

FILED
2011 JAN 26 A 11:10
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

M
99
11

1 SEAN REIS (sreis@edelson.com) - SBN 184044
2 EDELSON MCGUIRE, LLP
3 30021 Tomas Street, Suite 300
4 Rancho Santa Margarita, California 92688
5 Telephone: (949) 459-2124
6 Fax: (949) 459-2123

7 JAY EDELSON* (jedelson@edelson.com)
8 RAFEY S. BALABANIAN* (rbalabanian@edelson.com)
9 WILLIAM C. GRAY* (wgray@edelson.com)
10 BENJAMIN H. RICHMAN* (brichman@edelson.com)
11 EDELSON MCGUIRE, LLC
12 350 North LaSalle Street, Suite 1300
13 Chicago, Illinois 60654
14 Telephone: (312) 589-6370
15 Fax: (312) 589-6378

16 *Pro hac vice admission to be sought

17 ATTORNEYS FOR PLAINTIFF AND THE PUTATIVE CLASS

18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA

20 JEFF MILANS, individually and on behalf
21 of all others similarly situated,

22 *Plaintiff,*

23 v.

24 NETFLIX, INC., a Delaware corporation,

25 *Defendant.*

Case No. 11-0379

0379

CLASS ACTION

HRL

COMPLAINT FOR:

- (1) Violations of the Video Privacy Protection Act, 18 U.S.C. § 2710;
- (2) Violations of California's Customer Records Act, Cal. Civ. Code § 1798.80;
- (3) Violations of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200;
- (4) Unjust Enrichment; and
- (5) Breach of Fiduciary Duty.

DEMAND FOR JURY TRIAL

1 Plaintiff Jeff Milans, by and through his attorneys, upon personal knowledge as to
2 himself and his own acts, and upon information and belief as to all other matters, complains and
3 alleges as follows:

4 **NATURE OF THE ACTION**

5 1. Plaintiff Jeff Milans brings this Class Action Complaint against Defendant
6 Netflix, Inc. ("Netflix") for Defendant's unlawful retention of his personally identifiable
7 information ("PII") and video programming viewing history after cancellation of his membership
8 services with Netflix.

9 2. Netflix owns and operates the website www.Netflix.com, which provides
10 streaming video via the Internet and online video rental services to over 10 million subscribers.

11 3. Netflix maintains a digital record system that details every streaming video or
12 video rental that its subscribers have ordered during the course of their membership. In addition,
13 Netflix stores and analyzes the movie preferences of its subscribers based upon a user-inputted
14 ranking system.

15 4. Netflix maintains records containing its users' billing and contact information on
16 its server computers.

17 5. Netflix retains, stores, and utilizes the information described in Paragraphs three
18 (3) and four (4) *supra*, for a period of at least two (2) years after a subscriber cancels his or her
19 account with Netflix.

20 6. As a result, Netflix maintains a veritable digital dossier on thousands, if not
21 millions, of former subscribers. These records contain not only the former subscriber's credit
22 card number, username and password, as well as billing/contact information, but also a highly
23 detailed account of the individual's video programming viewing history.

24 7. Accordingly, Netflix has knowingly retained the PII and sensitive video
25 programming viewing histories of former subscribers in violation of state and federal laws.
26
27
28

1 **PARTIES**

2 8. Plaintiff Jeff Milans is a natural person and citizen of the state Virginia.

3 9. Defendant Netflix, Inc., is a corporation organized and existing under the laws of
4 the state of Delaware with its headquarters and principal place of business located at 100
5 Winchester, Los Gatos, California 95032. Netflix does business throughout the State of
6 California, the United States, and Canada.

7 **JURISDICTION AND VENUE**

8 10. This Court has subject matter jurisdiction over Plaintiff's claims arising under the
9 laws of the United States pursuant to 28 U.S.C. § 1331, and, as to all other claims, pursuant to 28
10 U.S.C. § 1367.

11 11. This Court has personal jurisdiction over Netflix because it maintains its
12 corporate headquarters in this District and the improper conduct alleged in the Complaint
13 occurred in, was directed and/or emanated from California.

14 12. This Court is an appropriate venue for the adjudication of this controversy
15 because a substantial part of the events giving rise to Plaintiff's claims occurred in this District.

16 **INTRADISTRICT ASSIGNMENT**

17 13. Pursuant to Civil Local Rule 3-2(e), this case shall be assigned to the San Jose
18 Division.

19 **FACTUAL BACKGROUND**

20 **A Brief Overview of Netflix**

21 14. On its website, Netflix boasts that, "[w]ith more than 16 million members in the
22 United States and Canada, Netflix, Inc. is the world's leading Internet subscription service for
23 enjoying movies and TV shows." Netflix Press Info., <http://www.netflix.com/MediaCenter> (last
24 visited January 5, 2011).

25 15. Netflix has developed an extensive and complex online system to provide
26 cataloged video programming to its subscribers. Using this system, subscribers are offered the
27

1 opportunity to rank in order of preference a wide variety of viewing selections. Netflix uses
2 these user-inputted rankings to recommend video programming to the subscriber based upon his
3 or her preferences.

4 16. Subscribers of Netflix's services may also rent DVD's from Defendant's website,
5 which are then physically shipped to the individual.

6 17. Netflix subscribers are able to cancel their subscription to Netflix's services at any
7 time through its website.

8 **The Information that Netflix Stores About its Subscribers**

9 18. According to its website, Netflix collects, stores, and analyzes data from its
10 subscribers in the following manner:

11 We keep track of your interactions with us and
12 collect information related to your use of our
13 service, including but not limited to your online
14 activity, title selections and ratings, payment history
15 and correspondence as well as Internet protocol
16 addresses, device types, operating systems, any
17 instant watching of movies, TV shows and related
18 activity. We use this information for such purposes
19 as providing recommendations on movies and TV
20 shows we think will be enjoyable, personalizing the
21 service to better reflect particular interests, tracking
22 your instant-watching hours, helping us quickly and
23 efficiently respond to inquiries and requests and
24 otherwise enhancing or administering our service
25 offering for our customers.

26 Netflix Privacy Policy, <http://www.netflix.com/PrivacyPolicy> (last visited January 5, 2011).

27 19. In addition to their programming preferences, Defendant allows subscribers to
28 keep track of movies and television shows they would like to watch in the future, in what is
known as a "queue."

20. A queue is essentially a list of video programming, selected and organized by the
subscriber for later viewing.

1 21. Defendant continues to store its former subscribers' queues, along with their
2 contact, billing and viewing preference information, even after subscribers cancel their
3 memberships.

4 22. The video programming that Netflix stores includes, but is not necessarily limited
5 to, every streaming video that the consumer has watched, every DVD the consumer has ever
6 rented, and the video rankings that the consumer has assigned to other videos, which in turn
7 reveals that individual's preferences.

8 23. Former subscribers who log-in to their cancelled Netflix account are greeted with
9 previously inputted credit card numbers and contact information, as well as a detailed history of
10 what video programming they ordered from Defendant throughout the duration of their
11 subscription. Defendant retains video programming history beyond the time that the customer
12 has terminated their service with Netflix.

13 24. Indeed, Defendant's privacy policy goes on to state that Netflix uses that
14 information to "provide analysis of our users in the aggregate to prospective partners, advertisers
15 and other third parties." *See supra*, Netflix Privacy Policy. Armed with the knowledge that
16 Netflix indefinitely retains its subscribers' data, it becomes clear that inherent in this statement is
17 the fact that Defendant continues to profit from the use of its former subscribers' personal
18 information, including their video programming viewing histories, even though these individuals
19 have cancelled their subscriptions.

20 **The Video Privacy Protection Act and Digital Dossiers**

21 25. The desire to keep video programming viewing history records private led
22 Congress to enact the Video Privacy Protection Act in 1988 (the "Act" or "VPPA"). Inspired by
23 the release of video viewing records of Supreme Court Justice Nominee Robert H. Bork and his
24 family, Congress promulgated the Act to explicitly preserve United States citizens' right to
25 privacy in their video viewing histories.

26 26. When the VPPA was introduced, the late Senator Paul Simon noted that,
27
28

1 There is no denying that the computer age has
2 revolutionized our world. Over the past 20 years
3 we have seen remarkable changes in the way each
4 one of us goes about our lives. Our children learn
5 through computers. We bank by machine. We
6 watch movies in our living rooms. These
7 technological innovations are exciting and as a
8 nation we should be proud of the accomplishments
9 we have made. Yet, as we continue to move ahead,
10 we must protect time honored values that are so
11 central to this society, particularly our right to
privacy. The advent of the computer means not
only that we can be more efficient than ever before,
but that we have the ability to be more intrusive
than ever before. *Every day Americans are forced
to provide to businesses and others personal
information without having any control over where
that information goes. These records are a window
into our loves, likes, and dislikes.*

12 S.Rep. No. 100-599 at 7-8 (1988) (emphasis added).

13 27. In another strikingly accurate forward-looking statement, Senator Patrick Leahy
14 ~~remarked that~~ "the trail of information generated by every transaction that is now recorded and
15 stored in sophisticated record-keeping systems is a new, more subtle and pervasive form of
16 surveillance." S.Rep. No. 100-599 at 8 (1988).

17 28. Although in 1988 these Senators could not possibly forecast the amount of data
18 collected on consumers today by large video-programming providers such as Netflix, both Sen.
19 Simon's and Sen. Leahy's comments would prove prescient.

20 29. Many glaring and dangerous privacy issues are implicated by Netflix's practice of
21 retaining customer information indefinitely after cancellation of Defendant's services—the exact
22 type of dangers that the VPPA was enacted to thwart.

23 30. As a practical matter, a former subscriber who cancels his or her Netflix account
24 logically believes that the Defendant has purged its system of that individual's private
25 information. Most, if not all consumers, would feel extremely uncomfortable with the prospect
26
27
28

1 that Defendant continues to store their credit card numbers and a detailed record of their video
2 programming viewing histories.

3 31. Furthermore, Netflix's practices are indicative of a larger problem that is
4 beginning to plague Internet users—the development and maintenance of digital dossiers on
5 consumers by online companies.

6 32. Prof. Daniel Solove, an expert in privacy law at the George Washington
7 University Law School has written extensively on this topic, and explains the crux of the
8 problem as follows:

9 While life in the Information Age has brought us a
10 dizzying amount of information, it has also placed a
11 profound amount of information about our lives in
12 the hands of numerous entities. These digital
13 dossiers are increasingly becoming digital
14 biographies, a horde of aggregated bits of
15 information combined to reveal a portrait of who we
16 are based upon what we buy, the organizations we
belong to, how we navigate the Internet, and which
shows and videos we watch. This information is not
held by trusted friends or family members, but by
large bureaucracies that we do not know very well
or sometimes do not even know at all.

17 Daniel J. Solove, Digital Dossiers and the Dissipation of Fourth Amendment Privacy, 75 S. Cal.
18 L. Rev. 1083, 1095 (2002).

19 33. The retention of subscriber data is not the first privacy concern that has raised
20 eyebrows about Netflix's business practices. In March of 2010, Associate Director Maneesha
21 Mithal of the Division of Privacy and Identity Protection at the Federal Trade Commission
22 issued a public letter to Netflix cautioning Defendant about the release of data regarding the
23 video programming viewing history of its subscribers. FTC Netflix Letter,
24 <http://www.ftc.gov/os/closings/100312netflixletter.pdf> (last visited January 5, 2011).

25 34. It follows then from the discussion above, as well as the unlawful behavior
26 described in this Complaint, that Netflix has continuously struggled to fully grasp its duty both to
27
28

1 uphold the privacy rights of its current and former subscribers, as well as to comply with federal
2 and state laws regarding the destruction of PII.

3 **FACTS RELATING TO PLAINTIFF**

4 35. Plaintiff Jeff Milans is a former Netflix subscriber who cancelled his account with
5 Defendant over one (1) year ago.

6 **CLASS ALLEGATIONS**

7 36. **Definition of the Class:** Plaintiff Jeff Milans brings this action pursuant to Fed.
8 R. Civ. P. 23(b)(2) and (3) on behalf of himself and a Class of similarly situated individuals,
9 defined as follows:

10 All individuals and entities in the United States and its territories that have
11 cancelled their subscriptions to Netflix's services.

12 Excluded from the Class are 1) Defendant, Defendant's agents, subsidiaries, parents,
13 successors, predecessors, and any entity in which the Defendant or their parents have a
14 controlling interest and their current and former employees, officers, and directors, 2) the
15 Judge or Magistrate Judge to whom this case is assigned and the Judge's or Magistrate
16 Judge's immediate family, 3) persons who execute and file a timely request for exclusion,
17 and 4) the legal representatives, successors, or assigns of any such excluded person.

18 37. **Numerosity:** The exact number of the members of the Class is unknown and is
19 not available to Plaintiff at this time, but individual joinder in this case is impracticable. The
20 Class consists of millions of individuals and other entities. Class members can be easily
21 identified through Defendant's records and public records.

22 38. **Commonality:** There are many questions of law and fact common to the claims
23 of Plaintiff and the other members of the Class, and those questions predominate over any
24 questions that may affect individual members of the Class. Common questions for the Class
25 include but are not limited to the following:

- 1 (a) whether Netflix unlawfully retained its former subscribers' PII and video
2 programming viewing histories;
- 3 (b) whether Netflix continues to benefit from the use of data relating to its
4 former subscribers' video programming viewing histories;
- 5 (c) whether Netflix's conduct described herein violated the Video Privacy
6 Protection Act (18 U.S.C. §§ 2710, *et seq.*);
- 7 (d) whether Netflix's conduct described herein violated the California
8 Customer Records Act, (Cal. Civ. Code § 1798.80);
- 9 (e) whether Netflix's conduct described herein violated California's Unfair
10 Competition Law (Cal. Bus. & Prof. Code § 17200, *et seq.*);
- 11 (f) whether Netflix has been unjustly enriched by Plaintiff and the Class;
- 12 (g) whether Netflix has breached its fiduciary duty to Plaintiff and the Class.

13 39. **Typicality:** The factual and legal bases of Netflix's liability to Plaintiff and to the
14 other members of the Class are the same and resulted in injury to Plaintiff and all of the other
15 members of the Class. Plaintiff and the other members of the Class have all suffered harm as a
16 result of Netflix's wrongful conduct.

17 40. **Adequate Representation:** Plaintiff will fairly and adequately represent and
18 protect the interests of the Class members, and has retained counsel competent and experienced
19 in complex class actions. Plaintiff has no interest antagonistic to those of the Class and
20 Defendant has no defenses unique to Plaintiff.

21 41. **Predominance and Superiority:** This class action is appropriate for certification
22 because class proceedings are superior to all other available methods for the fair and efficient
23 adjudication of this controversy, since joinder of all members is impracticable. The damages
24 suffered by the individual members of the Class will likely be relatively small, especially given
25 the burden and expense of individual prosecution of the complex litigation necessitated by the
26 actions of Defendant. It would be virtually impossible for the individual members of the Class to
27
28

1 46. Netflix has violated 18 U.S.C. § 2710(e) because Defendant failed to destroy
2 former subscribers' personally identifiable information as soon as practicable from the date the
3 information was no longer necessary for the purpose for which it was collected.

4 47. As a result of Defendant's conduct described herein and its violation of § 2710,
5 Plaintiff and the Class have suffered injuries. Plaintiff, on his own behalf and on behalf of the
6 Class, seeks an order enjoining Defendant's conduct described herein and awarding himself and
7 the Class the maximum statutory and punitive damages available under 18 U.S.C. § 2710(c).

8 **SECOND CAUSE OF ACTION**
9 **Violations of California's Customer Records Act, Cal. Civ. Code § 1798.80**
10 **(On Behalf of Plaintiff and the Class)**

11 48. Plaintiff incorporates paragraphs 1 through 42 above as though fully set forth
12 herein.

13 49. The California Customer Records Act mandates, among other things, that a
14 business take all reasonable steps to destroy or arrange for the destruction of a customer's records
15 within its custody or control which contain personal information which is no longer to be
16 retained by the business. Cal. Civ. Code § 1798.81.

17 50. A business may destroy customer records by erasing the information, or
18 modifying the personal information in those records to make it unreadable or undecipherable
19 through any means. Cal. Civ. Code § 1798.81(b), (c).

20 51. Defendant has violated Cal. Civ. Code § 1798.81 by failing to erase or otherwise
21 destroy its former subscribers customer records after cancellation of membership services.

22 52. Pursuant to Cal. Civ. Code § 1798.84, Plaintiff and the Class seek damages,
23 including statutory damages of \$3,000 per violation and injunctive relief. Plaintiff and the Class
24 also seek attorney's fees pursuant to Cal. Code Civ. Proc. § 1021.5, as well as such other and
25 further relief as the Court deems just and proper.

THIRD CAUSE OF ACTION
Violation of California's Unfair Competition Law
Cal. Bus. & Prof. Code §§ 17200, et seq.
(On Behalf of Plaintiff and the Class)

1
2
3 53. Plaintiff incorporates paragraphs 1 through 52 above as though fully set forth
4 herein.

5 54. California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code
6 §§ 17200, et seq., protects both consumers and competitors by promoting fair competition in
7 commercial markets for goods and services.

8 55. The UCL prohibits any unlawful, unfair or fraudulent business act or practice. A
9 business practice need only meet one of the three criteria to be considered unfair competition.
10 An unlawful business practice is anything that can properly be called a business practice and that
11 at the same time is forbidden by law.

12 56. Netflix has violated the fraudulent prong of the UCL in that Defendant failed to
13 inform Plaintiff and the Class that it would indefinitely retain their personally identifiable
14 information and video programming viewing histories.

15 57. Netflix has violated the unfair prong of the UCL in that, Defendant continues to
16 profit from selling Plaintiff and the Class's information to third-parties, even though they have
17 cancelled their membership with Defendant.

18 58. Netflix has violated the unlawful prong of the UCL in that Defendant's conduct
19 violated the Video Privacy Protection Act, (18 U.S.C. §§ 2710, et seq.), and the California
20 Customer Records Act, (Cal. Civ. Code § 1798.80).

21 59. Pursuant to Cal. Bus. & Prof. Code § 17203, Plaintiff seeks an order of this Court
22 permanently enjoining Netflix from continuing to engage in the unfair and unlawful conduct
23 described herein. Plaintiff seeks an order requiring Defendant to (1) immediately cease the
24 unlawful practices stated in this Complaint, and (2) pay attorney's fees and costs pursuant to Cal.
25 Code Civ. Proc. § 1021.5.

FOURTH CAUSE OF ACTION
Unjust Enrichment
(On Behalf of Plaintiff and the Class)

1
2
3 60. Plaintiff incorporates paragraphs 1 through 42 above as though fully set forth
4 herein.

5 61. Plaintiff and members of the Class conferred a monetary benefit on Defendant.
6 Defendant received and retained money by continuing to sell data to third parties that was
7 retained about Plaintiff and the Class as a result of the unlawful and/or wrongful conduct alleged
8 herein.

9 62. Defendant appreciates or has knowledge of such benefit.

10 63. Under principles of equity and good conscience, Defendant should not be
11 permitted to retain the money obtained by selling information about Plaintiff and members of the
12 Class, which Defendant has unjustly received as a result of its unlawful actions.

13 64. Accordingly, Plaintiff and the Class seek full disgorgement and restitution of any
14 amounts Netflix has retained as a result of the unlawful and/or wrongful conduct alleged herein.

FIFTH CAUSE OF ACTION
Breach of Fiduciary Duty
(On Behalf of Plaintiff and the Class)

15
16
17 65. Plaintiff incorporates paragraphs 1 through 42 above as though fully set forth
18 herein.

19 66. Because Netflix was entrusted to store Plaintiff's and the Class's PII and video
20 programming viewing histories ("the data"), Defendant owed a fiduciary duty to Plaintiff and the
21 Class to (a) store the data in compliance with state and federal laws, and (b) only use the data for
22 proper purposes.

23 67. Defendant breached its fiduciary duty to Plaintiff and Class members by:

- 24 a) Failing to destroy Plaintiff's and the Class's confidential information
25 within a timely manner upon cancellation of membership services; and
26
27
28

- 1 E. Award Plaintiff and the Class their reasonable litigation expenses and attorneys' fees;
- 2
- 3 F. Award Plaintiff and the Class pre- and post-judgment interest, to the extent
- 4 allowable; and
- 5 G. Award such other and further relief as equity and justice may require.

6 **JURY TRIAL**

7 Plaintiff demands a trial by jury for all issues so triable.

8 Respectfully submitted,

9 Dated: January 24, 2011

10 By: 
11 Sean Reis
12 One of Plaintiff's Attorneys

13 SEAN REIS (sreis@edelson.com) - SBN 184044
14 30021 Tomas Street, Suite 300
15 Rancho Santa Margarita, California 92688
16 Telephone: (949) 459-2124
17 Fax: (949) 459-2123

18 JAY EDELSON* (jedelson@edelson.com)
19 RAFEY S. BALABANIAN* (rbalabanian@edelson.com)
20 WILLIAM C. GRAY* (wgray@edelson.com)
21 BENJAMIN H. RICHMAN* (brichman@edelson.com)
22 EDELSON MCGUIRE, LLC
23 350 North LaSalle Street, Suite 1300
24 Chicago, Illinois 60654
25 Telephone: (312) 589-6370
26 Fax: (312) 589-6378
27 *Pro hac vice admission to be sought

28 ATTORNEYS FOR PLAINTIFF AND THE PUTATIVE CLASS