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FROM BLOCKBUSTER TO MOBILE APPS: VIDEO PRIVACY PROTECTION ACT OF 1988 CONTINUES TO PROTECT THE DIGITAL CITIZEN

*Ann Stehling**

A right to privacy is as old as the common law itself.¹ The nature and extent of such protection has necessarily evolved to meet the demands of society—but not without growing pains.² Recently, federal courts have struggled to apply the Video Privacy Protection Act of 1988 (VPPA or the Act) in the modern era of online video streaming. The VPPA was enacted in response to a profile that listed 146 films then-Supreme Court nominee Judge Robert H. Bork and his family had rented from a video store.³ The Act prohibits “video tape service provider[s]” from knowingly disclosing “personally identifiable information concerning any consumer” to a third-party.⁴ The Act defines “consumer” as “any renter, purchaser, or subscriber of goods or services from a video tape service provider.”⁵ Recently, in *Yershov v. Gannett Satellite Info. Network, Inc.*, the U.S. Court of Appeals for the First Circuit applied the Act and found that downloading and using a free mobile application, or app, to watch video clips could qualify the user as a “subscriber.”⁶ The decision created a possible split with the Eleventh Circuit.⁷ This Note argues that the First Circuit’s decision is proper because it best effectuates legislative intent and achieves a desirable outcome by continuing to protect the right to privacy in the digital age.

The facts of *Yershov* are the modern-day version of David and Goliath—“little guy” consumer versus big business. Defendant Gannett Satel-

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1. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

2. *Id.* at 193–196.

3. *Yershov v. Gannett Satellite Info. Network, Inc.*, 820 F.3d 482, 485 (1st Cir. 2016).

4. Video Privacy Protection Act of 1988, 18 U.S.C. § 2710(b) (2012).

5. § 2710(a)(1).

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

7. *See Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251, 1257 (11th Cir. 2015) (holding that a user who downloads and uses a free mobile application was not a “subscriber,” and, therefore, not a “consumer” under the VPPA).

lite Information Network, Inc. (Gannett) is a media company that produces news and entertainment programming, including the newspaper *USA Today* and the *USA Today Mobile App* (the App).⁸ Android device users must visit the Google Play Store to download and install the free App to their device.⁹ “[T]he App does not seek or obtain the user’s consent to disclose anything about the user to third parties.”¹⁰ Nonetheless, Gannett sends the following information to a third party each time a user views a video on the App:

- (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.¹¹

The third party, in this case Adobe Systems Incorporated (Adobe), uses that information and information pulled from other sources to compile an intimate “digital dossier” about the user, which contains “personal information, online behavioral data, and device identifiers.”¹² These digital dossiers allow Gannett “to, among other things, accurately target advertisements” based on the user’s traits and preferences.¹³

Plaintiff Alexander Yershov (Yershov) downloaded and installed the App to his Android mobile device.¹⁴ Using the App, he “read news articles and watch[ed] numerous video clips.”¹⁵ Since Gannett did not “provide him with the opportunity to prevent such disclosures,” Yershov never consented to disclosure of any information about himself to third parties.¹⁶ Yet, without Yershov’s knowledge, each time he watched a video, Gannett sent Adobe the video title, the GPS coordinates of his device, and his unique Android ID.¹⁷

Yershov brought a class-action lawsuit against Gannett for allegedly violating the VPPA by disclosing personal information to Adobe without his consent.¹⁸ In response, Gannett filed a motion to dismiss the suit for failure to state claim.¹⁹ In granting Gannett’s motion, the Federal District Court of Massachusetts found that the information Gannett disclosed to Adobe concerning Yershov was “personally identifiable information (PII) under the VPPA, 18 U.S.C. § 2710(a)(3), but that Yershov was not a ‘renter, purchaser, or subscriber’. . . protected by the Act.”²⁰

8. *Yershov*, 820 F.3d at 484.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 484–85.

13. *Id.* at 485.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 484.

On appeal, the First Circuit agreed with the district court that the information disclosed by Gannett concerning Yershov was PII, but reversed the district court's holding and found that the complaint adequately alleged that Yershov was a subscriber for purposes of the VPPA.²¹ Even though Yershov paid no money to use the App, "he intended more than a one-shot visit" and "provide[d] consideration in the form of . . . information, which was of value to Gannett."²² Thus, the First Circuit held that the transaction described in the complaint plausibly pled a case under the VPPA.²³ On remand, the district court denied Gannett's motion to dismiss.²⁴

Both the district court and Court of Appeals for the First Circuit agreed that the information Gannett disclosed to Adobe fit the definition of PII.²⁵ In reaching its decision, the First Circuit examined the statutory text and legislative intent behind the enactment of the VPPA.²⁶ The express purpose of the Act is "[t]o preserve personal privacy with respect to the rental, purchase or delivery of video tapes or similar audio visual materials."²⁷ In concluding that the information Gannett disclosed to Adobe was PII, the court adopted a broad interpretation of the term based on the "abstract" language of the statutory definition and the fact that the definition begins with the word "includes."²⁸ The court also relied on the official Senate Report on the Act, which stated that the drafters' aim was "to establish a minimum, but not exclusive, definition of personally identifiable information."²⁹ Based on this reasoning, the court determined that the information Gannett disclosed to Adobe about Yershov fit the definition of PII under the Act.³⁰

Turning to the closer issue of whether Yershov was a subscriber, the court first looked to the statutory text.³¹ However, the Act contains no definition of the term.³² As a result, the court assumed "the plain and ordinary meaning of the word."³³ But, while "[a]ll dictionaries appear to be clear that a 'subscriber' is one who subscribes," they disagree on whether monetary payment is necessary.³⁴ The First Circuit adopted the broader definition, finding that a user may be a subscriber without making a monetary payment.³⁵ The court emphasized that a statute should be

21. *Id.* at 484, 487.

22. *Id.* at 487, 489.

23. *Id.* at 489.

24. *Yershov v. Gannet Satellite Info. Network, Inc.*, No. CV 14-13112-FDS, 2016 WL 4607868, at *10 (D. Mass. Sept. 2, 2016).

25. *Yershov*, 820 F.3d at 484.

26. *Id.* at 485.

27. *Id.* (quoting S. REP. NO. 100-599, at 1 (1988), as reprinted in 1988 U.S.C.C.A.N. 4342-1).

28. *Id.* at 486 (internal quotations omitted).

29. *Id.* (quoting S. REP. NO. 100-599, at 12).

30. *Id.* at 486.

31. *Id.* at 487.

32. *Id.*

33. *Id.*

34. *Id.* at 487-88.

35. *Id.* at 488.

interpreted in a way that no word is superfluous or unnecessary.³⁶ Presumably, a “purchaser” pays to own, a “renter” pays to possess for a limited period of time, and a subscriber is a third category of people which Congress intended to protect.³⁷ In addition, the court noted that Congress amended the Act as recently as 2012, but left the definition of “consumer” untouched.³⁸

Finally, the court distinguished its decision from the Eleventh Circuit’s opinion in *Ellis v. Cartoon Network, Inc.*³⁹ In *Ellis*, the Eleventh Circuit held that downloading and using the free Cartoon Network mobile app was not enough to qualify the user as a subscriber because there was “no ongoing commitment or relationship between the user and the entity.”⁴⁰ The *Ellis* court viewed downloading an app as “the equivalent of adding a particular website to one’s Internet browser as a favorite.”⁴¹ In contrast, the *Yershov* court emphasized that “access [to the App] was not free of a commitment” because Yershov’s activity provided information to Gannett, and downloading and installing the *USA Today Mobile App* was “materially different” from simply accessing the *USA Today* website through a web browser.⁴² Additionally, the Eleventh Circuit found that *Ellis* “did not provide any personal information to Cartoon Network.”⁴³ The First Circuit viewed the circumstances in *Yershov* “quite differently,” pointing out that Yershov “did indeed have to provide Gannett with personal information, such as his Android ID and his mobile device’s GPS location.”⁴⁴ In concluding remarks, the *Yershov* court sought to narrow the effect of its decision by stressing that “only . . . the transaction described in the complaint . . . plausibly pleads a case” under the VPPA.⁴⁵

The First Circuit’s decision in *Yershov* helps bring the VPPA into the 21st century, and in doing so, the court properly interpreted legislative intent to protect modern users’ right to privacy. Since the VPPA was enacted in 1988, the way we consume news and entertainment has changed dramatically. Wireless technology, mobile devices, and video streaming have revolutionized the information landscape—and “outpac[ed] our pri-

36. *Id.*

37. *Id.* at 487–88; see also *In re Hulu Privacy Litig.*, No. C 11-03764 LB, 2012 WL 3282960, at *8 (N.D. Cal. Aug. 10, 2012) (holding that the term “subscriber” does not necessarily imply payment of money and noting that “[i]f Congress wanted to limit the word ‘subscriber’ to ‘paid subscriber,’ it would have said so”); *Locklear v. Dow Jones & Co.*, 101 F. Supp. 3d 1312, 1316 (N.D. Ga. 2015) (holding that “no money exchange is required between a ‘customer’ and ‘provider’ for [a user] to qualify as a ‘subscriber’”), *abrogated by Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251 (11th Cir. 2015).

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

39. *Id.* at 488–89.

40. *Ellis*, 803 F.3d at 1257–58.

41. *Id.*

42. *Yershov*, 820 F.3d at 489; see also *Austin-Spearman v. AMC Network Entm’t LLC*, 98 F. Supp. 3d 662, 669 (S.D.N.Y. 2015) (noting that an “affirmative action on the part of the subscriber” to “download an app or program” is evidence of a desire to form an “ongoing relationship between provider and subscriber”).

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

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

45. *Id.*

vacy laws.”⁴⁶ The ubiquity of new technologies “not only foster[s] more intrusive data collection, but make[s] possible increased demands for personal, sensitive information.”⁴⁷ To modern citizens, the VPPA would appear to offer protection from unwanted collection and disclosure of their personal information in connection with videos watched online. Unfortunately, deciding VPPA cases today is like trying to “place a square peg (modern electronic technology) into a round hole (a statute written in 1988 aimed principally at videotape rental services).”⁴⁸ Still, until Congress finds it necessary to amend or replace the VPPA, courts must make decisions within its framework. The First Circuit’s decision in *Yershov* proves that the VPPA continues to be effective in protecting the privacy of today’s consumer.

The First Circuit’s opinion in *Yershov* successfully applies legislative intent to the modern media landscape. The VPPA is just one example of a long line of statutes reflecting Congress’s desire to expand and define the right to privacy.⁴⁹ In denouncing the disclosure of the “Bork Tapes,” the impetus for enactment of the VPPA, Senator Patrick Leahy commented, “[I]n an era of . . . computers, it would be relatively easy at some point to give a profile of a person I think that really is Big Brother, and I think it is something that we have to guard against.”⁵⁰ Gannett disclosed information about *Yershov* to Adobe with the intention of compiling a profile about him.⁵¹ This “subtle and pervasive form of surveillance” is well within the realm of activity Congress sought to prohibit in the Act.⁵² While the means may have changed since 1988, the ends have not.

In contrast to the Eleventh Circuit’s holding in *Ellis*, that a free app user was not a subscriber protected by the VPPA, the First Circuit’s decision in *Yershov* more accurately reflects industry standards and modern users’ expectations of digital privacy.⁵³ According to the nonprofit Alliance for Audited Media, free access to digital media qualifies as a subscription if “[t]he recipient registers and activates an account, *or downloads an application*.”⁵⁴ Studies have shown that modern consumers are increasingly concerned about privacy on mobile devices.⁵⁵ A 2012 na-

46. *The Video Privacy Protection Act: Protecting Viewer Privacy in the 21st Century, Hearing Before the Subcomm. on Privacy, Technology, and the Law*, 112th Cong. 8, 28 (2012) (statement of Hon. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary).

47. S. REP. NO. 100-599, at 7.

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

49. S. REP. NO. 100-599, at 2.

50. *Id.* at 5–6.

51. *See Yershov*, 820 F.3d at 484–85.

52. S. REP. NO. 100-599, at 2, 7.

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

54. *U.S. Newspaper Digital Subscriptions*, ALLIANCE FOR AUDITED MEDIA, <https://auditedmedia.com/education/reference-guides/newspaper-digital-subscriptions> [https://perma.cc/6JWA-GD2F] (emphasis added).

55. *Mobile Privacy Disclosures: Building Trust Through Transparency*, FED. TRADE COMM’N 3 (Feb. 2013), <https://www.ftc.gov/sites/default/files/documents/reports/mobile-privacy-disclosures-building-trust-through-transparency-federal-trade-commission-staff-report/130201mobileprivacyreport.pdf> [https://perma.cc/8QVC-H3FF].

tionwide survey indicated that “57% of all app users have either uninstalled an app over concerns about having to share their personal information, or declined to install an app in the first place for similar reasons.”⁵⁶ To avoid “an erosion of trust . . . which could be detrimental to both consumers and industry,” the Federal Trade Commission has advised app developers to provide “disclosures and obtain affirmative express consent before collecting and sharing sensitive information.”⁵⁷

The VPPA did not establish any minimum requirements for finding that an individual is a subscriber.⁵⁸ While the courts agree that there should be some “commitment,” the Eleventh Circuit errs in defining what activities satisfy that term.⁵⁹ The First Circuit correctly notes that Yershov’s use of the App was not free of commitment—access to the App required providing Gannett with his Android ID and GPS location.⁶⁰ Moreover, common sense dictates that downloading and installing an app to your mobile device is more of a commitment than merely adding a website to your browser as a favorite. While you may “favorite” a website to make it easier to access in the future, you download an app to regularly engage in the service it provides. Accessing apps on your mobile device is more personal than accessing a website on a laptop or desktop computer. People want to decide what they keep private and what they share, and the *Yershov* court’s decision recognizes and protects that right under the VPPA.

Companies who offer free mobile device apps may be concerned by the pro-consumer result reached in *Yershov*. To avoid potential litigation under the VPPA, a prudent app company should carefully scrutinize the information they wish to disclose to third parties to determine what is PII and thus protected by the VPPA. Then, for any information that is PII, the company should obtain affirmative, express consent from the user before disclosing.⁶¹ Consent can easily be obtained electronically, but it must be “in a form distinct and separate from any form setting forth other legal or financial obligations of the consumer.”⁶²

We, the people of the United States, want to be left alone. We want to decide which information we keep private, and which information we share. The VPPA puts the choice of whether to disclose a consumer’s video viewing history squarely in the hands of the consumer—not the video provider. Thus, the Act continues to be relevant in the digital age. The First Circuit, in *Yershov*, properly relied on statutory text and legisla-

56. *Id.* (citing *Privacy and Data Management on Mobile Devices*, PEW INTERNET & AMERICAN LIFE PROJECT (Sept. 2012), <http://www.pewinternet.org/2012/09/05/privacy-and-data-management-on-mobile-devices/> [<https://perma.cc/8QVC-H3FF>]).

57. *Id.* at ii, 3.

58. *See* 18 U.S.C. § 2710 (2012).

59. *Yershov v. Gannett Satellite Info. Network, Inc.*, 820 F.3d 482, 488–89 (1st Cir. 2016); *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251, 1257 (11th Cir. 2015).

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

61. *See Mobile Privacy Disclosures: Building Trust Through Transparency*, *supra* note 5555, at ii.

62. § 2710(b)(2).

tive history to hold that downloading and using a free mobile app to watch video clips could qualify the user as a subscriber under the VPPA.⁶³ While it remains to be seen whether other courts will adopt either the First Circuit's or the Eleventh Circuit's interpretations, undoubtedly the private sector has already taken note of the shift. As companies re-evaluate their disclosure practices and seek to comply with the VPPA, consumers can only benefit from additional protection of their personal information.

63. *Yershov*, 820 F.3d at 485–89.