Boston College Law Review

Volume 58
Issue 6 *Electronic Supplement*

Article 7

2-23-2017

Enjoying Your "Free" App? The First Circuit's Approach to an Outdated Law in *Yershov v. Gannett Satellite Information Network, Inc.*

Wendy Beylik
Boston College Law School, wendy.beylik@bc.edu

ENJOYING YOUR "FREE" APP? THE FIRST CIRCUIT'S APPROACH TO AN OUTDATED LAW IN *YERSHOV v. GANNETT SATELLITE INFORMATION NETWORK, INC.*

Abstract: On April 29, 2016, in *Yershov v. Gannett Satellite Information Network, Inc.* ("*Yershov II*"), the U.S. Court of Appeals for the First Circuit held that the Video Privacy Protection Act ("VPPA") of 1988 extended to a free application provider who disclosed its users' GPS coordinates, phone identification numbers, and video histories to a data analytics company. In a similar case, the U.S. Court of Appeals for the Eleventh Circuit held that the VPPA did not apply because the relationship was too weak to render the user a "subscriber" under the Act. The U.S. Court of Appeals for the Third Circuit—in an opinion immediately following *Yershov II*—also adopted a tentative approach when limiting the VPPA's application to technological innovations. This Comment argues that the First Circuit's application of the VPPA to new technology properly analogized the Act in line with its text and legislative intent. Because analogies carry some uncertainty and until an agency regulates the area, courts should err on the side of upholding consumer privacy rights and focus on transparency. This approach, showcased by the First Circuit in *Yershov II* and hesitated on by the Eleventh and Third Circuits, allows for greater predictability in a developing area of the law and re-establishes consumer control for online personal information.

INTRODUCTION

After renting or purchasing a movie, consumers have a right to have video providers keep that information private.[1] In 1988, Congress enacted the Video Privacy Protection Act ("VPPA" or the "Act") creating a civil cause of action against providers who reveal an individual's identity and viewing history without consent.[2] When approached with a VPPA claim, judges must ensure two important elements are met in order for the claim to proceed: (1) the plaintiff is a "consumer," defined as someone who "rent[s]," "purchase[s]," or "subscribe[s to]" the video content; and (2) the provider has disclosed "personally identifiable information" sufficient to expose the identity of the viewer.[3]

---

[1] *See* Video Privacy Protection Act of 1988, Pub. L. No. 100-618, 102 Stat. 3195 (1988) (codified as amended at 18 U.S.C. § 2710 (2012)) (protecting viewers' privacy and freedom to rent, purchase, or subscribe to video providers without their information delivered to another party).

[2] *See* 18 U.S.C. § 2710(a)–(b). Congress specifically wrote the Video Privacy Protection Act ("VPPA" or the "Act") to protect individuals against video providers publicizing their viewing history. *See* S. REP. NO. 100-599, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4342-1, 4342-5.

[3] 18 U.S.C. § 2710(a)–(b) (stating that video providers will be held liable for disclosing a consumer's movie history and identity without consent). *See generally* Yershov v. Gannett Satellite Info.

In April 2016, the U.S. Court of Appeals for the First Circuit in *Yershov v. Gannett Satellite Information Network, Inc.* ("*Yershov II*") held that a valid VPPA claim existed against a phone application provider who disclosed a user's GPS coordinates, Android ID number, and viewing history to a data analytics company without consent.[4] The First Circuit reviewed the issue de novo and reasoned that the relationship between the user of the free *USA Today* application at issue in the case and the provider of the application resembled a cable provider installing a hotline into a user's home at no cost.[5] Additionally, the court found that releasing a user's GPS coordinates functions like a name when coupled with today's search engine technology.[6] By contrast, the U.S. Court of Appeals for the Eleventh Circuit previously held that a free application downloader was not protected by the VPPA because the relationship between the downloader and the provider was more akin to opening a favorites tab on a website.[7] Similarly, the U.S. Court of Appeals for the Third Circuit avoided expanding the VPPA by finding that an individual's computer browsing data is too removed from his or her name to resemble the original protections of the Act and warrant VPPA protection.[8]

This Comment argues that the First Circuit appropriately analogized the VPPA's definitions to a developing area of technology and upheld legislative intent to safeguard video privacy rights.[9] This Comment further argues that until Congress clarifies or assembles an agency to administer the VPPA, judicial discretion should be applied in favor of consumer privacy interests by requiring more transparent disclosures from video providers.[10] Part I of this Comment examines the factual and procedural history of *Yershov II* and reviews the legislative history of the VPPA.[11] Part II discusses the different ap-

---

Network, Inc. (*Yershov II)*, 820 F.3d 482 (1st Cir. 2016) (assessing whether a user of an application was a "subscriber" and whether or not the user's device GPS coordinates and phone identification number constituted "personally identifiable information").

[4] *See Yershov II*, 820 F.3d at 489 (broadening the VPPA to include a claim against phone application providers who sell users' digital information to data analytics companies).

[5] *See id.* (analogizing an old technology like a phone hotline with new technology like video streaming to gain better understanding of how the VPPA might apply). A "hotline" is a direct line that is available to be called, like a landline in a home. *Hotline*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/hotline [https://perma.cc/2G79-JZDN] (last visited Oct. 4, 2016).

[6] *See Yershov II*, 820 F.3d at 486, 489 (reasoning that the VPPA includes protections for digital information that can readily identify an individual, like a home address or jersey number).

[7] *See* Ellis v. Cartoon Network, Inc. (*Ellis II*), 803 F.3d 1251, 1257 (11th Cir. 2015) (finding the relationship between a user of a free application and the application provider too weak to extend VPPA protection).

[8] *See In re* Nickelodeon Consumer Privacy Litig. (*In re Nickelodeon II*), 827 F.3d 262, 269, 284 (3d Cir. 2016) (finding that the consumers' digital information was too far removed from the VPPA's protection because a third party could not readily identify the consumers).

[9] *See infra* notes 84–93 and accompanying text.

[10] *See infra* notes 94–102 and accompanying text.

[11] *See infra* notes 14–54 and accompanying text.

proaches taken by the First, Eleventh, and Third Circuits in determining how to apply the VPPA to modern technology.[12] Lastly, Part III argues that the First Circuit better approached applying the VPPA by upholding consumer privacy interests when providers sell their personal data to third parties without consent.[13]

I. THE HISTORY OF THE VPPA AND *YERSHOV V. GANNETT SATELLITE INFORMATION NETWORK, INC.*

Congress enacted the VPPA in 1988 to protect an individual's right to privacy with respect to renting, purchasing, and subscribing to "video tapes" or analogous audio visual material.[14] The VPPA was passed in the wake of the tumultuous Supreme Court nomination of then-D.C. Circuit Judge Robert Bork after a newspaper exposed two years of his rental history leaked by his local video store.[15] Even though the rental history was found to be unremarkable, Congress found this exposure shocking and created a remedy for consumers against video providers who disclose their video transactions without prior consent or absent a limited exception.[16] In applying the Act, courts have struggled to adapt its traditional verbiage to today's electronic age, leading to uncer-

---

[12] *See infra* notes 55–79 and accompanying text.

[13] *See infra* notes 80–102 and accompanying text.

[14] *See* Video Privacy Protection Act of 1988, 102 Stat. at 3195 (declaring that the purpose of the VPPA is to uphold personal video privacy). Congress passed the VPPA in line with a series of statutes designed to protect an individual's private information: Fair Credit Reporting Act of 1970 (credit score), Family Educational Rights and Privacy Act of 1974 (school records), Tax Reform Act of 1976 (tax returns), Right to Financial Privacy Act of 1978 (financial records), Privacy Protection Act of 1980 (journalists and the press), Electronic Funds Transfer Act of 1980 (bank services), Cable Communications Policy Act of 1984 (cable history), and the Electronic Communications Privacy Act (phone and email communications). *See* S. REP. NO. 100-599, at 3.

[15] *See* S. REP. NO. 100-599, at 5. After the release of 146 film titles that Judge Bork and his family had rented over two years from a video store, Senator Patrick Leahy denounced the disclosure as the beginning of a "Big Brother" era that America must "guard against." *Id.* at 5–6; *see also* Andrea Peterson, *How a Failed Supreme Court Bid Is Still Causing Headaches for Hulu and Netflix*, WASH. POST (Dec. 27, 2013), https://www.washingtonpost.com/news/the-switch/wp/2013/12/27/how-a-failed-supreme-court-bid-is-still-causing-headaches-for-hulu-and-netflix/ [https://perma.cc/Z6CF-7AST] (explaining Judge Bork's contested Supreme Court nomination as the impetus for a news reporter requesting and publishing his video information). Ironically, Judge Bork declared that privacy itself was *not* a fundamental right in his opinion in *Dronenburg v. Zech* in 1984. *See* 741 F.2d 1388, 1396–97 (D.C. Cir. 1984) (refusing to extend a right to privacy to a Navy officer's personal sexual activities).

[16] *See* 18 U.S.C. § 2710(b)(2) (exempting from the VPPA a video provider's disclosure of personally identifiable information in limited circumstances, such as directly to the consumer or to third parties with a consumer's written or electronic consent); *see also* Peterson, *supra* note 15 (remarking how Judge Bork's publicized rental history did not contain any videos that were damaging to his reputation, but in fact, were rather monotonous). Congress created a civil cause of action for anyone who is aggrieved by a violation of the VPPA, and provides for a minimum $2,500 recovery. 18 U.S.C. § 2710(c).

tainty as to the extent of the VPPA's online application.[17] Section A of this Part examines the interpretation of the Act in light of modern video streaming technology.[18] Section B of this Part details *Yershov II*, in which the First Circuit in 2016 applied the VPPA to videos watched through a free phone application.[19]

A. The VPPA's Analogical Evolution

The VPPA creates a civil remedy against video suppliers that intentionally release a "consumer['s]" "personally identifiable information" and film history to a third party.[20] The VPPA defines "personally identifiable information" as information that "identifies a person" and their specific video viewing history or requests from a supplier.[21] A "consumer" is defined as "any renter, purchaser, or subscriber" of the video content.[22]

Because the VPPA was enacted in response to Judge Bork's publicized film rental history, it originally focused on protecting persons who rented videos the old fashioned way—for instance, by going to a Blockbuster.[23] The 1988 legislative history, nonetheless, warns against evolving technology and the invasive potential of online companies to profile a consumer.[24] In 2012, Congress revisited and amended the VPPA to focus on disclosures of online

---

[17] *See Yershov II*, 820 F.3d at 486 (associating "personally identifiable information" with a person's name, social security number, football jersey number, or phone identification number and GPS coordinates); *Ellis II*, 803 F.3d at 1257 (finding someone who downloads a free application with no greater commitment is not a subscriber under the VPPA because this is like "adding a particular website to one's Internet browser as a favorite"); *In re* Hulu Privacy Litig., No. C 11–03764 LB, 2014 WL 1724344, at *14 (N.D. Cal. Apr. 28, 2014) (declaring that video streaming entities may fall under the scope of the Act if they release information that is equivalent to a name like cookies that link to a user's Facebook identification); *see also* Venkat Balasubramani, *Important and Troubling Video Privacy Protection Act (VPPA) Ruling from First Circuit*—Yershov v. Gannett, TECH. & MKTG. LAW 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 [https://perma.cc/9CZ2-A8HJ] (discussing the unclear legal implications of the First Circuit's ruling for online video application developers resulting in "panic" among app developers).

[18] *See infra* notes 20–37 and accompanying text.

[19] *See infra* notes 38–54 and accompanying text.

[20] 18 U.S.C. § 2710(b)(1) (2012). The VPPA defines a 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*, or any person or other entity to whom a disclosure is made." *Id.* § 2710(a)(4) (emphasis added). An aggrieved consumer can recover actual or liquidated damages of $2,500 in addition to punitive damages, attorney's fees and costs, and other equitable relief. *Id.* § 2710(c)(2).

[21] *Id.* § 2710(a)(3).

[22] *Id.* § 2710(a)(1).

[23] *See id.* § 2710(b)(1) (referring to "video tape rental[s]" when discussing the means of watching a movie); S. REP. NO. 100-599, at 5 (describing the publication of Judge Bork's film history as the "impetus for [the VPPA] legislation"); *see also Yershov II*, 820 F.3d at 482 (referring to the VPPA's origination as part of the "brick-and-mortar" world of the past generation).

[24] *See* S. REP. NO. 100-599, at 5–6 (classifying future technology that allows companies to profile consumers as "Big Brother" behavior).

information, making it easier for companies like Netflix and Facebook to obtain online consent to share users' video histories.[25] Despite disclosure updates, Congress did not modify the VPPA's terms from its 1988 language.[26] Frustrated that the terms of the Act are "awkward and unclear," courts have resorted to analogizing the Act's terms to modern viewing methods, but with varying outcomes.[27]

While courts generally agree that "personally identifiable information" is broad enough to include information beyond a name, such as an address, the extent of this coverage is unclear.[28] In particular, courts disagree with whether or not a device's identification number or GPS coordinates qualify as a person's identity covered by the Act.[29] In fact, one approach asks whether the digital information is similar enough to a person's name so that no additional research is necessary.[30] Another approach protects information that indirectly

---

[25] *See* 18 U.S.C. § 2710(b)(2) (allowing companies to meet VPPA requirements for disclosing consumer personal information by obtaining online consent); 158 CONG. REC. H6849–51 (Dec. 18, 2012) (requiring companies to issue disclosures every two years separate from the legal and financial agreements in order to obtain online consumer consent for sharing their video history). Netflix lobbied heavily for the online consent amendment so that subscribers could use Netflix's new Facebook application to share their video preferences at the click of a button. Julianne Pepitone, *New Video Law Lets You Share Your Netflix Viewing on Facebook*, CNN (Jan. 10, 2013), http://money.cnn.com/2013/01/10/technology/social/netflix-vppa-facebook/ [https://perma.cc/N7V6-7V7L].

[26] *See* 18 U.S.C. § 2710; 158 CONG. REC. H6849–51 (clarifying in the legislative history of the VPPA's 2012 amendments that the updates serve to facilitate video providers' access to online consent and to increase consumer awareness through disclosures, but do not alter the Act's 1988 terms).

[27] *See Yershov II*, 820 F.3d at 482 (describing the VPPA's use of the phrase "personally identifiable information" as "awkward and unclear"); Suzanne L. Riopel, *The Price of Free Mobile Apps Under the Video Privacy Protection Act*, 6 AM. U. BUS. L. REV. 115, 129 (2016) (acknowledging the sensibility for drafters to broadly define "personally identifiable information" because technology advances constantly and would otherwise require regular amendments); *supra* note 17 (showing how courts have applied the VPPA's outdated verbiage to modern technology).

[28] *See Yershov II*, 820 F.3d at 486 (quoting the Senate Report's analysis that the word "includes" was used intentionally to imply a "minimum, but not exclusive, definition" to encompass all video-related content) (quoting S. REP. NO. 100-599, at 12); *see also* Joshua Jessen & Priyanka Rajagopalan, *Teaching an Old Law New Tricks: The 1988 Video Privacy Protection Act in the Modern Era*, 85 U.S.L.W. 329 (2016) (chronicling the differences between court opinions in whether personally identifiable information requires a device's ID number, IP address, or both).

[29] *Compare Yershov II*, 820 F.3d at 486 (likening an individual's phone identification number and GPS coordinates to a social security number or football jersey number, and holding that they constituted an identity covered by the Act), *with* Robinson v. Disney Online, 152 F. Supp. 3d 176, 180–81 (S.D.N.Y. 2015) (refusing to identify an individual's Roku or streaming device's serial number as identifiable information and disagreeing with *Yershov II*'s "overly expansive" interpretation because it indirectly identifies a person).

[30] *See In re Hulu*, 2014 WL 1724344, at *14 (characterizing personal identification information as that "akin" to a name that links specific people to their video history); *see also In re* Nickelodeon Consumer Privacy Litig. (*In re Nickelodeon I*), MDL No. 2443 (SRC), 2014 WL 3012873, at *10 (D.N.J. July 2, 2014), *aff'd*, 827 F.3d 262 (3d Cir. 2016) (adopting *In re Hulu*'s reasoning and holding that personal information, "must, without more, itself link an actual person to actual video materials").

identifies a consumer if the plaintiff shows that the third party has the means and is expected to identify the consumer.[31]

Similarly, courts disagree as to who constitutes a "consumer" protected by the Act.[32] Unlike the classic 1988 customer who would physically purchase, rent, or subscribe to a video provider, modern individuals can stream videos at no cost from electronic devices.[33] While courts generally agree that a protected subscriber does not have to make a monetary payment, they disagree about what sort of relationship must be established to come under the Act.[34] Whether or not to extend VPPA protections to downloaders is a matter of judicial interpretation, hinging on nuanced understandings of modern technology and the relationships between providers and consumers.[35]

When applying an open-ended, "brick-and-mortar" statute in an electronic era, courts rely on analogies and the Act's purpose to form their interpretations.[36] The First Circuit approached the VPPA in this manner in *Yershov II* when it was asked to determine whether individuals who download a free video phone appli-

---

[31] *See Yershov II*, 820 F.3d at 486 (allowing indirect information to be personally identifiable as long as the risk of direct identification is "readily foreseeable").

[32] *See* 18 U.S.C. § 2710(a)(1). The Act defines consumer as a "renter, purchaser, or subscriber," but fails to further define subscriber. *See id.* As a result, judges have resorted to the dictionary definition of subscriber. *See Yershov II*, 820 F.3d at 487 (defining "subscriber" by reference to *Merriam–Webster's Collegiate Dictionary*, the *American Heritage Dictionary*, and the *Random House Dictionary of the English Language*); *Ellis II*, 803 F.3d at 1255–56 (defining "subscriber" by consolidating dictionary definitions from *Webster's New World College Dictionary*, the *Oxford English Dictionary*, *Black's Law Dictionary*, and *Webster's Third New International Dictionary*).

[33] *See* Recent Case, *Eleventh Circuit Limits the Scope of "Subscriber" for VPPA Protections*, 129 HARV. L. REV. 2011, 2011 (2016) (exploring the history of viewing habits in light of the Eleventh Circuit's decision in *Ellis II* to exclude free application downloaders).

[34] *Compare Yershov II*, 820 F.3d at 487 (finding persons who downloaded the *USA Today's* phone application were subscribers under the VPPA because they exchanged their phone identification number and GPS coordinates for free video access, even if unaware of this transaction), *with Ellis II*, 803 F.3d at 1256–57 (finding persons who downloaded the Cartoon Network application were not subscribers under the VPPA because they did not directly exchange personal information for video access and established no ongoing relationship). Ironically, the Eleventh Circuit relied heavily on reasoning from *Yershov I*, the District of Massachusetts decision that was later reversed. *See Ellis II*, 803 F.3d at 1256 (citing Yershov v. Gannett Satellite Info. Network, Inc. (*Yershov I*), 104 F. Supp. 3d 135, 147 (D. Mass. 2015), *rev'd*, 820 F.3d 482 (1st Cir. 2016)). Therefore, in *Yershov II*, the First Circuit acknowledged a disagreement with the "reasonable inferences" and "impression" of the *Ellis II* court when it found that an exchange did occur between a user and free service provider because there was an exchange of digital information. *Yershov II*, 820 F.3d at 488–89.

[35] *See Yershov II*, 820 F.3d at 489; *Ellis II*, 803 F.3d at 1256. While the Eleventh Circuit likened downloading an application to merely tabbing a website, the First Circuit found the relationship to be more significant, like installing a physical hotline at one's home. *Yershov II*, 820 F.3d at 489; *Ellis II*, 803 F.3d at 1257.

[36] *See supra* note 27 (noting various court interpretations of the VPPA, and frustrations with the Act's unclear terminology); *see also* Luke M. Milligan, *Analogy Breakers: A Reality Check on Emerging Technologies*, 80 MISS. L.J. 1319, 1322–23 (2011) (noting the potential for missteps and diverse outcomes when judges use analogies to apply a law to unforeseen technology).

cation have a claim under the VPPA as subscribers when their GPS coordinates, Android ID, and viewing history are released to a third party.[37]

B. The First Circuit Addresses the VPPA's Modern Application

In late 2013, Alexander Yershov downloaded a free application, called "USA Today Mobile App," on his Android smartphone that allowed him to view videos posted by *USA Today*.[38] The application was distributed by Gannett Satellite Information Network, Inc. free of charge and without requesting a user name or email address.[39] Nonetheless, each time Mr. Yershov viewed a video clip, the application allegedly sent to Adobe Systems the title of the video, the device's Android ID, and his GPS coordinates.[40] Using this information, Adobe allegedly identifies users by linking them to individualized profiles it has constructed from amassing online data.[41] Mr. Yershov contends that he and other users did not consent to this exchange of information and that their identifiable information was unlawfully disclosed to Adobe.[42]

Mr. Yershov filed a putative class action against Gannett on July 24, 2014 in the United States District Court for the District of Massachusetts for violating the VPPA.[43] Judge Saylor dismissed the case under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim based on a finding that Mr. Yershov was not a "subscriber" protected by the VPPA.[44] He reasoned that no elements of a subscription were present: Mr. Yershov did not make payments, register any personal information, receive recurring deliveries, or have access to restricted content.[45] Notably, Judge Saylor accepted Mr. Yershov's argument that the GPS coordinates and Android ID were "personally identifiable information"

---

[37] *See Yershov II*, 820 F.3d at 484.

[38] *Yershov I*, 104 F. Supp. 3d at 148–49. The district court reviewed the facts in favor of Plaintiff because the case was on motion to dismiss. *See id.* at 137.

[39] *Id.* at 138 (emphasizing the lack of information that a user needed to submit to *USA Today* before gaining access to the phone application).

[40] *Id.* Yershov alleged that Adobe Systems collected data about a consumer's online behavior by receiving information from companies, like application providers. *See id.* An Android ID is a "64-bit number . . . randomly generated when the user first sets up the device and should remain constant for the lifetime of the user's device." *Id.*; *see also Settings.Secure*, ANDROID DEVELOPERS, https://developer.android.com/reference/android/provider/Settings.Secure.html#ANDROID_ID [https://perma.cc/XJ58-F7CJ] (last visited Feb. 3, 2017) (defining Android ID).

[41] *See Yershov I*, 104 F. Supp. 3d at 138. Although Gannett argued this connection was too disconnected, even if possible, Yershov asserted that Adobe has the capability to personally identify users from their Android IDs using its amassed data. *See id.* at 138, 146.

[42] *Id.* at 138.

[43] *Id.*

[44] *See id.* at 149.

[45] *Id.* The court synthesized the following key factors from "subscriber" and "subscription" dictionary definitions: "payment, registration, commitment, delivery, and/or access to restricted content." *Id.* at 147.

protected by the VPPA.[46] The court reasoned that a phone's identifying number acts like an address, but is in some circumstances even "more significant."[47]

On appeal, the First Circuit, in an opinion written by Judge Kayatta, reviewed the factors used by the district court to define "subscriber" and considered whether a phone's identifying number and GPS coordinates constituted "personally identifiable information."[48] The First Circuit agreed with the district court's finding that according to the facts as pled, Gannett disclosed its users' identities.[49] The court, however, reversed the district court's dismissal and remanded the case because, unlike the district court, it found that Mr. Yershov was a subscriber protected by the VPPA.[50] In its reasoning, the First Circuit looked to the plain meaning of "subscribe" and concluded that it applied broadly because a subscription is just an arrangement to obtain a product or service.[51] Moreover, while the First Circuit acknowledged that Congress did not alter the 1988 terms in its recent amendments, it reasoned that the Act's already broad definitions should also apply to new technology.[52] Thus, it likened Mr. Yershov downloading a free phone application from Gannett to Gannett installing a free hotline at Mr. Yershov's home.[53] Notably, the First Circuit

---

[46] *See id.* at 146. The court in *Yershov I* found unpersuasive other district court opinions that constrained personal information to "information which must, without more," connect a video to a specific individual. *See id.* at 145 (quoting *In re Nickelodeon I*, 2014 WL 3012873, at *10). Instead, the court found that the VPPA included data that could be linked to an individual, such as a home address, social security number, and date of birth. *See id.* at 146.

[47] *See id.* at 141–42 (highlighting that an individual's phone identification number may contain information beyond just a name, such as his or her contacts, pictures, schedule, and bank statements).

[48] *See Yershov II*, 820 F.3d at 484, 486 (affirming the district court's holding that users had their identities disclosed when their GPS coordinates and Android IDs were sold to Adobe because Gannett allegedly knew that Adobe had the means to identify them).

[49] *See id.* at 486. The First Circuit recognized its decision hinged on "reasonable inferences" from the facts as alleged because it analogized old fashioned applications of the VPPA to modern technology. *See id.* at 489. Therefore, the court prefaced its decision by acknowledging that new facts may shift these inferences outside of the VPPA's protection, like if Adobe actually cannot readily identify individuals from their digital information. *See id.*

[50] *Id.* at 490.

[51] *See id.* at 487. The court considered several dictionary definitions, but found the *American Heritage Dictionary* most on point because it described the process of getting a subscription as an agreement to access an electronic product or service. *See id.* Therefore, the court likened Yershov's direct access to Gannett's phone application videos to a 1988 citizen's access to a newspaper from a home-delivery service. *See id.*

[52] *See id.* at 488 (reasoning that if Congress intended broad definitions of these terms in their 1988 physical applications, then those same, broad definitions should also apply in their electronic applications).

[53] *See id.* at 489. Although the court acknowledged this hypothetical is imperfect because it is impractical and expensive, it found the Eleventh Circuit's comparison of adding a website to one's "favorite" tabs to be less persuasive. *See id.*

confined its analysis to the facts as pled and emphasized that new information on remand might alter the court's inferences to exclude VPPA protection.[54]

II. Judges Struggle with Applying the Video Privacy Protection Act to Modern Video Streaming Technology

With constantly evolving video streaming technology, courts struggle to interpret and apply the VPPA's outdated language while holding fast to Congress's expressed intent.[55] In 2016, in *Yershov v. Gannett Satellite Information Network, Inc.* ("*Yershov II*"), the U.S. Court of Appeals for the First Circuit extended the VPPA's provisions to include video privacy protections for *USA Today*'s application users in light of the Act's plain meaning, analogous features, and legislative history.[56] Recent diverging VPPA interpretations from the U.S. Courts of Appeals for the Eleventh and Third Circuits highlight the unpredictable nature of the VPPA's provisions in light of unclear terms and judges' familiarity with new technology.[57] Section A of this Part analyzes the Eleventh Circuit Court of Appeals 2015 decision in *Ellis v. Cartoon Network, Inc.* ("*Ellis II*") to not apply the VPPA to persons who downloaded an application.[58] Section B examines the Third Circuit Court of Appeals 2016 decision in *In re*

---

[54] *See Yershov II*, 820 F.3d at 489 (leaving the following questions open for remand: Does Gannett treat its applications and website access differently? Can Adobe identify users as alleged?). Recently, the Supreme Court addressed a plaintiff's obligation to plead concrete Article III injury before bringing suit. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1543 (2016) (finding that Article III requires an injury to be both particularized and concrete for a court to hear a claim against a consumer reporting agency for violating the Fair Credit Reporting Act). On remand from *Yershov II*, the critical question was whether Gannett and other providers could dismiss VPPA claims for failure of plaintiffs to allege injuries in fact. *See* Greg Herbers, *Post-* 'Spokeo*,' More Suits Should Be Vulnerable to Article III Standing Attacks*, FORBES (June 17, 2016), http://www.forbes.com/sites/wlf/2016/06/17/post-spokeo-more-suits-should-be-vulnerable-to-article-iii-standing-attacks/#1582419275f3 [https://perma.cc/92GH-3HVQ]. On September 2, 2016, the *Yershov III* district court answered this much anticipated *Spokeo* issue by affirming that there is Article III standing for plaintiffs alleging VPPA privacy violations even if the effects are intangible. Yershov v. Gannett Satellite Info. Network, Inc. (*Yershov III*), No. 14-13112-FDS, 2016 WL 4607868, at *1 (D. Mass. 2016); *see also In re Nickelodeon II*, 827 F.3d at 262 (finding Article III standing for plaintiffs alleging VPPA violations).

[55] *See, e.g.*, *In re* Nickelodeon Consumer Privacy Litig. (*In re Nickelodeon II*), 827 F.3d 262, 283–84 (3d Cir. 2016) (expressing the unclear and flexible nature of the VPPA); Yershov v. Gannett Satellite Info. Network, Inc. (*Yershov II)*, 820 F.3d 482, 486 (1st Cir. 2016) (describing part of the VPPA as "awkward and unclear"); Ellis v. Cartoon Network, Inc. (*Ellis II*), 803 F.3d 1251, 1255 (11th Cir. 2015) (acknowledging the divided district court applications of the VPPA).

[56] *See Yershov II*, 820 F.3d at 488 (deciding that if Congress applied a broad definition in the physical rental era, then the present video streaming era should also apply a broad interpretation).

[57] *See In re Nickelodeon II*, 827 F.3d at 281–84 (defining "personally identifiable information" narrowly in holding that an IP address, browser setting, and personal computer number do not suffice); *Ellis II*, 803 F.3d at 1252 (finding someone who simply downloaded an application to stream videos lacked a sufficient relationship to be a "subscriber" under the VPPA).

[58] *See infra* notes 60–70 and accompanying text.

Nickelodeon Consumer Privacy Litigation to restrict the VPPA when uncertain as to what extent an individual's digital information is personally identifying.[59]

A. Eleventh Circuit: Downloading a Phone Application Does Not Make Someone a "Subscriber" Under the VPPA

In October 2015, the Eleventh Circuit in *Ellis II* held that an individual who merely downloads a free phone application is not a "subscriber" under the VPPA.[60] In that case, an individual downloaded a free application from Cartoon Network in order to watch television episodes and clips from his phone.[61] Without acquiring consent, the Cartoon Network app collected each user's viewing history and submitted it to a third party data analytics company along with the phone's identification number.[62] Users did not create an account, make payments to Cartoon Network, register, or create a profile.[63] The court also took note of the fact that users could remove the app from their devices at anytime.[64]

On appeal, the Eleventh Circuit reasoned that mere users of the Cartoon Network app had an insufficient connection to the application provider to be considered a "subscriber."[65] To define "subscriber," which was left undefined in the VPPA, the Eleventh Circuit scoured dictionaries in search of the word's plain meaning.[66] The Eleventh Circuit determined that the district court of Massachusetts's multi-factored analysis in *Yershov I* correctly limited the scope of "subscriber" as would have been applicable in 1988, because recent

---

[59] *See infra* notes 71–79 and accompanying text.

[60] *See Ellis II*, 803 F.3d at 1252. Although the complaint on appeal asks the court to define who is a "subscriber" and what constitutes "personally identifiable information," the circuit court only addressed the former issue because it concluded that the application downloader was not a subscriber. *See id.* Nonetheless, the district court did rule on what constitutes personally identifiable information. *See* Ellis v. Cartoon Network, Inc. (*Ellis I*), No. 1:14-CV-484-TWT, 2014 WL 5023535, at *3 (N.D. Ga. Oct. 8, 2014). Although not precedent because the Eleventh Circuit did not decide the issue, the district court found that a user's phone identification number sent to a data analytics company was not personally identifiable information because, unlike a name, further action is required to identify the particular individual. *See id.*

[61] *See Ellis II*, 803 F.3d at 1253.

[62] *See id.* at 1254. The phone identification number in this case was an Android ID, which is a specific 64-bit number provided at the time a user purchases and operates an Android. *See id.*

[63] *See id.* at 1257.

[64] *See id.* (demonstrating the weak relationship between the consumer and provider while also suggesting that the consumer maintains control over the interaction).

[65] *See id.* The Eleventh Circuit's classification of the relationship between an application downloader and free video supplier as weak has been contested as a poor understanding of the technology. *See* Recent Case, *supra* note 33 (disagreeing with the *Ellis II* court by finding that downloading a phone application indicates a strong commitment to use the service).

[66] *See Ellis II*, 803 F.3d at 1255–56 (using definitions from *Webster's New World College Dictionary*, the *Oxford English Dictionary*, *Black's Law Dictionary*, and *Webster's Third New International Dictionary* to define "subscriber").

amendments did not modify the relevant terms.[67] Thus, the court's decision hinged on the relationship it understood to be formed when a person downloads a free phone application.[68] Judge Jordan, writing for the court in *Ellis II*, analogized downloading a free application to creating an internet browser tab to allow faster access to one's favorite website.[69] Based on this analogy, the court reasoned that the Cartoon Network app user had a weak connection to the video supplier, and thus, was not sufficiently committed to be a "subscriber."[70]

B. Third Circuit: Browsing Data Is Not "Personally Identifiable Information" Under the VPPA

In June 2016, the Third Circuit held in *In re Nickelodeon Privacy Litigation* that digital information such as a user's IP address does not constitute "personally identifiable information" protected under the VPPA.[71] The Plaintiffs were children under the age of thirteen who visited Nickelodeon's website and registered their birthdate and gender in order to access games and stream

---

[67] *See id.* at 1256–57 (quoting Yershov v. Gannett Satellite Info. Network, Inc. (*Yershov I*), 104 F. Supp. 3d 147, 149 (D. Mass. 2015), *rev'd*, 820 F.3d 482 (1st Cir. 2016)) (finding that subscriptions generally require these elements: fee, registration, relationship to supplier, distribution, and/or access to private content); *see also* Austin-Spearman v. AMC Network Entm't LLC, 98 F. Supp. 3d 662, 669 (S.D.N.Y. 2015) (focusing on the commitment or continuing relationship a subscriber maintains with a supplier). Ironically, on appeal in *Yershov II*, the First Circuit disagreed with the *Yershov I* district court's inferences and application of the term that *Ellis II* cited in its reasoning. *See Yershov II*, 820 F.3d at 488–89. Rather, the First Circuit concluded that "subscriber" could include persons who download a free application if there is an exchange of personal digital information and services between the user and the provider. *See id.*

[68] *See Ellis II*, 803 F.3d at 1257 (viewing an application downloader who pays no fee and requires no continued relationship with a video supplier to access video content as insufficient to establish a subscriber relationship under the VPPA). District courts have applied similar facts differently under the VPPA when determining the relationship between free video streaming content providers and users. *Compare Yershov I*, 104 F. Supp. 3d at 146–49 (finding that someone who downloaded a free application on a phone without a greater commitment was not a subscriber), *and Austin-Spearman*, 98 F. Supp. 3d at 668–69 (holding that viewing a website and watching videos without further relation to the provider did not make a subscriber), *with* Locklear v. Dow Jones & Co., 101 F. Supp. 3d 1312, 1316 (N.D. Ga. 2015), *abrogated by Ellis II*, 803 F.3d 1251 (11th Cir. 2015) (finding that a subscriber included someone who visited and watched video content on a website).

[69] *Ellis II*, 803 F.3d at 1257.

[70] *Id.* at 1257–58.

[71] *See In re Nickelodeon II*, 827 F.3d at 262. Recent online tracking techniques like placing a "cookie" on an advertisement to collect a user's browsing data has led to concerns that companies have access to everything about a particular user without needing a direct name. *See* Paul M. Schwartz & Daniel J. Solove, *The PII Problem: Privacy and a New Concept of Personally Identifiable Information*, 86 N.Y.U. L. REV. 1814, 1850–51 (2011) (offering an approach to classifying "personally identifiable information" that accounts for the risk of accumulated data and technology advancements over time); Kate Crawford, *When Big Data Marketing Becomes Stalking: Data Brokers Cannot Be Trusted to Regulate Themselves*, SCI. AM. (Apr. 1, 2014), http://www.scientificamerican.com/article/when-big-data-marketing-becomes-stalking1/ [https://perma.cc/A2MM-8ESH] (suggesting that almost any digital information given to a data analytics company is personal).

videos.[72] Viacom, the service provider, delivered to Google the children's video history, IP addresses, browser data, and unique computer number, which allegedly allowed Google to identify the children personally.[73]

On appeal, the Third Circuit recognized the VPPA's uncertain applicability, and provided a range of examples that it believed fell into, in between, or out of the VPPA's protection.[74] Judge Fuentes, who wrote the opinion, acknowledged the fact-sensitive nature of this spectrum and emphasized that what constitutes identifiable information is in constant "flux" with new technology.[75] The Third Circuit noted that Congress had the opportunity to re-define or clarify "personally identifiable information" in its 2012 amendments but did not, and therefore concluded that the court should confine the terms to a more narrow 1988 connection.[76] As a result, the Third Circuit found the children's digital information too far removed from their names to warrant protection.[77]

Although the First Circuit's recent decision in *Yershov II* encouraged a broader application of personally identifiable information, the Third Circuit distinguished the two cases on their facts, stating that its holding is not a split from the First Circuit.[78] Ultimately, the Third Circuit left open the possibility

---

[72] *See In re Nickelodeon II*, 827 F.3d at 267–68.

[73] *See id.* at 282. The Third Circuit constructed a balancing test in which some types of personal information proved more similar than others to the 1988 example of giving an individual's name. *See id.* at 282–83.

[74] *See id.* at 282–83 (finding information like a person's name to be the most clearly identifying, while a phone number, home or work address, social security number, and digital identifiers were of less certain protection under the VPPA).

[75] *See id.* at 284.

[76] *See id.* at 286. In its 2012 amendments to the VPPA, Congress did not update the 1988 definitions for "consumer" and "personally identifiable information," but maintained the same 1988 terms. *See* 158 CONG. REC. H6849–51 (Dec. 18, 2012). Instead, Congress amended the statute to clarify that consumer consent in the VPPA can be obtained over the internet but must be re-obtained every two years. *See* 18 U.S.C. § 2710(b)(2)(A) (2012). Although courts, including the First Circuit in *Yershov II*, still use the quintessential 1988 brick-and-mortar analogy to apply the Act to new technology, the Third Circuit's application requires an even tighter connection between the two. *Compare In re Nickelodeon II*, 827 F.3d at 284 (explaining that the 1988 legislature most likely intended to restrict the VPPA's application to situations similar to the initial impetus for the Act—a video store releasing a customer's video history), *with Yershov II*, 820 F.3d at 486 (finding that Congress intended a broad application of the statute by not limiting the Act to mere names).

[77] *See In re Nickelodeon II*, 827 F.3d at 289.

[78] *See id.* ("Nor does our decision today create a split with our colleagues in the First Circuit."). The Third Circuit distinguished itself from *Yershov II* because Google did not receive any GPS coordinates in addition to the digital information provided. *See id.* The court was also concerned about holding Google liable merely because it hypothetically had the capability to identify users through the consumer's supplied digital data and its own resources. *See id.* at 290. By contrast, the First Circuit in *Yershov II* found this same argument persuasive that Adobe could predictably use its resources to link not only a user's GPS coordinates but also its device information to a particular individual. *See Yershov II*, 820 F.3d at 486.

for modern applications of the VPPA, but only for those with a tight link to the brick-and-mortar system.[79]

III. Redirecting the VPPA in Light of Congressional Intent and Consumer Privacy Interests

Unlike the U.S. Court of Appeals for the First Circuit's interpretation of the ambiguous VPPA with its emphasis on consumer protection, the U.S. Courts of Appeals for the Eleventh and Third Circuits' reserved application gives providers the benefit of the doubt and opens the Act up to circumvention.[80] To begin, this Part contends that the First Circuit's 2016 reasoning in *Yershov v. Gannett Satellite Information Network, Inc.* ("*Yershov II*") properly interpreted an outdated statute in a developing area of the law.[81] Next, this Part argues that while analogies can be helpful tools for applying outdated technical laws, they can also lead to unpredictable results depending on the court's familiarity with the underlying technology.[82] Finally, this Part argues that in light of the VPPA's evident purpose to protect consumer video privacy and Congress's recent amendments, courts should err on the side of requiring video application providers to obtain online consent and disclose personal data transactions.[83]

First, the First Circuit's reasoning in *Yershov II* used fundamental canons of statutory interpretation to properly expand the scope of the VPPA beyond the 1988 brick-and-mortar application and into modern video privacy concerns.[84] Beginning with the VPPA's text, the First Circuit noted that Congress allotted for judicial discretion by not defining "subscriber," and by establishing that personal information "*includes*" identifying a person.[85] The word "includes" indicates a

---

[79] *See In re Nickelodeon II*, 827 F.3d at 284. For instance, Judge Fuentes predicted that if YouTube provided a third party with a subscriber's video history, that would sufficiently resemble Judge Bork's local video store releasing his rental history to fall under the VPPA. *See id.* at 286.

[80] *Compare In re* Nickelodeon Consumer Privacy Litig. (*In re Nickelodeon II*), 827 F.3d 262, 284 (3d Cir. 2016) (stating that if an average person cannot readily connect certain information to a specific individual, then it should not be protected under the VPPA), *and* Ellis v. Cartoon Network, Inc. (*Ellis II*), 803 F.3d 1251, 1257 (11th Cir. 2015) (characterizing the relationship between an application user and video provider as weak and so forfeiting VPPA protection), *with* Yershov v. Gannett Satellite Info. Network, Inc. (*Yershov II)*, 820 F.3d 482, 488 (1st Cir. 2016) (emphasizing that application users for *USA Today* did not receive disclosures asking for consent before their information was distributed to a data analytics company).

[81] *See infra* notes 84–93 and accompanying text.

[82] *See infra* notes 94–97 and accompanying text.

[83] *See infra* notes 98–102 and accompanying text.

[84] *See* King v. Burwell, 135 S. Ct. 2480, 2483–84 (2015) (stating that statutory interpretation begins and ends with the text when the statute is clear, but in cases of ambiguity, a court must assess the text in context); *Yershov II*, 820 F.3d at 487–88 (beginning with the VPPA's text and plain meaning before consulting legislative history).

[85] *Yershov II*, 820 F.3d at 486–88; *see also* 18 U.S.C. § 2710(a)(1)–(3) (2012) (emphasis added).

range of applicable identifying methods.[86] Thus, the First Circuit recognized that even though users downloaded the *USA Today* application at no monetary cost, it still cost them their device numbers, GPS locations, and video history, all of which served some value to Gannett.[87] Likewise, the court recognized that a device's GPS coordinates often link a person to his or her home and work address, allowing for easy identification.[88] Without consenting to providers selling their information, users paid this price unknowingly.[89]

Although the VPPA's legislative history is not critical to this result, it is persuasive.[90] In 2012, Congress revisited the statute to facilitate video providers' access to online consent, but clarified that it did not broaden the scope of the Act beyond the 1988 version.[91] The Third Circuit interpreted Congress's disclaimer to mean that the Act should be narrowly applied, when in fact, the 1988 legislative history warned against a "Big Brother" era in which emerging technology allows companies to compile an individual's interests, habits, and dislikes into a personal profile.[92] Thus, the First Circuit stayed true to the 100th Congress's in-

---

[86] *See Yershov II*, 820 F.3d at 486 (citing *In re* Fahey, 779 F.3d 1, 5–6 (1st. Cir. 2015)) (finding that the word "includes" expands rather than constricts the statute's application to examples that are not expressly provided).

[87] *See id.* at 489; *see also* Natalia Drozdiak, *EU Mulls New Rules on Data Collection*, WALL ST. J. (Feb. 25, 2016), http://www.wsj.com/articles/eu-mulls-new-rules-on-data-collection-1456386051 [https://perma.cc/6KXE-QR78] (discussing competition in the international marketplace for consumer data).

[88] *See Yershov II*, 820 F.3d at 486 (highlighting the logical assumption that a large data analytics company like Adobe has the mechanisms and is likely to link users' GPS coordinates and device numbers to specific individuals).

[89] *See* Mary Madden, *Public Perceptions of Privacy and Security in the Post-Snowden Era*, PEW RES. CTR. (Nov. 12, 2014), http://www.pewinternet.org/2014/11/12/public-privacy-perceptions/ [https://perma.cc/RS88-HYXG]. The Pew Research Center conducted surveys with 607 adults and found that on average, 91% "agree" or "strongly agree" that online consumers have "lost control" of their online personal information to companies. *See id.*

[90] *See Yershov II*, 820 F.3d at 487–88 (beginning with the VPPA's text and plain dictionary definition, the First Circuit developed the presumed meaning of "subscriber" before consulting the Act's legislative history to confirm Congress's intention). *See generally* Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613 (2014) (arguing that legislative history communicates the context of a statute crucial to the decision-making process). Legislative history serves to anchor the judges' decision in Congress's meaning rather than allowing judges to "write the law that they want." *See id.* at 1620.

[91] *See* 158 CONG. REC. H6849–51 (Dec. 18, 2012) (stating expressly that the 1988 terms not be impacted by the 2012 consent amendments). The Third Circuit reasons that because Congress did not update the VPPA's ambiguous terms, its definitions should be narrowly construed around the 1988 beliefs of personal information and video consumers. *In re Nickelodeon II*, 827 F.3d at 288. Nonetheless, legislative inaction has been considered an unreliable means for understanding legislative intent and should cautiously be applied to statutory interpretation. *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 94 (1988) (analyzing the function of legislative inaction in statutory interpretation and arguing that it does not reveal actual legislative intent, but a presumed one).

[92] *See In re Nickelodeon II*, 827 F.3d at 288 (tying the VPPA closely to the physical video rental space); *see also* S. REP. NO. 100-599, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4342-1, 4342-5

tent by protecting users from a video provider selling their viewing history and personal information to a data analytics company without their consent.[93]

Without more direction from Congress or an administrative agency, courts must interpret vague statutory terms in a developing area of the law by relying in part on a court's familiarity with the technology itself.[94] As a result, key privacy concerns hinge on inferences, leading to unpredictable results.[95] Both providers and consumers are negatively impacted by such ambiguous liability and fact-sensitive inquiries.[96] Not only may consumers lose an important privacy right, but this uncertainty in the law also threatens the productivity of new technology developers who struggle to follow outdated statutes or to predict how a judge will view their product.[97]

In light of the foundational privacy right Congress sought to protect, courts should be more willing to infer ambiguities in favor of safeguarding consumers'

(anticipating a future similar to today's reality where an individual's preferences are compiled online by third parties).

[93] *See Yershov II*, 820 F.3d at 488 (declaring that Congress constructed a broad video privacy law in 1988 and the VPPA does not require any degree less of protection in the digital world).

[94] *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 806 (2011) (Alito, J., concurring) (warning courts to consider carefully the potential societal consequences of new technology and to be weary of analogizing to "familiar" technology while ignoring key differences); Schwartz & Solove, *supra* note 71, at 1845–46 (explaining the unpredictable climate surrounding changing technology and difficulty of trying to formulate a definition for "personally identifiable information").

[95] *See Yershov II*, 820 F.3d at 489 (likening the relationship between Gannett and Yershov to a provider installing a "hotline" at a user's home, and so was the type of relationship that fell under the VPPA's protection); *Ellis II*, 803 F.3d at 1257 (finding that the relationship fell out of the VPPA's protection because it was more similar to creating a "favorites" tab on an internet home page). The Third Circuit distinguished itself from the First Circuit by clarifying that, unlike in *Yershov II* where the consumer's GPS coordinates were disclosed to a provider allowing even an average person to identify a user, in *In re Nickelodeon II*, solely the users' digital information was disclosed making it more removed from their specific identities. *See In re Nickelodeon II*, 827 F.3d at 289.

[96] *See* Balasubramani, *supra* note 17 (discussing the unclear legal implications of the First Circuit's ruling for online video application developers, resulting in "pani[c]"). As the Third Circuit noted, had the users' GPS coordinates been disclosed as in *Yershov II*, then the sliding scale might have moved in favor of protecting the information under the VPPA as their personal identities. *See In re Nickelodeon II*, 827 F.3d at 289. The court in *Yershov II* also carefully narrowed its opinion to the facts as pled and left open the possibility that further fact-finding may shift the court's inferences to not extend VPPA protection. *See Yershov II*, 820 F.3d at 489.

[97] *See* Balasubramani, *supra* note 17 (discussing the alarm the *Yershov II* decision may have on application providers who are uncertain if their disclosures to third party data analytic companies require consent). On October 27, 2016, the Federal Communications Commission ("FCC") adopted regulations to help consumers understand and control what personal information is tracked and gathered by broadband internet service providers. *See* Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, 81 Fed. Reg. 87,274 (Dec. 2, 2016) (to be codified at 47 C.F.R. pt. 64). The FCC order requires internet service providers to receive affirmative consumer consent before disclosing "personally identifiable information" such as their "email address or other online contact information; phone numbers; MAC addresses or other unique device identifies; IP addresses; and persistent online or unique advertising identifiers" to a third party. *See id.* at 87,285.

privacy interests rather than video providers.[98] Because Congress made it easier for providers to obtain consent, courts should focus on requiring disclosures about what private information is being tracked and sold to third parties.[99] Disclosures are a critical, if not the most critical, way to combat privacy invasions.[100] As the First Circuit noted, consumers of a "free" application pay a price by forfeiting their device information, GPS location, and viewing history to a third party.[101] By notifying consumers of the information to be shared, providers can manage their liability, and consumers can know what costs they are paying, thus, regaining control over their personal video information.[102]

CONCLUSION

When applying the outdated VPPA to modern technology, judges must resort to analogies that can bridge the gap between Congress's intended protections and modern viewing methods. This mode of interpretation, however, must be exercised with deference to Congress's original intent to protect *consumer* privacy. The U.S. Court of Appeals for the First Circuit stayed true to the text and purpose of the VPPA in *Yershov v. Gannett Satellite Information Network, Inc.* by increasing consumer control in the online rental space.

WENDY BEYLIK

Preferred Cite: Wendy Beylik, *Enjoying Your "Free" App? The First Circuit's Approach to an Out-dated Law in* Yershov v. Gannett Satellite Information Network, Inc., 58 B.C. L. REV. E. SUPP. 60 (2017), http://lawdigitalcommons.bc.edu/bclr/vol58/iss6/7.

---

[98] *See* S. REP. NO. 100-599, at 4. Quoting the Supreme Court, the Act's legislative history stressed an individual's First Amendment right to choose what movies he or she wished to watch in privacy. *See id.* (quoting Stanley v. Georgia, 394 U.S. 557, 565 (1969)).

[99] *See* 158 CONG. REC. H6849–51 (allowing companies to meet VPPA requirements by obtaining consumer consent electronically).

[100] *See* Madden, *supra* note 89 (summarizing findings from a Pew Research Center survey on consumer privacy). A Pew Research Center survey found that 55% of consumers were willing to provide some personal information in exchange for free online services. *See id.* Additionally, a Microsoft study found that 66% of U.S. consumers, when given the option of sharing their location and calendar in exchange for digital access, were willing to share. MICROSOFT, THE CONSUMER DATA VALUE EXCHANGE 16 (2015).

[101] *Yershov II*, 820 F.3d at 489.

[102] *See* Tara Mapes, Spokeo *Defense Not Good Enough for Gannett in Class Action Over USA Today App*, LEGAL NEWS LINE (Sept. 30, 2016), http://legalnewsline.com/stories/511011257-spokeo-defense-not-good-enough-for-gannett-in-class-action-over-usa-today-app [https://perma.cc/E8SL-265R] (explaining the litigation risk that businesses outside of the First Circuit face in whether or not their jurisdiction will adopt the First Circuit's broad application of the VPPA); Mike Orcutt, *FTC Chairwoman: We Must Not Give Up on Privacy*, MIT TECH. REV. (Oct. 10, 2016), https://www.technologyreview.com/s/602474/ftc-chairwoman-we-must-not-give-up-on-privacy/ [https://perma.cc/PGZ9-T9PE] (describing the importance for consumer control of online information in the wake of technology advancements and for greater data collection transparency).