“Privacy Trolls” - A Discussion on How to Empower Individuals Without Creating a System that Breeds “Trolls”

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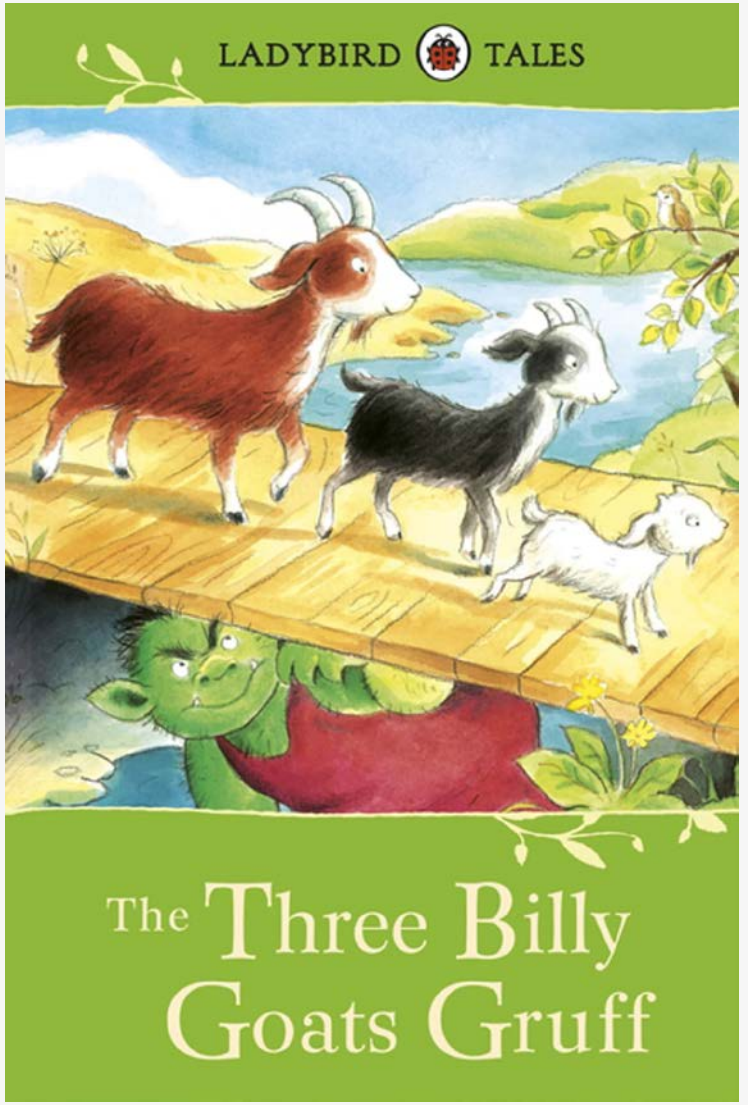
ROTHWELL FIGG

What is a Troll?

- In the story “Three Billy Goat’s Gruff,” a troll prevented the goats from getting to the grass field claiming to own the bridge. Likewise, legal trolls threaten to sue companies unless companies pay a fee.
- Trolls tend to prey on the small and weak first.



Introduction to Panel

Jenny Colgate

Practicing litigator for 18 years (patents, trade secrets, privacy and data issues, trademarks). In addition to competitor suits, has represented dozens of defendants in troll litigations and threatened litigations.

Steven Lieberman

A litigator for more than 30 years, has served as lead counsel in hundreds of lawsuits across venues. Extensive experience in advising clients on privacy and AI matters and successfully representing clients in privacy-related investigations initiated by the Federal Trade Commission (FTC).

John Verdi

Supervises FPF's policy portfolio, which advances FPF's agenda on a broad range of issues, including: Artificial Intelligence & Machine Learning; Algorithmic Decision-Making; Ethics; Connected Cars; Smart Communities; Student Privacy; Health; the Internet of Things; Wearable Technologies; De-Identification; and Drones.

What is the Problem?

Private rights of action

Plaintiffs are misapplying privacy laws

High cost of litigation

Lack of decisions

Statutory damages

Damages per violation

No damages caps

Ease of proof of standing

No *mens rea*

No relationship requirement

No shifting of attorneys' fees for baseless litigation

Are Private Rights of Action the Problem?

You can't have "privacy trolls" without a private right of action.

Private rights of action allow those who have been wronged to go after the entity that violated the law.

More enforcement means more decisions, which means more clarity.

Legal systems with PRAs have greater deterrence / more enforcement.

But private rights of action also incentivize bad actors who exploit, and try to profit from, the system. Frivolous claims; nuisance settlements. Time wasted on "bad arguments."

To Have a PRA or Not to Have a PRA?

Examples of PRAs	Examples without PRAs
• Video Privacy Protection Act of 1988 (VPPA) • Telephone Consumer Protection Act (TCPA) • IL Biometric Information Privacy Act (BIPA) • California Invasion of Privacy Act (CIPA) • Uniform Trade Secrets Act (UTSA) • California Privacy Rights Act (CPRA) • WA's My Health My Data Act (MHMD) • [Proposed] American Data Privacy and Protection Act (ADPPA)	• State Privacy Legislation (CO, VA, UT, CT, CA (other than data breaches)) • Most state Unfair and Deceptive Acts and Practices (UDAP) laws (but there are some exceptions) • Section 5 of the Federal Trade Commission Act • Health Insurance Portability and Accountability Act (HIPAA) • Children's Online Privacy Protection Act (COPPA)

Is Misappropriation of Laws the Problem?

Application of “old” statutes to “new” technologies?

Interpreting statutes too broadly

Possible examples:

VPPA (video viewing on apps and websites)

TCPA (any automated dialing and text messages)

CIPA (third-party chat vendors)

VPPA

How did we go from a country that made it illegal to share video rental records to one where everything you watch is constantly monitored and monetized?

- VPPA was enacted in 1988, in response to *Washington City Paper*'s publication of U.S. Supreme court nominee Robert Bork's video rental history, which newspaper obtained without his knowledge or consent
- Does VPPA regulate current video-related privacy practices, or is the law outdated?

VPPA, 18 USC 2710

- a video tape service provider who knowingly discloses, to any person, personally identifiable information, concerning any consumer of such provider shall be liable to the aggrieved person for the relief in subsection (d)
  - Exceptions for informed written consent, pursuant to warrant, etc.
- provides for private right of action, including actual damages not less than liquidated damages in the amount of $2,500; punitive damages; reasonable attorneys' fees and other litigation costs reasonably incurred

VPPA – Definitions Are Limited

- "**consumer**" = any renter, purchaser, or subscriber of goods or services from a video tape service provider
- "**personally identifiable information**" includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider
- "**video tape service provider**" = any person engaged in the business, in or affecting interstate or foreign commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials, or any person or other entity to whom a disclosure is made under subparagraph (D) or (E) of subsection (b)(2) …

Is VPPA Being Stretched Too Far?

What is a "subscriber"?

- Just downloading a free app?
  - *Ellis v. Cartoon Network* (MTD) – 11th Circuit says not enough.
  - *Yershov v. Gannett Satellite Info Network, Inc.* – 1st Circuit says enough.
- Signing up for newsletter?
  - *Lebakken v. WebMD, LLC* (N.D. Ga. 2022) (MTD) – Denied MTD, but Court assumed that videos were embedded in newsletter.

What is *knowingly disclosing* "personally identifiable information"?

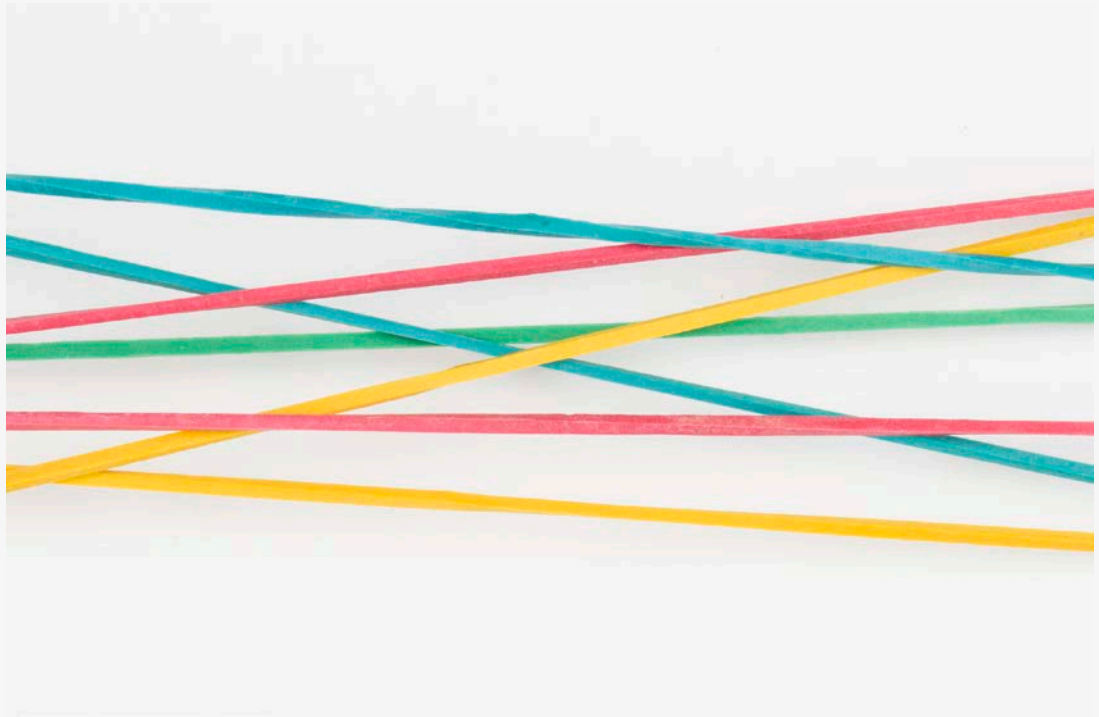
- What does it take for information to be "personally identifiable"?
- Does inquiry focus on what is transmitted, or how information is used?
- Examples:
  - Many courts have held that ID alone (e.g., Android ID or Roku device serial number) is not sufficient to constitute PII. Focus is on the information that is transmitted, not how recipient uses it.

What is a "video tape service provider"?

- D.R.I. and N.D. Cal. have dismissed Complaints where accused video content was live-stream and not pre-recorded (statute says "rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials")

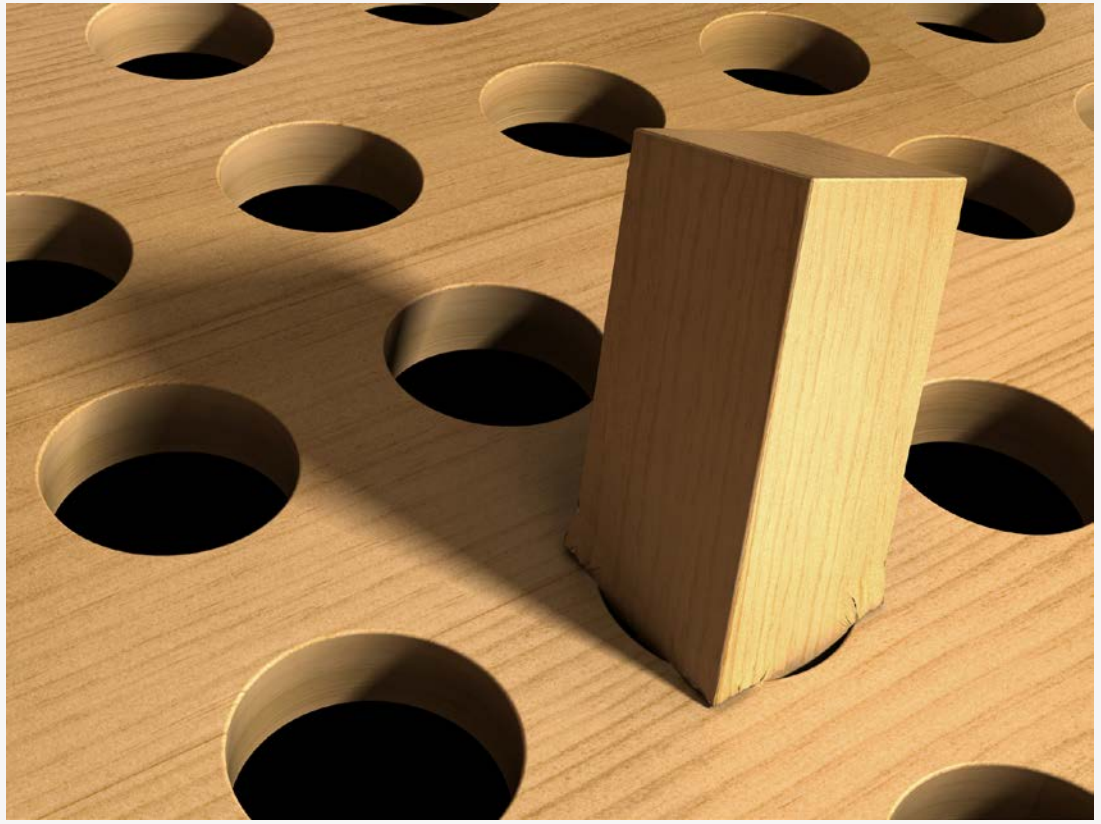
Is VPPA Being Stretched Too Far?

- Mobile applications
- Roku devices
- Hulu, HBO, other content providers
  - In combination with Cookies, shared information with Facebook, etc.
- Google Analytics and Meta/Facebook Pixel
  - Discloses webpage and associated Facebook / Google ID; leaves off if website contains one or more videos, and if any videos were watched (if so, which one(s))
  - According to Oct. 2022 *Bloomberg* article, nearly 50 class actions had been filed since February 2022 alleging that sharing tracking data with Facebook without consent on what videos they watch using Meta's pixel tracking tool violated VPPA
    - How many more actions were *threatened*, but not filed?



VPPA - Intentionally Left Outdated?

- Since 1988 enactment, Congress has amended VPPA only once, in 2012.
  - Amended section 2710 to clarify that a video tape service provider may obtain consumer's written consent through the Internet.
  - Amendment recognized increasing use of technology, but did not change any terms or definitions.
  - Result of Netflix's lobbying efforts – wanted blanket Internet consent from users so it could share titles viewed on their website without having to seek express permission each time.



Is CIPA Being Stretched Too Far?

- Enacted in 1967. CA Legislature declared that the advent of new devices and technology used "for the purpose of eavesdropping upon private communications" resulted in an invasion of privacy.
- CIPA makes it illegal:
  - To wiretap (§631)
  - To eavesdrop (monitor) and record telephonic communications (§632)
  - To record without consent cell phone communications (§632.7)
- Plaintiffs have been asserting that online chat services run by third party entities constitute "wiretapping"
  - Is there an "interception"?
  - Is the chat service vendor a third party to the communication?
  - Does end-user consent if vendor is disclosed?

Role of Litigation, High Court Rulings, Predictability

Role of private rights of action vs. public enforcement

- TCPA allows for public and private enforcement. By far the majority of the enforcement is by private rights of action.

Role of High Court rulings. Supreme Court recently adopted a narrow version of "automatic telephone dialing system" (ATDS) in *Facebook v. Duguid* (2021), concerning TCPA claim.

- Rejected: any device that can "store" and "automatically dial" telephone numbers, even if device does not "us[e] a random or sequential number generator".

Are private rights of action helpful or hurtful?

- Helpful because they can clarify the law
- Hurtful because without a unifying voice, conflicting opinions create uncertainty

Judicial Decisions are Helpful, but $$$

If the problem is lack of clarity, then PRAs should help by resulting in more decisions

If the problem is the high cost of litigation, how do we make it cheaper?

How do we get clarity and predictability on the law without skyrocketing costs?

Is the Problem Statutory Damages?

Let's look at the TCPA…

Statutory damages of *up to* $500 per violation, with possible trebling where defendant "willfully or knowingly" violates TCPA

Single call can constitute multiple violations (E.g., autodialing, recorded voice, etc.)

Are these damages fair or are they excessive?

- *Wakefield v. ViSalus, Inc.* (D. Oregon, 2021) (vacated and remanded by 9th Circuit)
  - Jury found ViSalus had made 1,850,440 telemarketing calls using an artificial or prerecorded voice to mobile or residential phones in violation of TCPA.
  - Statutory damages of $500/violation (no enhancement)
  - Verdict of $925,220,000 (largest TCPA verdict in history)

- *Perrong v. Mla Int'l* (M.D. Fla. 2022)
  - Only 26 calls, but three statutory damages ($500 each) per call:
    - Automated dialing; artificial/pre-recorded voice; and no internal DNC policy
  - Court awarded default judgment of $39K
    - $500 x 26 calls x 3 violations per call

Do Class Actions Render Statutory Damages Inappropriate?

At least one Court determined that class actions are virtually *per se* inappropriate for TCPA violations. *See Forman v. Data Transfer, Inc.*, 164 F.R.D. 400 (E.D. Pa. 1995) ("[a] class action would be inconsistent with the specific and personal remedy provided by Congress to address the minor nuisance of unsolicited facsimile advertisements").

Do statutory damages awards in class actions violate due process?

- *Wakefield v. ViSalus* (9th Circuit 2022)
  - Vacated and remanded district court's denial of ViSalus's post-trial motion challenging constitutionality of $925,220,000 award under Due Process Clause of Fifth Amendment.
  - In certain extreme circumstances, a statutory damages award violates due process if it is so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable.
  - Cited factors from *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990): amount of award to each plaintiff; total award; nature and persistence of violations; extent of defendant's culpability; damage awards in similar cases; substantive or technical nature of violations; circumstances of each case

Are More High Damages Cases Coming? (BIPA)

Richard Rogers v. BNSF Railway Company (N.D. Ill. 2022), federal jury found BNSF Railway, operator of large freight railroad network, liable for violating BIPA. First BIPA case to go to trial.

Truck driver's fingerprints were scanned for identity verification at rail yards when picking up /dropping off loads. No written notice/executed release.

- (BNSF had hired a third party vendor to process the drivers' fingerprints)

Jury found BNSF recklessly or intentionally violated law 45,600 times

- BIPA provides $5K damages for willful or reckless violations; $1K damages for negligent violations
- $228 million in damages

Are More High Damages Cases Coming? (CCPA/CPRA)

CCPA/CPRA allows affected customers to sue company where company is involved in data breach and failed to maintain reasonable security procedures and practices

- Only applies to certain data breaches (CA data breach notification law, Cal. Civ. Code § 1798.82)
- Statutory damages $100-750/customer or incident (consider nature and seriousness of misconduct, number of violations, willfulness, defendant's assets/worth, etc.) OR actual damages, whichever is greater

Are statutory damages for a data breach, where company failed to maintain reasonable security procedures/practices, different than statutory damages for a privacy violation?

The Role of Damages Caps? (VPPA)

VPPA: The Court may award "actual damages but not less than liquidated damages in an amount of $2,500…"

- Few publicly-disclosed settlements.
- Cases not typically litigated past early stages.

Is Standing the Problem? Is It Too Easy to Establish Standing?

In *Spokeo, Inc. v. Robins*, US Supreme Court held that Article III standing in federal court required more than just a "bare procedural violation"; instead, needed both a "particularized" and "concrete" injury.

- Consumer alleged website operator published inaccurate information about him in violation of Fair Credit Reporting Act. Court held that consumer could not satisfy demands of Article III standing by alleging *bare procedural violation* (e.g., false zip code, without more, could not work any concrete harm).

When is a violation of a privacy statute – by itself– a "particularized" and "concrete" injury?

Courts Have Found that Violation of VPPA Confers Standing

Yershov v. Gannett (D. Mass. 2016) – "Congress, by enacting the VPPA, elevated an otherwise nonactionable invasion of privacy into a concrete, legally cognizable injury."

Eichenberger v. ESPN (9th Cir. 2017) – Unlike the Fair Credit Reporting Act (FCRA) analyzed in *Spokeo*, the VPPA (specifically 18 USC 2710(b)(1)) codifies a substantive right to privacy in one's video-viewing history. Thus, mere disclosure of this information is sufficient to confer Article III standing under VPPA.

Martin v. Meredith Corp. et al., Case No. 22-cv-04776 (SDNY 2023) – "Martin's allegations that the defendants disclosed his private information to a third party without his consent are sufficient to confer standing." *Id*. at 6 (citing *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) (noting that intangible harms including "disclosure of private information" can be sufficiently concrete to satisfy Article III).

Circuits Split on When Violation of TCPA Confers Standing

Circuit split – Is a single unwanted text message sufficient to confer standing?

- *Salcedo v. Hanna* (11th Circuit 2019) – No
- *In re: Deepwater Horizon* (5th Circuit 2014) – Yes

When does technical non-compliance with regulation qualify as "concrete" harm "traditionally" remediable at law? What if the entity tried to comply, but regulations changed?

- *Wakfield v. ViSalus* (TCPA) - Absence of compliance with FCC's heightened consent standard.
  - Class members voluntarily provided phone numbers and some consent to receive marketing and promotional communications. But FCC changed regulations in Oct. 2013 to require prior express written consent.

Slippery slope: Would every statutory violation have to be further assessed to determine if "concrete" harm "traditionally" remediable at law?

Violation of BIPA *Sometimes* Confers Article III Standing

Sometimes violation of BIPA leads to a "concrete" and "particularized" injury and sometimes it does not. It depends on violation.

- **Concrete & particularized:**
  - 15(a) violation - retaining biometric information after initial purpose/time elapsed – *Fox v. Dakkota*, 7th Circuit
  - 15(b) violation - withholding substantive information so plaintiffs could not give informed consent – *Bryant v. Compass Group*, 7th Circuit
- **Procedural:**
  - 15(a) violation - making publicly available written retention schedule – *Bryant v. Compass Group*, 7th Circuit
  - 15(c) violation - alleged violation of BIPA's prohibition on sale/profit from individuals' biometric information without more – *Thornley v. Clearview AI*, 7th Circuit

Are Different State and Federal Standing Requirements a Problem?

Rosenbach v. Six Flags (2019) –Illinois Supreme Court held that actual harm is not required to establish standing to sue under BIPA

- Under IL law, standing exists when a person is prejudiced or aggrieved
- A person is "prejudiced or aggrieved, in the legal sense, when a legal right is invaded by the act complained of or his pecuniary interest is directly affected by the decree or judgment."
- Under this definition, a procedural violation of BIPA is enough for standing in IL courts.

While traditionally defendants were able to remove cases to federal court pursuant to Class Action Fairness Act (CAFA), different standing requirements allow plaintiffs to strategically plead cases (with procedural violations) to stay in state court.

Is PRA Without a Relationship in Between the Parties a Problem?

In 2015, when there was effort to create a uniform regime for trade secret protection (Defend Trade Secrets Act of 2015), several law professors proclaimed that if federal trade secret legislation was enacted it would lead to a rise in trade secret trolls.

- According to Gene Quinn article in *IPWatchdog* (2015), "[y]ou simply cannot commoditize trade secret litigation in the same ways patent trolls can and do commoditize patent litigation"
  - Anyone can knowingly or unknowingly infringe a patent – that is at the heart of the patent troll model.
  - Unlike patents, trade secrets do not provide a right against the world. Trade secret actions by their very nature are between parties that **have a business relationship or at least operate in the same industry**.
- Are PRAs less likely to result in "troll problems" if they are limited to circumstances where the parties have a business relationship?

Would Shifting Attorneys' Fees for Baseless Litigation Solve the Troll Problem?

The UTSA provides that "the court *may* award reasonable attorneys' fees to the *prevailing party*" if: (i) claim of misappropriation is made in bad faith; (ii) a motion to terminate an injunction is made or resisted in bad faith; or (iii) willful and malicious misappropriation exists. Unif. Trade Secrets Act, § 4 (emphasis added).

But…before receiving attorneys' fees the defendant must be deemed a prevailing party by a court and persuade the court to exercise discretion for attorneys' fees in its favor.

- Requires litigating / being a "prevailing party"
- What is "bad faith"? Different states apply different standards and tests.
- Discretion of the court whether to award attorneys' fees.

How could fee shifting be improved?

Conclusion

What should we keep doing?

What should we do differently?

Any Questions?