4-1-2017

A Square Peg in a Round Hole: The Current State of the Video Privacy Protection Act for Videos on the Internet and the Need for Updated Legislation

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A SQUARE PEG IN A ROUND HOLE: THE CURRENT STATE OF THE VIDEO PRIVACY PROTECTION ACT FOR VIDEOS ON THE INTERNET AND THE NEED FOR UPDATED LEGISLATION

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In 2014, online streaming services overtook the traditional method of viewing television programs.[1] Recent court decisions, however, extending the applicability of the Video Privacy and Protection Act (hereafter VPPA) to videos provided over the Internet have created unease in the current system of distributing online content.[2] Originally drafted in 1988 and amended in 2012,[3] the VPPA creates a private cause of action for "consumers" against "video tape service providers" that provide "personally identifiable information" to third parties.[4] Yet, due to unclear definitions in the VPPA's drafting, the First, Third, and Eleventh Circuits have reach conflicting conclusions over Act's reach in the online era and the reach of the terms "subscriber," as a subset of "consumer," and "personally identifiable information" in *Yershov v. Gannett Satellite Network, Inc.*, *In re Nickelodeon Consumer Privacy Litigation*, and *Ellis v.*

* Thank you to my editors Professor Mary Dant, Ethan Bond, and Neda Hajian.

1. *See* Todd Spangler, *Streaming Overtakes Live TV Among Consumer Viewing Preferences: Study*, VARIETY (Apr. 22, 2015, 5:21 AM), http://variety.com/2015/digital/news/streaming-overtakes-live-tv-among-consumer-viewing-preferences-study-1201477318/.

2. The Video Privacy Protection Act, 18 U.S.C. § 2710 (2012).

3. The Video Privacy Protection Act Amendments Act of 2012, Pub. L. No. 112-258 (2013).

4. The Video Privacy Protection Act, 18 U.S.C. § 2710(b) (2012).

Cartoon Network.[5] This conflicting precedent threatens the common practice of online video providers trading viewer information in order to secure sufficient revenue.

This Note outlines the history of the VPPA and argues that the VPPA in its current form is inadequate to cover the complexities of online video distribution. After outlining and comparing the contrasting approaches by the First, Third, and Eleventh Circuits, this paper illustrates the underlying issues of the cases that cannot be properly addressed through the Supreme Court granting certiorari without causing further needless uncertainty. Finally, this Note describes the necessary considerations for the legislature to correctly balance consumer privacy with the economic realities of free online content and provide a suitable benchmark for online privacy.

5. Yershov v. Gannett Satellite Info. Network, Inc., 820 F.3d 482 (1st Cir. 2016); *In re* Nickelodeon Consumer Privacy Litig., No. 15-1441, 2016 U.S. App. LEXIS 11700 (3d Cir. June 27, 2016); Ellis v. Cartoon Network, Inc., 803 F.3d 1251 (11th Cir. 2015).

I. INTRODUCTION

We recognize, even if only intuitively, that our data has to be going somewhere. And indeed it does, feeding an entire system of trackers, cookies, and algorithms designed to capture and monetize the information we generate. Most of the time, we never think about this. We browse the Internet, and the data-collecting infrastructure of the digital world hums along quietly in the background.

–Judge Julio M. Fuentes[6]

Every day, Americans use websites and online subscription services to view movies, television programs, and other videos.[7] There is no doubt that online access to video content has become the dominant method of video consumption in the United States.[8] In 2014, online streaming services overtook the traditional method of viewing television programs with over forty-two percent of American households using video-streaming services[9] and over fifty percent of households streaming movies and television programs on a monthly basis.[10] In addition, people watch other videos online on free websites such as YouTube, which boasts 300 hours of new content uploaded each minute, 500 million videos viewed each day, and over a billion users worldwide.[11] Simultaneously, mobile phones now account for over fifty percent of YouTube views.[12]

Although this growth allows ideas and information to flow freely, the reality is that no online content is truly available for free: in exchange for

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6. *In re* Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 266 (3d Cir. 2016).

7. *See* Todd Spangler, *Streaming Overtakes Live TV among Consumer Viewing Preferences: Study*, VARIETY (Apr. 22, 2015, 5:21 AM), http://variety.com/2015/digital/news/streaming-overtakes-live-tv-among-consumer-viewing-preferences-study [http://perma.cc/K5XZ-TF3A].

8. *See id.*

9. *Id.*

10. 56% of those surveyed stream movies and 53% stream television on a monthly basis. *Id.*

11. *Statistics*, YOUTUBE, http://www.youtube.com/yt/press/statistics.html [http://perma.cc/5369-PVZH].

12. *Id.*

this content, viewers provide data about themselves and their habits.[13] Lurking behind the scenes of every webpage is a web of tracking software taking note of each visitor and compiling the raw data of each visit.[14] Most Internet users know that websites supplying articles or videos to the public often monetize their content by selling related advertising space to third parties.[15] However, advertisers also seek additional information through social media to target individuals for services based on their interests.[16]

The obvious benefit to this practice is that advertisers can observe consumers' habits online to create targeted advertising.[17] This process compensates websites both for the information they gather behind the scenes and for the subsequent advertising opportunities they provide, thus enabling businesses to distribute online content for free.[18] Furthermore, these advertisements are convenient for consumers, enabling them to efficiently find goods and services that they will enjoy.[19] Subscription video services similarly track their users' video habits while outwardly claiming these actions merely provide personalized services for customers.[20]

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13. *See In re* Nickelodeon Consumer Privacy Litig., 827 F.3d at 266.

14. *See id.*

15. Contextual advertising is one of the main strategies for monetizing a website, along with selling advertising space to affiliated sites. *See* Vishnu, *How Do Blogs and Websites Make Money Online? Monetize Your Blog for Maximum Revenue*, COLORLIB. (Oct. 10, 2016), http://colorlib.com/wp/how-blogs-and-websites-make-money-online [http://perma.cc/CVW9-UA8V].

16. Facebook tells businesses that its advertising tools provide "fine-tuned" marketing to help its clients find new customers using information provided by its users to target profiles it deems similar to those of consumers the business already has, along with particular interests and tendencies that align with the company's desired market. *Choose Your Audience*, FACEBOOK BUSINESS, http://www.facebook.com/business/products/ads/ad-targeting [http://perma.cc/4DYJ-GW5K].

17. *Data Brokers: A Call for Transparency and Accountability*, FED. TRADE COMMISSION i, v (2014), http://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf [http://perma.cc/M5X5-7SWR].

18. *Id.*

19. *Id.*

20. *See* Lara O'Reilly, *Netflix Lifted the Lid on How the Algorithm that Recommends You Titles to Watch Actually Works*, BUS. INSIDER (Feb. 26, 2016, 8:53 AM),

In recent years, more sophisticated methods have emerged for collecting data, enabling "data brokers" to take full advantage of the wealth of information available from Internet usage.[21] These companies create information profiles on consumers, using data collected from websites, users themselves, and public sources.[22] Data brokers rarely have any direct contact with consumers but instead sell the information gathered to corporations or other data brokers.[23] Nevertheless, the Federal Trade Commission expressed concern about the massive amounts of data stored regarding individuals and their habits.[24] As of now, no federal legislation prohibits brokers from sharing this information with third parties unless the data is used for specific purposes such as credit, employment, insurance, or housing.[25] Furthermore, consumers do not have a right to know what information has been gathered about them or to correct any inaccuracies in the data.[26]

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http://www.businessinsider.com/how-the-netflix-recommendation-algorithm-works-2016-2 [http://perma.cc/8448-2F97].

21. According to the FTC report, one such broker has roughly 3000 pieces of data on every American consumer. *Data Brokers: A Call for Transparency and Accountability*, *supra* note 12, at iv.

22. *Id.* at iv–v.

23. *See id.* at iv.

24. According to the FTC report, one such broker has roughly 3000 pieces of data on every American consumer. *Id.*

25. Most data brokers are not consumer reporting agencies under the Federal Credit Reporting Act and are not subject to its restrictions on consumer reports. *Data Brokers and "People Search" Sites*, PRIVACY RIGHTS CLEARINGHOUSE (Feb. 1, 2016), http://www.privacyrights.org/consumer-guides/data-brokers-and-people-search-sites [http://perma.cc/H5KD-UMU4].

26. Some data brokers provide general statistics of what sorts of information have been collected on a specific user but do not provide what exact information has been gathered. Steve Kroft, *The Data Brokers: Selling Your Personal Information*, 60 MINUTES (Mar. 9, 2014), http://www.cbsnews.com/news/the-data-brokers-selling-your-personal-information [http://perma.cc/CMJ9-3CEL]. Naturally, individuals are wary when it comes to the use of personal information and have expressed concern when such data driven marketing becomes very specific or seemingly inaccurate. *See* Kashmir Hill, *How Target Figured out a Teen Girl was Pregnant before Her Father Did*, FORBES (Feb. 16, 2012, 11:02 AM), http://www.forbes.com/sites/kashmirhill/2012/02/16/how-target-figured-out-a-teen-girl-was-pregnant-before-her-father-did [http://perma.cc/PY4D-4F3E].

However, recent federal appellate court decisions extending the applicability of the Video Privacy and Protection Act ("VPPA")[27] to videos provided over the Internet created unease in the current system of distributing online content.[28] Originally drafted in 1988[29] and amended in 2012,[30] the VPPA creates a private cause of action for "consumers" against "video tape service providers" that provide "personally identifiable information" to third parties.[31] Thus, the VPPA has become the sword for the recent outburst in class-action litigation against video providers by consumers concerned for their privacy.[32]

Yet courts have recently disagreed about how the VPPA should apply to the modern age of Internet technology.[33] In *Ellis v. Cartoon Network*, the Eleventh Circuit concluded that a person who uses a smartphone to view free content without some form of commitment does not qualify as a "consumer" under the statute.[34] However, the First Circuit reached an entirely different conclusion in *Yershov v. Gannett Satellite Network, Inc.*,

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27. 18 U.S.C. § 2710(a)–(f) (2012) (effective Jan. 10, 2013).

28. *See generally* Evan Wooten & Zachariah DeMeola, *A New Chapter in Video Privacy Protection Act's History*, LAW360 (June 23, 2014, 10:40 AM), http://www.law360.com/articles/550346/a-new-chapter-in-video-privacy-protection-act-s-history [http://perma.cc/LAV9-8KP8].

29. S. REP. NO. 100-599, at 1 (1988).

30. Video Privacy Protection Act Amendments Act of 2012, Pub. L. No. 112-258, 126 Stat. 2414 (2013).

31. 18 U.S.C. § 2710(a) (defining consumer as "any renter, purchaser, or subscriber of goods or services from a video tape service provider." A video tape service provider is "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 . . . ." and personally identifiable information "includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider.").

32. Christin S. McMeley & John D. Seiver, *A Look at How Technology is Transforming the Application of the VPPA to Digital Media*, BLOOMBERG (Dec. 29, 2014), http://www.bna.com/look-technology-transforming-n17179921750 [http://perma.cc/8Q6Y-HHS7].

33. *See generally* Yershov v. Gannett Satellite Info. Network, Inc., 820 F.3d 482 (1st Cir. 2016); *In re* Nickelodeon Consumer Privacy Litig., 827 F.3d at 262; Ellis v. Cartoon Network, Inc., 803 F.3d 1251 (11th Cir. 2015) (illustrating how courts have disagreed about the VPPA's application to Internet technology).

34. *Ellis*, 803 F.3d at 1255–58.

ruling that downloading a free application for viewing of free content is sufficient to make an individual a "consumer" under the VPPA.[35] The court also held that an Android device identification number and a GPS location together qualify as "personally identifiable information" under the VPPA even though the two pieces of information did not independently provide the identity of the user.[36]

After the *Yershov* decision, the Third Circuit in *In re Nickelodeon Consumer Privacy Litigation* reached the opposite conclusion, declaring that only information "that would readily permit an ordinary person to identify a specific individual's video-watching behavior" can be considered personally identifiable information.[37] Furthermore, the Third Circuit found that a child's username, IP address, gender and birthdate, along with communications on a website, do not meet the criteria.[38] In early 2017, the Supreme Court denied certiorari in the case, thus refusing to resolve the conflict. [39] Such conflicting precedent does not permit a stable marketplace, as video providers cannot be certain what information they can give advertisers without exposure to litigation or even to whom they owe a duty of privacy.

This Note argues that the VPPA in its current form is inadequate to cover the complexities of video distribution online and therefore creates needless ambiguity. Further legislation is necessary to balance consumer privacy with the economic realities of free online content. Part II of this Note discusses the history of the Video Privacy Protection Act, its statutory structure, the terms under debate, and the 2012 amendment pertaining to online video. Part III outlines the contradictory approaches of the First, Third, and Eleventh Circuits in applying the VPPA. Part IV discusses the fundamental differences in these approaches, examines the underlying

35. *Yershov*, 820 F.3d at 484, 487–90.

36. *Id.* at 486.

37. *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d at 267.

38. *Id.* at 287 n.163, 287–88.

39. *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d at 266, *cert. denied sub nom.* C. A. F. v. Viacom Inc., 137 S. Ct. 624 (2017) (mem.); *see also* Julie Shepard, Emily Bruemmer & Andrew Noll, *Supreme Court Declines to Weigh in on What Constitutes "Personally Identifiable Information" Protected by the Video Privacy Protection Act*, JENNER & BLOCK 1, 1–2 (2017), http://jenner.com/system/assets/publications/16486/original/Supreme%20Court%20Declines%20to%20Weigh%20in%20on%20What%20Constitutes%20Personally%20Idetifiable%20Information%20Protected%20by%20the%20Video%20Privacy%20Act.pdf [http://perma.cc/WN5T-6HC2].

issues, and outlines the need for legislative action to resolve these issues. Part V outlines the considerations Congress should take in drafting new legislation that protects both personal privacy and e-commerce. Part VI explores the possibility that proper online video legislation can pave the way for future additional legislation regarding even broader personal privacy on the Internet.

II. THE VIDEO PRIVACY PROTECTION ACT

[I]t is the role of the legislature to define, expand, and give meaning to the concept of privacy. This bill will give specific meaning to the right of privacy, as it affects individuals in their daily lives.

–Senator Chuck Grassley[40]

A. Judge Bork & the Birth of the VPPA

The roots of the VPPA lie in the age of the brick-and-mortar video-rental store.[41] In 1987, the *Washington City Paper* published an article containing a list of 146 films rented by then Supreme Court nominee Robert Bork and his family.[42] The paper acquired and published this list without Bork's permission and it concluded its article by expressing interest in the viewing history of other public officials.[43] Congress viewed this publication as a serious breach of personal privacy akin to a real life version of "Big Brother" monitoring individuals' activities.[44] Congress quickly took action as both the Senate and the House of Representatives concurrently drafted legislation to address the impropriety.[45] In a joint

40. S. REP. NO. 100-599, at 6 (1988).

41. *See id.*

42. *Id.* at 5.

43. *Id.*; *see* Christin S. McMeley & John D. Seiver, *A Look at How Technology is Transforming the Application of the VPPA to Digital Media*, BLOOMBERG (Dec. 29, 2014), http://www.bna.com/look-technology-transforming-n17179921750 [http://perma.cc/8Q6Y-HHS7] (discussing politicians such as Senator Bob Dole, Senator Joe Biden, and Senator Ted Kennedy).

44. S. REP. NO. 100-599, at 6.

45. *In re* Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 284 (3d Cir. 2016).

session, both bodies passed the VPPA by voice vote.[46] President Reagan signed the VPPA into law on November 5, 1988.[47]

According to the Senate's Judiciary Committee Report, the Act's stated purpose was "[t]o preserve personal privacy with respect to the rental, purchase or delivery of video tapes or similar audio visual materials."[48] Representative Al McCandless, the sponsor of the original House bill, tied the right of privacy in this instance to personal growth and free speech.[49] According to Representative McCandless, the public has the right to "quiet" and "reflection" in pursuing the "intellectual vitamins that fuel the growth of thought."[50] To this same end, early drafts of the legislation also endeavored to place similar limitations on the disclosure of library records.[51] Overall, the Senate Judiciary Committee considered the VPPA the next logical step in a long line of privacy statutes starting in the 1970s[52] and the immediate successor to the Cable Communications Policy Act of 1984 and the Electronic Communications Privacy Act of 1986.[53]

B. The VPPA: Structure and Terms

Paragraph (b)(1) of the VPPA states that "[a] video tape [sic] service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person . . . ."[54] The Act also specifies several exceptions.[55] A

46. William McGeveran, *The Law of Friction*, 2013 U. CHI. LEGAL F. 15, 23 (2013).

47. *Id.* at 23 n.37.

48. S. REP. NO. 100-599, at 1.

49. *Id.* at 7.

50. It is not clear if Representative McCandless also believes that cat videos amount to an "intellectual vitamin," but here we are. *See id.*

51. The committee ran into issues of application in the context of enforcement and left the protection of library records unresolved. *See id.* at 8.

52. *Id.* at 2–4.

53. The VPPA is also similar in structure to these two acts, which will be discussed in section II.B. 47 U.S.C. § 551 (2012) (effective Oct. 26, 2001); 18 U.S.C. § 2510 (2012) (effective Nov. 2, 2002).

54. 18 U.S.C. § 2710(b)(1).

video service provider is *not* liable when it discloses such information to the consumer himself,[56] discloses such information to any other person pursuant to the consumer's informed written consent[57] or to a warrant or court order,[58] discloses the name and address of the consumer (but not the title or subject matter of the video) where the consumer had ample opportunity to prevent the disclosure,[59] or discloses such information in the provider's "ordinary course of business."[60] In addition, the statute requires that video service providers destroy personally identifiable information within one year unless an action or order is pending.[61] Moreover, the VPPA prohibits using personally identifiable information as evidence if it was not obtained in compliance with the Act.[62] Finally, the VPPA expressly preempts directly conflicting state laws.[63]

Structurally, the VPPA is very similar to both the Cable Communications Policy Act of 1984 and the Electronic Communications Privacy Act of 1986.[64] The VPPA contains damages provisions that are nearly identical in structure to both Acts.[65] Furthermore, the VPPA and the

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55. *Id.* § 2710(b)(2).

56. *Id.* § 2710(b)(2)(A).

57. *Id.* § 2710(b)(2)(B).

58. *Id.* § 2710(b)(2)(C), (b)(2)(F).

59. Subject matter may be disclosed if the sole purpose of the disclosure is for direct marketing of goods and services. 18 U.S.C. § 2710(b)(2)(D), (b)(2)(D)(ii).

60. *Id.* § 2710(b)(2)(E).

61. *Id.* § 2710(e).

62. *Id.* § 2710(d).

63. *Id.* § 2710(f). Additionally, courts have found that the Act does not preempt local rules requiring that there be no doors on private viewing booths. Kathryn E. Copeland, *Construction and Application of Federal Video Privacy Protection Act, 18 U.S.C.A. § 2710*, 73 A.L.R. Fed. 2d 1, 2 (2013).

64. *See generally* 47 U.S.C. § 551 (2012) (effective Oct. 26, 2001); 18 U.S.C. § 2510 (illustrating the structural similarities in the Acts).

65. *Compare* 18 U.S.C. § 2710(c) ("(A) actual damages but not less than liquidated damages in an amount of $2,500; (B) punitive damages; (C) reasonable attorneys' fees and other litigation costs reasonably incurred; and (D) such other preliminary and equitable relief as the court determines to be appropriate."), *with* 47 U.S.C. § 551(f) ("(A) actual damages but not less

Cable Communications Policy Act both center on the terms "personally identifiable information" and "subscriber."[66] Finally, both the VPPA and the Cable Communications Policy Act require the timely destruction of personally identifiable information[67] and both expect similarly permitted disclosures.[68] Nonetheless, the VPPA includes damages terms that are much more favorable to plaintiffs than similar terms in the other two acts,[69] thereby providing consumers with more incentive to bring private actions.

The VPPA's definition of a "video tape service provider" encompasses a broad range of potential defendants.[70] Under the Act, "video tape service provider" comprises "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 . . . ."[71] This definition also includes "any person or other entity"

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than liquidated damages computed at the rate of $100 a day for each day of violation or $1000, whichever is higher; (B) punitive damages; and (C) reasonable attorneys' fees and other litigation costs reasonably incurred), *and* 18 U.S.C. § 2520(c) ("(A) . . . the greater of the sum of actual damages . . . or statutory damages of not less than $50 and not more than $500. (B) . . . the greater of the sum of actual damages . . . or statutory damages of not less than $100 and not more than $1000.").

66. *Compare* 18 U.S.C. § 2710(a) (pertaining to video tape service providers and disclosure of a subscriber's personally identifiable information), *with* 47 U.S.C. § 551(a), (a)(2) (pertaining to cable operators and disclosure of a subscriber's personally identifiable information).

67. *Compare* 18 U.S.C. § 2710(e) (pertaining to video tape service providers and timely destruction of personally identifiable information), *with* 47 U.S.C. § 551(e) (pertaining to cable operators and timely destruction of personally identifiable information).

68. *Compare* 18 U.S.C. § 2710(b)(2) (explaining permitted disclosures of personally identifiable information by video tape service providers), *with* 47 U.S.C. § 551(c), (d), (h) (explaining permitted disclosures of personally identifiable information by cable operators).

69. The VPPA minimum damages award is $2,500 as opposed to $1,000 under the Electronic Communications Privacy Act and $500 under the Cable Communications Policy Act. *Compare* 18 U.S.C. § 2710(c) ("(A) actual damages but not less than liquidated damages in an amount of $2,500 . . ."), *with* 47 U.S.C. § 551(f)(2) ("(A) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1000, whichever is higher . . ."), *and* 18 U.S.C. § 2520 (c)(1) ("(A) . . . the greater of the sum of actual damages . . . or statutory damages of not less than $50 and not more than $500. (B) . . . the greater of the sum of actual damages . . . or statutory damages of not less than $100 and not more than $1000 . . .").

70. 18 U.S.C. § 2710(a)(4).

71. *Id.*

to whom a disclosure is made in a narrowly limited "usual course of business" or in special circumstances.[72] Finally, subsection (c) states that the aggrieved party has a private cause of action against any person found "in violation" of the Act.[73]

The Act defines a "consumer" as "any renter, purchaser, or subscriber of goods or services from a video tape service provider."[74] While the terms "renter" and "purchaser" are abundantly clear in requiring some sort of commercial transaction, the term "subscriber" does not specify what kind of relationship is necessary to establish a subscription.[75] Thus, the full definition of "consumer," describing the appropriate class of plaintiffs, is a key subject of debate in courts.[76]

"Personally identifiable information," as defined in the VPPA, "includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider."[77] In the Senate Committee Report, Representative Kastenmeier notes that subparagraph (a)(3) consciously uses the word "include" to "establish a minimum, but not exclusive, definition of personally identifiable information."[78] Indeed, according to the report, the Senate intended the definition of "personally identifiable information" to encompass *any* information that links the customer or patron to particular materials or services,[79] thereby allowing consumers to "maintain control"

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72. *Id.*

73. *Id.* § 2710(c).

74. *Id.* § 2710(a)(1).

75. *See* Yershov v. Gannett Satellite Info. Network, Inc., 820 F.3d 482, 487–90 (1st Cir. 2016); *see also* Ellis v. Cartoon Network, Inc., 803 F.3d 1251, 1255–58 (11th Cir. 2015).

76. *See generally Yershov*, 820 F.3d 482. *See also Ellis*, 803 F.3d at 1255.

77. 18 U.S.C. § 2710(a)(3).

78. The Representative's opinion appears in the Senate report as the Senate and House drafted bills concurrently and held a joint meeting to discuss. The meeting determined that the Senate bill would continue forward. S. REP. NO. 100-599, at 12 (1988). *See generally Video and Library Protection Act of 1988: Joint Hearing on H.R. 4947 and S. 2361 Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the H. Comm. on the Judiciary and the Subcomm. on Tech. & the Law of the S. Comm. on the Judiciary*, 100th Cong. (1988).

79. S. REP. NO. 100-599, at 12.

of their personal identities.[80] The report also declared the term was intended to be "transaction-oriented" and limited the scope of "video" in the bill to restrict the covered transactions to "the sale or rental of videotapes" and not other business transacted by the provider.[81]

The damages provision of the VPPA also helps explain the Act's recent popularity in class-action litigation.[82] A successful plaintiff is entitled to liquidated damages of $2,500 or actual damages, whichever is greater.[83] Additionally, the plaintiff can receive punitive damages, reasonable attorney's fees, and other equitable relief "as the court determines to be appropriate."[84] Combined with the broad definition of possible defendants discussed above, this promise of significant damages under the VPPA is quite attractive to potential class-action litigants.

C. The Video Privacy Protection Act Amendments Act of 2012

In July of 2011, Representative Robert Goodlatte introduced to the House a proposed amendment to the VPPA to allow video tape service providers to obtain consent either at the time of a disclosure or "in advance for a set period of time" and by means of online election.[85] Supporters saw the amendment merely as updating the outdated VPPA[86] by allowing consumers to consent to disclosures of their information while viewing videos online.[87] But providers of online videos, such as Netflix, wanted to encourage users to share their movie and television preferences directly to social media through a simple, one-time click to avoid future litigation.[88]

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80. S. REP. NO. 100-599, at 8.

81. *Id*. at 12.

82. 18 U.S.C. § 2710(c); McMeley & Seiver, *supra* note 38.

83. 18 U.S.C. § 2710(c)(2)(A).

84. *Id.* § 2710(c)(2)(B)–(D).

85. *Video Privacy Protection Act*, EPIC, http://epic.org/privacy/vppa/#2011 [http://perma.cc/A5CT-ZRB5].

86. 158 CONG. REC. H6851 (daily ed. Dec. 18, 2012).

87. *Id.*; McMeley & Seiver, *supra* note 38.

88. Netflix helped sponsor the original bill following a call to shareholders in 2011. *Video Privacy Protection Act*, *supra* note 80; Joe Mullin, *Congress Tweaks US Video-Privacy Law so Netflix Can Get on Facebook*, ARS TECHNICA (Dec. 21, 2012, 11:41 AM),

Indeed, the amendment became widely known as a "Netflix-backed amendment."[89]

Although Representative Goodlatte's proposed changes passed the House overwhelmingly by a vote of 303 for and 116 against,[90] the Senate returned the initial draft with further expansion to allow greater consumer flexibility in sharing their video sharing habits.[91] The final amendment replaced the previous language of subparagraph (B), which had created an exception for "any person with the informed, written consent of the consumer given at the time the disclosure is sought."[92] The new language instead created a blanket license for videotape service providers lasting up to two years provided there was written consent via any means and the consumer's right to withdraw consent at any time.[93] President Obama signed the amendment into law in 2013.[94] Interestingly, the 2012 amendment process attempted no other alterations to the VPPA[95] despite lawmakers recognizing that the changes failed to address the digital issues lurking on the horizon.[96]

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http://arstechnica.com/tech-policy/2012/12/congress-tweaks-us-video-privacy-law-so-netflix-can-get-on-facebook [http://perma.cc/V8KR-FQPJ].

89. Netflix helped sponsor the original bill following a call to shareholders in 2011. *Video Privacy Protection Act*, *supra* note 80; Mullin, *supra* note 83.

90. 158 CONG. REC. H6851.

91. *Id.*

92. 18 U.S.C. § 2710(b)(2)(B) (2012) (effective Jan. 10, 2013).

93. Video Privacy Protection Act Amendments Act of 2012, Pub. L. No. 112-258, 126 Stat. 2414 (2013).

94. McMeley & Seiver, *supra* note 38.

95. *See* Video Privacy Protection Act Amendments Act § 2.

96. 158 CONG. REC. H6851 ("[M]y concerns are not so much about what's in this bill as much as they are concerns about what is not in the bill. So I'm agreeing not to allow the perfect to be the enemy of the good.").

III. CURRENT ANALYSIS: FEDERAL CIRCUIT COURT INTERPRETATIONS & SPLIT

The statute is not well drafted, even after the error in section (b)(1) is corrected.

–Judge Richard Posner[97]

The VPPA lay dormant for nearly eight years after its passage and the first case under the Act did not occur until 1996.[98] Early cases primarily involved police obtaining video records, including pornography, during investigations.[99] Because there were markedly few VPPA cases during the age of physical media,[100] there were few opportunities for courts to address the VPPA's numerous ambiguities. More recently, however, both the Third and Seventh Circuits have politely noted that the VPPA is far from a perfect document.[101]

A. In Re Hulu Privacy Litigation Opens the Floodgates

In 2012, the Northern District in California first applied the VPPA to providers of videos over the Internet.[102] In *In re Hulu Privacy Litigation*, a class of plaintiffs contended that Hulu wrongfully shared their personally identifiable information with various "online ad networks, metrics

97. Sterk v. Redbox Automated Retail, LLC, 672 F.3d 535, 538 (7th Cir. 2012).

98. *See* Dirkes v. Borough of Runnemede, 936 F. Supp. 235, 238 (D.N.J. 1996).

99. Camfield v. City of Oklahoma City, 248 F.3d 1214, 1218 (10th Cir. 2001) (holding that officers violated the VPPA when obtaining individuals' names and addresses without a subpoena or court order in order to ask they hand over a film deemed to be child pornography); *Dirkes*, 936 F. Supp. at 240 (holding that an officer's video records including pornography were protected and could not be used in a disciplinary action without a warrant, subpoena, or court order); *see* Kathryn Elizabeth McCabe, Note, *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, 428–29 (2013).

100. Evan Wooten & Zachariah DeMeola, *A New Chapter in Video Privacy Protection Act's History*, LAW360 (June 23, 2014, 10:40 AM), http://www.law360.com/articles/550346/a-new-chapter-in-video-privacy-protection-act-s-history [http://perma.cc/LAV9-8KP8].

101. *In re* Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 284 (3d Cir. 2016); *Sterk*, 672 F.3d at 538.

102. *In re* Hulu Privacy Litig., No. C 11-03764 LB, 2012 WL 3282960, at *23–24 (N.D. Cal. Aug. 10, 2012).

companies (meaning, companies that track data), and social networks," including comScore and Facebook.[103] In opposition, Hulu filed for dismissal and claimed that plaintiffs could not have a valid claim under the VPPA because, among other reasons, Hulu was not a "video service provider" and plaintiffs were not "consumers" under the Act.[104]

The district court rejected Hulu's arguments for dismissal. The court found that Hulu was a "video service provider," stating that the VPPA included Hulu's streamed videos under other "similar audiovisual materials."[105] In concluding that the medium of distribution did not limit the protection of video records, the court cited the 2001 Oxford English Dictionary, which included online formats in its definition of "material," as well as the Senate Judiciary Committee Report's general attitude regarding the necessity for privacy. [106]

The court was less clear about who a "subscriber" is under the VPPA.[107] The court stated that a "subscriber" need not be a *paying* subscriber.[108] Although the opinion mentions that Hulu tracked and shared information regardless of whether the individual was registered or logged in,[109] it does not clarify whether a "subscriber" must be at least a registered user.[110] Instead, the court required only that the plaintiffs be "more than just visiting" the website to survive the motion.[111]

In 2014, the same court had the opportunity to set the threshold for personally identifiable information when Hulu moved for summary

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103. *Id.* at *2.

104. Hulu also argued that its disclosures were under the ordinary course of business but the court quickly dismissed this argument as Hulu's activities were not among the explicit exceptions listed in the VPPA. *Id.* at *12.

105. *Id.* at *19.

106. The court listed several of the Senate Report's statements regarding privacy that are included in the discussion above. *Id.* at *17.

107. *In re Hulu Privacy Litig.*, 2012 WL 3282960, at *22–24.

108. *Id.* at *24.

109. *Id.* at *7.

110. *Id.* at *22–24.

111. *Id.* at *23–24.

judgment based on the argument that no such information under the Act had been disclosed.[112] In analyzing the Act's statutory history, the court decided that personally identifiable information "identifies a specific person and ties that person to particular videos that the person watched."[113] Thus, to this court, digital identifiers alone do not qualify as personally identifiable information, even if they could identify an individual when combined with other information disclosed to third parties. However, this standard is not absolute and as the court noted, "context could render it not anonymous and the equivalent of the identification of a specific person."[114]

The court then applied this analysis to the different types of disclosures Hulu made to comScore and to Facebook.[115] With regards to comScore, Hulu disclosed an individual's Hulu ID, the video watched, and a cookie that comScore used to track users' interactions with websites in which comScore was also interested.[116] Although theoretically comScore could link the Hulu ID number to the specific Hulu ID, which includes the individual's name used to register for the site,[117] the court decided that this was insufficient to establish "personally identifiable information" under the VPPA since there was no evidence that anyone did in fact link "a specific, identified person and his video habits."[118] Further, the court decided that the tracking cookie implemented by Hulu also was not pernicious as it merely identified "someone's consumption relevant to an advertiser's desire to target ads to them."[119]

However, the court found a triable issue of fact as to whether Hulu's disclosures to Facebook violated the VPPA.[120] When a viewer loaded a

112. Hulu also argued consent, but the law discussed in this case is prior to the 2012 amendment and so is not relevant. *See generally In re* Hulu Privacy Litig., No. C 11-03764 LB, 2014 WL 1724344 (N.D. Cal. Apr. 28, 2014).

113. *Id.* at *28.

114. *Id.* at *36.

115. *Id.* at *28.

116. *Id.* at *28–29.

117. *In re Hulu Privacy Litig.*, 2014 WL 1724344, at *39.

118. *Id.* at *40.

119. *Id.* at *41.

120. *Id.* at *55.

video on Facebook, a Facebook "Like" button loaded on the page, which in turn sent Facebook the name of the video and a cookie through its programming.[121] Overall, the court decided this interaction was markedly different from the comShare disclosure since the information could *directly* link an individual's Hulu ID and Facebook account.[122] As the Facebook account ID already includes the individual's real name, the court determined that the above disclosure was not anonymous.[123] Indeed, the court declared that Hulu's disclosure to Facebook would violate the VPPA should there be clear evidence that the parties "negotiated the exchange of cookies so that Facebook could track information (including watched videos) about its users on Hulu's platform when the Like button loaded, or if Hulu knew that it was transmitting Facebook ID cookies and video watch pages."[124] For this reason, the court was reluctant to grant summary judgment before it had completed a full analysis on the cookie.[125]

This district court decision, because it supported the need for a court to look at the specific facts in each case, opened the floodgates for class-action litigation under the VPPA against online video service providers.[126] Although the court attempted to distinguish online business from the personal disclosures the VPPA intended to prevent, it did not resolve ambiguities regarding the thresholds for "subscriber" and "personally identifiable information."[127]

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121. *Id.* at *44–45.

122. *In re Hulu Privacy Litig.*, 2014 WL 1724344, at *50.

123. The court likened such a disclosure to throwing away confidential information into a bin that you knew was searched by the Washington Post. *See id.*

124. *Id.* at *55.

125. *Id.*

126. Wooten & DeMeola, *supra* note 95 (noting subsequent filings after the initial decision against ESPN, Cartoon Network, and the Wall Street Journal). In 2014, further VPPA cases were filed against ESPN, CNN, Dow Jones, and the Walt Disney Company. *See generally* Gregory M. Huffman, Note, *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 (2016).

127. *In re* Hulu Privacy Litig., 2012 WL 3282960, at *13–19.

B. Ellis v. Cartoon Network: The Eleventh Circuit's Narrow Approach to "Subscriber"

The Eleventh Circuit endorsed a narrow definition of "subscriber," deciding that individuals using a free application (or "app") on their phone to watch a video do not qualify for protection under the VPAA.[128] In *Ellis v. Cartoon Network*, Mark Ellis downloaded the free Cartoon Network app onto his Android phone to watch videos from the network.[129] Using the app did not require logging in to view content.[130] Cartoon Network then provided the Ellis's Android ID number and the video title watched to "Bango," a service that tracks consumer behavior across multiple platforms and links that information to a particular person.[131]

The Eleventh Circuit noted that most dictionaries define "subscriber" as someone making some sort of payment.[132] The court, however, concluded that payment is only one factor in determining whether someone is a subscriber, adopting the 1981 Webster's Third New International Dictionary definition of "subscriber" as "one that favors, aids, or supports (as by money contribution, moral influence, [or] personal membership)."[133] In looking at other VPPA cases outside of the Eleventh Circuit, the court noted the discrepancy in judicial approaches to the interpretation of the word "subscribers" and elected instead to adopt a straightforward approach based on the "ordinary meaning" of the word "grounded" in the text of the Act.[134] To accomplish this goal, the court pointed to the totality of factors involved in subscriptions including "payment, registration, commitment, delivery, [expressed association,] or access to restricted content."[135] Finally, the court justified its approach by

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128. *See generally* Ellis v. Cartoon Network, Inc., 803 F.3d 1251 (11th Cir. 2015).

129. *Id.* at 1254.

130. *Id.* at 1253–54.

131. *Id.* at 1254.

132. *Id.* at 1256.

133. *Ellis*, 803 F.3d at 1256; WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2278 (Philip Babcock Gove et al. eds., 3d ed. 1966).

134. *Ellis*, 803 F.3d at 1256; *see* Yershov v. Gannett Satellite Info. Network, Inc., 104 F. Supp. 3d 135, 146–47 (D. Mass. 2015).

emphasizing that Congress had not altered the VPPA definitions of "consumer" or "subscriber" during the 2012 amendment process.[136]

Using this approach, the court determined that Ellis's interaction with the Cartoon Network app did not qualify him as a "subscriber" under the VPPA.[137] The court noted that Ellis had no "ongoing relationship" with Cartoon Network and that Ellis was "free to simply delete the app without consequences."[138] Additionally, Ellis did not have to provide any personal information to access the content.[139] The court in this case agreed with the 2012 analysis of the district court in *In re Hulu Privacy Litigation* that to be a subscriber, an individual must do more than visit a website and bookmark it for future use.[140] In the instance before it, the court declared that Ellis did not establish an ongoing relationship because by accessing a free app for free content, he was essentially just bookmarking the site.[141]

C. Yershov v. Gannett Satellite Info. Network: The First Circuit's Broad Interpretation of "Subscriber" & "Personally Identifiable Information"

In April 2016, the First Circuit significantly broadened the definitions of "subscriber" and "personally identifiable information" under the VPPA.[142] In *Yershov*, plaintiffs accessed video and other content through Gannet's USA Today mobile app which in turn gave a third party, Adobe, information about the user including the title of the video, the phone's GPS coordinates, and the phone's unique Android ID.[143]

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135. *Ellis*, 803 F.3d at 1256 (alteration in original) (quoting *Yershov*, 104 F. Supp. 3d at 147).

136. *Id.* at 1256–57.

137. *Id.* at 1258.

138. *Id.* at 1257.

139. *Id.*

140. *Ellis*, 803 F.3d at 1257.

141. *Id.* at 1258 ("[T]he free downloading of a mobile app on an Android device to watch free content, without more, does not a 'subscriber' make.").

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

143. *Id.* at 484–85.

The court analyzed whether Yershov qualified as a "subscriber" under the VPPA on the alleged facts.[144] Like the court in *Ellis*, the court in *Yershov* consulted various dictionaries regarding the "plain meaning" of the term "subscriber"[145] but ultimately adopted a multi-step approach and interpreted the term more broadly.[146] In this instance, the First Circuit concluded that a subscriber is simply a person who "subscribes"; thus, it ignored other variations of the word and instead looked to definitions of the verb "subscribe."[147] In doing so, the court relied on updated definitions from The American Heritage Dictionary from 2000, which defined "subscribe" as "[t]o receive or be allowed to access electronic texts or services by subscription" and additionally defined "subscription" to include "[a]n agreement to receive or be given access to electronic texts or services."[148] In choosing this interpretation of "subscriber," the First Circuit overturned the District Court's decision, one that the Eleventh Circuit in *Ellis* had championed in its own approach.[149]

Furthermore, the court openly deviated from the Eleventh Circuit's approach in *Ellis* in the remainder of its analysis.[150] The First Circuit first analogized the USA Today app to a service of convenience, akin to receiving a newspaper delivered to one's doorstep.[151] Indeed, the court found that by simply downloading the app, a user proclaimed intention of visiting the content more than once, thereby establishing a significant relationship.[152] The court also reviewed the factors relied on in *Ellis* but commented that its own analysis balanced these factors "quite differently":

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144. *Id.* at 487.

145. *Id.*

146. *Id.* at 487–89.

147. *Yershov*, 820 F.3d at 487.

148. THE AMERICAN HERITAGE DICTIONARY 1726 (4th ed. 2000).

149. *Yershov*, 820 F.3d at 488; Ellis v. Cartoon Network, Inc., 803 F.3d 1251, 1256 (11th Cir. 2015).

150. *Yershov*, 820 F.3d at 489.

151. *Id.* at 487.

152. *See id.*

To use the App, Yershov did indeed have to *provide* Gannett 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 provide consideration in the form of that information, which was of value to Gannett. And by installing the App on his phone, thereby establishing seamless access to an electronic version of USA Today, Yershov *established a relationship* with Gannett that is materially different from what would have been the case had USA Today simply remained one of millions of sites on the web that Yershov might have accessed through a web browser.[153]

The court also distanced its decision from that in *Ellis* by concluding that the legislative inaction regarding the meaning of "subscriber" in the amendment indicated that the legislature intended courts to broadly interpret the term.[154]

The First Circuit concluded that sharing a device's Android ID and GPS coordinates qualify as sharing "personally identifiable information."[155] Although the court admitted the VPPA's definitions were "awkward,"[156] it drew inspiration from the Act's statement that "personally identifiable information" includes an individual's name and address, thus stating that the category of information should be taken to encompass a broader range of data than just those listed.[157] The court considered the hypothetical scenario where an individual views videos repeatedly from both home and work.[158] In this scenario, the panel concluded that repeated views from these locations would reveal the identity of the individual in the same manner as handing over a name or address.[159] Therefore, the First Circuit declared that Gannet should have been aware that Adobe had the "know

153. *Id.* at 489 (emphasis added).

154. *Id.* at 488.

155. *Yershov*, 820 F.3d at 486.

156. *Id.*

157. *Id.* (quoting 18 U.S.C. § 2710(a)(3) (2012) (effective Jan. 10, 2013)).

158. *Id.*

159. *Id.*

how" to link the addresses with a particular individual through data collection.[160]

As the decision in *Yershov* merely allowed the case to survive a motion to dismiss, the court noted that its "actual holding, in the end, need not be quite as broad as [its] reasoning suggests."[161] However, the First Circuit's reasoning has thrown the contentious arena of the VPPA into further chaos.[162]

D. In re Nickelodeon Consumer Privacy Litigation: The Third Circuit's Interpretation of "Personally Identifiable Information"

In June of 2016, yet another federal circuit court, the Third Circuit, faced the difficult task of addressing the limits of liability under the VPAA.[163] In *In re Nickelodeon*, plaintiffs claimed that Viacom provided a third party, Google, with children's "personally identifiable information" obtained when both parties installed their cookies on its Nickelodeon website.[164] These cookies then collected, for advertising purposes, each child's username, gender, birthdate, IP address, browser settings, unique device identifier, operating system, screen resolution, browser version, and web communications, including URL and video requests and cookie identifiers.[165] Among other claims, plaintiffs brought an action under the VPAA against both Viacom and Google.[166]

As the complaint listed Google as a defendant, the Third Circuit initially addressed the issue of third-party liability under the VPAA.[167]

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160. *Yershov*, 820 F.3d at 486.

161. *Id.* at 489.

162. *See* Joshua Jessen & Priyanka Rajagopalan, *1st Circ. Video Privacy Decision Creates Split with 11th Circ.*, LAW360 (May 13, 2016, 12:15 PM), http://www.law360.com/articles/795073/1st-circ-video-privacy-decision-creates-split-with-11th-circ [http://perma.cc/44BD-DCRL].

163. *See generally In re* Nickelodeon Consumer Privacy Litig., 827 F.3d 262.

164. *Id.* at 269.

165. *Id.*

166. *Id.* at 267.

167. *Id.* at 279.

Here, the court determined that in receiving information from Viacom, Google's position was akin to that of the reporter who released Judge Bork's video records in 1987.[168] Indeed, plaintiffs argued that the reporter who published Judge Bork's records would have been subject to liability under the VPAA if it had existed then.[169] However, the Third Circuit noted that the drafting of the VPPA was unclear regarding the declaration in subsection (c) that "a person found in violation" of the statute may be held liable.[170] To resolve this ambiguity, the court reviewed decisions by the Sixth and Seventh Circuits regarding the liability of third parties.[171] Based on these decisions, the court decided that the VPPA merely prohibited the disclosure of "personally identifiable information" and not the collection of such information.[172] Thus, Google was exempt from the claim.[173]

Acknowledging that the VPPA was enacted before the widespread use of the Internet, the court followed the U.S. Supreme Court's "instruction" that "[w]hen technological change has rendered its literal terms ambiguous, [a law] must be construed in light of [its] basic purpose."[174] Through this approach, the court decided that any reasoning that would find "any unique identifier" as "personally identifiable information" was far too broad[175] since such reasoning contains no limitations and would force courts to presume the use of third party cookies on any website is illegal.[176] The court also acknowledged that section

168. *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d at 279–81.

169. *Id.* at 279.

170. 18 U.S.C. § 2710(c) (2012) (effective Jan. 10, 2013); *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d at 280.

171. *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d at 281 (reviewing Daniel v. Cantrell, 375 F.3d 377 (6th Cir. 2004) and Sterk v. Redbox Automated Retail, LLC, 672 F.3d 535 (7th Cir. 2012) to determine that the VPPA did not include liability for parties who received personally identifiable information).

172. *Id.*

173. *Id.*

174. *Id.* at 284 (quoting Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (interpreting the Copyright Act)).

175. *Id.* at 290.

176. *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d at 290.

(a)(3) of the VPPA could be interpreted to widen the scope of personally identifiable information, but determined that Congress's intent at the time of the legislation was that this phrase would apply to other simple types of information that would identify a specific individual and not stretch to identifiers online.[177]

Using the Supreme Court's words as guidance, the Third Circuit found that personally identifiable information in the VPPA, as currently written, could only be information that with "little or no extra effort" would link individuals with their video records.[178] The court bolstered its position by noting that Congress did not alter the language during the 2012 amendment process to provide an updated definition despite receiving amicus briefs that raised the issue.[179] Furthermore, the court distinguished Congress's passing of the Children's Online Privacy Protection Act to allow the Federal Trade Commission to issue regulations expanding the definition of "personal information" to include "persistent" identifiers that "over time" could reveal an individual's identity.[180] Similarly, without a comparable legislative process, the court was unwilling to expand the meaning of "personally identifiable information."[181]

With regard to Viacom, the Third Circuit focused on Viacom's disclosures of IP addresses, browser fingerprints, and device identifiers.[182] The court described these pieces of information as "static digital identifier[s]" that could not be directly linked to an individual without further information or considerable data-tracking.[183] Indeed, the court noted that the process necessary to match an IP address to an individual person would require a subpoena in many cases.[184] Thus, the court remarked that an outcome similar to *Yershov* would be appropriate only

177. 18 U.S.C. § 2710(a)(3) (2012) (effective Jan. 10, 2013); *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d at 286.

178. *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d at 284.

179. *Id.* at 288–89.

180. *Id.* at 287.

181. *Id.*

182. *Id.* at 281–82.

183. *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d at 283.

184. *Id.* at 281 n.121.

where technology enabled receiving parties to enter an IP address in a search engine and reveal the identity of the individual with no further complications.[185] Therefore, the court found that Viacom's disclosures to Google practically identifying individuals was "too hypothetical" to qualify as "personally identifiable information."[186]

IV. IMPACT OF THE CURRENT CIRCUIT SPLIT & THE SUPREME COURT'S INABILITY TO EFFICIENTLY RESOLVE THE ISSUES

[W]e do not think that a law from 1988 can be fairly read to incorporate such a contemporary understanding of Internet privacy.

–Judge Julio M. Fuentes[187]

The Third Circuit correctly noted that the current crisis of the VPPA revolves around the common law's inability to keep up with rapid changes in technology.[188] While no case explicitly declares a split among the federal circuit courts, the circuits' approaches are too irreconcilable to predict future cases brought under the current VPPA. Furthermore, as this section will explain, even if the Supreme Court had taken a stance on the circuit splits, a Supreme Court decision regarding "subscribership" and "personally identifiable information" would not adequately resolve the underlying issues at hand. Thus, only Congressional action will be sufficient to prevent future complications by providing Internet businesses with a reliable guideline.

A. "Subscriber": The Battle of the Dictionaries; 2012 Amendment

As currently constructed, the VPPA's failure to define "subscriber" leaves courts the opportunity to manipulate the term to their own ends. In addressing the VPPA's failure to define "subscribership," the First Circuit in *Yershov* circumnavigated the common definition of the term "subscriber" and instead looked to define the related words "subscribe" and "subscription."[189] The First Circuit has faced valid criticism for avoiding

185. *Id.* at 290 n.177.

186. *Id.* at 290.

187. *In re* Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 290 (3d Cir. 2016).

188. *Id.*

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

any citation to pre-1988 dictionaries to support its final conclusion regarding legislative intent.[190] On the other hand, the finding in *Ellis* requires much more comprehensive contact and sharing of personal information and uses definitions as understood at the time by utilizing the 1981 Webster's Third New International Dictionary.[191] In this regard, the *Ellis* approach seems to more accurately represent Congress's intent.

Yet, as illustrated by the *Yershov* court's application of the *Ellis* court's analysis in other respects, basing decisions on a finding of a "relationship" still leaves ample room for courts to dictate the outcome based on their own policy preferences.[192] Indeed, this split is dangerous for online video providers as those providers who distribute videos through apps are currently at the mercy of a court's choice of dictionary. Furthermore, under the *Yershov* decision, a trade of any information is sufficient to form a relationship between the parties,[193] leaving video providers potentially included under the VPPA should a court deem that the user intended to form a relationship with the video provider.

The courts in *Ellis* and *Yershov* also reached different conclusions about Congress's purpose in failing to define the term "subscriber" during the 2012 amendment process.[194] To understand this disagreement, it is important to note the impetus for the amendment and what it changed. As noted above, the press described the 2012 amendment to the VPPA as a "Netflix-Backed Amendment."[195] Indeed, this fact alone explains the legislature's priorities in making the changes. Since Netflix users pay for

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190. Joshua Jessen & Priyanka Rajagopalan, *1st Circ. Video Privacy Decision Creates Split with 11th Circ.*, LAW360 (May 13, 2016, 12:15 PM), http://www.law360.com/articles/795073/1st-circ-video-privacy-decision-creates-split-with-11th-circ [http://perma.cc/44BD-DCRL].

191. *See* Ellis v. Cartoon Network, Inc., 803 F.3d 1251, 1256 (11th Cir. 2015).

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

193. *See id.*

194. *Compare Ellis*, 803 F.3d at 1256–57 (indicating that Congress did not want the term to be broadly defined), *with Yershov*, 820 F.3d at 488 (indicating that Congress did not want the term to be narrowly defined).

195. *See Video Privacy Protection Act*, EPIC, http://epic.org/privacy/vppa/#2011 [http://perma.cc/A5CT-ZRB5]; Joe Mullin, *Congress Tweaks US Video-Privacy Law so Netflix Can Get on Facebook*, ARS TECHNICA (Dec. 21, 2012, 11:41 AM), http://arstechnica.com/tech-policy/2012/12/congress-tweaks-us-video-privacy-law-so-netflix-can-get-on-facebook [http://perma.cc/V8KR-FQPJ].

access to the company's video library, they would qualify as "subscribers" under either a broad or a narrow interpretation of the term.[196] Therefore, any legislation sought by Netflix would necessarily have no interest in addressing this definition. Thus, it is clear why the 2012 amendment process provided no clarification on the scope of "subscriber" under the VPPA.

B. "Personally Identifiable Information": Disagreement over a Static versus Evolving Definition

The differences between the First and Third Circuit's interpretation of "personally identifiable information" under the VPAA stem from a fundamental disagreement over whether the term should remain static with a 1980s definition or evolve with changing technology.[197] In *Yershov*, the First Circuit argued for a broad interpretation, relying on the original Congressional intent to protect more than just an individual's name as "personally identifiable information."[198] Yet the logic in extending what types of information may be "personally identifiable" creates a possible slippery slope of liability that places the onus on the private viewer who may not know a conglomerate has the ability to discern an individual's identity from collected data. Conversely, in *In re Nickelodeon*, the Third Circuit argued that the 2012 amendment did not update the definition of the term in accordance with the trend of other legislation.[199] Therefore, the court reasoned that the definition of "personally identifiable information" should remain static despite the threat of data amalgamation in the future.[200]

Indeed, the use of "personally identifiable information" in the Cable Communications Policy Act of 1984 ("CCPA") supports such a static interpretation of the term.[201] Curiously, the CCPA only negatively defines

196. *Choose the Plan That's Right for You*, NETFLIX, http://www.netflix.com/getstarted?locale=en-IN [http://perma.cc/TC7X-Y9EB].

197. *In re* Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 290 (3d Cir. 2016).

198. *Yershov*, 820 F.3d at 486.

199. *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d at 284.

200. *Id.* at 290.

201. 47 U.S.C. § 551 (2012) (effective Oct. 26, 2001).

the term through an amendment in 1992, stating that the term "does not include any record of aggregate data which does not identify particular persons."[202] This revision suggests that the original intention of the CCPA possibly included impersonal aggregated data. However, even including the amendment to the CCPA, courts have taken a narrow interpretation of the original definition of "personally identifiable information."[203] As the Tenth Circuit observed in a footnote in *Scofield v. Telecable of Overland Park, Inc.*, the legislative history of the CCPA indicates that the term was meant to apply only to "specific information about the subscriber" or the name and address of the individual on a list.[204]

C. Inability of the U.S. Supreme Court to Adequately Resolve the Issues

A Supreme Court decision interpreting the breadth of subscribership under the VPPA could have decisively signaled whether the Act applies only to the online equivalents of membership to video stores or whether it applies beyond this scope to an individual's interaction with any video distributor online. If the Supreme Court adopted the reasoning of the Eleventh Circuit in *Ellis* and narrowed the definition to the sharing of personal information and comprehensive contact, it would give video providers a general idea of what their boundaries are. However, if the Supreme Court instead broadened the definition of "subscriber," thereby broadening subscribership to free, downloadable apps, it would create considerable economic waste. Companies would err on the side of caution and incur expense in developing compliant, but perhaps less efficient, practices. Indeed, such a broad interpretation would not hinder data collection, but only deter video providers from using the convenient app format for video distribution. To draw on the newspaper delivery analogy used in *Yershov*,[205] if a doorstep is too far, the company will not toss a newspaper but leave it on the public street instead. In either case, the Supreme Court would need to define precisely the relationship necessary to establish subscribership, which it is currently unwilling or unable to do.

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202. *Id.* § 551(a)(2).

203. Scofield v. Telecable of Overland Park, Inc., 973 F.2d 874, 876 n.2 (10th Cir. 1992); *see also* United States v. Cox Cable Commc'ns, No. 98CV118/RV, 1998 WL 656574, at *1 n.4 (N.D. Fla. Apr. 28, 1998).

204. *Scofield*, 973 F.2d at 876 n.2.

205. Yershov v. Gannett Satellite Info. Network, Inc., 820 F.3d at 487.

Additionally, if the Supreme Court were to broaden the interpretation of "subscriber" under the VPPA to cover free app users, it may prove to be insufficient to cause the desired change in online activity. Indeed, why should the title of a video on the USA Today app be treated differently from other content on an app, such as the title of the article, or simply the fact that an individual has downloaded the app to a device? In the age of brick-and-mortar video stores, the video's title or description was the chief content that would tie an individual to certain interests and entertainment preferences.[206] Today, a video may be only one of many pieces of media on a page that would provide that same information about an individual.[207]

Indeed, members of Congress showed a similar thought process in their desire to include library records in early drafts of the Act—all information identifying "intellectual vitamins" must be protected equally.[208] Although library records were separated from video records in the original drafting of the Act due to complications in enforcement against different providers,[209] it should not be difficult to enforce the sharing of video titles and web page titles through an electronic medium by the same provider. But, a broad interpretation of subscribership by the Supreme Court to include such apps would be fruitless without systematic change as the same data would simply be acquired elsewhere.

With regard to "personally identifiable information," both the First Circuit in *Yershov* and the Third Circuit in *In re Nickelodeon* addressed the real concern underlying the debate: data brokers' ability to unmask the identities of individuals via their disclosures through accessing web pages.[210] In the end, this fear of "Big Brother" is not about individuals sharing small pieces of anonymous information in a single transaction but instead about the possibility of these Internet companies gathering information from Internet use to target specific individuals.[211] For

206. *See* S. REP. NO. 100-599, at 13 (1988).

207. Most news stories include both video and text addressing an issue. *See, e.g.*, *US Visa-Free Residency for Cubans Ends*, BBC NEWS (Jan. 13, 2017), http://www.bbc.com/news/world-us-canada-38605338 [http://perma.cc/WA73-MJDV].

208. *See* S. REP. NO. 100-599, at 7–8.

209. *Id.* at 8.

210. *See Yershov*, 820 F.3d at 486; *see also In re* Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 268 (3d Cir. 2016).

211. *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d at 268.

individuals to properly combat the possibility of being unmasked online, they would need extensive knowledge of the processes through which the information is currently gathered and connected as well as any new methods through which information will be gathered in the future. Any Supreme Court decision would only be binding as to the facts of the case before the court and so would not provide individuals this protection. Without legislative intervention, courts will continue to struggle in creating a standard for privacy through the time-consuming process of litigation.

Additionally, any Supreme Court interpretation of the VPPA terms' application to online schemes would need to consider the motivations of plaintiffs seeking protection under the VPPA: either a desire to gain access to the favorable damage provisions of the VPPA, a desire to assert a right to privacy and a lack of reasonable alternatives, or a combination of the two. For the Supreme Court to discern which scenario it is facing, it would need to undertake an exhaustive overview of current privacy law to find potential alternatives available to plaintiffs. If it were to find sufficient alternatives, the Supreme Court may side with the logic outlined in *In re Nickelodeon* and agree that the Act is meant only to protect a certain subset of individuals not protected at all by other privacy statutes.[212] Accordingly, the Court would have barred broadened access to VPPA claims for all but the most basic personally identifying information. But if no such alternative privacy laws applied, the Supreme Court would be forced to decide the precise limit of information that is "personally identifiable" under the VPPA. To set such a limitation, the Supreme Court would need access to significant resources and extensive knowledge regarding the information that may provide an individual's identity. Alternatively, should the Supreme Court not set strict requirements for "personally identifiable information," plaintiffs in subsequent litigation would continue to attempt to extend the reaches of the VPPA.

Overall, the Supreme Court would not have access to the same time, experts, and resources as Congressional committees to draft an outcome that would adequately resolve these issues. As noted in section I above, forty-two percent of American households currently use video-streaming services.[213] Thus, any drastic changes to the system of video distribution

212. *Id.* at 281.

213. Todd Spangler, *Streaming Overtakes Live TV among Consumer Viewing Preferences: Study*, VARIETY (Apr. 22, 2015, 5:21 AM), http://variety.com/2015/digital/news/streaming-overtakes-live-tv-among-consumer-viewing-preferences-study [http://perma.cc/K5XZ-TF3A].

would affect a sizeable portion of the population. Since the practice of collecting information in exchange for content has become commonplace, Congress should determine the threshold of information individuals are willing to trade for video services. Instead of courts broadening the lines of privacy under the VPPA, deferring to Congress empowers the public to defend its privacy through representation in the political process. To this end, the Supreme Court was entirely correct to deny certiorari in *In re Nickelodeon*.[214]

V. CONGRESSIONAL CONSIDERATIONS FOR DRAFTING NEW LEGISLATION TO FURTHER AMEND & SUPPLEMENT THE VPPA

> Our decision necessarily leaves some unanswered questions about what kinds of disclosures violate the Video Privacy Protection Act. Such uncertainty is ultimately a consequence of our common-law system of adjudication and the rapid evolution of contemporary technology.
>
> –Judge Julio M. Fuentes[215]

Congress could leave the VPPA static to govern the limited scope of the online equivalent of video rental subscription services. To do so, Congress would first need to amend the VPPA to clearly define such subscription services and encourage a narrow interpretation of the Act. This approach would allow Congress to move forward and make key decisions regarding online privacy as a whole. In fact, doing so is far from making the Act dead-letter law as the VPPA still governs pure subscription services that operate online.[216] Instead, the current circumstance creates an opportunity for the legislature to mold the future of online privacy.

In drafting new legislation, Congress should endeavor to provide sufficient clarity for video service providers of permitted online conduct while maintaining adequate flexibility to be adapted to future technological changes. First, Congress would be wise to consider the issues outlined in the previous section and thoroughly address the motives underlying VPPA claims. New legislation must be structured so as not to chill the entrepreneurial spirit of the online marketplace. It must leave markets open

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214. C. A. F. v. Viacom Inc., 827 F.3d 262, 262 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 624 (2017) (mem.).

215. *In re* Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 290 (3d Cir. 2016).

216. 18 U.S.C. § 2710(a)–(f) (2012) (effective Jan. 10, 2013).

for small video makers, distributors, and websites to enter and generate income through advertising revenue. Therefore, video service providers must be allowed to share *some* information to gain a profit from advertisement firms and data brokers. To balance these interests, Congress should invite commentary from businesses operating in Internet distribution of online video content.

As the subject matter of this legislation involves highly technical and specialized information, Congress must ensure that any protections of personal information are uniformly applied. One means of accomplishing this goal would be to delineate categories of data and their level of attachment to individual identity as discussed in *In re Nickelodeon*.[217] Such categories could establish a firm line on the number of steps or additional data necessary to unmask an individual to qualify as "personally identifiable information." This guidance would prove invaluable in ensuring uniform application in the future and avoid the current problems of the VPPA.

Congress should also consider the broad nature of the practice of online information collecting. For this purpose, future legislation could also address the source of the problem for the *Yershov* conundrum[218]—the collection of such data that can pinpoint an individual's viewing habits and history. As the Third Circuit decided in *In re Nickelodeon*, the VPPA merely permits claims against individuals that send data, not third parties who receive personally identifiable information with the ability or intent to discover an individual's identity.[219] New legislation could address this issue by barring such conduct. However, this consideration will run up against legitimate interests in freedom of speech, i.e. the reporter that obtained Judge Bork's information[220] and thus any restrictions must be narrowly tailored if applied. Therefore, it would be best to include a strict consent provision informing precisely what data is being combined. Such a measure would allow personalized advertising to continue but provide an avenue for individuals to set its limits.

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217. *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d at 289–90; *see* 18 U.S.C. § 2710(a)(3).

218. *See generally* Yershov v. Gannett Satellite Info. Network, Inc., 820 F.3d 482.

219. *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d at 267.

220. Andrea Peterson, *How Washington's Last Remaining Video Rental Store Changed the Course of Privacy Law*, WASH. POST (Apr. 28, 2014), http://www.washingtonpost.com/news/the-switch/wp/2014/04/28/how-washingtons-last-remaining-video-rental-store-changed-the-course-of-privacy-law [http://perma.cc/7K9H-JFY2].

Alternatively, should Congress have issues outlining all-encompassing regulation, a new statute could establish or appoint a governing body. This body could give nonbinding suggestions regarding the types and nature of permitted practices to aid future interpretation by generalist judges. Indeed, a governing body could provide much-needed relief for both individuals and video providers. Instead of waiting for the courts to set the limits of the legislation, companies that believe they may have exposure to liability under new legislation have the comfort of consulting the body to clarify their concerns and address any potential issues. Furthermore, the body would benefit individuals by providing a watchdog for online privacy instead of individuals having to rely solely on litigation. Should Congress require a more direct approach, it could enable a governing body to directly control application to emerging technologies similar to that granted to the Federal Trade Commission under the Children's Online Privacy Protection Act.[221]

VI. CONCLUSION

To some extent, of course, this exercise 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).

–Judge F. Dennis Saylor IV[222]

Since the VPPA's enactment in 1988,[223] the Act has protected individuals who wanted to watch videos without giving away their personal information to third parties.[224] However, the disagreements between the First, Third, and Eleventh Circuits regarding the definitions of "subscriber" and "personally identifiable information" clearly illustrate a struggle to adapt the Act to current technology and usage during the Internet era. As this Note has shown, it is not enough for courts to merely adopt a broad or narrow interpretation of the VPPA as these approaches will lead to either inconsistency in application by courts and the potential for nearly limitless liability for video service providers or under-protection of individuals'

221. *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d at 267.

222. Yershov v. Gannett Satellite Info. Network, Inc., 104 F. Supp. 3d 135, 140 (D. Mass. 2015).

223. S. REP. NO. 100-599, at 5 (1988).

224. *Id.* at 8.

identities. Furthermore, the current ambiguity regarding the reaches of the VPPA requires Internet video providers to navigate between the Scylla of bankruptcy and the Charybdis of unlimited liability.

Indeed, Congress must create new guidelines to prevent the onslaught of case-by-case litigation that will arise when courts are inevitably asked to apply such legislation to unanticipated new technology. While the principles underlying the VPPA protect individuals who engage in online activities,[225] the VPPA itself lacks sufficient clarity. Congress must act to adequately protect the interests of parties involved on all sides of the business of online video.

However, with the necessity of legislative change comes the prospect of fixing the current system. Although Congress created the VPPA using the form of similar acts in its time,[226] it has a chance to set a new standard for Internet privacy in drafting a new act that both addresses the needs of the consumer and safeguards the financial needs of the online industry.

225. *Id.*

226. *See* 47 U.S.C. § 551 (2012) (effective Oct. 26, 2001); 18 U.S.C. § 2510 (2012) (effective Nov. 2, 2002).