which confirms the sale and allows them to share the fact of their purchase through Facebook, Twitter or other social media. In fact, the post is already prepared and “I just purchased [item]” appears in the body of the message or tweet. The consumer simply has to click a button and the message is sent.

It is difficult to imagine how this could be any easier for consumers. They are completely empowered to share their purchases whenever they want. Most importantly, they control whether they share a particular purchase or rental. The process a consumer would have to undertake if H.R. 2471 becomes law presents a sharp contrast. Once consumers agree to share information, they would have to decide each time whether they want to keep information private and hunt down the method for disabling sharing.

As currently drafted H.R. 2471 raises serious concerns regarding consumer control and law enforcement access to video records and has a detrimental impact on other important policy decisions currently pending before the committee. If the committee does not address these concerns before taking any action on H.R. 2471, we will oppose the legislation.

Sincerely,



Laura W. Murphy

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<sup>7</sup> Howard, Alex. “ECPA reform: Why digital due process matters.” *O’Reilly Radar*, 23 Sept. 2010. <http://radar.oreilly.com/2010/09/ecpa-reform-why-digital-due-pr.html>

<sup>8</sup> Press Release, Office of Senator Patrick Leahy, Comment Of Senator Patrick Leahy (D-Vt.) Chairman, Senate Judiciary Committee, On Supreme Court Decision In *United States v. Jones* (Jan. 3, 2012).

Director, Washington Legislative Office

A handwritten signature in black ink, appearing to read "Chris L. Calabrese". The signature is fluid and cursive, with a long horizontal stroke at the end.

Christopher Calabrese  
Legislative Counsel