FROM BLOCKBUSTER TO BIG BROTHER: HOW AN INCREASE IN MOBILE PHONE APPS HAS LED TO A DECREASE IN PRIVACY UNDER THE VIDEO PRIVACY PROTECTION ACT

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Abstract

Congress enacted the Video Privacy Protection Act (VPPA or the Act) in 1988 to protect consumers by prohibiting video tape service providers from knowingly disclosing their personally identifiable information to any person, without first obtaining consent. The VPPA defines "consumer" as any renter, purchaser, or subscriber. However, the Act does not define the term "subscriber." Over the past thirty years, there has been a rapid increase in the use of downloadable apps that allow individuals to watch videos and other online content for free on their mobile phones. Does the sole act of downloading a free app onto a mobile phone make an individual a protected "subscriber?" This question has challenged the scope of protection afforded by the VPPA to consumers and has created a circuit split between the United States Court of Appeals for the Eleventh Circuit and the United States Court of Appeals for the First Circuit.

Both circuits have struggled to define "subscriber" and have struggled in determining when an individual's conduct rises to the level of becoming a protected "consumer." This Note argues for the resolution of the circuit split through a two-pronged approach. The first prong requires amending the VPPA to include a broad and unambiguous definition of "subscriber," which will adequately protect the privacy rights of individuals that download and use free apps. The second prong requires implementing a balancing test consisting of several different factors that the courts must weigh and consider. The test will allow courts to broaden the scope of the VPPA to protect the rights of individuals who rise to the level of protected "consumers," despite their actions not falling squarely into one of the statutory requirements.

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INTRODUCTION

An individual has a privacy interest in preventing their personal information from becoming public knowledge.[1] Recognizing this right to privacy, Congress has continuously enacted statutes that "extend privacy protection to records that contain information about individuals."[2] In

1. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 769 (1989).

2. S. REP. NO. 100-599, at 2–3 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 4342-1, 4342-1 to 4342-3 (listing several federal statutes that were enacted to increase privacy rights, including: the Fair Credit Reporting Act of 1970, the Family Educational Rights and Privacy Act of 1974, the Privacy Act, the Tax Reform Act of 1976, the Right to Financial Privacy Act of 1978, the Privacy Protection Act of 1980, the Electronic Funds Transfer Act of 1980, the Fair Debt Collection Act, the Cable Communications Policy Act of 1984, and the Electronic Communications Privacy Act).

1988, Congress passed the Video Privacy Protection Act (VPPA or the Act),[3] "to preserve personal privacy with respect to the rental, purchase, or delivery of video tapes or similar audio visual materials."[4] The VPPA protects consumers by creating a civil remedy against video tape service providers who knowingly disclose their personally identifiable information to any person without first obtaining consent.[5]

The VPPA has extended privacy rights of individuals; however, its recent application to cases involving mobile phones has created a split among the circuit courts.[6] The primary issue between the circuits concerns the statutory interpretation of an ambiguous and undefined term stated within the VPPA[7]: "subscriber."[8] Under 18 U.S.C. § 2710(b)(1), the only individuals who will receive protection under the VPPA are "consumer[s]."[9] The statute defines a "consumer" as "any renter, purchaser, or subscriber of goods or services from a video tape service provider."[10] However, an ambiguity lies within the definition of "consumer" in that it poses the question of what exactly constitutes a "subscriber."[11] A second ambiguity within the statute, though not as

3. Pub. L. No. 100-618, 102 Stat. 3195 (1988) (codified as amended at 18 U.S.C. § 2710 (2012)).

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

5. 18 U.S.C. § 2710(b)(1).

6. *Compare* Ellis v. Cartoon Network, Inc., 803 F.3d 1251, 1256–58 (11th Cir. 2015) (holding that an individual who downloads a mobile application onto his or her smartphone, to watch television episodes, is not a "subscriber" under the VPPA because the sole act of downloading an app to watch videos does not establish some type of ongoing relationship or commitment between the individual and the video provider), *with* Yershov v. Gannett Satellite Info. Network, Inc., 820 F.3d 482, 489 (1st Cir. 2016) (recognizing that an individual who downloads and installs a mobile application onto his or her phone, to access news and watch videos, establishes a relationship with the video tape service provider and may be a "subscriber" under the VPPA).

7. Wendy Beylik, Comment, *Enjoying Your "Free" App? The First Circuit's Approach to an Outdated Law in* Yershov v. Gannett Satellite Information Network, Inc., 58 B.C. L. REV. E. SUPP. 60, 62–63 (2017), https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3562&context=bclr&_ga=2.76414224.489497517.1552501361-220379575.1552501361 [https://perma.cc/6CCE-EKYW] ("In applying the Act, courts have struggled to adapt its traditional verbiage to today's electronic age, leading to uncertainty as to the extent of the VPPA's online application.").

8. 18 U.S.C. § 2710(a)(1) (listing the definition of "consumer," which includes the undefined term "subscriber").

9. *Id.* § 2710(b)(1) ("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 for the relief provided in subsection (d).").

10. *Id.* § 2710(a)(1).

11. *See id.* (leaving the term "subscriber" undefined).

heavily discussed by the circuit split, is what type of information constitutes "personally identifiable information."[12]

This Note argues that Congress should amend the VPPA to resolve the circuit split among the U.S. Courts of Appeals for the Eleventh and First Circuits.[13] The proposed method of treatment includes two steps that require legislative action. The first step is amending the VPPA to include an unambiguous definition of "subscriber." This will prevent courts from conducting their own statutory interpretation of the term. The second step establishes a balancing test that will aid courts in determining whether the conduct of an individual rises to the level of becoming a protected "consumer." With the increased use of online technology platforms that allow individuals to download videos directly onto their mobile phones, discerning when each individual becomes a "consumer" depends on the circumstances of each individual case. Therefore, the test provides an additional method for cases when an individual's actions do not clearly fall into one of the statutory definitions.

Part I of this Note discusses the legislative history of the VPPA, why it was enacted, and why it currently fails to adequately protect the privacy rights of individuals who download mobile phone apps. Part II analyzes the circuit split between the Eleventh Circuit and First Circuit, and why both circuits have differed in their statutory interpretations. Part III firmly addresses the issue by providing a new, clear definition of "subscriber" that will adequately protect the privacy rights of individuals who download mobile apps to watch videos. Lastly, Part IV introduces and describes a balancing test that courts may use to determine when an individual becomes a "consumer" under the VPPA. Since "subscriber" will be clearly defined under Part III, courts need only utilize the test stated in Part IV when an individual's conduct does not clearly identify him as a consumer, purchaser, renter, or subscriber under the statute. Therefore, courts will have the discretion to apply the factors of the test based on the individual facts of a case.

I. AN OVERVIEW OF THE VPPA

A. *The History Behind the VPPA: Why Change Now?*

The VPPA was enacted in response to the *Washington City Paper*'s publication of U.S. Supreme Court nominee Robert Bork's video rental history, which the newspaper obtained without his knowledge or

12. *See id.* § 2710(a)(3) ("[T]he term '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 . . . .").

13. *See supra* notes 6–8 and accompanying text.

consent.[14] In 1987, the *Washington City Paper* published a profile of Bork after gathering information on the 146 movies that he and his family had rented from a video store.[15] The public disclosure and invasion of privacy captured the attention of members of the United States Senate Judiciary Committee, who quickly condemned the publication and sought to prohibit such disclosures of personal information.[16] In support of heightened privacy rights,[17] committee members announced that the VPPA would enhance and strengthen an individual's right to privacy by preventing the unauthorized disclosure of personal information to third parties.[18] More specifically, with the increasing influx of new technology, the VPPA would help protect individuals from being subjected to the intrusive collection of personal information by video tape service providers.[19]

The public disclosure of an individual's private facts have long been recognized as an invasion of privacy.[20] In 1890, Samuel D. Warren and Louis D. Brandeis stated that certain business methods and inventions have highlighted the need for increased protection, which is to allow individuals "to be let alone."[21] Furthermore, William L. Prosser identified that the public disclosure of private facts, as well as the intrusion upon seclusion, are two of the four torts of privacy.[22] Applying these policy arguments to the purpose of the VPPA, it is apparent that Congress

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14. *In re* Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 278 (3d Cir. 2016) (noting that the *Washington City Paper* published Robert Bork's video rental history without first obtaining his consent); *see* Sterk v. Redbox Automated Retail, LLC, 770 F.3d 618, 621 (7th Cir. 2014).

15. *In re Nickelodeon*, 827 F.3d at 278. *See generally* S. REP. NO. 100-599, at 5 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 4342-1, 4342-5 (discussing the legislative intent of the VPPA, including the incident with Robert Bork that prompted its enactment).

16. *See* S. REP. NO. 100-599, at 5–6 (noting that several senators, including Senator Leahy and Senator Simpson, denounced the public disclosure of Robert Bork's video rental history).

17. *Id.* at 6 ("Privacy is something we all value. The right of privacy is not, however, a generalized undefined right: It is a specific right, one which individuals should understand. And it is the role of the legislature to define, expand, and give meaning to the concept of privacy. This bill will give specific meaning to the right of privacy, as it affects individuals in their daily lives." (quoting 134 CONG. REC. 10,261 (1988) (statement of Sen. Grassley))).

18. *See id.* at 8.

19. *See In re Nickelodeon*, 827 F.3d at 284 ("Congress's purpose in passing the Video Privacy Protection Act was quite narrow: to prevent disclosures of information that would, with little or no extra effort, permit an ordinary recipient to identify a particular person's video-watching habits.").

20. *In re* Vizio, Inc., Consumer Privacy Litig., 238 F. Supp. 3d 1204, 1215–16 (C.D. Cal. 2017) (discussing the common law history of the right to privacy).

21. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (2d ed. 1888)).

22. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

viewed the disclosure of an individual's personal video and audio records as an invasion of privacy that needed to be addressed.[23] Therefore, the VPPA in modern times should be interpreted to extend protection to individuals who download apps onto their mobile phones to view videos and other online forms of entertainment.[24]

The current issue with the VPPA stems from its outdated and vague language,[25] which fails to consider the nature of relationships formed when individuals download a free app onto their mobile phones. In 1988, it was more common for individuals to physically "purchase" or "rent" a movie from a video provider, or to "subscribe" to a video provider.[26] Given that an individual had to physically enter a store to purchase or rent a video, the formation of a relationship between the provider and individual was much easier to identify under the VPPA's original construction. However, with the increasing use of online technology and mobile phones, individuals are now able to download easily free apps onto their mobile phones without having to ever physically enter a store. As a result, the language of the VPPA fails to identify the level of communication or engagement that is necessary, between a video provider and an individual, to consider him or her a "consumer" after he downloads an app.

Since its enactment in 1988, Congress has amended the VPPA only once.[27] In 2012, Congress revisited the statute and amended § 2710, "to clarify that a video tape service provider may obtain a consumer's informed, written consent on an ongoing basis and that consent may be obtained through the Internet."[28] By allowing providers to obtain consent through the Internet, Congress recognized the increasing use of technology among individuals; however, the amendment did not address the more pertinent issue: the unclear language of § 2710(a). Therefore, Congress's failure to amend § 2710(a) has forced courts to perform their

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23. *See* S. REP. NO. 100-599, at 1 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4342-1, 4342-1 ("The Video Privacy Protection Act follows a long line of statutes passed by the Congress to extend privacy protection to records that contain information about individuals. In each instance, Congress has expanded and given meaning to the right of privacy.").

24. *But see* Ellis v. Cartoon Network, Inc., 803 F.3d 1251, 1258 (11th Cir. 2015) (holding that the plaintiff was not entitled to protection under the VPPA after a video tape provider knowingly disclosed his personal video viewing records and Android ID to a third party, without his consent or knowledge).

25. *See supra* notes 8–12 and accompanying text.

26. Beylik, *supra* note 7, at 65 (noting that the classic customer in 1998 "would physically purchase, rent, or subscribe" to video providers, as opposed to renting or downloading online videos).

27. *See* Video Privacy Protection Act Amendments Act of 2012, Pub. L. No. 112-258, 126 Stat. 2414 (2013) (codified as amended at 18 U.S.C. § 2710(b)(2)(B) (2012)).

28. *Id.*

own statutory interpretation of ambiguous terms such as "subscriber," which has resulted in conflicting opinions.[29]

B. *The Issue with Statutory Interpretation*

Under the VPPA, the definition of "subscriber" is open to interpretation.[30] Courts have struggled to apply the statute to recent cases involving an expanding area of technology: mobile apps that allow users to watch videos on their mobile phones.[31] The increased use of such apps and the development of this new type of relationship between video tape providers and individuals has challenged the scope of the VPPA.[32] Courts have had to look beyond the statutory language of the VPPA to define "subscriber."[33] As a result, there is no clear definition that clarifies when an individual is protected under the VPPA by rising to the level of a "consumer."[34]

The use of analogical reasoning by judges and courts to aid in the statutory interpretation of older legislation as applied to new technologies is problematic.[35] Analogical reasoning impacts how a court will apply a

29. *See supra* note 6 and accompanying text.

30. *See* Ellis v. Cartoon Network Inc., 803 F.3d 1251, 1255 (11th Cir. 2015) ("The VPPA does not define the term 'subscriber,' and we, as a circuit, have yet to address what the term means. The few district courts that have weighed in on the issue appear to be divided."); *see also In re* Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 278–79 (3d Cir. 2016) (noting that the VPPA is not well drafted); Yershov v. Gannett Satellite Info. Network, Inc., 820 F.3d 482, 487 (1st Cir. 2016) ("Because it contains no definition of the term 'subscriber,' nor any clear indication that Congress had a specific definition in mind, we assume that the 'plain and ordinary meaning' of the word applies." (quoting Stornawaye Fin. Corp. v. Hill (*In re* Hill), 562 F.3d 29, 32 (1st Cir. 2009))).

31. *See* Beylik, *supra* note 7, at 65 ("Whether or not to extend VPPA protections to downloaders is a matter of judicial interpretation, hinging on nuanced understandings of modern technology and the relationships between providers and consumers.").

32. *See In re Nickelodeon*, 827 F.3d at 288 ("Assessing congressional intent in these cases can be difficult; indeed, Congress may not have considered the temporal problem at all.").

33. *See, e.g.*, *Ellis*, 803 F.3d at 1255–56 (noting that the court begins its statutory analysis of the VPPA by referencing several dictionaries); *In re* Vizio, Inc., Consumer Privacy Litig., 238 F. Supp. 3d 1204, 1221 (C.D. Cal. 2017) (consulting multiple dictionaries to help define "video tape service provider" as stated in the VPPA (quoting 18 U.S.C. § 2710(a)(4) (2012))).

34. *See Ellis*, 803 F.3d at 1255 ("The VPPA does not define the term 'subscriber,' and we, as a circuit, have yet to address what the term means. The few district courts that have weighed in on the issue appear to be divided.").

35. *See* Luke M. Milligan, *Analogy Breakers: A Reality Check on Emerging Technologies*, 80 MISS. L.J. 1319, 1322 (2011) ("While analogical reasoning is particularly attractive to judges confronting technologies that were not likely foreseen at the time of the drafting of relevant legislation or precedent, the use of analogical reasoning to mediate old rules and emerging technologies has led to mixed results." (footnote omitted)).

legal rule.[36] The problem is that courts "have demonstrated a bad track record in adopting the appropriate analogies or metaphors for these new technologies."[37] When doing so, judges may not fully understand the modern "intricacies of new technologies."[38] This directly relates to how courts have struggled to apply the VPPA to a newly formed area of technology that easily allows individuals to watch videos from various online platforms.[39] The courts' regulation of new technology should not be left open to any type of statutory interpretation that resorts to analogical reasoning, especially when the legal issue involves the right to privacy.[40] Therefore, Congress must amend the language of the VPPA to protect individuals who are able to watch free videos by downloading an app onto their mobile phone.

II. A SPLIT AMONG THE CIRCUIT COURTS

A. *United States Court of Appeals for the Eleventh Circuit*

1. Ellis v. Cartoon Network, Inc.

In 2015, the Eleventh Circuit addressed an issue of first impression in *Ellis v. Cartoon Network, Inc.*[41] when it defined the term "subscriber" located in § 2710(a)(1).[42] In that case, Mark Ellis brought suit against Cartoon Network (CN) after downloading and watching videos on CN's free mobile app in 2013.[43] Without Ellis's consent, CN knowingly disclosed his Android ID and viewing records to Bango, a third-party data analytics company.[44] Ellis alleged that he became a "subscriber" of CN after downloading the app onto his Android smartphone, thereby making him a protected "consumer" under the VPPA.[45]

The free app downloaded by Ellis allows users to watch TV show episodes on CN.[46] Users also have the option to view additional content

36. Jonathan H. Blavin & I. Glenn Cohen, Note, *Gore, Gibson, and Goldsmith: The Evolution of Internet Metaphors in Law and Commentary*, 16 HARV. J.L. & TECH. 265, 267 (2002).

37. *Id.*

38. Susan Freiwald, *First Principles of Communications Privacy*, 2007 STAN. TECH. L. REV. 3, para. 8 (2007).

39. *See supra* note 6 and accompanying text.

40. *See* Blavin & Cohen, *supra* note 36, at 268 ("[J]udicial rejection of analogizing altogether may prove to be equally detrimental, as *sui generis* regimes governing new technologies have historically failed to preserve existing fundamental rights and liberties.").

41. 803 F.3d 1251 (11th Cir. 2015).

42. *Id.* at 1255–56.

43. *Id.* at 1254.

44. *Id.*

45. *Id.*

46. *Id.* at 1253.

by logging in with their television provider information.[47] If users do not wish to provide their television provider information, they do not have to provide any other personal information to CN to view the free content.[48] Furthermore, the app does "not ask users for their consent to share or otherwise disclose personally identifiable information to third parties."[49] After downloading the app, CN tracks users through their Android ID[50] and keeps a record of every video users view.[51] CN then sends the information to Bango.[52] Bango uses the information to track individuals' behavior and to analyze their engagement between mobile apps, as well as other websites.[53]

The district court ultimately dismissed Ellis's amended complaint, but made two important findings.[54] For a video tape service provider to violate § 2710(b) of the VPPA, the user must be a "consumer" under the Act and the video tape service provider must disclose "personally identifiable information."[55] The district court first considered whether the VPPA protected Ellis as a "consumer" of CN.[56] To do so, the district court applied a broader definition of the word subscriber and stated that a user can become a "subscriber" under the Act without logging into an app or paying for it.[57] Under this line of reasoning, by downloading the app onto his smartphone, Ellis's actions amounted to more than just simply visiting CN's website, making him a protected "subscriber" under the VPPA.[58]

The second issue decided by the district court was whether Bango actually received personally identifiable information about Ellis.[59] Personally identifiable information is defined under the VPPA as "information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider."[60]

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47. *Id.*

48. *Id.* at 1253–54.

49. *Id.* at 1254.

50. *Id.* ("[A] 64–bit number (hex string) that is randomly generated when a user sets up his device and should remain constant for the lifetime of the user's device.").

51. *Id.*

52. *Id.*

53. *Id.* (noting that Bango can link an Android ID to a particular person by gathering information from other sources).

54. *See id.*

55. *See* 18 U.S.C. § 2710(b)(1) (2012) ("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 for the relief provided in subsection (d).").

56. *Ellis*, 803 F.3d at 1254.

57. *Id.*

58. *Id.*

59. *Id.* at 1254–55.

60. 18 U.S.C. § 2710(a)(3).

The court found that the disclosure of Ellis's video viewing records and Android ID was not "personally identifiable information" as defined by the Act because it failed to link Ellis himself to the video materials.[61] Because Bango had to take its own additional steps to identify Ellis, CN did not violate the VPPA and Ellis could not receive protection under it.[62]

On appeal, the Eleventh Circuit reviewed the district court's dismissal *de novo*.[63] The court began its analysis by addressing the definition of "subscriber" under the VPPA.[64] Prior to Ellis' case, only a few district courts had defined the term.[65] For example, in *Yershov v. Gannett Satellite Information Network, Inc.*,[66] the United States District Court for the District of Massachusetts held that the simple act of downloading an app did not make a user a subscriber, especially when the user did not have to make a payment or register with the provider.[67] However, *Yershov* directly conflicted with the Northern District of Georgia's decision in *Locklear v. Dow Jones & Co.*,[68] which held that a user was a subscriber after visiting its website and watching its video content.[69] Given these conflicting decisions, the Eleventh Circuit felt compelled to perform its own statutory interpretation of the term "subscriber."[70]

The Eleventh Circuit referenced several dictionaries to look at the ordinary meaning of "subscriber."[71] The fourth edition of *Webster's New World College Dictionary* defined the term as a person who is "registered to pay for and receive a periodical, service, theater tickets, etc. for a specified period of time."[72] Similarly, the fifth edition of the *Shorter Oxford English Dictionary* defined the term as a "contributor to a project, fund, etc.; a person subscribing to a periodical, for share issue, etc."[73] Additionally, *Webster's Third New International Dictionary* stated that a "subscriber" is "one that favors, aids, or supports (as by money contribution, moral influence, [or] personal membership)."[74] The court

61. *Ellis*, 803 F.3d at 1254–55.

62. *Id.* at 1255.

63. *Id.*

64. *Id.*

65. See *id.*, for a discussion comparing and contrasting several district court cases that provided conflicting definitions of the term "subscriber."

66. 104 F. Supp. 3d 135 (D. Mass. 2015), *rev'd*, 820 F.3d 482 (1st. Cir. 2016).

67. *Id.* at 149.

68. 101 F. Supp. 3d 1312 (N.D. Ga. 2015), *abrogated by Ellis*, 803 F.3d 1251.

69. *Id.* at 1316.

70. *See Ellis*, 803 F.3d at 1255.

71. *Id.* at 1255–56.

72. *Id.* at 1255 (quoting WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1427 (4th ed. 2000)).

73. *Id.* at 1255–56 (quoting 2 SHORTER OXFORD ENGLISH DICTIONARY 3089 (5th ed. 2002)).

74. *Id.* at 1256 (alteration in original) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2278 (3d ed. 1981)).

noted that not all of these definitions referenced some sort of payment to be made, and thus agreed with the Northern District of Georgia that payment is an unnecessary factor.[75] Therefore, a user can become a "subscriber" without making a payment to the video tape service provider.[76]

While payment was determined to be unnecessary, a commonality among the dictionary definitions is that there must be "some type of commitment, relationship, or association (financial or otherwise) between a person and an entity."[77] The Eleventh Circuit referenced *Austin–Spearman v. AMC Network Entertainment LLC*,[78] which suggested that there must be affirmative action by the user that creates a type of ongoing relationship where the user supplies the provider with sufficient personal information.[79] In *Ellis*, the court also relied on the District of Massachusetts' holding in *Yershov*[80] to support the proposition that downloading an app, without providing any personal information, does not make a user a subscriber.[81] If Congress had intended for a broader definition of "consumer," it could have included the term "user" or "viewer," but, importantly, it did not.[82]

Lastly, the Eleventh Circuit scrutinized the lower court's reliance on *In re Hulu Privacy Litigation*.[83] The court distinguished *Hulu* from the instant case because the plaintiffs in *Hulu* were registered users, signed up for an account, received a Hulu ID, and streamed videos using Hulu's services.[84] Therefore, *Hulu* did not support the proposition that a user does not have to register or log in to be considered a "subscriber."[85] In Ellis' case, and unlike the plaintiffs in *Hulu*, Ellis did not create an account with CN, did not provide CN with any personal information, did not become a registered user, did not make any payments, did not establish a profile, and did not receive a Cartoon Network ID.[86] The sole act of downloading the app therefore did not create an ongoing

75. *Id.* ("The term 'subscriber' is not preceded by the word 'paid' in § 2710(a)(1) of the VPPA, and there are numerous periodicals, newsletters, blogs, videos, and other services that a user can sign up for . . . and receive for free. Payment, therefore, is only one factor a court should consider when determining whether an individual is a 'subscriber' under the VPPA.") (citation omitted).

76. *See id.*

77. *Id.*

78. 98 F. Supp. 3d 662 (S.D.N.Y. 2015).

79. *Id.* at 669.

80. *See supra* note 67 and accompanying text.

81. *Ellis*, 803 F.3d at 1256.

82. *Id.* at 1256–57.

83. No. C 11–03764 LB, 2012 WL 3282960 (N.D. Cal. Aug. 10, 2012).

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

85. *Id.*

86. *Id.*

commitment or relationship between Ellis and CN that amounted to the level of becoming a "subscriber" under the VPPA.[87] Further, Ellis was also able to delete the CN app without any consequences.[88]

In summation, the Eleventh Circuit affirmed the district court's dismissal of Ellis's complaint, but did not agree with its definition of "subscriber."[89] Downloading a free app in order to watch free content does not make a user a "subscriber" under the VPPA.[90] Because the Eleventh Circuit held that Ellis was not a "subscriber" and therefore not protected under the VPPA, it did not address the next issue regarding personally identifiable information.[91]

2. Perry v. CNN

After its decision in *Ellis* in 2015, the Eleventh Circuit was confronted once again with the same issues two years later. In *Perry v. Cable News Network, Inc.*,[92] Ryan Perry filed a proposed class action against Cable News Network, also known as CNN, under the VPPA.[93] Perry alleged that CNN unlawfully disclosed his personally identifiable information to a third party.[94] Perry sought to amend his complaint, but the district court granted CNN's motion to dismiss his case entirely, stating that any additional amendments would be futile.[95] The district court held that Perry failed to state a claim under the VPPA because he was not a "consumer" under the Act and that the information alleged was not "personally identifiable."[96]

CNN produces news programming for television, but also offers a mobile app where users can receive news alerts and watch videos of live events.[97] Users are able to download the app through the Apple iTunes Store, and the app does not ask for consent to disclose personal data to third parties before downloading.[98] Perry claimed that CNN tracked his viewing activity and then sent his records to Bango without his knowledge or consent.[99] Through the app, CNN does send to Bango a

87. *Id.*

88. *Id.* ("The downloading of an app, we think, is the equivalent of adding a particular website to one's Internet browser as a favorite, allowing quicker access to the website's content.").

89. *Id.* at 1257–58.

90. *Id.* at 1258.

91. *Id.* at 1252.

92. 854 F.3d 1336 (11th Cir. 2017).

93. *Id.* at 1339.

94. *Id.*

95. *Id.*

96. *Id.* at 1338.

97. *Id.*

98. *Id.*

99. *Id.* at 1339.

user's MAC address, which is "a unique string of numbers associated with a particular user's specific mobile device."[100] Bango, a data analytics company,[101] is able to learn about a user's online behavior by linking their MAC address to their other internet activity.[102] More importantly, Bango is able to create a personal profile of the individual user and collect their name, email address, location, phone number, and payment information.[103]

On *de novo* review, the Eleventh Circuit first addressed the issue of standing.[104] CNN claimed that Perry failed to allege a legally cognizable injury, but the court rejected this argument.[105] In certain cases, a plaintiff does not need to allege additional harm if a statute provides a procedural right and that right has been violated.[106] The purpose of the VPPA is to provide an actionable right to consumers who have had their personally identifiable information disclosed to third parties without their consent.[107] Thus, a violation of the VPPA is a concrete harm.[108]

On appeal, Perry conceded that while he failed to state a claim under the VPPA, he should have been able to amend his complaint.[109] Perry argued that in addition to downloading the app onto his iPhone, he also subscribed to CNN through his cable package, and that the disclosure of his MAC address and video history constituted personally identifiable information under the VPPA.[110] In disagreement, the Eleventh Circuit relied on its previous decision in *Ellis*, stating that there must be an ongoing commitment or relationship between the user and provider in order to become a "subscriber."[111] The court analogized the instant case to *Ellis*, in which both plaintiffs downloaded a free app without signing up for an account, making any payments, or becoming a registered user.[112] Under the Eleventh Circuit's more narrow view of the term "subscriber," the plaintiffs' actions in both cases failed to create or

100. *Id.*

101. *See supra* notes 51–53 and accompanying text.

102. *Perry*, 854 F.3d at 1339.

103. *Id.*

104. *Id.*

105. *Id.* at 1339–40 ("Perry has established his standing to file this action because his alleged injury is sufficiently concrete.").

106. *Id.* at 1340 (citing Spokeo Inc., v. Robins, 136 S. Ct. 1540, 1549 (2016)).

107. *See id.*

108. *Id.* at 1340–41 (noting that the VPPA was created to protect personal privacy and that Supreme Court precedent has recognized that individuals have an interest in protecting their personal information from being disclosed).

109. *Id.* at 1341.

110. *Id.*

111. *Id.* at 1342.

112. *Id.*

establish a relationship or commitment with the providers.[113] Additionally, the court rejected Perry's argument that he subscribed to CNN's television channel through his cable package.[114]

The Eleventh Circuit in *Perry* cited the First Circuit's decision in *Yershov*, which distinguished *Ellis* from the case at bar.[115] In *Yershov*, the plaintiff provided his mobile device identification number to use the app, which established a relationship.[116] In contrast, Perry did not provide any personal information when he downloaded CNN's app.[117] The Eleventh Circuit held that, as a result, Perry was not a "subscriber" under the VPPA.[118] By resolving the first prong of the VPPA statute, the court did not need to address whether the information was personally identifiable.[119]

B. *United States Court of Appeals for the First Circuit*

1. Yershov v. Gannett Satellite Info. Network Inc.

Alexander Yershov brought a putative class-action lawsuit alleging that Gannett Satellite Information Network, Inc. (Gannett) violated the VPPA by disclosing his personal information to a third party.[120] The United States District Court for the District of Massachusetts held that while Gannett disclosed personally identifiable information to a third party, the VPPA did not protect Yershov because he was neither a "consumer" nor "subscriber."[121] The First Circuit reversed the district court's dismissal of the complaint, holding that Yershov was a "consumer" and that Gannett disclosed his personally identifiable information to a third party, thus violating the VPPA.[122]

Gannett, an international media company, produces news and entertainment programming in both printed and digital forms.[123] The newspaper *USA Today* is offered in digital form through Gannett's mobile app, known as the "USA Today Mobile App."[124] To download

113. *Id.*

114. *Id.* ("Perry's proposed amendment, however, shows a commitment to only his cable television provider, rather than to CNN.").

115. *Id.* at 1343–44.

116. *Id.* at 1343.

117. *Id.*

118. *Id.* at 1344.

119. *Id.*

120. Yershov v. Gannett Satellite Info. Network, Inc., 820 F.3d 482, 484 (1st Cir. 2016).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* ("The App allows users to access news and entertainment media content, including videos, on their mobile devices.").

the app onto a mobile phone, users must visit the Google Play Store, which is an online media platform run by Google.[125] After downloading the app, users do not receive any notification asking for their consent, but are asked for permission to receive notifications.[126] Despite not asking for consent, Gannett still discloses to Adobe Systems Incorporated: "(1) the title of the video viewed, (2) the GPS coordinates of the device at the time the video was viewed, and (3) certain identifiers associated with the user's device, such as its unique Android ID."[127] Adobe Systems Incorporated is able to compile the information sent by Gannett to create a profile that contains a user's personal information, their online activity, and device identifiers.[128]

On *de novo* review, the First Circuit addressed two issues: the meaning of "subscriber" and the meaning of "personally identifiable information" under the VPPA.[129] Beginning with personally identifiable information,[130] the court observed that the actual statutory term is awkward and unclear.[131] The abstract language used to define the term can be seen to encompass information that does not explicitly name an individual.[132] Furthermore, the definition contains the word "includes," which signals that the "definition falls short of capturing the whole meaning."[133] Therefore, if the information disclosed is reasonably and foreseeably likely to link an individual to their video history, it constitutes "personally identifiable information" under the Act.[134] In *Yershov*, it was reasonably likely that Adobe had the technology to link Yershov's GPS address and identifiable device information to his video history.[135]

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125. *Id.*

126. *Id.*

127. *Id.* (noting that Adobe Systems Incorporated is a third-party data analytics company that collects information about a user's online activity).

128. *Id.* at 484–85 ("The information contained in these profiles may include, for example, the user's name and address, age and income, 'household structure,' and online navigation and transaction history. These digital dossiers provide Adobe and its clients with 'an intimate look at the different types of materials consumed by the individual' that 'may reveal, or help create inferences about,' a user's traits and preferences.").

129. *Id.* at 485 (quoting 18 U.S.C. § 2710(a)(1), (3) (2012)).

130. *See* 18 U.S.C. § 2710(a)(3) ("[T]he term '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.").

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

132. *Cf. id.* ("The definition of that term ('identifies a person as having [obtained a video]') adds little clarity beyond training our focus on the question whether the information identifies the person who obtained the video." (alteration in original) (quoting 18 U.S.C. § 2710(a)(3))).

133. *Id.* (quoting 18 U.S.C. § 2710(a)(3)) (discussing how the official Senate Report stated that the goal was to establish a non-exclusive definition).

134. *See id.*

135. *Id.*

For the definition of "subscriber," the court assumed that the plain and ordinary meaning applied because Congress left the term undefined.[136] The court analogized the facts at bar to the definition provided by *The American Heritage Dictionary*.[137] The dictionary defined "subscribe" as "[t]o receive or be allowed to access electronic texts or services by subscription," and defined "subscription" as "[a]n agreement to receive or be given access to electronic texts or services."[138] In *Yershov*, Gannett offered its mobile app to Yershov, who in turn accepted it by downloading the app in order to view Gannett's electronic services.[139] This indicated that Yershov intended to visit the app multiple times and not just once.[140]

The next issue the court faced was whether the statutory term includes payment as a necessary element of becoming a subscriber.[141] When looking at the language of the VPPA, the definition of "consumer" also includes a "renter" or a "purchaser."[142] Both of these terms require a consumer to provide some type of monetary payment, leading the court to conclude that if Congress only intended to protect paying consumers, it would not have added an unnecessary third category of "subscribers."[143] In addition, it was not uncommon for a consumer to acquire videos from a supplier in 1988 with money back or without having to pay a fee; therefore, there is no reason to assume that Congress would have wanted to give consumers less protection with the electronic technology used today.[144]

Ultimately, the First Circuit did not want to adopt a narrow definition of "subscriber," even after considering the Eleventh Circuit's opinion in *Ellis*.[145] *Ellis* noted that the term "subscriber" does not require monetary payment, but the simple act of downloading an app onto a mobile phone, without providing any additional personal information, did not establish the necessary relationship to become a subscriber based on the facts of

136. *Id.* at 487.

137. *Id.*

138. *Id.* (alterations in original) (quoting THE AMERICAN HERITAGE DICTIONARY 1726 (4th ed. 2000)).

139. *Id.* ("[M]uch like how a newspaper subscriber in 1988 could, if he wished, retrieve a copy of the paper in a box at the end of his driveway without having to go look for it at a store.").

140. *See id.*

141. *Id.*

142. 18 U.S.C. § 2710(a)(1) (2012); *see Yershov*, 820 F.3d at 487.

143. *See Yershov*, 820 F.3d at 487.

144. *Id.* at 488 ("Congress left untouched the definition of 'consumer' in the statute, which we believe supports an inference that Congress understood its originally-provided definition to provide at least as much protection in the digital age as it provided in 1988.").

145. *Id.*

that case.[146] However, the First Circuit in *Yershov* disagreed.[147] Even though Yershov, unlike Ellis, provided some personal information,[148] Yershov established a relationship with Gannett by installing the app onto his mobile phone, which allowed him to gain access to the electronic newspaper.[149] The court noted that this type of relationship is different from when a user just views videos through a web browser.[150] Therefore, the Court found that Yershov's act of downloading the app onto his phone and providing some personal information made him a protected "consumer" and "subscriber" under the VPPA.[151]

C. *Summary of the Circuit Split*

The recent cases of *Ellis*, *Perry*, and *Yershov* involved users who downloaded an app onto their mobile phones to watch videos, unaware that their personal information was being disclosed to unidentified third parties without their consent.[152] All three plaintiffs brought their cases under the VPPA alleging that they were protected "consumers," but each case resulted in a different outcome due to conflicting circuit court opinions.[153] Currently, the Eleventh Circuit holds that a user must have an ongoing commitment or relationship with the video tape service provider to become a protected "subscriber," which requires more action than just downloading an app onto a mobile phone.[154] In contrast, the First Circuit currently holds that a user who downloads an app onto their mobile phone and provides the app with their personal information is a protected "subscriber."[155] More importantly, the First Circuit reasoned in the dicta of *Yershov* that a broader definition of "subscriber" should be adopted under the VPPA to protect users who download an app onto their mobile phone without providing any additional personal information or paying some sort of fee.[156]

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146. *See supra* notes 89–91 and accompanying text.

147. *Yershov*, 820 F.3d at 488.

148. *Id.* at 489 (noting that Yershov provided his Android ID and mobile device's GPS location).

149. *Id.*

150. *Id.*

151. *Id.*

152. *See* discussion *supra* Sections II.A, II.B.

153. *See* discussion *supra* Sections II.A, II.B.

154. *See* Perry v. Cable News Network, Inc., 854 F.3d 1336, 1343 & n.6 (11th Cir. 2017); Ellis v. Cartoon Network, Inc., 803 F.3d 1251, 1257 (11th Cir. 2015).

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

156. *Id.* at 488–89 ("Our unwillingness to adopt one of the narrower meanings of 'subscriber' rests as well on our recognition that Congress itself, in 2012, considered the impact of the VPPA on the electronic distribution of videos and chose only to make consent easier to obtain, rather than limiting the reach of the Act in the absence of consent.").

III. FIRST PRONG: A NEW DEFINITION

A. *Policy and Privacy Concerns*

To resolve the circuit split and provide protection to the millions of users that download apps onto their mobile phones to watch videos, there must be a broad, uniform definition of the term "subscriber" under the VPPA. As noted above, Congress has only amended the language of the VPPA once since its original enactment in 1988.[157] Over the past thirty years, there have been astounding advances in technology that have redesigned how individuals are connected to the internet, to social media, and to numerous other technological platforms through their mobile phones.[158] More specifically, as a nascent commercial environment in the United States, mobile commerce has raised significant policy and privacy issues.[159]

The increased use of mobile phones and apps allows users to stay connected to the news, stream videos, and purchase goods or services—just to name a few uses.[160] However, it also allows video tape service providers and other companies to take advantage of marketing opportunities and gain access to users' personal information without their consent or knowledge.[161] According to legal scholar Nancy J. King, consumers face two key privacy concerns due to the increased use of mobile phones and advertising practices: "[(]1) the collection, use, and disclosure of consumers' personally identifying information that accompanies mobile advertising; and [(]2) the generation of unsolicited mobile advertising."[162] Mobiles phones are providing companies with extensive marketing opportunities,[163] raising a need for increased consumer privacy protections that allow for the continued use and

157. *See supra* notes 27–28 and accompanying text.

158. Nancy J. King, *Direct Marketing, Mobile Phones, and Consumer Privacy: Ensuring Adequate Disclosure and Consent Mechanisms for Emerging Mobile Advertising Practices*, 60 FED. COMM. L.J. 229, 231–32 & n.2 (2008).

159. *Id.* at 231–32 (discussing how an increase of consumers who have mobile phones has led to a new commercial environment due to the availability of new communications and advertising opportunities that are available through mobile phones).

160. *See id.* at 231–32 & n.2.

161. *See id.* at 232 (noting that companies collect, use, and disseminate consumers' personally identifiable information for advertising purposes); *see also* Nicole A. Ozer, *Putting Online Privacy Above the Fold: Building a Social Movement and Creating Corporate Change*, 36 N.Y.U. REV. L. & SOC. CHANGE 215, 221 (2012) ("The growth in consumer concern regarding online privacy has become particularly marked in select sectors, including targeted advertising, social networking, and mobile services.").

162. King, *supra* note 158, at 232.

163. *Id.* at 233.

technological advances of mobile phones without subjecting users to invasions of privacy.

The need for increased consumer protection under the VPPA will continue to escalate as this is a new and developing issue faced by the courts, as well as by everyday consumers.[164] Even though the VPPA was enacted in 1988, advances in technology and the increased use of mobile phones have created relationships between users and video tape service providers that should be protected under the VPPA. The future developments of mobile technology, apps, and video streaming will only blur the lines between who becomes a "consumer" or "subscriber" under the Act if the statutory language remains unchanged. Therefore, the first step in resolving this issue requires that the VPPA be amended to include a clear and unambiguous definition of "subscriber."

B. *The Definition of Subscriber*

Currently, there is no definition for the term "subscriber" under the VPPA. The most critical issue faced by the First and Eleventh Circuits was analyzing and interpreting the language of the VPPA to formulate a definition that would be applicable to *Perry*, *Ellis*, and *Yershov*.[165] Instead of solely relying on the statutory language provided by the VPPA, the circuit courts had to consult other sources and dictionaries, resort to analogical reasoning, and attempt to assume Congress's original intent when it enacted the VPPA.[166] Thus, the most direct way to resolve this

164. *See* Ozer, *supra* note 161, at 220–21 ("Surveys performed over the past decade have consistently shown that a large percentage of the American public is concerned about their online privacy. In a 2000 study, 94 percent of respondents said that having their security and privacy protected when they were online was 'very important.' A 2004 Carnegie Mellon/Berkman Fund study found that more than 87 percent of respondents felt that they did not have enough privacy in today's society. By 2005, 52 percent of Americans believed that their right to privacy was 'under serious threat.' In recent years, consumer concern has further escalated, both in the United States and around the world." (footnotes omitted) (first quoting Andrew Clement & Christie Hurrell, *Information/Communications Rights as a New Environmentalism? Core Environmental Concepts for Linking Rights-Oriented Computerization Movements*, *in* COMPUTERIZATION MOVEMENTS AND TECHNOLOGY DIFFUSION: FROM MAINFRAMES TO UBIQUITOUS COMPUTING 337, 352 (Margaret S. Elliott & Kenneth L. Kraemer eds., 2008); and then quoting Joel Roberts, *Poll: Privacy Rights Under Attack*, CBS NEWS (Sept. 30, 2005, 2:39 PM), https://www.cbsnews.com/news/poll-privacy-rights-under-attack/ [https://perma.cc/ZRB7-G982])).

165. *See supra* note 30 and accompanying text.

166. *See* Yershov v. Gannett Satellite Info. Network, Inc., 820 F.3d 482, 487 (1st Cir. 2016) ("Because it contains no definition of the term 'subscriber,' nor any clear indication that Congress had a specific definition in mind, we assume that the 'plain and ordinary meaning' of the world applies." (quoting Stornawaye Fin. Corp. v. Hill (*In re* Hill), 562 F.3d 29, 32 (1st Cir. 2009))); Ellis v. Cartoon Network Inc., 803 F.3d 1251, 1255 (11th Cir. 2015) ("The VPPA does not define the term 'subscriber,' and we, as a circuit, have yet to address what the term means. The few district courts that have weighed in on the issue appear to be divided.").

interpretive issue is to amend the VPPA to include an unambiguous definition of "subscriber."

Given the numerous policy and privacy issues that have accompanied the expansive increase of mobile technology since the VPPA's enactment in 1988, the definition of "subscriber" needs to be broad to protect users who download an app without providing any other personal information.[167] The First and Eleventh Circuits both agree that monetary payment is not required to become a "subscriber" under the VPPA.[168] Instead, determining the most applicable definition focuses on the nature of the relationship formed between the user and the video tape service provider. This determination includes assessing how the user downloaded the app, the user's accessibility to the videos on the app, and whether the user was required to provide additional personal information.

Broadening the definition will allow the statute to adapt to an expanding area of technology and protect app users; however, the definition must not be too broad.[169] The foundation to formulating a definition starts with the definitions cited by the First Circuit in *Yershov*.[170] The Fourth Edition of the *American Heritage Dictionary* defines "subscribe" as "[t]o receive or be allowed to access electronic texts or services by subscription" and defines "subscription" as "[a]n agreement to receive or be given access to electronic texts or services."[171] These definitions cover users who download apps onto their mobile phones to watch videos and receive other electronic information.

This Note suggests combining both definitions of the terms listed above so that the VPPA defines "subscriber" as "an individual who agrees to be allowed to access electronic texts or services through an agreement and continues to access the electronic texts or services." While this Note's definition might seem much broader than the Eleventh Circuit's approach of requiring an ongoing commitment or

167. *See Yershov*, 820 F.3d at 488 ("Our unwillingness to adopt one of the narrower meanings of 'subscriber' rests as well on our recognition that Congress itself, in 2012, considered the impact of the VPPA on the electronic distribution of videos and chose only to make consent easier to obtain, rather than limiting the reach of the Act in the absence of consent.").

168. *See id.* ("[W]e therefore decline to interpret the statute as incorporating monetary payment as a necessary element."); *Ellis*, 803 F.3d at 1256 ("We agree with the district court that payment is not a necessary element of subscription.").

169. *See* Suzanne L. Riopel, Comment, *The Price of Free Mobile Apps Under the Video Privacy Protection Act*, 6 AM. U. BUS. L. REV. 115, 126–27 (2016) (noting that defining subscriber to include unregistered users of mobile apps would effectively make the term "consumer" into the term "any person" in the statute).

170. *See supra* notes 138–40 and accompanying discussion.

171. *Yershov*, 820 F.3d at 487 (alterations in original) (quoting THE AMERICAN HERITAGE DICTIONARY 1726 (4th ed. 2000)).

relationship,[172] it is nonetheless similar. It still requires an ongoing relationship between the user and app, as well as an agreement. However, this Note's definition takes into account that by downloading a free app onto a mobile phone, a user has agreed to receive electronic services and information provided by the app while the app remains installed on the mobile phone. This in itself establishes an ongoing relationship. On both ends, there is an agreement by the user and the video tape service provider, as noted by the First Circuit.[173] The agreement begins to form when video tape service providers create apps that are available to users. In return, users who choose to download the apps and install them onto their mobile phones have agreed to receive those electronic texts, videos, and other services provided by the apps.

Users who download apps onto mobile phones should become protected subscribers under the Act because they have established a relationship that differs from the act of merely using an internet web browser. Downloading an app onto a mobile phone is not comparable to the act of favoriting a website—an analogy used by the Eleventh Circuit in *Ellis*.[174] Users may favorite a website to save content that they wish to return to or to have quicker access to that website. On the other hand, mobile apps that are particularly designed for streaming videos and providing news, such as Cartoon Network and CNN's apps, are physically installed onto a user's mobile phone and have the ability to send push notifications and other alerts to the user. This creates an ongoing relationship between the user and the app that can be upgraded, modified, updated, and/or terminated. Furthermore, users have to physically click and choose to download the app from a platform onto their mobile phones before they can begin to view its content or watch its videos, unlike the ability to browse the internet and favorite websites without having to download any additional software or app.

In summation, this Note's definition of "subscriber" under the VPPA will provide more protection to users who do not purchase or rent videos, but still agree to form a relationship with video tape service providers in order to view those providers' content on their mobile phones. The definition is not too broad because it still requires an agreement between the user and provider, as well as the actual process of downloading the app onto a mobile phone. Users of video tape service providers who

172. *See supra* note 154 and accompanying text.

173. *See Yershov*, 820 F.3d at 487 ("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 without going through other distribution channels, much like how a newspaper subscriber in 1988 could, if he wished, retrieve a copy of the paper in a box at the end of his driveway without having to go look for it at a store.").

174. *See* Ellis v. Cartoon Network, Inc., 803 F.3d 1251, 1257 (11th Cir. 2015).

create apps that are specifically designed to provide videos should be a class of protected "consumers" under the VPPA. The process of a provider creating an app to provide services to a user and that user, in return, agreeing to download the app establishes the necessary relationship and agreement to become a protected "subscriber."[175] Allowing video tape service providers to disclose secretly the personal information of users who downloaded their apps should not be allowed to conduct such an invasion of privacy without first obtaining consent. Implementing this Note's definition will provide additional protection to each user that becomes a "subscriber" by agreeing to download an app and receive the app's services.

C. *Summary of First Solution*

The first step to resolving the circuit split requires clarifying the ambiguous language of the VPPA through an amendment. The original language of the VPPA, from its enactment in 1988, has failed to adapt to the technological advances that allow users to download free apps to watch videos on their mobile phones. The traditional method of renting videos from brick and mortar stores, like Blockbuster, has become outdated by the recent influx of mobile phone technology.[176] Users who download apps onto their mobile phone to watch videos should become a class of protected "consumers" under the VPPA.

Congress must amend the VPPA to include a definition of subscriber to create an unambiguous class of "consumers" that will receive protection.[177] This Note suggests that the VPPA should define "subscriber" as "an individual who agrees to be allowed to access electronic texts or services through an agreement and continues to access the electronic texts or services." The issue that follows after an individual comes within the protection of the VPPA is discerning whether the information disclosed was personally identifiable information. While the determination of what constitutes personally identifiable information is critical, the issue with the circuit split focuses on the undefined term "subscriber." If a plaintiff cannot become a "consumer" or "subscriber,"

175. *See supra* note 173 and accompanying text.

176. *See* Jason Nark, *Renting DVDs in the Age of Netflix: Glenview-Based Family Video Carves out Strategy in Rural America*, CHI. TRIB. (Feb. 19, 2019, 8:50 AM), https://www.chicagotribune.com/business/ct-biz-family-video-dvd-rentals-20190219-story.html [https://perma.cc/C9F4-88RE] ("When the digital age . . . came for the brick-and-mortar movie rental business, the decline was rapid. Blockbuster Video, the rental giant with nearly 9,000 locations, declared bankruptcy in 2010.").

177. *See supra* Section III.B.

courts will not consider the issue of personally identifiable information.[178]

IV. SECOND PRONG: A UNIFORM TEST

A. *The Balancing Test*

Amending the VPPA to include a broader definition of "subscriber" will resolve the current circuit split, but a single definition will not remain as determinative in future cases. Advances in technology will continue to challenge the scope of the VPPA's language. More specifically, the increasing use of mobile phones will create new ways for users to become protected "consumers" under the Act. A balancing test that focuses on how the user established a relationship with the app, as well as how often the user interacted with the app, will provide the necessary flexible approach for courts to use when determining whether a user should be protected under the VPPA.

Each individual case brought under the VPPA is very fact-specific. Therefore, the balancing test, consisting of several different factors, will allow courts to rely on two different approaches. The first approach consists of solely looking at the language of the VPPA and determining whether the plaintiff clearly falls into one of the defined categories: a "purchaser," "subscriber," or "renter." If the case is clear, a court will not need to apply the balancing test. However, if the facts create a situation where it is unclear what category the plaintiff is in, the second approach mandates courts to apply the test. In doing so, courts will weigh the different factors present in the case to determine if the plaintiff established the necessary relationship to become a protected "consumer." The test will specifically apply to the use of mobile phones and apps under the VPPA.

> If 18 U.S.C. § 2710(a)(1) is not applicable when determining whether a user is a protected "consumer" under the Video Privacy Protection Act, a court must consider and weigh the following factors:
>
> (1) whether the user provided information to the video tape service provider prior to, during, or after downloading the app;
>
> (2) the type of information provided by the user if applicable;

178. *See* Perry v. Cable News Network, Inc., 854 F.3d 1336, 1344 (11th Cir. 2017) ("Having concluded that that the district court did not err in concluding that Perry is not a 'subscriber' . . . we need not address the second prong for liability under the VPPA, whether CNN provided Perry's 'personally identifiable information' to a third party.").

(3) how often the user accessed the app;

(4) whether the user removed or deleted the app from their mobile phone; and/or

(5) whether the user agreed to receive notifications from the app.

This balancing test mirrors the requirements for protection under § 2710(a)(1),[179] but also extends protection to users that establish an ongoing commitment or relationship with an app through other means not explicitly covered by the statute. The variance among each factor allows the courts to broaden the scope of the VPPA, which is necessary to protect a user's privacy rights. Under this Note's newly proposed statutory definition of "subscriber,"[180] there are still many instances when a user's conduct may not fit within the definition. For example, a user may not have downloaded the app onto their phone, or the phone already came with pre-installed apps. This type of situation is where the balancing test well demonstrates its flexibility. Applying each factor will help courts discern whether there was the establishment or termination of an ongoing commitment or relationship between the user and app.

The first two factors a court should consider is whether the user provided any information to the app and, if so, the type of information provided. In *Yershov*, the court noted that in addition to installing the app onto his mobile phone, the plaintiff also provided personal information, including his Android ID and GPS location, which created a more distinctive relationship with the app.[181] Applying the rationale in *Yershov*, it can be inferred that the user's act of providing personal information to an app strengthens their relationship with the video tape service provider and should, therefore, be a determinative factor. For example, as mentioned above, mobile phones may have apps that are already pre-installed onto the phone before being purchased. Under this scenario, a user would not satisfy this Article's new definition of "subscriber" because they did not agree to download the app. However, a court will have the ability to conclude, under the balancing test, that the user became a protected subscriber by providing personal information to the app, which created an ongoing commitment or relationship with that app.

The remaining three factors of the test also directly pertain to whether the user has established an ongoing commitment or relationship with the app. A court may analyze a user's frequency of use to determine whether a relationship existed and, if so, for how long. If a user downloads an app,

179. *See* 18 U.S.C. § 2710(a)(1) (2012) (defining who becomes a "consumer" under the VPPA).

180. *See supra* Section III.B.

181. Yershov v. Gannett Satellite Info. Network, Inc. 820 F.3d 482, 489 (1st Cir. 2016).

but never accesses the app again, there is no ongoing relationship. However, revisiting the pre-installed app example, a user can rise to this Note's definition of what constitutes a "subscriber" by consistently accessing an app, just as if they had subscribed to it. The same rationale applies to a user who has deleted an app, thereby terminating any ongoing relationship, or to a user who agrees to receive notifications, thereby creating a relationship.

Ultimately, the balancing test guides courts to weigh and consider several factors that relate to the establishment of an ongoing relationship between a user and an app that should receive protection under the VPPA. While it is not a bright-line rule, courts will have the necessary discretion to consider the strength of each of the factors depending on the individual facts of a case. Courts will also have the option to look only to the language of the VPPA if a plaintiff falls squarely into one of the defined categories. This will eliminate future ambiguities under the VPPA by expanding the scope of protection afforded under § 2710(a)(1).

B. *Implications of the Test*

Implementing the balancing test is the most effective way to resolve the ambiguities created by the language of the VPPA.[182] The flexibility of the test will continue to protect users notwithstanding future technological advances.[183] Applying a strict test or bright-line rule will only constrain the scope of protection afforded by the VPPA by allowing advances in mobile phone technology to create new ways for users to download apps that do not come under the purview of the statute. Therefore, the balancing test gives judges the discretion to weigh the importance of the most determinative factors without creating only one scenario in which a user can become a protected "consumer" under the VPPA. As a result, the test will provide a framework courts can use to assess future cases brought under the VPPA regarding the use of mobile phones.

CONCLUSION

Recently, the language of the VPPA has failed to encompass an emerging area of technology that will continue to rapidly expand and create more ambiguities. Outdated and undefined terminology, stemming from the VPPA's original enactment in 1988, has opened the door to

182. *See* Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. REV. 585, 651 (1988) ("[T]he balancing test has become an important part of American legal process. Courts use it to find facts, to create rules, and to determine results, as well as to . . . construe statutes, and to resolve common law disputes.").

183. *See id.* at 655 ("In areas of law so novel or complex that principled sets of rules are especially difficult to fashion, a court might introduce the test in order to encourage experimentation on a case-by-case basis.").

statutory interpretation, resulting in numerous conflicting opinions among the circuits. If the VPPA remains unchanged, courts and individuals will remain in a state of uncertainty regarding the scope of protection that the statute affords.

To resolve the circuit split, protect an individual's right to privacy, and provide a solution that will continue to grow with advances in mobile phone technology, Congress must amend the VPPA to include a broader definition of "subscriber." The second and more critical step is to implement the balancing test. This Note's two-pronged approach will allow courts to expand the scope of the VPPA in a more structured and focused manner. Currently, a bright-line rule will not be beneficial when applied to this area of law and technology, which has the ability to expand without limitations. While in the future a more determinative rule may be applicable, the current and immediate solution calls for a more flexible and broad approach.