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VIDEO REVIEW; ROUTINE DATA SHARING PRACTICES PLACE VIDEO-STREAMING PROVIDERS IN THE CROSSHAIRS OF THE VIDEO PRIVACY PROTECTION ACT

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VIDEO REVIEW: ROUTINE DATA SHARING PRACTICES PLACE VIDEO-STREAMING PROVIDERS IN THE CROSSHAIRS OF THE VIDEO PRIVACY PROTECTION ACT

ABSTRACT

The Video Privacy Protection Act of 1988 (VPPA) creates a private cause of action for any consumer whose personally identifiable information has been disclosed by a video tape service provider to a third party. The rapid growth of media companies that provide free internet-based video-streaming services, and the technologically-advanced advertising methods employed to fund this business model, have created uncertainty regarding the specific consumer segments the VPPA is designed to protect. The extensive role that third-party providers play in the collection, analysis, and segmentation of user data in the personalized advertising process raises justifiable privacy concerns for consumers. Recent VPPA case law signals that courts are now beginning to find merit in what was once dismissed as a plaintiff's mere paranoia about online data tracking. However, these recent decisions do not clarify the VPPA's application to the behind-the-scenes data sharing practices that free video-streaming providers utilize to generate advertising revenue. The current climate of uncertainty surrounding key definitions in the VPPA exposes video-streaming providers to costly class action litigation and threatens to destabilize the advertising-based business model that has itself enabled the growth of the internet. This Note seeks to analyze the judicial expansion of the VPPA through the lens of recent case law, and present considerations that video-streaming providers can make in order to reduce their exposure to a successful lawsuit. This Note also argues that an amendment to the VPPA that conforms to consumer expectations in the modern online ecosystem is necessary to firmly establish the VPPA's application to the routine data sharing practices of video-streaming providers.

INTRODUCTION

> *Privacy is something we all value. The right to privacy is not, however, a generalized undefined right: It is a specific right, one which individuals should understand. And it is the role of the legislature to define, expand, and give meaning to the concept of Privacy.*[1]
>
> - Chuck Grassley, United States Senator for Iowa

As media companies are expanding their use of innovative technologies, such as mobile applications to deliver video content, data privacy concerns

1. S. Rep. No. 100-599, at 6 (1988).

have come to the forefront of the video-streaming world.[2] Consumers have recently brought their privacy concerns to the courts by filing class action lawsuits against video-streaming providers that utilize third-party companies to facilitate data analysis and personalized advertising efforts.[3] The Video Privacy Protection Act (VPPA) was originally enacted in 1988 to establish clear guidelines for brick-and-mortar video tape providers regarding the disclosure of their consumers' personal information.[4] The VPPA's privacy protections are now being stretched to encompass routine transactions in the technologically-advanced online ecosystem.[5] Given the increase in consumer demand for both free and subscription-based video content, it is essential for video-streaming providers to clearly understand when their users' data may be subjected to the privacy protections provided for in the VPPA.[6] In order to restore clarity in its application, it is necessary for Congress to amend the VPPA to distinguish between those who subscribe to, and those who simply have access to, free video-streaming services.

The VPPA makes liable a "video tape service provider" that knowingly discloses any of its consumers' personally identifiable information to a third party.[7] Any person aggrieved by such a disclosure may bring a civil action in federal court to recover actual damages in an amount not less than $2,500 in liquidated damages, punitive damages, reasonable attorneys' fees, and litigation costs.[8] Congressional enactment of the VPPA in 1988 was a direct response to the publication of then-Supreme Court nominee Judge Bork's video tape rental history.[9] Although the VPPA was enacted in a pre-internet era, its purpose—to prevent the disclosure of video titles in conjunction with an individual's personally identifiable information—remains relevant

2. *See* Ronald Raether et al., *The Technology Lawyer and Connected Things*, Law360 (July 28, 2016, 3:36 PM), http://www.law360.com/articles/822484/the-technology-lawyer-and-connected-things.

3. *See* Ellis v. The Cartoon Network, Inc., 803 F.3d 1251, 1257 (11th Cir. 2015); Yershov v. Gannett Satellite Info. Network Inc., 820 F.3d 482, 489 (1st Cir. 2016); Austin-Spearman v. AMC Network Entm't LLC, 98 F. Supp. 3d 662, 669 (S.D.N.Y. 2015); Locklear v. Dow Jones & Co., 101 F. Supp. 3d 1312, 1316 (N.D. Ga. 2015).

4. *See* S. Rep. No. 100-599, at 6.

5. *See* Brief for A.H. Belo Corp. et al. as Amici Curiae Supporting Appellees at 3–5, Yershov v. Gannett Satellite Info. Network Inc., 820 F.3d 482 (2016) (No. 15-1719) [hereinafter Amici Brief Supporting Appellee, Yershov].

6. *See* Praveen Datta et al., Cisco Internet Bus. Sols. Grp., "It Came to Me in a Stream…" 4 (2012), http://www.cisco.com/c/dam/en_us/about/ac79/docs/sp/Online-Video-Consumption_Consumers.pdf.

7. *See* 18 U.S.C. § 2710(b)(1) (2012). Statutory exceptions include disclosures made to the consumer, made with the consumer's written or electronic consent, made pursuant to a court order or warrant, or made incident to the ordinary course of business of the video tape service provide. *See id.* at (b)(2).

8. *See id.* at (c)(1)–(2).

9. *See* S. Rep. No. 100-599, at 5. The Washington City Paper obtained, without Judge Bork's knowledge or consent, a list of nearly 150 videos that the Bork family rented from a video store. *See id.*

today.[10] The emergence of internet-based video-streaming services[11] and "big data" analytics has brought the VPPA to the forefront of consumer privacy litigation.[12]

Attracted by the prospect of substantial statutory damages, class action plaintiffs are using the VPPA to challenge the data sharing practices of video-streaming providers.[13] Specifically, litigants are calling into question the routine practice of sharing user data with third-party analytics companies, social media services, and online advertising platforms.[14] However, using the VPPA as a weapon against video-streaming providers is arguably outside the scope for which the Act was originally intended.[15] The exposure to class action liability poses a threat to scores of video providers that utilize an advertising-based model to fund their businesses—a business model that has itself enabled the growth of the internet.[16]

The VPPA's definitions have become a focal point in the debate over video privacy concerns.[17] In 2012, the United States District Court for the Northern District of California, in *In re Hulu Privacy Litigation*, broadened the VPPA's scope by ruling that the phrase "similar audio video materials," as used in the VPPA's definition of "video tape service provider," subjects video-streaming providers to the privacy protections provided for in the VPPA.[18] This ruling prompted a wave of VPPA class action lawsuits brought against some of the media industry's largest providers of free video-

10. *See* S. Rep. No. 100-599, at 6–7; *see also* Yershov v. Gannett Satellite Info. Network Inc., 820 F.3d 482, 488 (1st Cir. 2016) (in discussing the VPPA's applicability to evolving technologies, the Court reasoned that "because we think that Congress cast such a broadly inclusive net in the brick-and-mortar world, we see no reason to construe its words as casting a less inclusive net in the electronic world when the language does not compel that we do so.").

11. Video-streaming is "an on demand online entertainment source for TV shows, movies and other streaming media." *Video Streaming Service*, WhatIs.com (Dec. 2013), http://whatis.techtarget.com/definition/video-streaming-service. Video-streaming providers offer video content across numerous devices including "smart TVs, streaming media receivers, computers, tablets, and smartphones." *Id.*

12. *See* D. Reed Freeman & Joseph Jerome, *The VPPA and PII: Is Geolocation Another Anonymous Identifier?*, BNA: Computer Tech. L. Rep. (July 15, 2016), http://www.bna.com/vppa-piiis-geolocation-n73014445217/.

13. *See* Joshua Jessen & Priyanka Rajagopalan, *Teaching an Old Law New Tricks: The 1988 Video Privacy Protection Act in the Modern Era*, BNA: Privacy & Security L. Rep. (June 30, 2016), http://www.bna.com/teaching-old-law-n57982076512/.

14. *See* Freeman & Jerome, *supra* note 12, at 1.

15. *See* Kristian Stout, *Pushing Ad Networks Out of Business: Yershov v. Gannett and the War Against Online Platforms*, Truth on the Mkt. (May 10, 2016), https://truthonthemarket.com/2016/05/10/pushing-ad-networks-out-of-business-yershov-v-gannett-and-the-war-against-online-platforms/.

16. *See id.*

17. *See* Kathryn Elizabeth McCabe, *Just You and Me and Netflix Makes Three: Implications for Allowing "Frictionless Sharing" of Personally Identifiable Information Under the Video Privacy Protection Act*, 20 J. Intell. Prop. L. 413, 422 (2013).

18. *See In re* Hulu Privacy Litig., No. C 11-03764, 2012 WL 3282960, at *18–19 (N.D. Cal. Aug. 10, 2012).

streaming services, including ESPN, CNN, Walt Disney Co., Dow Jones, AMC Network, Cartoon Network, and Nickelodeon.[19]

More recent VPPA litigation has focused on the Act's definitions of "consumer" and "personally identifiable information."[20] Within the VPPA, the term "consumer" means "any renter, purchaser, or subscriber of goods or services from a video tape service provider."[21] The term "personally identifiable information" is defined to include "information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider."[22] Applying these statutory definitions to the ordinary course business transactions of video-streaming providers has been described by one court as "placing a square peg . . . in a round hole."[23] Unfortunately, the judicial analysis coming out of seminal VPPA cases in the First and Eleventh Circuits has led to further uncertainty regarding the Act's core definitions.[24]

This Note emphasizes the necessity for video-streaming providers, particularly those who rely on personalized advertising, to reevaluate their data sharing practices and consider taking steps to proactively reduce exposure to a successful VPPA suit. Part I of this Note discusses the emergence of video-streaming providers and the business model sustaining that ecosystem. Part II assesses the ramifications of recent case law for video providers and delves into the steps video providers can take to reduce their exposure to liability. Part III calls for an amendment to the VPPA that accounts for accepted business practices in the modern online ecosystem. Finally, Part IV of this Note recommends amending the VPPA to define the term "subscriber" in order to reaffirm the Act's privacy protections and restore its clarity.

I. VIDEO-STREAMING IN THE MODERN ONLINE ECOSYSTEM

Over 200 million people in the United States watch online videos,[25] and a majority of people mainly watch free video content.[26] Free video content

19. *See* Gregory M. Huffman, *Video-Streaming Records and the Video Privacy Protection Act: Broadening the Scope of Personally Identifiable Information to Include Unique Device Identifiers Disclosed with Video Titles*, 91 Chi.-Kent L. Rev. 737, 739 (2016).

20. *See, e.g.*, Ellis v. The Cartoon Network, Inc., 803 F.3d 1251, 1253 n.1 (11th Cir. 2015).

21. 18 U.S.C. § 2710(a)(1) (2012).

22. *Id.* at (a)(3).

23. Yershov v. Gannett Satellite Info. Network Inc., 104 F. Supp. 3d 135, 140 (D. Mass. 2015), *rev'd*, 820 F.3d 482 (1st Cir. 2016).

24. *See* Venkat Balasubramani, *Important and Troubling Video Privacy Protection Act (VPPA) Ruling From First Circuit – Yershov v. Gannett*, Tech. & Marketing L. Blog (May 1, 2016), http://blog.ericgoldman.org/archives/2016/05/important-and-troubling-video-privacy-protection-act-vppa-ruling-from-first-circuit-yershov-v-gannett.htm.

25. *See 11 Online Video Marketing Statistics to Know in 2016*, Mediakix (Sept. 21, 2016), http://mediakix.com/2016/09/11-top-online-video-marketing-statistics-for-2016/.

26. *See* Accenture, Multi-tasking and Taking Control 6 (2013), http://boletines.prisadigital.com/Accenture-Video-Over-Internet-Consumer-Survey-2013.pdf.

providers are able to sustain their business models largely through the support of advertising revenues,[27] a practice that has become the default business model behind free online services,[28] and has itself enabled the growth of the internet.[29] This advertising-based business model requires video-streaming providers to work with unrelated third-party companies that offer data analytics and marketing services, which allow these providers to monetize their distribution of free video content.[30] The expertise and distribution networks of third-party service providers are essential to sustaining the consumer demand for free video content.[31] However, the VPPA prohibits "video tape service providers" from knowingly disclosing to a third party, "personally identifiable information concerning any consumer."[32] The recent line of VPPA case law signals that sharing user data with third-party service providers may expose video-streaming providers to liability.[33] This exposure to liability may be increased when personalized advertising efforts call for the disclosure of a user's GPS location, mobile device ID, or IP address in conjunction with the video titles the user watched.[34] As such, video-streaming providers must be aware of the user information they are collecting and disclosing to third-party service providers.

A. APPLYING A MODERN TRANSACTION TO AN OLD STATUTE

The rise in popularity of video-streaming can be attributed to the near universal expanse of internet access and the wide-use of video-oriented social media platforms, such as Facebook and Twitter.[35] Paired with the advancement of mobile technologies,[36] consumer demand has driven the rapid expansion of media companies that produce and distribute free video content. This has resulted in a video consumption method that does not always carry the traditional hallmarks of the transactions envisioned by the

27. *See* The Boston Consulting Group, The Value of Content 17 (Liberty Global, 2016), https://www.libertyglobal.com/pdf/public-policy/The-Value-of-Content-Digital.pdf.

28. *See* Pedro Giovanni Leon et al., Why People Are (Un)willing to Share Information with Online Advertisers 1 (May 2015), http://reports-archive.adm.cs.cmu.edu/anon/isr2015/CMU-ISR-15-106.pdf.

29. *See* Stout, *supra* note 15.

30. *See Getting to Know You*, The Economist (Sept. 11, 2014), http://www.economist.com/news/special-report/21615871-everything-people-do-online-avidly-followed-advertisers-and-third-party.

31. *See* Amici Brief Supporting Appellee, Yershov, *supra* note 5, at 4–5.

32. 18 U.S.C. § 2710(b) (2012).

33. *See, e.g.*, Huffman, *supra* note 19, at 739.

34. *See* Balasubramani, *supra* note 24.

35. *See 11 Online Video Marketing Statistics to Know in 2016*, *supra* note 25.

36. *See* Amanda Walgrove, *The Explosive Growth of Online Video, in 5 Charts*, Contently (July 6, 2015), https://contently.com/strategist/2015/07/06/the-explosive-growth-of-online-video-in-5-charts/.

drafters of the VPPA.[37] Specifically, modern technology gives video-streaming providers the tools they need to *automatically* access certain information about their users.[38] Such information often includes certain alpha-numeric identifiers, like computer or mobile device identifiers, that can be automatically transmitted, along with other data, to third parties.[39] This is made possible simply as a matter of a user's device functionality, whether it be a mobile device or computer.[40]

Supporting the cost of content distribution with advertising revenue is a strategy that has long been employed by traditional broadcast television, magazines, and newspapers.[41] However, unlike the traditional subscription-based publisher model, the aforementioned technologies give video-streaming providers the capability to collect vast amounts of data about their users, whether or not the users actively provide it.[42] This information is then used to advertise certain products and services to users based on their particular interests.[43] Importantly, this is a practice that a majority of consumers actually prefer over generic advertisements for products or services.[44] Nevertheless, recent VPPA plaintiffs argue that transmitting certain user information to a third party for advertising or data analysis purposes violates the VPPA's prohibition on disclosing consumers' personally identifiable information.[45] Applying the VPPA in this context presents a unique challenge for the courts because it requires a searching inquiry into the relationship a video-streaming provider has with its users, and a determination of whether anonymous alpha-numeric user data sent to a third party is considered personally identifying under the law.[46]

37. This traditional relationship typically required individuals to open an account and provide personal information such as their name, address, and phone number in order to rent physical video tapes. *See* McCabe, *supra* note 17, at 421.

38. For example, to use the USA Today App, the plaintiff in *Yershov* had to provide USA Today with "personal information, such as his Android ID and his mobile device's GPS location at the time he viewed a video, each linked to his viewing selections. While he paid no money, access was not free of a commitment to provider consideration in the form of that information, which was valuable to [USA Today]." Yershov v. Gannett Satellite Info. Network, Inc., 820 F.3d 482, 489 (1st Cir. 2016).

39. *See* Jessen & Rajagopalan, *supra* note 13.

40. *See id.*

41. *See* The Boston Consulting Group, *supra* note 27, at 55.

42. *See Getting to Know You*, *supra* note 30.

43. *See* Ceren Budak et al., *Do-Not-Track and the Economics of Third-Party Advertising* 1 (B.U. Sch. of Mgmt. Res. Paper No. 2505643, 2004), http://justinmrao.com/dnt.pdf.

44. *See Poll: Americans Want Free Internet Content, Value Interest-Based Advertising*, Digital Advert. Alliance (Apr. 18, 2013), http://digitaladvertisingalliance.org/press-release/poll-americans-want-free-internet-content-value-interest-based-advertising.

45. *See, e.g.*, Yershov v. Gannett Satellite Info. Network Inc., 820 F.3d 482, 486 (1st Cir. 2016).

46. The District Court in *Yershov* noted that statutory analysis of the VPPA "involves an attempt to place a square peg (modern electronic technology) into a round hole (a statute written in 1988 aimed principally at videotape rental services)." Yershov v. Gannett Satellite Info. Network Inc., 104 F. Supp. 3d 135, 140 (D. Mass. 2015), *rev'd*, 820 F.3d 482 (1st Cir. 2016).

B. GENERATING REVENUE WITH FREE VIDEO: ONLINE BEHAVIORAL ADVERTISING

Data collection is the vital element in the billion-dollar online advertising economy.[47] This gives online content publishers a serious incentive to collect any and all information about their users that can be utilized for personalized advertising efforts.[48] The practice of displaying online advertisements to consumers based on their personal interests is known as Online Behavioral Advertising (OBA).[49] Due to the increased value it presents for marketers, online publishers increasingly rely on OBA,[50] over non-personalized advertising, as a strategy to fund their services.[51] Displaying personalized advertisements to consumers can deliver "an average return over twice that of traditional advertising,"[52] and this value directly translates into significantly higher advertising rates for the publisher.[53] In fact, one study found that advertising revenue for online and mobile video content providers has "increased seven-fold between 2010 and 2015 and will more than double by the end of 2018."[54]

The emergence of OBA has allowed advertising-supported video providers to answer the call for free video content. However, it has also led to an increasing reliance on third parties with the expertise required to execute this type of data-driven advertising.[55] Unrelated third parties that offer data analytics and online marketing services play a crucial role for content providers seeking to maximize the value of their users.[56] Third-party technologies can identify and track a user's online activity via laptop or desktop computer through the use of "cookies, web beacons, e-tags and a variety of other tools."[57] These technologies allow a website to effectively "remember" information about a user's internet browsing activities.[58] Cookies can be particularly powerful if the same company, such as Google, hosts ads across multiple websites because third-party advertising companies are then able to track a user's browsing activity across each of the websites

47. *See Getting to Know You*, *supra* note 30.

48. *See id.*

49. *See* Leon et al., *supra* note 28, at 1.

50. *See* Amici Brief Supporting Appellee, Yershov, *supra* note 5, at 4.

51. "If advertising better matches consumer interests, consumers are more likely to respond to the message, and advertisers will be willing to pay more for ads delivered to such an audience." Howard Beales, *The Value of Behavioral Targeting*, Network Advert. Initiative 1 (2010), https://www.networkadvertising.org/pdfs/Beales_NAI_Study.pdf.

52. Adam Thierer, *Birth of the Privacy Tax*, Forbes (Apr. 4, 2011, 12:01 AM), http://www.forbes.com/2011/04/02/privacy-tax-social-networking-advertising-opinions-contributors-adam-thierer.html.

53. *See* Leon et al., *supra* note 28, at 1.

54. The Boston Consulting Group, *supra* note 27, at 56.

55. *See Getting to Know You*, *supra* note 30.

56. *See id.*

57. *Id.* at 2.

58. *See In re* Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 268 (3d Cir. 2016).

that host the company's ads.[59] This information can be matched with a user's IP address in order to attribute all of their online activities to a particular computer.[60]

Consumers are increasing their use of tablets and smartphones to stream video via mobile device application ("apps").[61] This means that video providers now have the ability to access data about their users' mobile device ID and GPS location.[62] VPPA plaintiffs often argue that GPS location data constitutes personally identifiable information because it is akin to being able to identify their home address—a kind of identifying information specifically contemplated by the VPPA.[63] Mobile apps do not support cookies like traditional web browsers, but third-party providers are able to reconcile a user's in-app activity with their online behavioral data by way of their mobile device ID.[64] A mobile device ID, much like an IP address, is considered to be a "unique device identifier."[65]

Third-party service providers may also sell to publishers additional data about their users that was collected while they were on other websites.[66] This helps to facilitate the creation of "detailed behavioral profiles of users."[67] The information contained in these profiles may include, for example, a user's gender, household income, interests, and online purchase history.[68] Third-party data brokers can divide these consumer profiles "into segments defined by location, device, marital status, income, job, shopping habits, travel plans and a host of other factors, and auction those segments off to buyers of ad space in real time."[69]

The extensive role that third-party providers play in the collection, analysis, and segmentation of user data in the OBA process raises justifiable privacy concerns for consumers. In the context of recent VPPA litigation, consumer litigants argue that the disclosure of their IP addresses, for example, is personally identifiable information when it is transmitted to a third party that has the capability to attribute it to a user's online behavioral profile.[70] Some courts have been unpersuaded by this argument because they

59. *See id.*

60. *See id.* at 282.

61. *See* Walgrove, *supra* note 36.

62. *See Getting to Know You*, *supra* note 30.

63. *See* Yershov v. Gannett Satellite Info. Network Inc., 820 F.3d 482, 485 n.2 (1st Cir. 2016); Robinson v. Disney Online, 152 F. Supp. 3d 176, 178–79 (S.D.N.Y. 2015); *In re Nickelodeon*, 827 F.3d at 289.

64. *See Getting to Know You*, *supra* note 30.

65. *See* Huffman, *supra* note 19, at 740–41. A unique device identifier is a number or code assigned to a device when it is manufactured and can be used to distinguish the device from others. *See Device Identifiers,* Future of Privacy Forum, Application Privacy, http://www.applicationprivacy.org/learn-resources/unique-device-identifier-udid-2/ (last visited Aug. 9, 2017).

66. *See Getting to Know You*, *supra* note 30.

67. Leon et al., *supra* note 28, at 1.

68. *See id.* at 2.

69. *Getting to Know You*, *supra* note 30.

70. *See In re* Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 282 (3d Cir. 2016).

believe that a "static identifier" such as an IP address, even when coupled with other data points about a user, is not enough to actually identify a specific individual.[71] However, recent VPPA decisions do suggest that the transmission of more powerful data points, such as the GPS location of a user's smartphone, may allow third parties to more easily identify a specific person.[72]

Clearly, the business model of video providers has evolved dramatically since the VPPA was enacted in 1988.[73] Unlike the simple disclosure of a name, address, or phone number, the data points that third parties assemble to create user profiles for OBA purposes do not easily identify a particular person. It is not surprising that courts have recently equated the applicability of the VPPA in the online ecosystem to "placing a square peg . . . in a round hole."[74] However, this has not deterred classes of consumer litigants, led by eager plaintiffs' attorneys, from pursuing claims against video providers with an eye on the VPPA's $2,500 statutory penalty.[75]

Due to the growing demand for free video-streaming services, increasing value of OBA, and uncertainty surrounding key definitions in the VPPA, litigation is likely to continue until concrete bounds of the Act are established.[76] If the scope of the VPPA, as it applies to providers of free video-streaming services, "is not resolved in a way that permits platforms to continue to outsource their marketing efforts as they do today, the effects on innovation could be drastic."[77]

II. RECENT CASE LAW: DISCOVERING WAYS TO AVOID A SUCCESSFUL SUIT

During the first two decades after its passage, very few cases challenged the VPPA's breadth and application.[78] However, the rise of online video content has brought the VPPA back into court, as litigants are attempting to fit the modern practice of using third-party service providers into the "design and intent of the VPPA."[79] In today's online ecosystem, "the sheer number of ways in which a user's personal information may be disclosed to third parties creates substantial potential vulnerability" for video-streaming

71. *See id.* at 290.

72. *See* Yershov v. Gannett Satellite Info. Network Inc., 820 F.3d 482, 485 n.2 (1st Cir. 2016); Robinson v. Disney Online, 152 F. Supp. 3d 176, 179 (S.D.N.Y. 2015); *In re Nickelodeon*, 827 F.3d at 289.

73. *See Yershov*, 820 F.3d at 288 (discussing congressional recognition of "the impact of the VPPA on the electronic distribution of videos").

74. Yershov v. Gannett Satellite Info. Network Inc., 104 F. Supp. 3d 135, 140 (D. Mass. 2015), *rev'd*, 820 F.3d 482 (1st Cir. 2016).

75. *See* Stout, *supra* note 15.

76. *See* Jessen & Rajagopalan, *supra* note 13.

77. Stout, *supra* note 15.

78. *See* Freeman & Jerome, *supra* note 12.

79. Stout, *supra* note 15.

providers.[80] In light of recent VPPA litigation, video providers must take steps to proactively reduce their exposure to a successful suit. Such steps include knowing what constitutes a video service provider in the modern age, monitoring what user data is being tracked and collected, and knowing which users may be afforded VPPA privacy protections.

A. VIDEO TAPE SERVICE PROVIDERS IN THE MODERN AGE

The VPPA defines "video tape service provider" as "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."[81] *In re Hulu* is the first contemporary VPPA case where consumer litigants successfully convinced the court to interpret this definition to include providers of online video content.[82] In this case, the plaintiffs accessed Hulu's website[83] on their computer to stream free videos.[84] Hulu argued that the VPPA "only regulates businesses that sell or rent physical objects . . . and not businesses that transmit digital content over the internet."[85] Hulu further contended that video-streaming providers are categorically distinct from physical video providers because it is necessary for companies like Hulu to utilize third-party services to "facilitate many aspects of their businesses, including in-stream advertising, analytics, and [video] transmission to users."[86] The court declined to accept this argument, stating that Hulu was incorrectly focusing on how the video content was delivered, instead of the content itself.[87] Pointing to the legislative history and the ordinary meaning of "similar audio visual materials," the court ruled that video-streaming providers, like Hulu, are "video tape service providers" within the meaning of the VPPA.[88] Subsequent cases have made it clear that

80. Behnam Daynim et al., The Video Privacy Protection Act: Is It the New TCPA (aka Class Action Bonanza)? A Summary of Recent Developments and Tips for Avoiding Successful Suit 1 (Nov. 2014), https://www.paulhastings.com/docs/default-source/PDFs/stay-current-the-video-privacy-protection-act-is-it-the-new-tcpa.pdf.

81. 18 U.S.C. § 2710(a)(4) (2012).

82. *See* Huffman, *supra* note 19, at 738.

83. "Hulu is a video streaming service that offers premium video content from television shows to feature-length movies. For a small monthly fee, users gain access to everything on Hulu and can stream as much and as often as they want." Daniel Nations, *Hulu Basics and How It Compares to Netflix*, Lifewire (July 28, 2017), https://www.lifewire.com/what-is-hulu-3486349.

84. *See In re* Hulu Privacy Litig., No. C 11-03764, 2012 WL 3282960, at *6 (N.D. Cal. Aug. 10, 2012).

85. *Id.* at *14.

86. *Id.*

87. *See id.* at *16.

88. *See id.* at *15–19.

video providers offering streaming services through mobile apps[89] and digital media devices, such as the Roku, also fall within the scope of the VPPA.[90]

Importantly, VPPA liability does not extend to the third-party analytics and marketing service providers that are on the receiving end of users' potentially personally identifiable information.[91] This holds true even if the third-party provider is itself a video service provider in some of its business activities.[92] For example, in *In re Nickelodeon Consumer Privacy Litigation*, the court dismissed a VPPA claim against Google because the video tape service provider aspect of Google's business was not relevant to the plaintiffs' claim.[93] In this case, the plaintiffs argued that the VPPA allowed them to sue *both* Viacom, Nickelodeon's parent company, for disclosing personally identifiable information, *and* Google, Viacom's analytics and marketing service provider, as the entity that received the information.[94] Although the plaintiffs alleged that Viacom's disclosure of certain information to Google, such as its users' IP addresses and unique device identifiers, enabled Google to personally identify the users, the court was unpersuaded because Google was not "alleged to have disclosed any such information here."[95] The court's ruling in *In re Nickelodeon* signals that the VPPA's scope is generally limited to civil actions against video tape service providers "from whom 'specific video materials or services' have been requested."[96] Third-party service providers may be safe from VPPA liability, but the *Hulu* decision puts scores of video-streaming providers firmly within the scope of the VPPA's consumer privacy protections.[97]

B. REDEFINING PERSONALLY IDENTIFIABLE INFORMATION WITHIN THE VPPA

To establish a claim under the VPPA a plaintiff must show that a video service provider knowingly disclosed its "personally identifiable information" to a third party.[98] Personally identifiable information under the VPPA is defined as including "information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider."[99] A key issue for the courts in recent litigation

89. *See, e.g.*, Yershov v. Gannett Satellite Info. Network Inc., 820 F.3d 482, 484 (1st Cir. 2016).

90. *See, e.g.*, Eichenberger v. ESPN, Inc., C14-463 TSZ, 2015 WL 7252985 at *1 (W.D. Wash. May 7, 2015). "Roku is a device that allows users to view videos and other content on their televisions via the Internet." *Id.*

91. *See* Daynim et al., *supra* note 80, at 3–4.

92. *See id.*

93. *See In re* Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 280–81 (3d Cir. 2016).

94. *See id.* at 279.

95. *See id.* at 281.

96. Daynim et al., *supra* note 80, at 4.

97. *See generally In re* Hulu Privacy Litig., No. C 11-03764, 2012 WL 3282960 (N.D. Cal. Aug. 10, 2012).

98. *See* 18 U.S.C. § 2710(b)(1) (2012).

99. *Id.* at (a)(3).

is whether the definition of personally identifiable information in the VPPA is broad enough to encompass the disclosure of a user's unique device identifier, as opposed to a direct indication of a user's name, address, and the title of videos watched.[100] Accordingly, video-streaming providers should be proactive in scrutinizing the types of user data they are collecting and disclosing to third parties.[101]

Generally, courts have held that information shared with third parties does not qualify as personally identifiable under the VPPA unless the information *itself* serves to identify a specific person and the videos that person watched.[102] Such non-identifying information typically includes the disclosure of unique anonymous identifiers such as a user's IP address or mobile device ID.[103] However, courts have held that certain data points, such as a user's Facebook ID,[104] or GPS location,[105] may be sufficient to personally identify a particular user, and thus fall under the VPPA's definition personally identifiable information. Overall, the contemporary line of VPPA case law suggests that a determination of whether certain user information is personally identifiable should focus on the context in which the information is disclosed.[106] Likewise, the Federal Trade Commission (FTC) recommends that content providers utilizing OBA should take a contextual approach in evaluating whether the data they are collecting is the type of personally identifiable information that requires user consent prior to disclosure.[107]

Two years after the 2012 *Hulu* decision, the same court went on to enter a decision that offers an example of the distinction between information that may rightfully identify an individual and information that does not, within the meaning of the VPPA.[108] In the 2014 *Hulu* case, the plaintiffs alleged that Hulu made routine disclosures of their users' information to two different parties: comScore and Facebook.[109] Whenever a user watched a video on

100. *See, e.g.*, Yershov v. Gannett Satellite Info. Network Inc., 820 F.3d 482, 489 (1st Cir. 2016).

101. *See* Daynim et al., *supra* note 80, at 4.

102. *See, e.g.*, *In re* Hulu Privacy Litig., No. C 11–03764, 2014 WL 1724344, at *7 (N.D. Cal. Apr. 28, 2014) (defining personally identifiable information as, in part, "information that identifies a specific person and ties that person to particular videos that the person watched").

103. *See id.*

104. *See id.* at *13–14.

105. *See Yershov*, 820 F.3d at 489.

106. *See, e.g.*, *In re Hulu*, 2014 WL 1724344, at *11 (stating that "a unique anonymized ID alone is not [personally identifiable information] but context could render it not anonymous and the equivalent of the identification of a specific person").

107. *See* Fed. Trade Comm'n, Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers 15 (2012), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.

108. *See In re Hulu*, 2014 WL 1724344, at *3–5.

109. *See id.* at *3. ComScore provides Hulu with "'reports containing metrics regarding the size of the audience for programming on hulu.com,' and Hulu uses the reports to obtain programming

hulu.com, Hulu sent comScore the user's unique anonymous Hulu ID and the name of the video being watched.[110] Hulu also sent the user's information to Facebook—the title of the videos viewed and the user's Facebook ID—each time they clicked on Facebook's "Like" button while watching a video on hulu.com.[111] The court distinguished these two disclosures. First, the court held that the alpha-numeric code sent to comScore did not personally identify the plaintiffs.[112] Then, conversely, the court held that the information sent to Facebook did personally identify the plaintiffs because the disclosure revealed "information about what the Hulu user watched and who the Hulu user is on Facebook."[113] The fact that a user's Facebook ID is "more than a unique, anonymous identifier," lead the court to conclude that such a disclosure was akin to personally identifying the Hulu user.[114]

On appeal, however, Hulu successfully defeated the VPPA claim by arguing that they did not "knowingly" disclose information to Facebook that could identify Hulu users.[115] The court defined "knowingly" in this context to mean the "consciousness of transmitting the private information."[116] Importantly, the court found this to be distinct from simply transmitting an alpha-numeric code that a third party may use to construct a user's identity.[117] Hulu's argument relied on the fact that their users' information was sent to Facebook in two separate cookies—one containing a user's Facebook ID and the other containing the video information.[118] The plaintiffs were unable to present convincing evidence that Hulu knew that Facebook might combine the information in the separate cookies to ultimately tie the user and video title together.[119] The Hulu decision emphasizes that the VPPA's "knowledge" element is narrowly focused on the specific VPPA claim at issue; Hulu's general knowledge that a Facebook cookie could serve to recognize Hulu users was not relevant enough to the specific activities the plaintiffs claimed gave rise to a VPPA violation.[120]

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and sell advertising. The reports never identify a user by name and instead present the data in an 'aggregated and generalized basis, without reference even to User IDs.'" *Id.* at *3–5.

110. *See id.* at *3–4.

111. *See id.* at *5.

112. *See id.* at *12–13.

113. *See id.*

114. *See id.* at *14–15.

115. *See In re* Hulu Privacy Litig., 86 F. Supp. 3d 1090, 1091 (N.D. Cal. 2015).

116. *See id.* at 1095.

117. *See id.*

118. *See id.* at 1097. Hulu sent Facebook the watch page address, which included the title of the video, "so that Facebook knew where to send code for the Like button so that it could be downloaded, displayed on the watch page, and used." *Id.* at 1093. Further, "if the Hulu user had logged into Facebook using certain settings within the previous four weeks, the Like button would cause a 'c_user' cookie to be sent to Facebook; c_user contains (among other things) the logged-in user's Facebook ID expressed in a numeric format." *Id.* at 1093–94.

119. *See id.* at 1097.

120. *See id.* at 1103. The court stated that Hulu likely "knew that a Facebook cookie could be used to identify Hulu users." However, the court thought this knowledge was too generalized in

In subsequent decisions, courts have built on the reasoning in *Hulu* to emphasize that the information disclosed must itself be personally identifying.[121] In *Eichenberger v. ESPN, Inc.*, the plaintiff alleged that each time he used his Roku digital streaming device to watch video through the WatchESPN Channel, ESPN would disclose his Roku device serial number to a third party, Adobe Analytics (Adobe).[122] The plaintiff claimed that Adobe could automatically correlate an individual's Roku serial number with information about the user it already possessed and, as a result, ESPN's disclosure allowed Adobe to identify the plaintiff as having watched specific video titles.[123] Even though the court acknowledged that this practice may allow ESPN and Adobe "to identify specific consumers and track them across various platforms and devices," it ultimately ruled in favor of ESPN.[124] The court held that the alleged steps Adobe took to discover the plaintiff's identity, after the disclosure by ESPN, was evidence that the information ESPN disclosed was not itself personally identifying within the meaning of the VPPA.[125] This holding is in line with how other courts have ruled on similar facts: where individuals stream video through a provider's website or other streaming device, an anonymous string of numbers is insufficient to qualify as personally identifiable information within the VPPA.[126]

The First Circuit's recent opinion in *Yershov v. Gannett Satellite Info. Network Inc.*, however, creates further uncertainty for video-streaming providers looking to avoid successful VPPA claims.[127] In *Yershov*, the plaintiff downloaded the free USA Today Mobile App, and used it to watch videos on his mobile device.[128] The complaint alleged that each time a user watches a video on the app, Gannett, USA Today's parent company, sends to Adobe, an unrelated third party, the title of the video viewed, the GPS coordinates of the device at the time the video was viewed, and the user's unique Android ID.[129] Similar to the situation in *Eichenberger*, the plaintiff in *Yershov* argued that Adobe correlates this information with existing data in its possession to identify users and to construct user profiles to facilitate

light of the specific claim that "Hulu knew that a user-identifying cookie would be sent to Facebook when the Like button loaded" on the Hulu watch-page, and that that "cookie might be connected to a watch-page URL." *Id.*

121. *See, e.g.*, *In re* Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 284 (3d Cir. 2016).

122. *See* Eichenberger v. ESPN, Inc., C14-463 TSZ, 2015 WL 7252985, at *2 (W.D. Wash. May 7, 2015).

123. *See id.* at *3–4. Specifically, Adobe was alleged to have paired the information disclosed by ESPN with other information in Adobe's possession that it collected from different sources. *See id.*

124. *See id.* at *4.

125. *See id.* at *6.

126. *See In re Nickelodeon*, 827 F.3d at 284; *Eichenberger*, 2015 WL 7252985, at *6; Robinson v. Disney Online, 152 F. Supp. 3d 176, 179 (S.D.N.Y. 2015).

127. *See* Yershov v. Gannett Satellite Info. Network Inc., 820 F.3d 482 (1st Cir. 2016).

128. *See id.* at 485.

129. *See id.* at 484. An Android ID is a string of numbers "that is randomly generated when the user first sets up the device and should remain constant for the lifetime of the user's device." *Id.*

personalized advertising efforts.[130] However, unlike the preceding line of cases, the court held, and the appeals court agreed, that the disclosure of this information was "reasonably and foreseeably likely to reveal which USA Today videos Yershov had obtained."[131]

The court's reasoning in *Yershov* focused on the collection of the plaintiff's GPS data.[132] The court distinguished this type of user information from an unique anonymous identifier by comparing it to the disclosure of an individual's home address.[133] This decision may give the VPPA more breadth than previously contemplated because it suggests that an individual's personally identifiable information may not be confined to information that is *itself* personally identifying.[134] As such, video providers should closely scrutinize their data sharing practices whenever a user's GPS location data is being collected.[135]

C. DETERMINING THOSE USERS WHO ARE AFFORDED VPPA PROTECTION

Another contentious issue in recent VPPA litigation is whether plaintiffs are "consumers" within the meaning of the Act. The VPPA makes any video tape service provider liable when they knowingly disclose their consumers' personally identifiable information.[136] The term "consumer" under the VPPA is defined as "any renter, purchaser, or subscriber of goods or services from a video tape service provider."[137] Courts generally agree that the VPPA's plain language does not require plaintiffs to pay for video services to be considered "consumers" within the Act.[138] In the absence of payment, plaintiffs generally argue that they fall under the VPPA's definition of "consumer" because they "subscribe" to particular video-streaming services.[139] To analyze these claims, courts typically look to the extent of the relationship between a video provider and the user-plaintiff to determine whether a subscriber relationship exists.[140]

In *Hulu*, the court held that the plaintiffs became Hulu subscribers by signing up for a Hulu account, becoming registered users, receiving a Hulu ID, establishing Hulu profiles, and using Hulu's video-streaming services.[141]

130. *See id.* at 484–85.
131. *See id.* at 486.
132. *See id.*
133. *See id.*
134. *See id.*
135. *See* Daynim et al., *supra* note 80, at 4.
136. *See* 18 U.S.C. § 2710(b)(1) (2012).
137. *Id.* at (a)(1).
138. *See, e.g.*, *Yershov*, 820 F.3d at 488; *see also* Ellis v. The Cartoon Network, Inc., 803 F.3d 1251, 1256 (11th Cir. 2015).
139. *See Yershov*, 820 F.3d at 488; *see also Ellis*, 803 F.3d at 1256.
140. *See Yershov*, 820 F.3d at 488; *see also Ellis*, 803 F.3d at 1256.
141. *See In re* Hulu Privacy Litig., No. C 11-03764, 2012 WL 3282960, at *7–8 (N.D. Cal. Aug. 10, 2012).

The court reasoned that this relationship made the plaintiffs subscribers under the VPPA because they did more than just visit Hulu's website.[142] However, a subscriber relationship is less apparent when individuals use a website or download a free mobile app to watch free video without having to register or create a profile with the provider.[143] In such cases, plaintiffs argue that the video provider's ability to automatically access certain information in conjunction with the video titles they have watched makes them a subscriber under the VPPA.[144]

A circuit split between the First and Eleventh Circuits has emerged over this very issue.[145] The leading cases in both circuits have substantially similar facts: the plaintiff downloaded a free app on his mobile device and used it to watch free video clips without having to actively provide any personal information to the app's proprietor.[146] In both cases, however, the app's proprietor was able to automatically collect certain information about the user through his mobile device once he downloaded and accessed the app.[147] The broad issue upon which the two courts are split is whether this automatic exchange of information in the background, itself, is enough to establish a subscriber relationship between the user of the app and the app's proprietor.

In the First Circuit's leading case, *Yershov*, the court ruled that the automatic exchange of information that occurred upon downloading the free USA Today app and using it to stream free videos was sufficient to establish a subscriber relationship between the plaintiff and USA Today.[148] The court's conclusion hinges on the fact that the plaintiff had to "give" USA Today personal information—his Android ID and GPS location—each time he viewed a video.[149] The court saw this automatic exchange of the plaintiff's information as a form of consideration that the plaintiff paid to USA Today in exchange for access to the content that was delivered to his phone through the USA Today app.[150] This valuable exchange of information, paired with easy access to content within the app, established a relationship between USA Today and the plaintiff that the court saw as "materially different" from USA Today remaining a random website that the plaintiff could access through a web browser.[151]

142. *See id.*

143. *See Yershov*, 820 F.3d at 488; *Ellis*, 803 F.3d at 1256; Austin-Spearman v. AMC Network Entm't LLC, 98 F. Supp. 3d 662, 669 (S.D.N.Y. 2015).

144. *See Yershov*, 820 F.3d at 484; *Ellis*, 803 F.3d at 1256; *Austin-Spearman*, 98 F. Supp. 3d at 664.

145. *See* Joshua Jessen & Priyanka Rajagopalan, *1st Circ. Video Privacy Decision Creates Split With 11th Circ.*, Law360 (May 13, 2016, 12:15 PM), https://www.law360.com/articles/795073.

146. *See Yershov*, 820 F.3d at 485; *see also Ellis*, 803 F.3d at 1254.

147. *See Yershov*, 820 F.3d at 485; *see also Ellis*, 803 F.3d at 1254.

148. *See Yershov*, 820 F.3d at 489.

149. *See id.*

150. *See id.*

151. *See id.*

In the leading case from the Eleventh Circuit, *Ellis v. The Cartoon Network Inc.*, the court ruled that the automatic exchange of information that occurred upon downloading the free Cartoon Network (CN) app and using it to stream free videos did not demonstrate an "ongoing commitment or relationship" with Cartoon Network.[152] Thus, the plaintiff was not a subscriber under the VPPA.[153] The court's opinion was not swayed by the fact that Cartoon Network was able to automatically track smartphone users on the CN app through their mobile device ID or Android ID each time they watched a video.[154]

The *Ellis* court pointed to several factors that influenced its conclusion: the plaintiff did not sign up or establish an account with Cartoon Network, provide any personal information to Cartoon Network, make any payments to Cartoon Network for use of the CN app, become a registered user of Cartoon Network or the CN app, receive a Cartoon Network ID, establish a Cartoon Network profile, sign up for any periodic services or transmissions, nor did the plaintiff make any commitment or establish any relationship that would allow him to have access to exclusive or restricted content.[155] It was also material to the court's analysis that the plaintiff could delete the CN app from his mobile device at any time and without consequences.[156]

One distinguishing factor between these two rulings appears to be the automatic collection of the plaintiffs' GPS location[157]—a piece of personal information that is easily analogized to a person's home address and specifically contemplated by the VPPA.[158] Importantly, the plaintiff in *Ellis* did not allege that he was required to provide Cartoon Network automatic access to his GPS location each time he watched a video in the app.[159] It is unclear, however, whether the *Ellis* court would have ruled differently if this fact was alleged because the plaintiff still had the ability to delete the app from his mobile device without consequences, regardless of whether or not he was required to provide Cartoon Network automatic access to his GPS location.[160]

152. *See Ellis*, 803 F.3d at 1257.
153. *See id.*
154. *See id.* at 1254.
155. *See id.* at 1257.
156. *See id.*
157. In its most recent VPPA ruling, the Eleventh Circuit, in *Perry v. Cable News Network, Inc.*, stated that *Yershov* and *Ellis* were distinguished by the fact that the plaintiff in *Yershov* provided his "GPS location to the proprietor of the app," and "[t]hat fact was sufficient to 'establish a relationship' with the proprietor of the app." *See* Perry v. Cable News Network, Inc., 854 F.3d 1336, 1343 (11th Cir. 2017).
158. *See* Yershov v. Gannett Satellite Info. Network Inc., 820 F.3d 482, 485 n.2 (1st Cir. 2016); Robinson v. Disney Online, 152 F. Supp. 3d 176, 178–79 (S.D.N.Y. 2015); *In re* Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 289 (3d Cir. 2016).
159. *See Ellis*, 803 F.3d at 1254.
160. *See id.* at 1257.

A second distinguishing factor is the order in which the *Ellis* and *Yershov* courts analyzed their respective plaintiff's VPPA claims. By using the designation of "consumer" in subsection (b)(1) as a qualifier for its protections, the VPPA's application is limited to individuals who first establish such a relationship or ongoing commitment with a video provider.[161] In *Ellis*, the court began its analysis by first considering whether the plaintiff's activity brought him within the VPPA's definition of "consumer."[162] Once the court concluded that the plaintiff was not a subscriber, it was not necessary to address whether Cartoon Network provided the plaintiff's personally identifiable information to a third party.[163]

In contrast, the *Yershov* court began its analysis by first confirming the district court's ruling that the disclosure of the plaintiff's GPS coordinates, Android ID, and titles of the videos he watched fit within the VPPA's definition of personally identifiable information.[164] Starting with this conclusion seemingly made it easier for the court to hold that the plaintiff was a "subscriber" because it was already established that he automatically provided personally identifiable information to USA Today each time he watched a video through the USA Today mobile app.[165]

D. CONSIDERATIONS FOR VIDEO-STREAMING PROVIDERS GOING FORWARD

In light of the rulings in *Yershov* and *Ellis*, future VPPA defendants should be aware that courts may consider a provider's access to personally identifiable information about its users, particularly their GPS location, sufficient to establish a subscriber relationship. The court's reasoning in *Yershov*[166] suggests that the value a provider seeks to realize by distributing content through a mobile app, as compared with a website, could be considered payment in the form of valuable information; this may be particularly true where a user's GPS coordinates are accessible.[167] Such a

161. *See* Amici Brief Supporting Appellee, Yershov, *supra* note 5, at 11–13.

162. *See Ellis*, 803 F.3d at 1258. The Eleventh Circuit took the same analytical approach in *Perry*, and similarly, did not address whether CNN provided the plaintiff's personally identifiable information to a third-party. *See Perry*, 854 F.3d at 1344.

163. *See Ellis*, 803 F.3d at 1258 n.2.

164. *See* Yershov v. Gannett Satellite Info. Network Inc., 820 F.3d 482, 486 (1st Cir. 2016).

165. *See id.* at 489.

166. It is important to note that the proceedings in the *Yershov* case are still preliminary; further discovery regarding the relationship a user has with USA Today through their mobile app as compared with the USA Today website may ultimately alter the court's reasoning. *See* Jeffrey Neuburger, *User of Free App May Be "Consumer" Under the Video Privacy Protection Act*, Proskauer: New Media and Tech. L. Blog (May 3, 2016), https://newmedialaw.proskauer.com/2016/05/03/user-of-free-app-may-be-consumer-under-the-video-privacy-protection-act/.

167. *See id.* Even in the absence of access to GPS coordinates, mobile app providers benefit from "more control over their presence on a device than they would with a mobile website." For example, even when a mobile app is not being used on the phone, it can still operate in the background to collect data about an individual's "preferences and behaviors." Sara Angeles, *Mobile Website vs.*

broad interpretation of the VPPA potentially exposes all mobile app owners to liability for the routine practice of video tracking.[168]

The majority of recent VPPA video-provider-defendants did not obtain consent prior to disclosing their users' information to third-parties. Importantly, the VPPA *does* permit the disclosure of consumers' personally identifiable information after informed consent is obtained through writing or "through an electronic means using the internet."[169] Accordingly, video-streaming providers should fully understand what user data is being collected and shared with third parties, particularly when such data is shared in conjunction with video titles.[170] If a user's unique device numbers and GPS location are being disclosed to third parties, video providers should take proactive measures to protect themselves from VPPA liability.[171] This should include the consideration of obtaining users' affirmative express consent for OBA practices.[172] Likewise, the March 2012 FTC Report: Protecting Consumer Privacy in an Era of Rapid Change, advises that companies obtain consumers' affirmative express consent before collecting sensitive data for OBA purposes.[173] Importantly, the FTC has stated that "sensitive data" includes "precise, individualized geolocation data."[174]

The 2012 amendments to the VPPA may make the process of obtaining informed consent less cumbersome than the VPPA originally contemplated.[175] Specifically, video providers may obtain consent "in advance for a set period, not to exceed 2 years or until consent is withdrawn by the consumer, whichever is sooner."[176] This allows Netflix members, for example, to automatically share titles of the videos they watch with friends on Facebook without providing consent in each instance.[177] However, it is important to note that while VPPA consent can be obtained electronically, it must be specific and presented to the user as separate from other legal or financial obligations.[178]

Overall, the *Yershov* ruling is a signal to video-streaming providers that courts are beginning to find merit in what was once dismissed as a plaintiff's mere paranoia about online tracking.[179] In the absence of a concrete definition

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Mobile App: What's the Difference?, Bus. News Daily (July 15, 2014, 5:59 AM), http://www.businessnewsdaily.com/6783-mobile-website-vs-mobile-app.html#sthash.Y2D9Jg9F.dpuf.

168. *See* Balasubramani, *supra* note 24.

169. *See* 18 U.S.C. § 2710(b)(2)(B) (2012).

170. *See VPPA and PII: Lights, Camera, Chaos*, Mezzobit, https://www.mezzobit.com/vppa-and-pii-the-sands-continue-to-shift/ (last visited Sept. 29, 2017).

171. *See* Neuburger, *supra* note 166.

172. *See id.*

173. *See* Fed. Trade Comm'n, *supra* note 107, at 58–59.

174. *See id.*

175. *See* 18 U.S.C. § 2710(b)(2)(B) (2012).

176. *See id.* at (b)(2)(B)(ii)(II).

177. *See* McCabe, *supra* note 17, at 433.

178. *See* § 2710(b)(2)(B).

179. *See* Balasubramani, *supra* note 24.

for the term "subscriber" within the VPPA, providers should be aware that, when GPS tracking is implemented, the VPPA's privacy protections may even extend to the most casual viewers of video content.[180]

III. ALIGNING THE VPPA WITH BUSINESS STANDARDS OF THE SUBSCRIPTION ECONOMY

This Note began with a statement that Senator Chuck Grassley made when introducing the VPPA to Congress. He acknowledged the importance of video privacy rights and emphasized the necessity for these rights to be specific, defined, and understandable for individuals.[181] Unfortunately, the emergence of companies that provide free video-streaming services, and the technologically-advanced advertising methods employed to fund this business model, have led to confusion as to which individuals are afforded VPPA protections. This confusion derives from the VPPA's defined terms; specifically, the definition of "consumer." The term "subscriber" is used to define a subset of individuals who shall be designated as "consumers" under the VPPA, but is not itself a defined term.[182] This has forced courts to search beyond the statute for the ordinary meaning of the term "subscriber,"[183] which has led to inconsistent adjudication[184] and uncertainty about the specific consumer segments the VPPA is designed to protect. A clear and practical interpretation of the VPPA must account for the modern expectations of a subscriber-based relationship that individuals and internet-based companies have come to embrace.

Consumers now have access to massive libraries of online video content that can be streamed to their televisions, computers, and mobile devices.[185] Video-streaming providers typically monetize their video content through two primary models: advertising-supported video on demand (viewers watch for free) and subscription-based video on demand (viewers pay a monthly fee).[186] The latter model encompasses widely recognized video providers, such as Netflix, that restrict their content to paying customers. On the other hand, providers that employ an advertising-supported video on demand model allow access to video content free of charge, and often do not require

180. *See* Freeman & Jerome, *supra* note 12.

181. S. Rep. No. 100-599, at 6 (1988).

182. *See* § 2710(a)(1).

183. *See, e.g.*, Ellis v. The Cartoon Network, Inc., 803 F.3d 1251, 1256–57 (11th Cir. 2015); Yershov v. Gannett Satellite Info. Network Inc., 820 F.3d 482, 487–88 (1st Cir. 2016).

184. *Compare Ellis*, 803 F.3d at 1257 (holding that an individual who downloads a free app to watch video content is not considered a subscriber under the VPPA), *with Yershov*, 820 F.3d at 489–90 (holding that an individual who downloads a free app to watch video is considered a subscriber under the VPPA).

185. *See, e.g.*, Chiang-nan Chao & Saibei Zhao, *Emergence of Movie Stream Challenges Traditional DVD Movie Rental—An Empirical Study with a User Focus*, 4 Int'l J. of Bus. Admin., no. 3, 2013, at 22, *available at* http://www.sciedu.ca/journal/index.php/ijba/article/view/2797/1639.

186. *See* The Boston Consulting Group, *supra* note 27, at 17–18.

users to sign-up or register with the company. However, video-streaming providers represent only a fraction of the internet-based subscription services consumers have access to.[187]

In the modern online ecosystem, numerous companies offer consumers a way to save money and time by offering subscriptions for almost anything "from razors to home cooked meals to phone cases."[188] This trend has led to a rise in what is being called the "Subscription Economy".[189] In fact, most people are now so familiar with this way of getting the goods and services that they depend on, they even "expect this standard to apply to all parts of their lives."[190] Even Apple has started to offer what is essentially a subscription for their iPhone, which allows consumers to get a new phone every year in exchange for a recurring monthly fee.[191] All of these business models can be considered traditional subscription models in that they require recurring payments for the delivery of goods.

Along with the traditional subscription-based business model, many popular internet-based companies also offer what is called "'freemium'—a combination of 'free' and 'premium'"—a subscription model whereby a user can register to get basic features for free and at a later time can choose to access richer, restricted content for a paid subscription.[192] For instance, Dropbox has acquired "200 million users with a simple proposition: Everyone who enters a username and a password gets two gigabytes of cloud-based storage free" of charge.[193] Dropbox is just one example of the wide-use of freemium subscription-based internet services. A recent study shows that "visits to the top subscription sites have risen by 3000% in the U.S. since 2013, with 21.4 million hits" occurring in January 2016.[194]

Along with the cost savings that this business model offers to consumers, the growing demand for subscription-based goods and services can be attributed to the benefits of having an ongoing relationship with the provider

187. *See generally* Ilya Pozin, *Why the Subscription Economy Is the Best… And the Worst*, Inc. (Apr. 5, 2016), http://www.inc.com/ilya-pozin/why-the-subscription-economy-is-the-best-and-the-worst.html.

188. *See id.*

189. Kimberly A. Whitler, *How The Subscription Economy Is Disrupting The Traditional Business Model*, Forbes (Jan. 17, 2016, 10:06 AM), http://www.forbes.com/sites/kimberlywhitler/2016/01/17/a-new-business-trend-shifting-from-a-service-model-to-a-subscription-based-model/#75554b35685e.

190. *See* Jocelyn Turlan, *The Subscription Economy May Be Booming, But That Doesn't Make It The Right Model For Your Brand*, TheDrum (Aug. 23, 2016, 11:57 AM), http://www.thedrum.com/opinion/2016/08/23/subscription-economy-may-be-booming-doesnt-make-it-right-model-your-brand.

191. *See* Whitler, *supra* note 189.

192. *See* Vineet Kumar, *Making "Freemium" Work*, Harv. Bus. Rev., May 2014, *available at* https://hbr.org/2014/05/making-freemium-work.

193. *See id.* Users have the option to pay a monthly fee for 100 gigabytes of storage if they run out of free space. *See id.*

194. *The Rise of The Subscription-Based Economy*, SFG (July 14, 2016), http://www.sfgnetwork.com/blog/ecommerce/the-rise-of-the-subscription-based-economy/.

and the ability to personalize the product or experience they offer.[195] This type of consumer relationship is not static but, rather, it is fluid and takes place over time.[196] The rise of the internet-based Subscription Economy has created a consumer culture that is keenly aware of when they enter a subscriber relationship, and, by contrast, when they merely engage casually with an internet-based company. The general expectations of a subscription-based relationship in the Subscription Economy can be distilled to involve payment, registration, delivery, expressed association, and/or access to restricted content.[197] In order to provide the necessary clarity for individuals and video service providers, these expectations must be taken into consideration when determining the segment of consumers who are to be designated as "subscribers" under the VPPA.

IV. MAKING A CASE FOR DEFINING THE TERM "SUBSCRIBER" WITHIN THE VPPA

Knowing what individuals and internet-based companies have come to expect from each other when they enter a subscription-based relationship, whether it be payment-based or freemium, is critical to defining video privacy rights that are clear and understandable. It is against this backdrop that the scope of "consumer" under the VPPA should be defined today. The final section of this Note argues for amending the VPPA to define the term "subscriber" in a way that will limit the VPPA's designation of "consumer" to those individuals who establish an ongoing relationship with a video service provider.

A. RECOMMENDED AMENDMENT TO THE VPPA

In its current form, the VPPA defines the term "consumer" to mean "any renter, purchaser, or subscriber of goods or services from a video tape service provider."[198] The term "subscriber" is not itself defined within the Act; this shortfall creates uncertainty for individuals and exposes video-streaming providers to costly class action litigation. I recommend that Congress address this issue directly by amending subsection (a) of the VPPA to specifically define the term "subscriber" within the Act:

> (a) Definitions. For purposes of this section—
>
> (1) the term "consumer" means any renter, purchaser, or subscriber of goods or services from a video tape service provider;

195. *See* Whitler, *supra* note 189.
196. *See id.*
197. *See* Yershov v. Gannett Satellite Info. Network Inc., 104 F. Supp. 3d 135, 147 (D. Mass. 2015), *rev'd*, 820 F.3d 482 (1st Cir. 2016).
198. 18 U.S.C. § 2710(a)(1) (2012).

> (A) the term "subscriber" includes persons who register, create a profile, submit payment information, or otherwise take affirmative steps to actively commit to an ongoing relationship with a video tape service provider.

This solution will broaden the protections of consumers' personally identifiable information by providing video-streaming providers a more concrete indication of which consumers require notice and consent prior to the disclosure of their personally identifiable information to a third party. In the absence of such clarity, litigants will continue asking the court to interpret the VPPA to protect the privacy of every individual who casually uses free video-streaming services. This will nullify the VPPA's subscriber limitation, undermine innovation, and restrict access to free video content by exposing scores of free video-streaming providers to broad class action liability.[199] A provider's ability to access certain data about its users should not, alone, afford an individual the same VPPA privacy protections as a "consumer."

As discussed above, the VPPA is meant to provide a remedy for instances in which a video tape service provider knowingly discloses, to any person, personally identifiable information concerning any renter, purchaser, or subscriber of goods and services of such provider.[200] By using the designation of "consumer" in subsection (b)(1) as a qualifier for its protections, the VPPA's application is limited to individuals who first establish such a relationship or ongoing commitment with a video provider.[201] When an individual downloads a free app to stream free video content, without more, she has not entered into an "ongoing commitment or relationship" with the video provider.[202] A typical subscriber relationship requires an individual to take an affirmative step, such as creating an account or becoming a registered user in order to receive access to content that would otherwise be restricted.[203]

B. LEGISLATIVE INTENT TO LIMIT VPPA PRIVACY PROTECTIONS

The VPPA was not intended to punish video-streaming providers that fund the user demand for free video content with personalized advertising proceeds.[204] Congress swiftly enacted the VPPA in 1988 in response to a newspaper article titled "The Bork Tapes," which disclosed a list of video tapes that then-Supreme Court nominee Judge Bork and his family had rented.[205] Congress sought to grant individuals a privacy right in the titles of videos they watched, and prevent video providers from disclosing related

199. *See* Amici Brief Supporting Appellee, Yershov, *supra* note 5, at 3.
200. *See* § 2710(a)(1).
201. *See* Amici Brief Supporting Appellee, Yershov, *supra* note 5, at 11–13.
202. *See* Ellis v. The Cartoon Network, Inc., 803 F.3d 1251, 1257 (11th Cir. 2015).
203. *See id.*
204. *See* Stout, *supra* note 15.
205. *See* Jessen & Rajagopalan, *supra* note 13.

personal information to a third party.[206] But what practical concern was the VPPA meant to address?

The Committee reports suggest that there was a strong "legislative interest in preventing personal embarrassment."[207] For example, one Committee report quoted testimony from counsel for the ACLU: "[a]lthough Judge Bork recently joked about how embarrassed he is to have the world learn that he watches dull movies, imagine if his confirmation had been doomed by the revelation of more unsettling viewing habits."[208] Indeed, the enemies of Judge Bork who released his video rental history were looking for pornography in the hope of discrediting his moral character.[209] Fortunately for Judge Bork, his persecutors did not find what they were looking for, but Congress was nevertheless disturbed by the "attempted porn smear."[210] The disclosure of personal information to the *public* is the situation the VPPA's authors had in mind when they drafted the Act. As such, the VPPA was not designed to punish internet-based companies that disclose non-personal, non-embarrassing information to third-parties to facilitate personalized advertising.

The 2012 amendments to the VPPA further support the idea that Congress is primarily concerned with the public disclosure of consumers' personal information in conjunction with video titles they have watched. The 2012 amendments permit video providers to obtain internet-based consent from consumers to automatically share their name and video titles on social media websites, such as Facebook.[211] A sponsor of the amendment argued that public sharing of video titles on social media is no different than people being allowed to share the books and articles they read, which they do not need the government's approval for.[212] The fact that the amendment was intended to facilitate the social sharing of video titles watched through a specific provider (i.e., Netflix) is evidence that Congress recognized that VPPA contemplates liability only for those video service providers that publicize information that personally identifies a consumer as having watched a given video title.

The context in which the VPPA was enacted also demonstrates Congressional intent to limit the Act's application to those video providers that have a distinct relationship with their users. When the VPPA was introduced in 1988, consumers were "asked to provide their names and possibly their addresses in exchange for the right to purchase or rent" video

206. *See* S. Rep. No. 100-599, at 6 (1988).
207. *See id.* at 8.
208. *See id.* at 7–8.
209. *See* Bruce Sterling, Tomorrow Now: Envisioning the Next 50 Years 181 (2013).
210. *See id.*
211. *See* McCabe, *supra* note 17, at 432–33.
212. *See* Julianne Pepitone, *Why Netflix's Facebook App Would Be Illegal*, Cnn Money (Mar. 27, 2012, 5:45 AM), http://money.cnn.com/2012/03/27/technology/netflix-facebook/.

materials.[213] Providing this information suggests that an individual must do something to actively engage with a video provider to be considered a "consumer."

In contrast, the court in *Yershov* held that the automatic transmission of a mobile app user's information is evidence of an ongoing relationship between the two parties.[214] By focusing on the specific type of data that a provider is able to automatically gather, rather than the user's relationship with the company, or lack thereof, the court effectively read out the "subscriber" limitation of the VPPA in order to impose liability on the video provider.[215] Without this limitation, the scope of the VPPA will be expanded to include all video-streaming providers that support their content distribution through the use of OBA.[216]

Given the foregoing, the interpretation of "subscriber" proffered by the First Circuit in *Yershov* is too broad. The act of simply downloading a free app and watching a video, without more, should not place an individual in the category of subscriber. Arguably, this interpretation is inappropriate to describe the category of individuals who casually stream free video content. Further, exposing free app-based video providers to broad class action liability, simply because they transmit certain data points for OBA purposes, is certainly not what Congress intended to accomplish when they enacted the VPPA.

A common theme can be distilled from both efforts to legislate consumer privacy rights under the VPPA: the spirit of the Act seeks to prevent the public from discovering what video titles a consumer has watched. Notably, the 2012 amendments did not update the VPPA's consent requirement to address the non-public disclosure of user data behind-the-scenes to facilitate targeted advertising.

CONCLUSION

The VPPA is being stretched by consumer litigants to cover the routine data sharing practices of video-streaming providers. Recent case law reveals the uncertainty of the VPPA's scope and leaves video providers exposed to class action liability without firm judicial guidance on how to interpret the VPPA. In an era of increasingly sophisticated video-streaming platforms, where over 200 million in people in the United States stream video content,[217] companies that provide consumers free video-streaming services are in desperate need for the VPPA's key definitions to be clearly defined.

In the absence of an amendment to the VPPA, video providers must consider obtaining affirmative express consent each time a user watches a

213. *See* Huffman, *supra* note 19, at 751.
214. *See* Yershov v. Gannett Satellite Info. Network Inc., 820 F.3d 482, 489 (1st Cir. 2016).
215. *See id.*
216. *See* Amici Brief Supporting Appellee, Yershov, *supra* note 5, at 13.
217. *11 Online Video Marketing Statistics to Know in 2016*, *supra* note 25.

video, especially if the corresponding video title and unique identifiers are being simultaneously disclosed to a third party for data analysis or advertising purposes. However, a congressional amendment to the VPPA is necessary because it is the only way for video providers to gain a clear understanding of the users whose privacy the VPPA is meant to protect. Such an amendment must take into consideration the business standards that both companies and consumers have come to expect in the modern online ecosystem.

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