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From Borking to Streaming: The Normalization of Media Surveillance

Blake Hallinan
University of Colorado Boulder

Introduction

This paper builds on existing research on the role of surveillance in quotidian institutional contexts (Gilliom & Monahan 2012; Turow 2006; Turow 2011) and follows Jeremy Packer's provocation to communication scholars to understand "media not merely as transmitters—the old 'mass media' function—but rather as data collectors, storage houses, and processessing centers" (2013, 296). Through an analysis of congressional documents, news reports, and scholarly literature, the case study of the Video Privacy Protection Act shows how social, technological, and legal changes associated with media distribution trouble the distinctions between audience and user, how the social, technological and legal changes associated with video challenge new media and old media.

A class action lawsuit filed in late 2009 alleged that Netflix, the popular streaming video and DVD-by-mail company, perpetrated the "largest voluntary privacy breach to date, disclosing sensitive and personal identifying consumer information" (Jane Doe v. Netflix 2009). The alleged privacy breach referred to the Netflix Prize dataset released to the public in 2006 in conjunction with a contest of the same name. The lawsuit also argued that movie and television ratings should be considered sensitive information since they may reveal an individual's "sexuality, religious beliefs, or political affiliations," in addition to personal struggles "with issues such as domestic violence, adultery, alcoholism, or substance abuse" (Jane Doe v. Netflix 2009). Such concerns are well captured by the plaintiff, a Jane Doe and closeted lesbian mother from Ohio, who believed public knowledge of her sexual orientation threatened the social and economic well being of her and her family. In making these claims, the lawsuit draws upon the cultural and legal heritage of an earlier privacy breach involving video rental information.

During the 1987 congressional confirmation hearings for Judge Robert Heron Bork, a freelance journalist obtained a copy of Bork's complete rental history from Potomac Video and published an exposé on his viewing habits in the local weekly newspaper. The resulting scandal brought congress together in the long-honored American tradition of bipartisan outrage and provided the impetus for the Video Privacy Protection Act (VPPA). Enacted into law in 1988, the VPPA prohibits "video tape service providers"

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from disclosing personally identifiable information without informed and written content obtained at the time of disclosure, except to certain enumerated persons. It also requires providers to destroy personally identifiable information no later than one year after the data is no longer being used for the purpose it was originally collected (Murphy 2011). It is under this consumer privacy law that the class action lawsuit Jane Doe v. Netflix alleged wrongdoing.

The exposure of Robert Bork's rental history and the release of the Netflix Prize dataset share a number of structural similarities, including an obvious proximity to the VPPA, a conception of usage records as sensitive information, and a belief that policy plays an essential role in protecting the privacy of individuals. Despite these similarities, the two cases differ greatly with regard to public reception and the position of privacy within the cultural imagination. After the nonconsensual publication of his rental history, Robert Bork garnered public sympathy and righteous indignation on his behalf. Nearly two decades later, Jane Doe was met with apathy and a slew of threats and personal accusations. Why the differing reactions? Certainly, one might note issues of gender, sexuality, and anonymity as possible explanations, especially with regard to the threats and personal accusations directed towards Jane Doe (Cherny & Weise 1996; Whitehead & Wesch 2012). However, these issues do not fully account for the level of public apathy surrounding the 'largest voluntary privacy breach,' an exposure that potentially threatened the reputations of nearly 500,000 Netflix subscribers. As such, the two events bracket a number of changes in media consumption, technology, and society that collectively result in the normalization of media surveillance, or the collection of information about individuals related to the use of media. This normalization gives reason to the public apathy surrounding Jane Doe v. Netflix and other recent data breaches and, at the same time, suggests the value of returning to the Bork hearings and subsequent enactment of the Video Privacy Protection Act in order to recover an awareness of the historical specificity of media surveillance and to explore the associated concerns at a time when they were widely and publically expressed.

Tracking, Profiling, Human, Machine

The process of media surveillance differs according to the content and delivery system involved. For example, journalist Michael Dolan acquired Robert Bork's rental history from Potomac Video by walking into the store, stating his intention to write an article about the Judge, and asking to see the records. The clerk readily obliged and provided a list of all 146 VHS tapes the Bork family had rented over the past two years (Dolan). With the advent of the World Wide Web in 1991, computers also play an increasingly important role in providing direct access to various digital media, including web pages and electronic forms of news, books, music, images, and video. While these changes have not eclipsed older forms of distribution, digital distribution profoundly alters the possibilities for tracking media consumption. Where Bork's rental history remains agnostic to a number of questions concerning the use of the videotapes, consumption records maintained by Netflix, Hulu, and other online streaming video providers offer a more granular picture. For any given consumer, these services may have access to the following kinds of information: the name of the content; time and location of access; behavior during access, such as pausing, rewinding, and fast-forwarding; ratings;

device information; metadata from third parties; social media data; search information; and, increasingly, information about the content itself (Harris 2012; Havens 2014). The resulting glut of information fits within what Mark Andrejevic and Kelly Gates describe as the “collective everything approach” of big data surveillance (2014, 185). Compared to the records maintained by Potomac Video, the legitimate business interest in the more expansive records associated with data surveillance is both less singular and less obvious and may include everything from verifying the identify of a subscriber to assessing audience demographics to producing personalized recommendations. From the dominant industry perspective, as the volume of the data grows, so too does its value. However, from the perspective of privacy activists like Janlori Goldman, staff attorney for the American Civil Liberties Union, this growth is a cause for concern as it contributes to the creation of a “womb- to-tomb dossier” for every individual (U.S. Congress 1988).

Beyond loss of privacy, the creation of a ‘womb-to-tomb’ dossier also poses problems related to profiling, the active assessment of an individual based on a set of discrete information. Although some forms of profiling may be inevitable and even desirable (consider, for instance, the forms of profiling involved creating personalized media recommendations), other forms of profiling, such as journalist Michael Dolan’s exposé on Robert Bork’s viewing habits, appear considerably less justified. The newspaper article, described during congressional hearings as “beyond the pale” and a cause for “outrage,” (U.S. Congress 1988) claimed to reveal the “inner workings” of the Judge’s mind by analyzing the movies he and his family rented (Dolan). While the tone of the article is both pointed and hyperbolic, the general structure of argument, that of making inferences about other people from the media they consume, has broad acceptance. As Judith Klug, director of the American Library Association’s Office for Intellectual Freedom notes, “there are people in every community who believe that a person’s interest [sic] in a subject must reflect not merely his [sic] intellectual interests, but his character and his attitudes” (U.S. Congress 1988). Certainly some degree of inference undergirds all forms of social interaction, as humans are limited by mortality, social conventions, and bodily capacity to know everything about an interlocutor and her intentions. However, communication promises the ability to address incorrect or harmful assumptions and forge ethical ways of ‘being with’ other people (Peters 1999). Surveillance undercuts the experience of mutuality and separates words and behaviors from a given social context. This separation increases the possibility for misunderstanding and exposes individuals to an untold and inaccessible series of assessments that influences their ability to act in the world.

Isolated and individual acts of profiling, like Robert Bork’s treatment at the hands of Michael Dolan, give a human face to what is largely a hidden, structural phenomenon but, in so doing, threaten to paper over the extensive institutional aspects of media surveillance. Such papering took place during the period of time from when the VPPA was first proposed to when it was signed into law in January of 1989. The initial draft of the law included both libraries and direct marketers alongside videotape service providers and had an expressed goal of protecting the records of all “content based” media. However, thanks to lobbying efforts from the direct marketing industry and concerns over unduly restricting access to law enforcement officials and the FBI, the final law was much reduced in scope and only pertained to the single media type and

content provider directly applicable to the Bork incident - namely, videotapes and videotape rental services. As a result, the VPPA primarily protected individual consumers from the profiling committed by other individuals and left institutionalized forms of profiling unchecked. However, the records from the hearing do provide a clear sense of the stakes of institutional profiling. In a premonitory moment, Senator Patrick Leahy, sponsor of the Video Privacy Protection Act, described his vision of the near future,

> Where somebody sits at a massive computer—somebody whom [he has] never seen, never will meet in [his] life—but that person can kind of figure out that Patrick Leahy is this sort of person based on what he reads or what he thinks or what he views and, therefore, he gets pegged a certain way and we are now going to bring whatever the marketing tools are available against him. (U.S. Congress 1988)

This future has been robustly realized in the world of database marketing and personalized media, with a small amendment. Instead of a person sitting at a massive computer, the computer itself conducts mass profiling according to a set of programmatic rules. Though the participants of surveillance have expanded to include both human and nonhuman agents, the fundamental processes of collecting information and producing actionable judgments remains the same.

Conclusion: Frictionless Sharing and the Datafication of the Social

The recent spate of lawsuits invoking the Video Privacy Protection Act demonstrates its continued legal relevance within the contemporary media environment, while the lack of significant public *and* scholarly attention to these cases, which involve major media companies like Netflix, Facebook, Hulu, Redbox, the Cable News Network, ESPN, Google, and others, attests to its diminished cultural heritage. However, it is a mistake to treat privacy as either unspeakably obvious or outdated, a purely legal problem properly relegated to historical accounts of the 1970s and 1980s. Rather, the juxtaposition of the VPPA and Jane Doe v. Netflix speaks to a broad shift from a culture of protection to a culture of surveillance, and the normalization of tracking and profiling media consumption points to the importance of thinking through issues of privacy and intellectual freedom in this new context. Social media platforms encourage a kind of surveillant sociality, in that they allow users to observe the words, images, and media shared by others online without a public record. While most information posted to social networks is the result of a conscious decision, the more recent advent of ‘frictionless sharing’ removes this requirement. Frictionless sharing transforms media consumption and social networking into a closed system through an application that tracks what an individual reads, listens to, or watches and broadcasts that information automatically on a social network. While advertisers have long tracked media consumption, the possibility of publically broadcasting this information to friends and associates introduces a novel element. Through the broadcast, an individual’s friends and associates may see that individual the way data-miners do: as a stream of behavioral data. In a culture that implicitly endorses the validity of character judgments drawn from records of media consumption, the expanded availability of this information is a cause for concern.

Datafication, or transformation of behavior into quantified data, encroaches on previously unmeasured aspects of everyday life (van Dijck, 2014). Here, the history of media distribution proves instructive: before the rise of video rental stories in the 1970s and 1980s, there was very little individualized tracking of commercial media consumption; from the late 1980s to the early 2000s, various media industries shifted to more individualized forms of measurement; and finally, with the advent of online media distribution, these practices have increased in scope and, at the same time, have become increasingly proprietary. With the integration of media consumption patterns to social networks, the risk of this information reaching unanticipated audiences increases greatly. These audiences may include the same kinds of folks seeking records from video stores and libraries, removing the need to obtain a subpoena. The Video Privacy Protection Act was designed, in part, to prevent these kinds of unanticipated exposures. In fact, the act was the reason Netflix did not introduce social integration in the American market until 2013, despite frictionless sharing apps available for other, less regulated media forms such as music and the news since 2011. However, the 2012 amendment to the VPPA, colloquially and tellingly known as the Netflix Amendment, authorized durable—long term and automatic-- consent and paved the way for the social integration of video. During the Congressional hearing, David Hyman, the general counsel for Netflix, pointed out the inconsistent regulation of different types of media (U.S. Congress, 2012). Where Hyman argued the special treatment of video was antiquated, a leftover from the historical accident of Robert Bork's leaked rental history, a more robust consideration of the VPPA shows that the real historical accident was the failure to protect *all* forms of content media.

References

Andrejevic, Mark and Kelly Gates. 2014. "Big Data Surveillance: Introduction" *Surveillance and Society* 12(2): 185-196.

Cherny, Lynn and Elizabeth Reba Weise. 1996. *Wired women: Gender and new realities in cyberspace*. Seattle, Washing: Seal Press.

Dolan, Michael. "The Bork Tapes Saga." *The American Porch*. Available at: http://www.theamericanporch.com/bork2.htm.

Gilliom, John, and Torin Monahan. *SuperVision: An Introduction to the Surveillance Society*. Chicago: University of Chicago Press, 2013.

Harris, Derrick. "Netflix Analyzes a Lot of Data about Your Viewing Habits." Gigaom. June 14, 2012. Accessed December 15, 2014. https://gigaom.com/2012/06/14/netflix-analyzes-a- lot-of-data-about-your-viewing-habits/.

Havens, Timothy. 2014. "Media Programming in an Era of Big Data" *Media Industries Journal* 1.2.

Jane Doe v. Netflix. 2009. Original complaint, 17 December (United States District Court for the Northern District of California). Available at: http://www.wired.com/images_blogs/threatlevel/2009/12/doe-v-netflix.pdf.

Murphy, Bart. 2011. The Latest Trend of the Plaintiff Class Action Bar: Video Privacy Protection Act Class Action Litigation. *Intellectual Property & Technology Law Journal, 23.7.*

Packer, Jeremy. 2013. Epistemology Not Ideology OR Why We Need New Germans. *Communication and Critical/Cultural Studies, 10:2-3*.

Peters, John Durham. 1999. *Speaking into the Air: A History of the Idea of Communication*. Chicago: University of Chicago Press.
Turow, Joseph. 2006. *Niche Envy: Marketing Discrimination in the Digital Age.* Cambridge, MA: MIT Press.
Turow, Joseph. 2011. *The Daily You: How the New Advertising Industry is Defining Your Identity and Your Worth*. New Haven: Yale University Press.
U.S. Congress. 1988. Committees on the Judiciary of the U.S. House and the Committee on the Judiciary of the U.S. Senate. *Video and Library Privacy Protection Act of 1988* Hearing, 3 August 1988. Washington: Government Printing Office, 1993.
U.S. Congress. 2012. Committee on the Judiciary of the U.S. Senate. *The Video Privacy Protection Act: Protecting Viewer Privacy in the 21st Century*. Washington: Government Printing Office, 2012.
van Dijick, José. 2014. “Datafication, Dataism and Dataveillance: Big Data between Scientific Paradigm and Ideology” *Surveillance & Society* 12(2): 197-208.
Whitehead, Neil L and Michael Wesch. 2012. *Human No More Digital Subjectivities, Unhuman Subjects, and the End of Anthropology*. Boulder, Colorado: University Press of Colorado.