

Privacy and Information Governance

Vizio Pays \$2.2 Million Fine to Settle Smart TV Spying Charges

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Vizio, one of the largest Smart TV companies, recently agreed to pay a \$2.2 million fine and be subject to a permanent injunction to settle charges by Federal Trade Commission and the Office of the New Jersey Attorney General that Vizio tracked consumer television viewing on 11 million internet-connect TVs without consent in violation of consumer protection laws. This is the first case where the FTC's interpretation of "sensitive information" has been expanded to include consumer's television viewing data.

According to the FTC's proposed Complaint, Vizio's affiliated smart TV manufacturer developed proprietary automated content recognition ("ACR") software to detect content on internet-connected monitors and televisions. Commencing in 2014, Vizio began selling ACR-equipped smart TVs with ACR enabled by default and remotely installed ACR tracking on previously-sold TVs. Vizio allegedly captured "highly-specific, second-by-second information" as to what individuals watched, sent that information to Vizio's servers and matched it to publicly-available content. Vizio also allegedly collected viewing data from cable and broadband service providers, over the air broadcasts, set top boxes and external streaming devices. Vizio was alleged to have collected IP addresses, MAC addresses, and other items.

Vizio sold the data it collected for three main uses. The first was audience measurement where the data sold included persistent identifiers for each TV along with the content viewed (when viewed, for how long, channel). The second involved analyzing advertising effectiveness, where Vizio allegedly provided the IP addresses enabling third parties to track household behavior across devices. With the third, Vizio provided consumers' data to enable targeted advertising. The FTC alleged that, while Vizio's contracts prohibited the re-identification of consumers, Vizio allowed the following to be appended: gender, income, household size and marital status. The FTC's complaint noted that Vizio touted in its security filings that its data analytics program provided "highly specific viewing behavior or a massive scale with great accuracy."

A key problem for Vizio according to the FTC complaint is that viewers were provided "no onscreen notice of the collections of viewing data" from February 2014 to March 2016. Instead there was a pop up stating that "Smart Interconnectivity has been enabled" which was elsewhere described in Vizio's settings as "enabl[ing] program offers and suggestions." It was only after the FTC's investigation began in 2016 that Vizio added a single notification to its system which timed out after thirty seconds and did not require affirmative (opt in) consent.

The FTC alleged several counts against Vizio, including deceptive omission regarding Smart Interactivity information collection and sharing. With respect to these counts, as expressed in a concurring statement by Maureen Ohlhausen, now-acting FTC Chairman, this collection was misleading because "consumers do not expect televisions to collect and share information about what they want" and may wish to "choose a different television or change the television's settings to reflect" these preferences.

The FTC also alleged "unfair tracking" based on Vizio's "collection and sharing of sensitive data [i.e., the viewing data]" -- an unprecedented expansion of the definition of "sensitive information" under the FTC Act to include television viewing data. Ms. Ohlhausen commented on this expansion and noted that public policy might find viewing data might be sensitive, citing as an example the Cable Privacy Act's protection of video viewing activity. At the same time, she cautioned that this issue would require further examination.

To settle this matter, Vizio agreed to “prominently disclose” the type of data it collects and explain how the data would be shared with third parties. Vizio must obtain the consumer’s “affirmative express consent” and provide instructions “for how the consumer may revoke consent to collection” of his data. The settlement also requires \$2.2 million in payments, recordkeeping for twenty years, and compliance monitoring.

While the FTC matter has been resolved, a pending putative class action filed by Vizio purchasers alleging Vizio violated the Video Protection Privacy Act remains pending in the Central District of California.

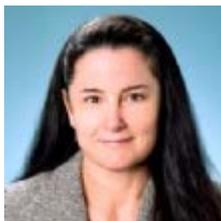
This case highlights that FTC has been focusing on novel types of data collection and use, particularly in evolving technologies like smart TVs; even with the transition to a Republican administration, the FTC will likely remain active in protecting consumers from deceptive practices in areas like the smart TVs and smart TV manufacturers and sellers. Companies developing internet-enabled products should incorporate notice and choice to consumers to the extent possible.

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