SUBSCRIBE HERE FOR MORE: ANALYZING THE VIDEO PRIVACY PROTECTION ACT IN THE MOBILE ERA

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I. INTRODUCTION

"There are two ways by which the spirit of a culture may be shriveled. In the first—the Orwellian—culture becomes a prison. In the second—the Huxleyan—culture becomes a burlesque . . . . In the Huxleyan prophecy, Big Brother does not watch us, by his choice. We watch him, by ours."

Neil Postman

In 1987, President Ronald Regan nominated D.C. Circuit Judge Robert Bork to the United States Supreme Court.[1] Bork's nomination is certainly best remembered as a "fierce dispute,"[2] incited by Bork's willingness to disclose his "controversial policy inclinations."[3] The extensive Senate hearings gained widespread publicity through television broadcasts, direct mailers, and printed media advertisements.[4] Although Bork's nomination exemplified a sharp ideological divide in the Senate, and ultimately was not approved,[5] both Republican and Democratic senators were appalled when a weekly Washington publication released a list of 146 movie titles Bork and his family had borrowed from a local video rental store.[6] In response to this heinous intrusion, Senator Patrick Leahy remarked, "[privacy] is not a conservative or a liberal or moderate issue. It is an issue that goes to the deepest yearnings of all Americans that we are free and we cherish our freedom and we want our freedom. We want to be left alone."[7]

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1. Ronald D. Rotunda, *The Confirmation Process for Supreme Court Justices in the Modern Era*, 37 EMORY L.J. 559, 561 (1988).
2. *Id.*
3. Albert P. Melone, *The Senate's Confirmation Role in Supreme Court Nominations and the Politics of Ideology Versus Impartiality*, 75 JUDICATURE 68, 72 (1991).
4. Rotunda, *supra* note 1, at 561.
5. Melone, *supra* note 3, at 75.
6. S. REP. NO. 100-599, at 5 (1988), *reprinted* in 1988 U.S.C.C.A.N. 4342-1, 4342–5.
7. *Id.* at 6.

In agreement with Senator Leahy's concerns, Congress passed the Video Privacy Protection Act (VPPA) in 1988.[8] The legislative purpose in enacting the VPPA is "to preserve personal privacy with respect to the rental, purchase, or delivery of video tapes or similar audio visual materials."[9] Furthermore, the VPPA is designed to enhance the concept of privacy for individuals in their daily lives, particularly in an age of rapid technological innovation.[10] As Senator Simon explained, "the advent of the computer means not only that we can be more efficient than ever before, but that we have the ability to be more intrusive than ever before."[11] Echoing Simon's fears, Senator Leahy opined, "I think that [intrusion] is wrong. I think that really is Big Brother, and I think it is something that we have to guard against."[12]

Today, the majority of videos are obtained online, rather than in a video rental store.[13] Nonetheless, understanding the VPPA is more crucial today than it was nearly 30 years ago. This is because online video service providers and third-party data collectors have a greater ability to track, monitor, and identify users in significant detail through a process known as reverse engineering.[14] For example, in 2006, Netflix released over 400,000 viewer profiles using anonymous identification numbers.[15] Despite these precautions, two computer scientists uncovered the identities of numerous Netflix subscribers by linking the released data profiles to customer reviews visible on the Internet Movie Database.[16] The resulting data breach exposed sensitive user information, such as sexual orientation and political affiliations.[17] Accordingly, the VPPA provides a valuable remedy for many disgruntled consumers whose privacy expectations have been compromised. Unfortunately, the challenge in applying an out-of-date privacy protection law in our modern technological era has led to disagreement and confusion among the federal circuit courts. Resolving this dispute is essential to adequately protecting the privacy interests of online video subscribers.

The purpose of this Note is to address the applicability of the VPPA to videos viewed on mobile devices through downloaded applications ("apps"). The fundamental issue presented is whether the user of a free mobile

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8. Video Privacy Protection Act, 18 U.S.C. § 2710 (1988).
9. S. REP. NO. 100-599, at 1.
10. *Id*. at 6 (statement of Sen. Grassley).
11. *Id*. at 6.
12. *Id*.
13. Daniel Lewis, *Technology Killed the Video Store*, THE SYDNEY MORNING HERALD (May 10, 2015), http://www.smh.com.au/entertainment/technology-killed-the-video-store-20150505-1mrikr.html.
14. *See* Laura J. Bowman, *Pulling Back the Curtain: Online Consumer Tracking*, 7 I/S: J.L. & POL'Y FOR INFO. SOC'Y 721 (2012).
15. Ryan Singel, *Netflix Spilled Your Brokeback Mountain Secret, Lawsuit Claims*, WIRED (Dec. 17, 2009 4:29 PM), https://www.wired.com/2009/12/netflix-privacy-lawsuit/.
16. *Id*.
17. *Id*.

application constitutes a "subscriber" under the VPPA. The following section describes the legal evolution of the VPPA since its creation, including the conflicting interpretations of the term "subscriber" between the First and Eleventh Circuits. Section III employs the concept of "push notifications" to create a bright-line test for determining when the use of a free mobile application qualifies as a subscription for purposes of the VPPA.

II. BACKGROUND

In 2012, the VPPA was amended to conform to "the realities of the 21st century."[18] Nonetheless, questions concerning the scope and applicability of the statute's protection continued to arise as new technologies emerged. The purpose of Part A is to provide an outline of the VPPA in its entirety, including a brief discussion of the statute's various elements and available remedy. Part B reviews the progression of case law interpreting two of the VPPA's primary provisions. Finally, Part C introduces the main topic this comment aims to address by examining the present treatment of the issue in the United States federal circuit courts.

A. The Video Privacy Protection Act

The VPPA provides "a video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person."[19] The aggrieved person is entitled to seek actual damages, including liquidated damages of at least $2,500, punitive damages, and attorney's fees in a United States district court.[20] Further, the court is authorized to award any additional equitable relief it deems necessary.[21]

The term "video tape service provider" is defined within the statute 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."[22] Additionally, "personally identifiable information" is defined to include "information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider."[23] The aggrieved person, referred to as the "consumer," is defined as "any renter, purchaser, or subscriber of goods or services from a video

18. 158 CONG. REC. H6849–50 (daily ed. Dec. 18, 2012) (statement of Rep. Goodlatte).
19. 18 U.S.C. § 2710(b)(1) (2012).
20. *Id.* § 2710(c)(2)(A)-(C).
21. *Id.* § 2710(c)(2)(D).
22. *Id.* § 2710(a)(4).
23. *Id.* § 2710(a)(3).

tape service provider."[24] The issue discussed here concerns the term "subscriber" as it is used within the statutory definition of "consumer." The text itself does not contain an additional definition for this term.

B. Increasing the Scope of Protection in Response to the Modern Digital Era

Given the dramatic evolution of computer technology in the last 30 years, consumers are now capable of obtaining video-content online.[25] Accordingly, modern "consumers" and "video tape service providers" do not fit neatly within the terms of the VPPA as written. The case law developing these two provisions is necessary in understanding the present framework of the VPPA, under which this Note's central dispute arises.

1. "Video Tape Service Provider"

In *In re Hulu Privacy Litigation*, the term "video tape service provider" was held to include Hulu.com, a website that delivers new and previously released digital video content.[26] Although Hulu does not deliver "prerecorded video cassette tapes," the court found the website's digital transmissions fell under the catchall phase "or other similar audio visual material."[27]

Attempting to avoid liability, defendant Hulu argued "materials" must consist of physical matter, and the VPPA's legislative history suggests the statute be limited to video content obtained solely from brick-and-mortar stores.[28] In response, the plaintiff argued the term "other similar audio visual materials" should be read broadly "to include new technologies for pre-recorded video content."[29]

In the end, the court reasoned the statute "is about the video content, not about how that content was delivered."[30] Furthermore, the court argued the inclusion of "streamed" video content within the scope of the statute comports with Congress's intent to safeguard the protections of the VPPA, even as new technologies evolve.[31]

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24. *Id.* § 2710(a)(1).
25. *See* Alexander Trowbridge, *Evolution of the Phone*, CBS NEWS (Dec. 16, 2014, 5:00 AM), http://www.cbsnews.com/news/evolution-of-the-phone-from-the-first-call-to-the-next-frontier/.
26. In re Hulu Privacy Litigation, No. C 11-03764 LB, 2012 WL 3282960, at *6 (N.D. Cal. Aug. 10, 2012).
27. *Id.*
28. *Id.* (citing S. REP. NO. 100-599, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4342-1, 4342–5).
29. *Id.* at *5.
30. *Id.*
31. *Id.* at *6.

Ultimately, expanding the scope of the VPPA to include streamed content paved the way for the issues brought in both *Ellis* and *Yershov*, and arguably led to significant confusion in defining the modern "subscriber."

2. "Consumer"

The decision in *Hulu* also reevaluated the term "consumer" in the VPPA, explaining a "renter, purchaser, or subscriber" need not contribute monetary payment in exchange for the video service.[32]

To gain access to Hulu.com, a user must register for an account.[33] Although the registration process does not require payment, the user must provide their name, email address, birth date, and gender.[34] Once this process is complete, the website creates "a unique numerical identifier of at least seven digits," known as the "User ID."[35]

While the plaintiffs in *Hulu* conceded they were not "renters" or "purchasers" of video content from Hulu.com, they insisted they were "subscribers" under the VPPA.[36] In response, defendant Hulu argued, "the ordinary meaning of subscriber implies payment of money."[37] Additionally, Hulu claimed, "even if payment is not required to be a subscriber, being a subscriber requires more than just visiting Hulu."[38]

Nonetheless, the court held the plaintiffs were subscribers under the VPPA because they had done "more than just visiting Hulu's website."[39] For example, when the plaintiffs visited the website to view videos, their data was collected through the use of tracking "cookies."[40] Furthermore, while the court agreed that the terms "renter" and "purchaser" suggest monetary payment, "subscriber" does not, as Congress could have instead used the phrase "paid subscriber" if this had been its intention.[41]

Conversely, in *Austin-Spearman v. AMC Network Entertainment*, the court held a user who visits a website to view free video clips without a login or registration, does not constitute a "subscriber" for purposes of the VPPA.[42]

Using the dictionary as its primary reference, the court reasoned the conventional definition of "subscription" must include either (1) monetary payment or (2) the release of personal information, in exchange for a future

32. *Id.* at *8
33. In re Hulu Privacy Litig., No. C 11-03764 LB, 2014 WL 1724344, at *2 (N.D. Cal. Apr. 28, 2014)
34. *Id.*
35. *Id.*
36. In re Hulu Privacy Litig., No. C 11-03764 LB, 2012 WL 3282960, at *7 (N.D. Cal. Aug. 10, 2012).
37. *Id.*
38. *Id.*
39. *Id.* at *8.
40. *Id.*
41. *Id.*
42. Austin-Spearman v. AMC Network Entm't, LLC, 98 F. Supp. 3d 662, 669 (S.D.N.Y. 2015).

and recurring service or benefit, such as "periodical magazines, club membership, cable services, or email updates."[43] Where monetary payment is not involved, an agreement must create a "deliberate and durable affiliation" between the subscriber and provider.[44] Moreover, it is generally the subscriber who initiates the undertaking, through affirmative steps to "supply the provider with sufficient personal information to establish the relationship and exchange."[45]

The plaintiff in *Austin-Spearman* did not meet this standard, as she did not exchange monetary payment, or take any other affirmative act, such as registering for an account or creating a user profile, to establish an on-going relationship with the video service provider.[46] For instance, because the plaintiff could "decide to never visit the AMC website ever again—and that decision will have zero consequences, costs, or further obligations," the relationship lacked all the critical components of a subscription.[47]

The *Austin-Spearman* court distinguished its decision from *Hulu*, as the users there did sign up, register, and create a profile before viewing streamed videos.[48] This information allowed Hulu.com to identify a user's name, location, and preference information in exchange for services.[49] According to the court in *Austin-Spearman*, this exchange by the subscriber qualifies as an affirmative act sufficient to establish a "deliberate and durable affiliation."[50]

Finally, in *Locklear v. Dow Jones*, the district court found a plaintiff who had downloaded the *Wall Street Journal Live Channel* from Roku, "a digital media-streaming device," constituted a subscriber under the VPPA.[51] First, the court agreed with the claim that "no money exchange is required between a 'customer' and 'provider' for a plaintiff to qualify as a 'subscriber."[52] Second, downloading the channel allowed Roku to track the user's serial number and viewing history.[53] Third, according to *Hulu*, registration is not a requisite element of a subscription when the user is continuously monitored through tracking cookies, even without a formal login procedure.[54]

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43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 670.
49. *Id.*
50. *Id.* at 669.
51. Locklear v. Dow Jones, 101 F. Supp. 3d 1312, 1316 (N.D. Ga. 2015).
52. *Id.* at 1315-16.
53. *Id.* at 1316.
54. *Id.* (citing In re Hulu Privacy Litig., No. C 11-03764 LB, 2012 WL 3282960, at *8 (N.D. Cal. Aug. 10, 2012)).

C. Disagreement Among the U.S. Circuit Courts

Most everyone would agree the smartphone has become an integral part of daily American life.[55] Furthermore, it is not uncommon for smartphone users to download mobile applications, or "apps," onto their devices for additional convenience and entertainment.[56] Many of these apps allow users to stream and view video content directly on their phone.[57] Accordingly, the judiciary was eventually asked to determine whether the user of a free mobile application constitutes a "subscriber" under the VPPA. In 2015 and 2016, both the Eleventh and First Circuit Courts, respectively, addressed this issue. Although the following cases are factually similar, the courts reached divergent opinions. The next two sections outline the facts of each dispute, as well as the deciding circuit court's analysis and conclusion.

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

In *Ellis v. Cartoon Network, Inc.*, the Eleventh Circuit held the user of a free mobile application was not a subscriber under the VPPA.[58]

a. Facts

In *Ellis*, the plaintiff downloaded the "CN" mobile app onto his smartphone to view episodes and clips of Cartoon Network television programs.[59] While users can choose to view additional programming by logging in through their cable server, numerous clips are available for free through the app without a login requirement.[60] Furthermore, the user does not in any manner consent to the sharing of personally identifiable information in using the free app. [61]

Although the user does not provide Cartoon Network with their name or payment information, each Android Smartphone has a mobile device identification number, or "Android ID."[62] This identification number is a randomly generated 64-bit number continuously tied to the Android device.[63] Using this mobile ID, Cartoon Network monitors and records every video the

55. *Planet of the Phones*, THE ECONOMIST, http://www.economist.com/news/leaders/21645180-smartphone-ubiquitous-addictive-and-transformative-planet-phones (last visited Mar. 2, 2017).
56. *See id.*
57. *See id.*
58. Ellis v. Cartoon Network, Inc., 803 F.3d 1251, 1252 (11th Cir. 2015).
59. *Id.* at 1254.
60. *Id.* at 1253.
61. *Id.* at 1254.
62. *Id.*
63. *Id.*

user views.[64] This information is then transmitted to Bango, a third-party data analytics firm.[65] This transmittal occurs every time the user accesses the app to view video clips.[66]

According to Bango, its technology monitors "individual behaviors across the Internet and mobile applications" and "reveals customer behavior, engagement and loyalty across and between all websites and apps."[67] By accessing all the websites the user visits, Bango acquires enough information to identify the specific person associated with the Android ID.[68] The viewing record Cartoon Network transmits to Bango is eventually linked to a particular person.[69] So, although plaintiff Ellis did not provide Cartoon Network with any identifying information, Bango was able to "reverse engineer" this information through the Android ID.[70] Ellis brought suit against Cartoon Network, arguing he qualified as a subscriber under the VPPA.[71] Cartoon Network moved to dismiss the complaint.[72]

b. District Court Analysis and Holding

The district court determined plaintiff Ellis was a subscriber under the VPPA.[73] Relying greatly on the precedent set forth in *Hulu*, the court agreed a subscription does not require monetary payment, if the plaintiff "pleads more than simply visiting a website."[74] Because plaintiff Ellis provided Cartoon Network with his viewing history and Android ID in exchange for video clips, he qualified as a subscriber under the VPPA.[75]

Interestingly, however, the district court granted Cartoon Network's motion to dismiss, as an Android ID does not constitute "personally identifiable information" under the statutory definition provided by the VPPA.[76]

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64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* (internal quotations omitted).
68. *Id.*
69. *Id.*
70. Ellis v. Cartoon Network, Inc., No. 1:14-CV-484-TWT, 2014 WL 5023535, at *1 (N.D. Ga. Oct. 8, 2014).
71. *Ellis*, 803 F.3d at 1254.
72. *Id.*
73. *Id.*
74. *Ellis*, 2014 WL 5023535, at *2.
75. *Id.*
76. *Id.* at *3 ("The Android ID is a randomly generated number that is unique to each user and device. It is not, however, akin to a name. Without more, an Android ID does not identify a specific person. As the Plaintiff admits, to connect Android IDs with names, Bango had to use information collected from a variety of other sources." (internal quotations omitted)).

c. Eleventh Circuit's Analysis and Holding

On appeal, the Eleventh Circuit reversed the district court's conclusion that Ellis was a subscriber of the CN App under the VPPA.[77]

The court begins its analysis with the text of the statute.[78] Although the court says it will first consider the ordinary meaning of the term, the court merely references dictionary definitions.[79] In doing so, the Eleventh Circuit agreed with the district court in that subscriber does not necessarily entail monetary payment.[80] Furthermore, because the statutory definition of consumer merely lists "subscriber," rather than "paid subscriber," the court insists monetary exchange is only one factor to consider.[81]

In reversing the issue, the Eleventh Circuit relied on the *Yershov* district court decision, praising its reasoning as "better grounded in the statutory text."[82] There, the court defined subscriptions as a set of factors: "payment, registration, commitment, delivery, and/or access to restricted content."[83] This means that a subscription, though not requiring monetary payment, must contain some "commitment, relationship, or association."[84] Here, Ellis simply did not establish the requisite relationship consistent with the meaning of subscriber.[85]

The Eleventh Circuit also criticized the district court's simplified understanding of *Hulu* as merely requiring a plaintiff to plead "more than just visiting" the video supplier's website.[86] In reality, the plaintiffs in *Hulu* "did a lot more than just visit" by making an account, generating a user profile, and becoming a registered user. [87]

Ellis, on the other hand, failed to establish a relationship with Cartoon Network through similar affirmative steps.[88] In addition to the lack of monetary payments, Ellis "did not receive a Cartoon Network ID, did not

77. *Ellis*, 803 F.3d at 1258.
78. *Id.* at 1255.
79. *Id.* at 1255–56.
80. *Id.* at 1256.
81. *Id.*
82. *Id.*
83. Yershov v. Gannett Satellite Info. Network, 104 F. Supp. 3d 135, 147 (D. Mass. 2015).
84. *Ellis*, 803 F.3d at 1256 (citing Austin–Spearman v. AMC Network Entm't LLC, 98 F. Supp. 3d 662, 669 (S.D.N.Y. 2015)) ("Whatever the nature of the specific exchange, what remains is the subscriber's deliberate and durable affiliation with the provider: whether or not for payment, these arrangements necessarily require some sort of ongoing relationship between provider and subscriber, one generally undertaken in advance and by affirmative action on the part of the subscriber, so as to supply the provider with sufficient personal information to establish the relationship and exchange.").
85. *Id.* at 1257–58.
86. *Id.* at 1257 (citing In re Hulu Privacy Litigation, No. C 11-03764 LB, 2012 WL 3282960, at *7 (N.D. Cal. Aug. 10, 2012)).
87. *Ellis*, 803 F.3d at 1257.
88. *Id.*

establish a Cartoon Network profile, did not sign up for any periodic services or transmissions, and did not make any commitment or establish any relationship that would allow him to have access to exclusive or restricted content."[89] Rather than a subscription, the court equated the downloading of a free application on a mobile device to bookmarking a webpage in an Internet browser, simply for purposes of convenience. [90]

The court concisely concluded: "[D]ownloading an app for free and using it to view content at no cost is not enough to make a user of the app a 'subscriber' under the VPPA, as there is no ongoing commitment or relationship between the user and the entity which owns and operates the app."[91]

d. Criticism of *Ellis*

In response to the *Ellis* decision, one scholar argues the court failed to recognize the significance in downloading and installing an app on a mobile device.[92] The author claims this act does, in fact, establish the requisite "commitment, relationship, or association" inherent in the concept of a subscription.[93] This is because a downloaded app, such as the Cartoon Network mobile application, constitutes a much stronger relationship than the court's comparison to bookmarking a website onto the user's browser, as an application creates "a fixture on a user's phone, where it remains permanently unless deleted."[94]

The scholar also noted mobile phone users can create a less stringent commitment by separately bookmarking a website by creating a shortcut on their home screen.[95] This sort of shortcut links the user to an external webpage, whereas a downloaded mobile application, such as the Cartoon Network application, installs permanent software onto the user's device.[96] Because an installed application is "a dedicated platform to view a particular provider's content that has become, quite literally, a part of one's phone," the author argues the user should qualify as a subscriber under the VPPA.[97] The author claims the *Ellis* court's under-inclusive interpretation of "subscriber" works to undermine the purpose of the VPPA by significantly limiting the

89. *Id.*
90. *Id.*
91. *Id.*
92. *Recent Case, Statutory Interpretation—the Video Privacy Protection Act—Eleventh Circuit Limits the Scope of "Subscriber" for VPPA Protections.* Ellis v. Cartoon Network, Inc., 803 F.3d 1251 (11th Cir. 2015), 129 HARV. L. REV. 2011, 2016 (2016).
93. *Id.*
94. *Id.* at 2016–17.
95. *Id.*
96. *Id.*
97. *Id.* at 2017.

pool of video subscribers who can seek protection for breach of privacy interests.[98]

Finally, the scholar addressed the claim that Ellis failed to plead "more than simply visiting."[99] While Ellis did not provide Cartoon Network with his personal information directly, it is contended the amount of information available by accessing one's smartphone is sufficient in establishing the kind of ongoing commitment repeatedly referenced by the court.[100] That author claims a free mobile application does not come "without consequence," because, according to the Federal Trade Commission, "applications can access the address book, call logs, and calendar data, among other items," even when the application does not require such access to function.[101] In fact, this practice has become so common that it is referred to as an "industry best practice."[102] This initial information transfer creates a significant relationship with the application provider, even if the app is later deleted.[103] Additionally, the "without consequences" argument is without merit, as many accepted forms of "subscriptions" are capable of termination without consequence.[104]

2. Yershov v. Gannet Satellite Information Network*, 820 F.3d 482 (1st Cir. 2016)*

Conversely, in *Yershov v. Gannet Satellite Information Network*, the First Circuit held the user of a free mobile application was a subscriber, and thus entitled to a remedial action under the VPPA.[105]

a. Facts

The mobile application at issue in *Yershov* was the USA Today App, which provides access to online editions of USA Today.[106] Through the app, users can view video content discussing recent topics in the news.[107] Downloading and installing the app is free, and users are not asked to register,

98. *Id.* at 2018
99. *Id.* at 2013 (citing Ellis v. Cartoon Network Inc., No. 1:14-CV-484-TWT, 2014 WL 5023535, at *2 (N.D. Ga. Oct. 8, 2014)).
100. *Id.* at 2017.
101. *Id.* at 2017–18.
102. *Id.* at 2017.
103. *Id.* at 2018.
104. *Id.*
105. Yershov v. Gannet Satellite Info. Network, 820 F.3d 482, 489 (1st Cir. 2016).
106. Yershov v. Gannet Satellite Info. Network, 104 F. Supp. 3d 135, 137 (D. Mass. 2015).
107. *Id.*

login, or make a profile page.[108] The app does, however, ask users to consent to "push notifications" though users may decline to consent.[109]

Similar to the data-analytics company Bango in *Ellis*, a user's history from the USA Today app is transmitted to the third-party information collector Adobe.[110] Again, this third party is able to identify the consumer by "reverse engineering" the user's internet history in conjunction with the user's Android ID.[111]

b. District Court Analysis and Holding

The district court concluded the plaintiffs were not subscribers within the meaning of the VPPA.[112] The court stated "subscription" entails "payment, registration, commitment, delivery, and/or access to restricted content."[113] The court reasoned the USA Today app did not comport with this standard, as it did not require payment information, place users on an e-mail registration list, or give users access to special content.[114] Instead, the app was merely a "more convenient form of visiting the USA Today website."[115]

Furthermore, the district court elaborated on the plain meaning of "subscription" as it is used today in light of recent technological advances.[116] According to Google Play, some mobile applications constitute a subscription, while others do not.[117] For example, an app that does not require monetary payment, and even an app that requires a one-time-only payment, does not create a subscriber relationship.[118] However, a mobile application that automatically charges a recurring fee, is a subscription application.[119] Additionally, there is a widely accepted definition of "subscription apps" within the mobile technology community.[120] The company ThinkApps, a well-known mobile application builder, describes subscription apps as offering "access to a particular service or content for a weekly, monthly, or annual fee."[121] Because users of the USA Today app do

108. *Id.*
109. *Id.*
110. *Id.* at 138.
111. *Id.* at 138 n.2.
112. *Id.* at 146–49.
113. *Id.* at 147.
114. *Id.* at 147–48.
115. *Id.* at 148.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 147.
121. *Id.* at 148.

not conform to the accepted definition, they do not constitute subscribers for purposes of the VPPA.[122]

c. First Circuit's Analysis and Holding

On appeal, the First Circuit reversed, holding Yershov was a subscriber, and thus a "consumer" for purposes of the VPPA.[123] To begin its analysis, the court claimed it will first consider the plain and ordinary meaning of the text.[124] Rather than doing so, however, the court relied solely on dictionary definitions.[125] After sampling a variety of entries, the court applied the definition it describes to be the most "on point technologically."[126] According to the American Heritage Dictionary, a "subscription" is "[a]n agreement to receive or be given access to electronic texts or services."[127] The court claimed the facts here fit squarely within this meaning, as "Gannett offered and Yershov accepted Gannett's proprietary mobile device application as a tool for directly receiving access to Gannett's electronic text and videos."[128] The court likens this to a newspaper subscriber who receive a daily copy of the newspaper at the end of his driveway, rather than having to visit a store to purchase one.[129]

Next, the court considered whether monetary payment is an essential component of subscription.[130] Applying textual canons of interpretation, the court found the term "would be rendered superfluous by the two terms preceding it" if it required payment.[131] This is because one either exchanges money to utilize something permanently, thus making them a "purchaser," or for temporary use, thus making them a "renter."[132] Accordingly, the statute must be read differently, as to accord independent meaning to each term Congress deliberately integrated into the statute.[133]

The court provided an additional example to explain why a monetary requirement would defeat the purpose of the VPPA:

> Suppose a customer in 1988 obtained several videos from a new commercial supplier at no charge, or with money back. We can discern no reason why Congress would have wanted different

122. *Id.* at 149.
123. Yershov v. Gannet Satellite Info. Network, 820 F.3d 482, 487 (1st Cir. 2016).
124. *Id*.
125. *Id.*
126. *Id*.
127. *Id.*
128. *Id*.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 488.

> disclosure rules to apply to those transactions than to ones where a monetary payment is made. And because we think that Congress cast such a broadly inclusive net in the brick-and-mortar world, we see no reason to construe its words as casting a less inclusive net in the electronic world when the language does not compel that we do so.[134]

Next, the court distinguished the case from *Ellis.*[135] While *Ellis*, the court claimed, did not provide any information to Cartoon Network, Yershov provided USA Today with both his Android ID and GPS location, "which was of value to Gannett."[136] The First Circuit also disapproved of the Eleventh Circuit's comparison of a free mobile application to adding a bookmark or "favorite" in one's Internet home page.[137] The court simply stated it does not find this "apparently true," for "[w]hy, after all, did Gannett develop and seek to induce downloading of the App"? [138]

The court provided one final example to illustrate its point:

> Imagine that Gannett had installed a hotline at Yershov's home, for free, allowing him to call Gannett and receive instant delivery of videos in exchange for his name and address, and he then used the hotline over the course of many months to order videos. We doubt that Congress would have intended that Gannett would have been free in such a scenario to publish Yershov's PII by claiming that he was not a purchaser, renter, or subscriber.[139]

For these reasons, the court concluded the user of a free mobile application does qualify as a subscriber under the VPPA.[140]

III. ANALYSIS

The objective of this section is to develop a test for determining when the use of a free mobile application qualifies as a subscription for purposes of the VPPA. Part A outlines the proper textual analysis for the disputed statutory term, while also explaining the errors committed by both circuit courts. Part B highlights the weaknesses inherent in both the *Ellis* and *Yershov* interpretations. Part C introduces the concepts of "push

134. *Id.*
135. *Id.*
136. *Id.* at 489.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 490.

notifications," and presents a new standard more consistent with the text of the VPPA. Finally, Part D proposes a simple amendment to the VPPA to clarify the meaning of the term "subscriber" within the statute.

A. Mistaken Textual Analysis

Because the central dispute here surrounds the statutory term "subscriber," it makes sense that both the First and Eleventh Circuit begin with a textual analysis. Under the traditional textualist approach, the court begins with the plain and ordinary meaning of the disputed term.[141] Occasionally, a court will instead use a technical meaning where this is the clear legislative intent.[142]

Here, the issue concerns the term "subscriber" as it is used in the definition of "consumer." Because the statute does not provide an additional definition for this term, it is proper to look to the plain and ordinary meaning. While both the Eleventh and First Circuit claim to do this, both do so incorrectly, resulting in conclusions inconsistent with the text. Rather than deferring simply to plain meaning, both courts overcomplicate the issue by relying solely on dictionary definitions. While a dictionary is likely to contain the intended plain meaning of a disputed term, it also demonstrates the variety of ways in which a word might be used. If the court chooses one of the dictionary definitions rather than the plain and ordinary of a term, the court is likely to displace the legislature's intended meaning.[143]

An example of this is apparent in the *Yershov* decision. The First Circuit considered multiple definitions of the terms "subscriber" and "subscribe." For instance, according to Merriam-Webster, to subscribe is "to enter one's name for a publication or service."[144] Nonetheless, the court glanced over this meaning, displacing it instead with the definition it determines to be more "on point technologically."[145] The court, however, should not use a technological meaning, as this is not the ordinary meaning of the term Congress chose to implement. If the First Circuit had applied the Merriam-Webster definition, which arguably is more reflective of the plain and ordinary meaning, the Court would have reached the opposite conclusion, because Yershov did not provide Gannett with his name in exchange for a service.

Additionally, the First Circuit misconstrued the dictionary meaning that it does choose. The definition for subscription is "an agreement to *receive* or

141. Smith v. United States, 508 U.S. 223, 227–28 (1993).
142. Van Reken v. Darden, Neef & Heitsch, 674 N.W.2d 731, 733 (Mich. Ct. App. 2003).
143. *Smith*, 508 U.S. at 242 (Scalia, J., dissenting).
144. *Subscribe*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/subscribe (last visited Feb. 13, 2017).
145. *Yershov*, 820 F.3d at 487.

be given access to electronic texts or services."[146] The court stated this definition is met, because "Gannett offered and Yershov accepted Gannett's proprietary mobile device application as a tool for directly *receiving access* to Gannett's electronic text and videos."[147] The problem lies in the court's reading of the word "receive" within the dictionary definition. The court interpreted the noun "access" as the direct object of the transitive verb "receive." In actuality, the direct object of "receive" should be the phrase "electronic texts or services." This means, according to the definition, one can either receive electronic texts or services, or be given access to electronic texts or services, but not that one *receives access* to electronic texts or services. Although this distinction seems slight, it is crucial in determining whether a relationship constitutes a subscription.

To say that someone *receives texts or services* is sufficient to constitute a subscription because it creates an ongoing relationship once set in place. For example, many internet users subscribe to their favorite blog or shopping site by providing an email address. The site then sends the user periodic emails, without the user having to take additional action. Here, the relationship continues without any active effort from the user.

Furthermore, the second part of the definition, to *be given access to electronic texts or services*, implies the information now accessible, was once restricted to the user. This would suggest some sort of deliberate exchange was implicit in the act of subscribing. While this element is often satisfied when the user gives money in exchange for the access, most courts agree this may also include giving one's name, email address, or other personal information, as this is of value to the provider.

It is argued in both *Ellis* and *Yershov* the user did provide identifying information of value through the Android ID. Nonetheless, this exchange is only incidental to the downloading of the app. Where the user is not actively aware he is giving something in exchange for access to the information, it cannot be said he or she subscribed to the service. Furthermore, the information Yershov was given access to was never restricted to him, as the same articles and video clips are available on the usatoday.com website.[148] It would not make sense to give something of value for nothing in return.

B. Erroneous Holdings

Because both the *Ellis* and *Yershov* courts failed to interpret the term "subscriber" according to its plain and ordinary meaning, both reach incorrect conclusions.

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146. *Subscription*, AHDICTIONARY, https://ahdictionary.com/word/search.html?q=subscription (last visited Feb. 13, 2017) (emphasis added).

147. *Yershov*, 820 F.3d at 487 (emphasis added).

148. USA TODAY, http://www.usatoday.com (last visited Feb. 13, 2017).

To review, the *Ellis* court held "downloading an app for free and using it to view content at no cost is not enough to make a user of the app a 'subscriber' under the VPPA, as there is no ongoing commitment or relationship between the user and the entity . . . ."[149] On the other hand, the *Yershov* court found downloading and installing a free mobile application created a relationship sufficient to satisfy the subscriber element of the VPPA.[150]

In light of the plain and ordinary meaning of the term, the user of free mobile applications will *sometimes* qualify as a subscriber under the VPPA, while other times he or she certainly will not. Consequently, the *Ellis* understanding of a subscriber is too narrow, while the *Yershov* standard is too broad.

This conclusion becomes obvious given the apparent weaknesses inherent in each court's interpretation. For example, the *Ellis* court compared the use of a free mobile application to the bookmarking of a webpage.[151] According to the court, this act alone does not constitute a subscription under the VPPA. Upon closer examination, however, the court's analogy fails. As critics have observed, a downloaded mobile application becomes a part of one's phone,[152] although arguably not necessarily as a permanent fixture. In fact, it is this subsequent access an app gains to a user's phone upon installation that distinguishes it from a bookmarked webpage, and is crucial in determining when a user may be deemed a subscriber.

Moreover, consider the First Circuit's hypothetical in which "Gannett [installs] a hotline at Yershov's home, for free, allowing him *to call* Gannett and receive instant delivery of videos . . . ."[153] Implicit in this description, is the proposition that Yershov must *first* call Gannett, and *then* receive instant delivery of the videos. In this instance, Yershov would be the one initiating that precise transmittal of information, rather the Gannett. This is equivalent to when a user initiates the transmittal by clicking on an app or webpage, and *then* instantly receives information. In a true subscriber relationship, the user is passive to the allowance of information received, other than the act necessary to initiate the subscription. Thus, the more tangible description the court illustrates does not constitute a subscription. Here, Yershov would simply be the beneficiary of a free service. If he provides nothing in exchange for this service, the protections of the VPPA should not apply.

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149. Ellis v. Cartoon Network, Inc., 803 F.3d 1251, 1257 (11th Cir. 2015).
150. *Yershov*, 820 F.3d at 487.
151. *Ellis*, 803 F.3d at 1257.
152. *Recent Case: Statutory Interpretation—the Video Privacy Protection Act—Eleventh Circuit Limits the Scope of "Subscriber" for VPPA Protections.*, Ellis v. Cartoon Network, Inc., 803 F.3d 1251 (11th Cir. 2015), 129 HARV. L. REV. 2011, 2016 (2016).
153. *Yershov*, 820 F.3d at 489 (emphasis added).

Therefore, the appropriate framework for determining when the user of a free mobile application has established a subscription under the VPPA must be one in which the subscriber remains passive in receiving additional and periodic goods, data, or other information. Further, the standard should reflect a mobile application's unique status as an internal fixture of the user's phone.

C. Push Notifications: A Solution Consistent with the Text

In *Yershov,* the district court briefly referenced the concept of "push notifications."[154] According to several mobile marketing guides, a push notification is "the delivery of information from a software application to a computing device without a specific request from the client."[155] By contrast, a "pull notification" provides the user with information only after a specific request has been made.[156] Push notifications are similar to text messages because they "[pop] up on a mobile device," however, they can only be delivered to users who have downloaded and installed the application.[157] Furthermore, a push notification can "pop up" even when the phone is locked and the application itself is not open or presently in use. [158]

The *Yershov* court does not say whether the plaintiff had accepted push notifications. However, if Yershov had agreed to receiving these notifications, he would be a subscriber for the purposes of the VPPA. This is because he would be passively receiving information and updates without making any active effort to get it. This ongoing delivery would continue until Yershov takes affirmative steps to terminate it. This is the type of lasting "commitment, relationship, or association" referenced throughout the various cases discussing the term subscriber.[159] On the other hand, if Yershov did not consent to these push notifications, he would not be a subscriber under the VPPA. This is because it cannot be said that he actually received information without requesting it. Instead, Yershov would be gathering the information himself, by choosing to open the app. Finally, if Yershov downloaded and installed the USA Today app, without accepting push notifications, he was not "given access to" any information or service different from what was already available on the usatoday.com webpage.

This distinction gives credence to the *Ellis* court's analogy to a bookmarked or favorited webpage. When someone saves a webpage to their

154. Yershov v. Gannet Satellite Info. Network, 104 F. Supp. 3d 135, 137 (D. Mass. 2015).

155. *Push Notification*, TECHTARGET, http://searchmobilecomputing.techtarget.com/definition/push-notification (last visited Feb. 13, 2017).

156. *Id.*

157. *Push Notifications Explained*, URB. AIRSHIP, https://www.urbanairship.com/push-notifications-explained (last visited Feb. 13, 2017) (alteration not in original).

158. *Id.*

159. Ellis v. Cartoon Network, Inc., 803 F.3d 1251, 1257–58 (11th Cir. 2015).

favorites in their internet browser, for example usatoday.com, they do not consent to automatically receiving information from that webpage without actually choosing to visit that page again. In effect, a free mobile application that does not send push notifications is the same as bookmarking a webpage, and thus is not a subscription.

Interestingly, the USA Today website allows readers to subscribe to its service, by signing up for daily newspaper home delivery, or daily e-newspaper delivery via email (both of which require monetary payment).[160] Accordingly, when someone subscribes to USA Today, they consent to receiving a hard copy or electronic newspaper every day, with the service continuing until the subscription term expires, or there is an affirmative step to terminate the relationship.[161] This is analogous to a mobile application that sends automatic information alerts through push notifications, thus constituting a subscription.

Overall, a mobile application that delivers new and periodic information through push notifications constitutes a subscription. The automatic and continuing delivery of new information via push notifications creates the type of lasting relationship contemplated by the courts. This understanding is more consistent with the text of the VPPA, as the subscriber is passive in receiving the service.

IV. PROPOSAL

To resolve the disagreement among the circuit courts, Congress should amend the VPPA to include the following definition:

The term "subscriber" means any person who gives money or personally identifiable information in exchange for an ongoing and periodic service. The service is to endure without the continued request or activation of the person receiving the service. For purposes of mobile phone applications, the unrequested delivery of information through texts, emails, or similar mobile phone notifications shall establish the existence of a subscription.

V. CONCLUSION

Both the *Ellis* and *Yershov* courts applied the VPPA to videos viewed through downloaded mobile applications incorrectly. The proper test for determining when the user of a free mobile application is a subscriber under the VPPA is whether downloading and installing the application allows the provider to automatically transmit information to the user through a push

160. USA TODAY, http://www.usatoday.com (last visited Feb. 13, 2017).

notification. A free mobile application that does not utilize such alerts is indistinguishable to a bookmarked webpage. Where the user only receives new information by initiating each transmission of information, it cannot be said that an ongoing relationship exists. The best way to clarify this discrepancy is through a legislative amendment to the statute. Doing so would provide a clearer and more adequate privacy protection law for online video customers in the modern technological era.