PRIVACY PROTECTION GAPS, FREE APPS, AND MARKETING TRAPS: DETERMINING WHO ARE "SUBSCRIBERS" UNDER THE VIDEO PRIVACY PROTECTION ACT

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ABSTRACT

The Video Privacy Protection Act of 1988 (VPPA) prohibits a videotape service provider from knowingly disclosing the personally identifiable information (PII) of a purchaser, renter, or subscriber to a third party. This legislation was created to protect consumers' privacy. In the last decade, use of the Internet for most daily tasks has skyrocketed, and individuals' methods for acquiring video content have not been immune to this transition. With the increase in technology use to obtain video materials came the need to evaluate whether a user of a free cell phone app qualifies as a subscriber—an undefined term within the VPPA—who would be afforded the Act's information-privacy protections. The First and Eleventh Circuits addressed this issue with conflicting outcomes.

In order to give effect to the original intent of the VPPA in this current era of digital downloads, an individual who downloads a free cell phone app and provides valuable PII to the video content provider in exchange for otherwise free video content should be considered a subscriber under the Act and afforded the Act's protections because the PII provided functions as consideration to form a contract between the parties. Due to the highly effective nature of targeted advertisements, PII has enormous value. It is

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bought and sold in a booming market and thus can function as consideration to form a contractual relationship between the consumer and video content provider. This relationship of heightened significance evidences a meaningful commitment between the parties, thereby affording the app user the status of subscriber and information-privacy protections under the VPPA.

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INTRODUCTION

The Ninth Circuit Court of Appeals' decision on August 29, 2016 removed many existing forms of privacy protection from Americans' personal information.[1] In a case between the Federal Trade Commission (FTC)—known as "the government's top privacy watchdog"[2]—and AT&T, a telecommunications conglomerate and "common carrier,"[3] the court determined that the FTC can no longer halt common carriers' questionable personal data collection[4] because such regulation is outside of the FTC's jurisdiction.[5] This ruling broadly forbids the FTC from regulating any part of an entity that provides phone or Internet service[6] and left the task of regulating

1. *See generally* Fed. Trade Comm'n v. AT&T Mobility L.L.C., 835 F.3d 993 (9th Cir. 2016).

2. Brian Fung, *This Court Ruling Is a 'Fatal Blow' to Consumer Protections, Advocates Say*, WASH. POST (Aug. 31, 2016), http://www.washingtonpost.com/news/the-switch/wp/2016/08/31/how-the-worlds-biggest-tech-companies-could-wriggle-out-of-all-privacy-regulations/ [https://perma.cc/2SD5-JYPD].

3. A common carrier is "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy." 47 U.S.C. § 153(11) (2012).

4. *See* Fung, *supra* note 2. This case commenced when the FTC challenged the sufficiency of AT&T's disclosure to its customers regarding the speed of their data plans. *See id*. The FTC accused AT&T of "data throttling," a process of slowing down the speed of the data provided to its unlimited data plan customers once they reach a particular threshold amount of data. *See AT&T*, 835 F.3d at 995. While this decision was not directly about data collection, by completely removing AT&T and other common carriers from the FTC's jurisdiction, this case set the important precedent that the FTC can no longer regulate common carrier companies. *See* Fung, *supra* note 2.

5. *See AT&T*, 835 F.3d at 1003. Before this ruling, it was generally understood that the FTC could regulate privacy issues arising from common carrier businesses as long as it avoided regulating activities directly related to common carrier functions. *See* Fung, *supra* note 2. At its inception, the FTC was empowered to regulate unfair competition and deceptive actions in many areas of commerce but specifically restricted from regulating common carriers. *See* 15 U.S.C. § 45(a)(2) (2012).

6. *See* Fung, *supra* note 2. This is of particular concern because now any company can entirely remove itself from the purview of FTC by engaging in any operations that would give it a common carrier label. *See id*.

common carriers to the Federal Communications Commission (FCC).[7] Taking privacy regulation of common carriers out of the hands of the FTC puts a lot of pressure on the FCC.[8] While the FCC has been developing privacy rules for Internet service providers, such new rules will not regulate content providers, also known as "edge providers."[9]

In light of the FCC's and FTC's new limitations, concern is growing over who will have jurisdiction over future information-privacy issues.[10] Even more worrisome is the possibility that such jurisdictional issues will become discoverable loopholes for providers to evade oversight.[11] These notable gaps in consumer privacy regulation increase the importance of statutorily provided privacy protection.[12] An important piece of privacy legislation that can fill these gaps between the FTC's and FCC's powers is the Video Privacy Protection Act.[13]

The Video Privacy Protection Act of 1988 (VPPA) prohibits a videotape service provider from knowingly disclosing a consumer's

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7. *See id.* Title II of the Communications Act of 1934 gave the FCC authority over all common carriers and authority to regulate much of their activities. *See* Frank W. Lloyd, *Cable Television's Emerging Two-Way Services: A Dilemma for Federal and State Regulators*, 36 VAND. L. REV. 1045, 1052 (1983).

8. *See* Fung, *supra* note 2; *see also* Kevin Werbach, *Off the Hook*, 95 CORNELL L. REV. 535, 540 (2010). The original intent in establishing the FCC was "to oversee telephone and radio services. Today, its jurisdiction covers a broad collection of major industries, including broadcasting, telephone service, mobile phones, satellite communications, and cable television." *Id.*

9. Edge providers are defined as an "individual or entity that provides any content, application, or service over the Internet, and any individual or entity that provides a device used for accessing any content, application, or service over the Internet." 47 C.F.R. § 8.2(b) (2017). *See also* Debra Diener, *New FCC Regulations May Not Give Consumers True Online Privacy Protection*, TECHCRUNCH.COM (June 23, 2016), https://techcrunch.com/2016/06/23/new-fcc-regulations-may-not-give-consumers-true-online-privacy-protection/ [https://perma.cc/27ZY-J5YN] (explaining that "the fundamental mistake in the way the FCC has framed the proposal [is] Google, Facebook, Amazon and a myriad of other 'edge providers' are not covered by the eventual privacy rules that will be drafted").

10. *See* Fung, *supra* note 2 (explaining that it is possible for a company's action to fall between FTC and FCC oversight and potentially be left unregulated).

11. *See id.* For example, there is concern that "any company [could] evade FTC oversight simply by launching or buying a small telecom service." *Id.*

12. *See id.* Fung notes that "[b]etween the FCC's inability to regulate much beyond the communications-related units of a company and the FTC's newfound prohibition on regulating *any* part of a company that owns a communications business, the 9th Circuit decision creates a gap in consumer protection law . . . ." *Id.*

13. *See generally* Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (2012).

personally identifiable information (PII)[14] to a third party.[15] The Act only protects the PII of "consumers," which it defines as purchasers, renters, or subscribers of video content.[16] The VPPA was created "[t]o preserve personal privacy with respect to the rental, purchase or delivery of video tapes or similar audio visual materials."[17] While VHS tapes are a thing of the past, protecting consumers' information is an enduring task.[18] Further, although online transactions were not within the original scope of the VPPA,[19] the Act's 2012 amendments help it address the needs of an online world.[20]

The VPPA has a renewed importance in light of the questionable and more limited scope of protection currently provided by the FTC[21] and the FCC[22] because this Act can protect the privacy of individuals consuming video content from common carrier edge

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14. According to the VPPA, PII "includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider." *Id.*

15. *Id.* The Act states that "[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." *Id.*

16. *See id.* (defining *consumer* as "any renter, purchaser, or subscriber of goods or services from a video tape service provider").

17. *Id.*; *see also Video and Library Privacy Protection Act of 1988: Joint Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary and the Subcomm. on Technology and the Law of the S. Comm. on the Judiciary*, 100th Cong. 29-30 (1988). This legislation was created to protect individuals' privacy in their video-watching choices, and the legislators indicated that what "we're trying to protect with this legislation are usage records of content-based materials." *Id.* (statement of Rep. Al McCandless).

18. *See* Behnam Dayanim & Kevin P. Broughel, *The Video Privacy Protection Act - Recent Decisions Further Narrow The Contours Of Liability*, PAUL HASTINGS (Apr. 14, 2015), http://www.paulhastings.com/publications-items/details/?id=d1f9e369-2334-6428-811c-ff00004cbded [https://perma.cc/76EY-QZ6X] (describing the recent increase in claims of VPPA violations on platforms with digital and online content that had not been contemplated by the original legislation).

19. *See id.*; *see also* Major R. Ken Pippin, *Consumer Privacy on the Internet: It's "Surfer Beware"*, 47 A.F. L. REV. 125, 153 (1999) (explaining that "application of the VPPA to on-line retailers that sell videotapes and videodiscs was not part of the original legislation because the Internet's commercial viability had not yet evolved").

20. Video Privacy Protection Act Amendments of 2012, Pub. L. No. 112-258, 126 Stat. 2414, 2414. The 2012 amendments to the VPPA allowed for consumer consent to be obtained online. *See id.*

21. *See* Fed. Trade Comm'n v. AT&T Mobility L.L.C., 835 F.3d 993, 1003 (9th Cir. 2016).

22. *See* Diener, *supra* note 9 (noting the FCC's new regulations' failure to regulate edge providers).

providers, thus filling an important part of the privacy protection gap.[23] These hybrid entities are an emergent concern as more common carriers are creating their own media content or merging with video content providers, such as Time Warner's attempts at merging with AT&T.[24] Although the United States Department of Justice has brought a lawsuit to stop this specific merger because of antitrust issues, such a common-carrier-content-creating entity is of concern[25] because the current state of the FTC's and FCC's regulatory powers would leave such a super-company untouchable.[26] However, the VPPA's protections for consumers' PII regulates all video content providers and could be a reliable tool to continue protecting consumers' privacy.[27]

An important issue with using the VPPA to protect consumer information is the conflicting opinions of the First Circuit and Eleventh Circuit Courts of Appeals regarding the term *subscriber*.[28] Although courts have interpreted *renter* and *purchaser* to have unequivocal meanings,[29] the term *subscriber* is not defined within the

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23. *See* Fung, *supra* note 2 (discussing the potential for unregulated action falling between the limitations of the FCC and the FTC).

24. Time Warner, a cable television company, merging with AT&T, a common carrier, could easily become a common carrier content provider. *See* Cecilia Kang & Michael J. De La Merced, *AT&T's Blockbuster Deal for Time Warner Hangs in Limbo*, N.Y. TIMES (July 9, 2017), https://www.nytimes.com/2017/07/09/technology/att-time-warner-merger.html?mcubz=3 [https://perma.cc/6BJX-N4U8] (describing the pending offer between the companies).

25. *See* Cecilia Kang & Michael J. De La Merced, *Justice Department Sues To Block AT&T-Time Warner Merger*, N.Y. TIMES (Nov. 20, 2017), https://www.nytimes.com/2017/11/20/business/dealbook/att-time-warner-merger.html [https://nyti.ms/2hP3Y1z]. As of April 23, 2018, the case was pending before the U.S. District Court for the District of Columbia, and the merger deadline is June 21, 2018. *See* Hadas Gold, *Beyond Yes or No: Judge Richard Leon's Options in the AT&T Antitrust Case*, CNN (Apr. 23, 2018), http://money.cnn.com/2018/04/23/media/att-time-warner-judge-richard-leon-options/index.html [https://perma.cc/4533-2HX5].

26. *See* Fung, *supra* note 2 (describing common carriers' subsidiaries and other facets of business as now out of the FTC's reach); *see also* Diener, *supra* note 9 (explaining how the FCC's rules do not regulate edge providers).

27. *See* Video Privacy Protection Act of 1988, 18 U.S.C. § 2710(b)(1) (2012).

28. *See* Jimmy H. Koo, *Free App User Is Subscriber Under Video Privacy Act*, 84 U.S. L. WK. 38, 38 (2016).

29. *See* Yershov v. Gannett Satellite Info. Network, Inc., 820 F.3d 482, 487 (1st Cir. 2016) (explaining that a *purchaser* is a consumer providing money in exchange for ownership of the video material, and a *renter* is a consumer providing money in exchange for temporary retention of the video material).

Act, and courts have not come to a consensus on how to define it.[30] As a result, the First and Eleventh Circuits have disagreed as to whether downloading and using a free cell phone application (app)[31] that shares a user's information with a third party qualifies the app's user to be a subscriber under the VPPA.[32]

Judiciaries have had difficulty distinguishing between a subscriber and a casual user,[33] and many courts stress that a *subscriber* must have more involvement than casual consumption of video content.[34] However, when a consumer provides something of value to the content provider, this evidences a commitment.[35] This Note argues that an app user sharing PII with a video content provider is yielding consideration to form a contract between the parties and is thus elevating the user's relationship with the content provider to that of a subscriber.[36]

Primarily, this Note provides a definition for *subscriber*, an otherwise undefined term.[37] Having a reliable, consistent meaning for

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30. *See* § 2710(a)(1) (defining *consumer* as "any renter, purchaser, or subscriber of goods or services from a video tape service provider" but not further defining *renter*, *purchaser*, or *subscriber*).

31. A cell phone application, or app, is "a software program you can download and access directly using your phone or another mobile device." *Consumer Information, Understanding Mobile Apps*, FED. TRADE COMMISSION, https://www.consumer.ftc.gov/articles/0018-understanding-mobile-apps [https://perma.cc/TR92-N2YC] (last visited Apr. 7, 2018).

32. *See* Koo, *supra* note 27, at 38 (reviewing the conflicting holdings of the First and Eleventh Circuits).

33. *See id.* (comparing the holdings from the First and Eleventh Circuit on this issue); *see also* Locklear v. Dow Jones & Co., 101 F. Supp. 3d 1312, 1316 (N.D. Ga. 2015) (determining that the plaintiff viewing video content on a channel she downloaded onto her media streaming device qualified her to be a subscriber under the VPPA).

34. *See, e.g.*, *Yershov*, 820 F.3d at 489 (describing how within the VPPA, being a *subscriber* signifies a heightened relationship between the consumer and video content provider); *see also* Austin-Spearman v. AMC Network Entm't L.L.C., 98 F. Supp. 3d 662, 669 (S.D.N.Y. 2015) (noting "casual consumption" of online media is not enough to make a user a subscriber).

35. *See Yershov*, 820 F.3d at 489 (describing how the plaintiff downloading the app to his phone and the video content provider acquiring the plaintiff's personal information exemplified a level of commitment between the parties).

36. *See* Andrea M. Matwyshyn, *Privacy, the Hacker Way*, 87 S. CAL. L. REV. 1, 4 (2013) (stating that "data privacy should be analyzed in the context of an exchange of two services that are each a 'thing of value': access to identity information in exchange for access to information services").

37. *See* Video Privacy Protection Act of 1988, 18 U.S.C. § 2710(a)(1) (2012) (defining *consumer* as "any renter, purchaser, or subscriber of goods or

a key term of the VPPA will make it more useful in protecting consumer privacy when facing today's privacy gaps.[38] This solution ensures the VPPA protects PII[39] in a world where consumer data is a highly sought after commodity,[40] and it gives effect to the legislators' intent for the VPPA—to protect consumers' PII.[41] Further, this solution aligns with many courts' assertions that the VPPA should only protect heightened consumer–provider relationships,[42] addresses the value of PII,[43] and makes the term *subscriber* exceptionally applicable in a technology-reliant world.[44]

Part I discusses the history of the Video Privacy Protection Act of 1988, the Act's definitions of pertinent terms, and the 2012 amendments to the Act.[45] Part II examines the cases from the First and Eleventh Circuits and assesses how each court analyzed whether downloading a free app made the user a subscriber under the

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services from a video tape service provider" but not further defining *renter*, *purchaser*, or *subscriber*).

38. *See* Fung, *supra* note 2 (noting the possibility for actions to fall between the FTC's and FCC's jurisdiction).

39. *See* Corey Ciocchetti, *Just Click Submit: The Collection, Dissemination, and Tagging of Personally Identifying Information*, 10 VAND. J. ENT. & TECH. L. 553, 574 (2008) (explaining that PII collections are "highly sought after on the open market").

40. *See* Andrew J. McClurg, *A Thousand Words Are Worth a Picture: A Privacy Tort Response to Consumer Data Profiling*, 98 NW. U. L. REV. 63, 71-72 (2003) (describing the high value of consumer data).

41. *See* Matwyshyn, *supra* note 35, at 8 (supporting the theory of consumer information having sufficient value to qualify as contractual consideration and thus being able to form a contractual relationship between consumers and service providers).

42. *See* Yershov v. Gannett Satellite Info. Network, Inc., 820 F.3d 482, 489 (1st Cir. 2016) (explaining that, within the VPPA, the subscriber status is recognized as a heightened relationship between the consumer and video content provider); *see also* Austin-Spearman v. AMC Network Entm't L.L.C., 98 F. Supp. 3d 662, 669 (S.D.N.Y. 2015) (emphasizing "casual consumption" of online media is not enough to create a subscriber relationship).

43. Paul M. Schwartz & Daniel J. Solove, *The PII Problem: Privacy and a New Concept of Personally Identifiable Information*, 86 N.Y.U. L. REV. 1814, 1882 (2011) (discussing the value of identifiable information, particularly in the current age of information exchange).

44. *See* Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1394 (2001) (explaining how society relies on technology for most encounters).

45. *See infra* Part I (explaining how the idea for the VPPA was sparked by the public exposure of the rental history of Judge Bork—a judge within the United States Court of Appeals for the District of Columbia Circuit—in a newspaper and that the purpose of the Act is to protect the privacy of individuals).

VPPA.[46] Part III reviews the rise in collection of consumer information for marketing purposes and explains why consumer information has become such a valuable commodity. Part IV analyzes which consumers of video content should be considered subscribers and provides an explanation as to why.[47]

I. A HISTORICAL LOOK AT THE VIDEO PRIVACY PROTECTION ACT

The Video Privacy Protection Act was enacted in 1988 to protect consumers' personal privacy in transactions involving renting, buying, or subscribing to video content.[48] At the time of the Act's inception, video materials were generally acquired at physical video stores.[49] However, video content distribution is no longer limited to in-person interactions,[50] and in the years since 1988, many media exchanges have evolved to occur online.[51]

A. History and Development of the Video Privacy Protection Act of 1988

Legislation that would become the VPPA was sparked by controversy related to then-Supreme-Court-Justice-nominee Judge Robert Bork.[52] During the period when the Senate held hearings on his nomination, a newspaper in Washington, D.C. printed Judge

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46. *See infra* Part II (reviewing the analyses and holdings from the First Circuit and the Eleventh Circuit).

47. *See infra* Part III (describing a new theory of an exchange of PII for video content creating a contractual relationship between the consumer and video content provider—qualifying the user as a subscriber).

48. *See* Video Privacy Protection Act of 1988, 18 U.S.C. § 2710(b)(2) (2012). The VPPA was created to "preserve personal privacy with respect to the rental, purchase, or delivery of video tapes or similar audio visual materials." *Id.*

49. *See* Pippin, *supra* note 19, at 153. The Act was created to regulate video stores and rental businesses. *Id.*

50. *See id.* "The application of the VPPA to on-line retailers that sell videotapes and videodiscs was not part of the original legislation because the Internet's commercial viability had not yet evolved." *Id.*

51. *See* Rob Frieden, *Internet Protocol Television and the Challenge of "Mission Critical" Bits*, 33 CARDOZO ARTS & ENT. L.J. 47, 48 (2015). Notably, "some video content consumers have 'cut the cord' and abandoned traditional video media options replacing them with online platforms." *Id.*

52. Gregory M. Huffman, *Video-Streaming Records and the Video Privacy Protection Act: Broadening the Scope of Personally Identifiable Information to Include Unique Device Identifiers Disclosed with Video Titles*, 91 CHI.-KENT L. REV. 737, 743 (2016). The VPPA was created in reaction to the publishing of Judge Bork's video rental history. *See id.*

Bork's rental history from a local video store.[53] Legislators were furious about this privacy violation.[54] Shortly thereafter, Representative Al McCandless introduced a bill to the House that would later become the VPPA.[55]

During the Joint Hearing on the VPPA, Representative McCandless emphasized the importance of individuals' privacy in their media consumption.[56] He explained that the disclosure of such habits was a privacy violation and that people have the right to enjoy media without government involvement.[57] In its final form, the VPPA of 1988 prohibited video content providers from wrongfully disclosing the PII of purchasers, renters, and subscribers—collectively labeled as consumers.[58]

The facts of *Dirkes v. Borough of Runnemede* provide a clear example of the type of individuals that legislators intended the VPPA to protect.[59] In *Dirkes*, the investigation of a former police officer led to the discovery of pornographic material the officer and his wife rented from a local video store.[60] The United States District Court for

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53. *See id.*

54. *See* Sarah Ludington, *Reining in the Data Traders: A Tort for the Misuse of Personal Information*, 66 MD. L. REV. 140, 152-53 (2006) (describing how "[t]he media initially reacted to the list with light-hearted commentary on the Borks' taste in movies," which was immediately followed by an uproar of legislators' frustration with such an invasion of privacy).

55. *See* H.R. 3523, 100th Cong. (1987). Representative Al McCandless introduced House Bill 3523, which would later become the VPPA, "to preserve personal privacy with respect to the rental or purchase of video tapes by individuals" shortly after. *Id.*

56. *See Video and Library Privacy Protection Act of 1988*, *supra* note 17, at 27. Representative McCandless stated, "It is really nobody else's business what people read, watch, or listen to." *Id.*

57. *See id.* Representative McCandless explained that "[a]t the heart of this legislation is the notion that all citizens have a right to privacy—the right to be left alone—from their Government and from their neighbor." *Id.*

58. *See* Video Privacy Protection Act of 1988, 18 U.S.C. § 2710(a)(1) (2012). The VPPA prevented the "[w]rongful disclosure of video tape rental or sale records." *Id.* The Act also stated that PII can only be disclosed to the consumer himself, to someone who has the consumer's consent, or to a law enforcement officer pursuant to a warrant. *See id.*

59. *See* Dirkes v. Borough of Runnemede, 936 F. Supp. 235, 236 (D.N.J. 1996)*; see also* § 2710 (stating that the VPPA was created "to preserve personal privacy with respect to the rental, purchase, or delivery of video tapes or similar audio visual materials").

60. *Dirkes*, 936 F. Supp. at 236. The court reviewed that "Lt. Busko obtained the names and rental dates of certain pornographic videotapes previously rented by Plaintiff Dirkes and his wife. . . . Busko received this information from an employee of Videos To Go," a store plaintiffs regularly visited. *Id.*

the District of New Jersey found two separate VPPA violations within this encounter.[61] First, by disclosing the officer's rental history to the investigator, the video store violated the Act.[62] A second violation occurred when the officer's PII was received into evidence at his disciplinary hearing.[63] The facts of this case portray the concerns of privacy violations in 1988 that the legislators contemplated when creating the VPPA.[64]

B. The Act Today

Although the Video Privacy Protection Act was originally enacted 1988,[65] it has evolved in its applicability.[66] Amendments to the Act were introduced in 2012 so consumers could provide electronic consent for video content providers to disclose their PII.[67] This amendment allowed the VPPA to reflect the new landscape of video consumption occurring online in consumers' homes, while still

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61. *Id.* at 239 (explaining that the VPPA can be violated in three different ways and the defendant violated the Act in two of the ways).

62. *See id.* at 239-40. The court explained in *Dirkes*:

> Videos to Go, the video tape service provider in this matter, violated subsection (b) of the Act by disclosing Plaintiffs' video rental information to Lt. Busko. It is undisputed that this disclosure does not fall into one of the six permissible disclosure exceptions delineated in subsection (b)(2) of the Act.

Id.

63. *See id.* at 240 (explaining that the "second violation of the Act occurred when Plaintiffs' personally identifiable information was received into evidence at Plaintiff Dirkes' disciplinary hearing").

64. *See* § 2710(a)(1); *see also Dirkes*, 936 F. Supp. at 236 (reviewing claims of VPPA violations involving a brick-and-mortar video store disclosing the names and video rentals of individuals, a situation that the Act clearly contemplated).

65. *See* § 2710 (indicating an enactment date of 1988).

66. Harv. L. Rev., 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, 2011 (2016) [hereinafter Recent Case] (explaining how "[t]he VPPA, originally aimed at traditional brick-and-mortar video rental stores such as Blockbuster, has seen a newfound applicability in the modern era of streaming video and 'big data' analytics"). This includes cases involving cell phone app downloads. *Id. See, e.g.*, Ellis v. Cartoon Network, Inc., 803 F.3d 1251, 1252 (11th Cir. 2015) (reviewing the download of a free mobile app).

67. *See* Video Privacy Protection Act Amendments Act of 2012, Pub. L. No. 112-258, 126 Stat. 2414, 2414. The amendment was created "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." *Id.*

providing the same necessary protections for consumers' privacy.[68] During the amendment's hearing before the Senate Subcommittee on Privacy, Technology, and the Law, Senator Patrick Leahy emphasized the importance of balancing innovation and protecting individual privacy.[69] Additionally, in his opening statement, Senator Al Franken focused on the importance of bringing the VPPA into the world of current advanced technology to ensure its applicability for claims involving Internet and cell phone use.[70] With this amendment, the Act could more easily be used to protect consumers' privacy as they accessed video content with new technology.[71]

Today, the terms of the VPPA are clearly applicable to a variety of video-content providers.[72] The Act no longer simply regulates "brick-and-mortar" video stores as it has been expanded to apply to video-content providers accessed online and on cell phones.[73] Importantly, however, the VPPA's amendment did not provide any definitions for the Act's originally undefined terms.[74]

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68. *See* 158 CONG. REC. H6850 (daily ed. Dec. 18, 2012) (statement of Rep. Bob Goodlatte) (explaining that the amendment "is narrowly crafted to preserve the VPPA's protections for consumers' privacy, while modernizing the law to empower consumers to do more with their video consumption preferences," such as sharing content on social media or downloading content from Internet-based services).

69. *See The Video Privacy Protection Act: Protecting Viewer Privacy in the 21st Century: Hearing Before the Subcomm. on Privacy, Technology and the Law of the S. Comm. on the Judiciary*, 112th Cong. 28-29 (2012) [hereinafter Protecting Viewer Privacy]. Senator Leahy explained that when "updating our Federal laws, we must carefully balance the need to promote American innovation and the legitimate needs of law enforcement, while ensuring that we protect personal privacy." *Id.*

70. *See id.* at 3 (quoting Senator Al Franken) (explaining that "if we are updating the Video Privacy Protection Act, I think we need to confirm that it covers video streaming technology").

71. *See* 158 CONG. REC. H6850 (statement of Rep. Bob Goodlatte). Representative Goodlatte explained that due to "today's technology, consumers can quickly and efficiently access video programming through a variety of platforms, including through Internet protocol-based video services, all without leaving their homes . . . . It's time that Congress updates the VPPA to keep up with today's technology and the consumer marketplace." *Id.*

72. *See In re* Hulu Privacy Litig., 86 F. Supp. 3d 1090, 1091 (N.D. Cal. 2015) (explaining that Hulu, an Internet-based television and movie provider, is a video tape service provider under the VPPA); *see also* Robinson v. Disney Online, 152 F. Supp. 3d 176, 179 (S.D.N.Y. 2015) (determining if Disney Online, as a video service provider, disclosed a user's PII).

73. *See* Recent Case, *supra* note 65, at 2011.

74. *See* Video Privacy Protection Act Amendments Act of 2012, Pub. L. No. 112-258, 126 Stat. 2414, 2414 (providing the amendment to the VPPA allowing for consent to be provided electronically).

C. Terms and Meaning Within the Act

Courts must use principles of statutory interpretation in many VPPA claims because application of the Act often requires the judiciary to make assessments using the Act's undefined terms.[75] Courts begin statutory interpretation and application with a review of the language found in the statute.[76] When a statute does not contain definitions of important terms or if the language is unclear, courts often review other judiciaries' definitions and analyses.[77] Assessments of VPPA claims have been no exception to this process;[78] courts hearing VPPA claims begin by looking to the Act itself,[79] followed by a review of other courts' assessments.[80]

1. *Definitions Within the Act*

The VPPA provides definitions for some of its key terms.[81] The first of these terms is *consumer*; a consumer is defined as a "renter,

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75. *See id.* The VPPA leaves the terms *personally identifiable information* and *subscriber* undefined within the Act, and courts are left to their own statutory interpretation methods to craft definitions of these terms. *See, e.g.*, *In re* Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 267 (3d Cir. 2016) (determining the definition of PII under the VPPA); *see also* Locklear v. Dow Jones & Co., 101 F. Supp. 3d 1312, 1316 (N.D. Ga. 2015) (resolving a definition of *subscriber* under the VPPA in order to rule on a claim of VPPA violation).

76. *See* United States v. Ron Pair Enters., 489 U.S. 235, 241 (1989) (describing "[t]he task of resolving the dispute over the meaning of [the statute] begins where all such inquiries must begin: with the language of the statute").

77. *See, e.g.*, *In re Hulu*, 86 F. Supp. 3d at 1099 (reviewing how the Seventh Circuit discussed personal information in *Senne v. Village of Palatine, Ill.*, 695 F.3d 597 (7th Cir. 2012)); *see also In re Nickelodeon*, 827 F.3d at 283 (discussing how the court defined PII in *Yershov v. Gannett Satellite Information Network*, 820 F.3d 482 (1st Cir. 2016)).

78. *See* Austin-Spearman v. AMC Network Entm't L.L.C., 98 F. Supp. 3d 662, 668-70 (S.D.N.Y. 2015) (reviewing the plain language of the statute, dictionary definitions of the terms within the statute, and then how two recent cases have discussed the meaning of the term *subscriber*).

79. *See, e.g.*, *In re* Hulu Privacy Litig., No. C 11-03764 LB, 2012 U.S. Dist. LEXIS 112916, at *16-17 (N.D. Cal. Aug. 10, 2012) (reviewing the plain language of the statute followed by a review of dictionary definitions).

80. *See Austin-Spearman*, 98 F. Supp. 3d at 669-70 (reviewing how two federal district courts defined the term *subscriber*); *see also* Robinson v. Disney Online, 152 F. Supp. 3d 176, 180-81 (S.D.N.Y. 2015) (discussing four recent cases concerning various information collected and determining if it was PII under the VPPA).

81. *See, e.g.*, Video Privacy Protection Act of 1988, 18 U.S.C. § 2710(a)(1) (2012).

purchaser, or subscriber of goods or services from a video tape service provider."[82] However, the term *subscriber* is not further defined within the Act.[83] Second, *personally identifiable information* (PII) is a collection of data that "identifies a person as having requested or obtained specific video materials or services from a video tape service provider."[84] Finally, a *video tape service provider* is someone in the business of selling, renting, or providing video content.[85]

The VPPA provides further information for what disclosures are considered wrongful under the Act.[86] For example, a video tape service provider violates the Act if there is a knowing disclosure of the identity of the consumer, the identity of the video content they used, and information linking the content to the consumer.[87] Consumer information alone, without the information connecting the consumer to the video materials watched, is not enough.[88]

2. *Definitions from Case Law*

Since the VPPA was enacted in 1988, courts in the United States have grappled with applying its terms.[89] Even when a term has

82. *Id.*

83. *See id.* (indicating that *subscriber* is listed within the definition of *consumer* but not further discussed within the Act).

84. *Id.* PII's definition "includes" such identifiable information, which indicates that it is not limited to only including such information. *See id.*

85. *See id.* The Act defines *video tape service provider* as a person that is "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." *Id. See also* Recent Case, *supra* note 65, at 2011 (describing how the VPPA originally aimed to regulate traditional video stores, and it now protects consumers from online video content providers).

86. *See* Video Privacy Protection Act of 1988, 18 U.S.C. § 2710(a), (b) (2012). While section (a) of the Act includes definitions, section (b) explains what constitutes a violation of the Act. *See id.*

87. *See id.* § 2710(b)(1); *see also In re* Hulu Privacy Litig., 86 F. Supp. 3d 1090, 1095 (N.D. Cal. 2015) (explaining how a video service provider violates the Act when it discloses the identity of the consumer and his or her viewing history).

88. *See* § 2710(a)(3). The Act specifically states that the provider cannot disclose information that "identifies a person as having requested or obtained specific video materials." *Id.*

89. *See, e.g.*, Robinson v. Disney Online, 152 F. Supp. 3d 176, 181-82 (S.D.N.Y. 2015) (discerning what the meaning of PII is under the VPPA, a term that is defined but has proven to be not always easily applicable); *see also* Austin-Spearman v. AMC Network Entm't L.L.C., 98 F. Supp. 3d 662, 668-71 (S.D.N.Y.

been defined by the Act, it is not always clear how a court should apply the definition in each unique case.[90] For terms that are not defined in the Act, courts must determine to whom and to what the terms apply.[91]

a. How Courts Have Defined *Personally Identifiable Information*

Liability under the VPPA exists if a video content provider discloses PII without the consumer's consent.[92] Assessing whether PII is involved is one of the most important steps in determining if there is a privacy violation.[93] Although the Act defines PII, courts struggle with what information can actually identify an individual.[94] Courts have proposed different strategies for discerning what comprises PII and what does not.[95]

2015) (discussing what constitutes a subscriber under the VPPA, a term that the Act does not define).

90. *See Robinson*, 152 F. Supp. 3d at 180 (explaining that although the Act defines PII, the court still needed to determine whether information actually identified the plaintiff). The court described how "[l]ess clear is the scope of information encompassed by PII, and how, precisely, this information must identify a person." *Id.*

91. *See* Yershov v. Gannett Satellite Info. Network, Inc., 820 F.3d 482, 487 (1st Cir. 2016) (reviewing the plain meaning and dictionary definitions of *subscriber* to determine the existence of VPPA violations).

92. *See* § 2710(b)(2)(B).

93. *See* Schwartz & Solove, *supra* note 42, at 1814. Further, "PII is one of the most central concepts in privacy regulation. It defines the scope and boundaries of a large range of privacy statutes and regulations. Numerous federal statutes turn on this distinction." *Id.* at 1816.

94. *See id.* at 1829 (defining PII data as "information which identifies a person. For purposes of the statute, information that identifies a person is PII and falls under the statute's jurisdiction once linked to the purchase, request, or obtaining of video material"); *see also In re* Hulu Privacy Litig., 86 F. Supp. 3d 1090, 1096 (N.D. Cal. 2015) (attempting to determine if particular information identifies the consumers).

95. *See, e.g.*, *In re* Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 267 (3d Cir. 2016) (holding that the VPPA's "prohibition on the disclosure of personally identifiable information applies only to the kind of information that would readily permit an ordinary person to identify a specific individual's video-watching behavior . . . [disclosures] involving digital identifiers like IP addresses, fall outside the Act's protections"); *see also In re Hulu*, 86 F. Supp. 3d at 1096 (holding that because the consumer's identity was sent separately from his video viewing history, the video content provider, Hulu, "did not disclose information that 'identifie[d] a person as having requested or obtained specific video materials'").

In 2016, the United States Court of Appeals for the Third Circuit endeavored to further define the parameters of PII.[96] A class action was brought on the behalf of children against Viacom, a video service provider; the action claimed that Viacom placed a cookie—a file that tracks a user's Internet browsing history—on the children's computers.[97] These cookies were placed to collect the children's online identifiers and data revealing what videos they watched online, and Viacom then shared this data with Google.[98] Plaintiffs claimed that the information collected was sufficient to identify the children, thus qualifying as PII, and its subsequent disclosure violated the VPPA.[99] While the court believed the definition of PII was unclear,[100] it determined that the data in question was not PII because, on its face, it could not identify a particular person along with his or her video consumption.[101] Contrary to the plaintiffs' arguments, the court held that the data could not be PII because it needed to be assembled in a particular way to actually identify the plaintiffs.[102]

In 2015, the United States District Court for the Northern District of California took on a similar issue in *In re Hulu Privacy*

96. *See In re Nickelodeon*, 827 F.3d at 267.

97. *See id*. at 268. The court discusses that "[a]n Internet 'cookie' is a small text file that a web server places on a user's computing device. Cookies allow a website to 'remember' information about a user's browsing activities (such as whether or not the user is logged-in, or what specific pages the user has visited)." *Id*.

98. *Id*. at 267 (describing that "[t]he plaintiffs are children younger than [thirteen] who allege that the defendants, Viacom and Google, unlawfully collected personal information about them on the Internet, including what webpages they visited and what videos they watched on Viacom's websites"). Viacom had also contracted with Google to display advertisements on Viacom's websites, so Google could place its own cookies on users' computers to track their online activities. *See id*. at 269.

99. *See id*. at 270 (explaining how plaintiffs believed "it is surprisingly easy for advertising companies to identify web users' offline identities based on their online browsing habits").

100. *See id*. at 284 (noting that "the proper meaning of the phrase 'personally identifiable information' is not straightforward").

101. *See id*. at 290. The court found that PII is only "the kind of information that would readily permit an ordinary person to identify a specific individual's video-watching behavior." *Id*.

102. *See id*. (specifying that "[t]he allegation that Google will assemble otherwise anonymous pieces of data to unmask the identity of individual children is, at least with respect to the kind of identifiers at issue here, simply too hypothetical to support liability under the Video Privacy Protection Act").

Litigation.[103] These plaintiffs were users of Hulu, a video content website.[104] Hulu tracked users' information with cookies that were connected to a user's Facebook profile.[105] However, viewers' identifiers were disclosed separately from their viewing history.[106] Ultimately, the court held that because the identifying information was transmitted separately from their video use information, the information was not PII.[107] Thus, even terms defined in the VPPA often require courts to discern their applicability in each VPPA case.[108]

b. How *Subscriber* Has Been Defined

A second term from the VPPA that courts have strived to define is the statutorily undefined term *subscriber*.[109] In 2015, the United States District Court for the Northern District of Georgia attempted to define *subscriber* while reviewing a user's download of the Wall Street Journal Live Channel onto her Roku media streaming

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103. *See In re* Hulu Privacy Litig., 86 F. Supp. 3d 1090, 1097 (N.D. Cal. 2015) (assessing if the information Hulu disclosed constituted PII).

104. *See id.* at 1091 (explaining that plaintiffs "allege that Hulu wrongfully disclosed their video viewing selections and personal-identification information to a third party").

105. *See id.* at 1093-94. The plaintiffs' expert believed "that this transmission enabled Facebook to link information identifying the user and the user's video choices to other information about the particular user." *Id.* at 1094.

106. *See id.* at 1096. Thus:

> [E]ven if both elements were sent to Facebook, they did not necessarily disclose a user "as having requested or obtained specific video materials" unless Facebook combined the two pieces of information. Without Facebook forging that connection there is no "disclosure" of "personally identifiable information" under the terms of the VPPA.

Id.

107. *See id.* at 1097 (explaining how the Act "requires proof that three things were disclosed: a consumer's identity; the identity of 'specific video materials'; and a connection between the two — that is, that the consumer 'requested or obtained' those videos").

108. *See, e.g.*, *id.* (determining if the information constituted PII); *see also In re* Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 267 (3d Cir. 2016) (reviewing if disclosed information was PII).

109. *See* Locklear v. Dow Jones & Co., 101 F. Supp. 3d 1312, 1316 (N.D. Ga. 2015) (reviewing if consumers qualified as subscribers under the VPPA); *see also* Austin-Spearman v. AMC Network Entm't L.L.C., 98 F. Supp. 3d 662, 668-71 (S.D.N.Y. 2015) (determining which consumers constitute subscribers under the VPPA); *In re* Hulu Privacy Litig., No. C 11-03764 LB, 2012 U.S. Dist. LEXIS 112916, at *22-24 (N.D. Cal. Aug. 10, 2012) (assessing which consumers constitute subscribers under the VPPA).

device.[110] The court decided to label the plaintiff as a subscriber because she downloaded the Wall Street Journal Channel and her Roku's serial number along with the media she streamed was sent to an analytics and advertising company;[111] these connections established her elevated subscriber status.[112] The District Court held that an exchange of money is not necessary for a user of an app to be a subscriber.[113] Similarly, when the United States District Court for the Northern District of California reviewed what *subscriber* means, it emphasized that the terms *renter* and *buyer* imply an exchange of money but that the word *subscriber* does not have the same effect.[114]

In 2015, the United States District Court for the Southern District of New York also addressed who is a subscriber.[115] In *Austin-Spearman v. AMC Network Entertainment LLC*, the plaintiff used AMC Network Entertainment's website to watch a television show; however, the court determined that she was not a subscriber.[116] The court concluded that to be a subscriber under the VPPA, the individual must do more than use the video provider's service

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110. *See Locklear*, 101 F. Supp. 3d at 1313, 1315-16. The court explained "Roku is a digital media-streaming device that delivers videos, news, games, and other content to consumers' televisions via the Internet." *Id.* at 1313.

111. *See id.* at 1316. When Plaintiff used her Roku, Dow Jones sent her serial number and what video content she watched to an analytics and advertising company, mDialog. *See id.* at 1314. The Court further stated:

> [O]nce equipped with the demographic data linked to a Roku serial number, mDialog, by receiving information from such other entities, can attribute video records received from Dow Jones to an actual individual. mDialog was able to identify Plaintiff and attribute her video records to an individualized profile in its databases.

Id.

112. *Id.* at 1316 ("Plaintiff has pled sufficient facts that qualify her as a 'subscriber,' and therefore a 'consumer.' She alleges that she downloaded the WSJ Channel and used it to watch video clips, and her [Roku] serial number and viewing history were transmitted to mDialog. These assertions suffice . . . .").

113. *See id.* at 1315-16 (explaining that the VPPA does not define *subscriber* and asserting that "if a plaintiff, in addition to visiting a website, pleads that he or she also viewed video content on that website, that plaintiff is a 'subscriber' to a service within the meaning of the VPPA").

114. *In re Hulu*, 2012 U.S. Dist. LEXIS 112916, at *23-24 ("[W]hile the terms 'renter' and 'buyer' necessarily imply payment of money, the term 'subscriber' does not. Hulu cites no authority suggesting any different result. If Congress wanted to limit the word 'subscriber' to 'paid subscriber,' it would have said so.").

115. *See* Austin-Spearman v. AMC Network Entm't L.L.C., 98 F. Supp. 3d 662, 668-71 (S.D.N.Y. 2015).

116. *See id.* at 670.

regardless of whether the provider collects a user's information.[117] This analysis emphasized how "casual consumption" and a lack of connection between the user and the content provider is not enough to produce a subscriber status.[118]

Throughout the technological advancements in the years since the VPPA was originally implemented, courts have endeavored to balance using the VPPA to protect consumers[119] while working to only apply it in situations that seem appropriate.[120] Problematically, courts wrestle with the parameters of who and what fits within the VPPA's protections on a case-by-case basis until more precise definitions are laid out.[121] The transition in how video content is acquired—from renting VHS tapes from a local video store to a finger tap download onto a smartphone—has dramatically changed how a *subscriber* is understood.[122]

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117. *See id.* at 671 (holding that "an individual must do more than simply take advantage of a provided service—even if doing so alone allows a provider to access her information—in order to have acted as a 'subscriber' of the provider").

118. *See id.* at 669 (describing how "[s]uch casual consumption of web content, without any attempt to affiliate with or connect to the provider, exhibits none of the critical characteristics of 'subscription'").

119. *See* Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (2012) (stating that the Act was created "to preserve personal privacy with respect to the rental, purchase, or delivery of video tapes or similar audio visual materials"); *see also* Ellis v. Cartoon Network, Inc., 803 F.3d 1251, 1253 (11th Cir. 2015) (explaining how the amendments to the VPPA "allowed consumers greater flexibility to share their video viewing preferences, while maintaining their privacy").

120. *See, e.g.*, *Ellis*, 803 F.3d at 1254-55 (determining that plaintiff's information did not constitute PII because, without additional information, it could not connect the plaintiff to the video content he viewed); *Austin-Spearman*, 98 F. Supp. 3d at 669 (determining that "casual consumption" of video content was not of a relationship between an individual who visited a video content provider's website to hold the provider liable under the VPPA).

121. *See, e.g.*, *In re* Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 267 (3d Cir. 2016) (concluding PII must be information directly linking an individual to the video content he or she acquired); Locklear v. Dow Jones & Co., 101 F. Supp. 3d 1312, 1316 (N.D. Ga. 2015) (holding that plaintiff viewing video content on a channel she downloaded onto her media streaming device qualified her to be a subscriber under the VPPA).

122. *See* Recent Case, *supra* note 65, at 2011 (explaining that who a subscriber is under the VPPA involves a review of actions such as downloading apps, logging in, and engaging online in ways that did not exist when the Act was created).

II. IN THIS NEW ERA, WHO ARE SUBSCRIBERS?

Today's technology creates many instances that require courts to determine if a consumer constitutes a "subscriber" under the VPPA.[123] Recently, the First and Eleventh Circuits have addressed whether users of free cell phone apps can be considered subscribers under the Act.[124] In *Yershov v. Gannett Satellite Information Network*, the First Circuit determined that the use of a free app user qualified as a subscriber,[125] while in *Ellis v. Cartoon Network*, the Eleventh Circuit came to the opposite conclusion.[126]

A. How the First Circuit Determined a User of a Free App Was a Subscriber

In April of 2016, the United States Court of Appeals for the First Circuit heard Alexander Yershov's claim that Gannett Satellite Information Network (Gannett) violated the VPPA.[127] Yershov appealed the district court's grant of Gannett's motion to dismiss the complaint; the district court concluded that Gannett's release of Yershov's PII did not violate the VPPA because Yershov was not a consumer under the Act's definition, and thus he was not protected.[128] Yershov's relationship with Gannett, an international media company, began when he downloaded the USA Today Mail App on his cell phone—a cell phone app that Gannett provides content for, including videos.[129]

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123. *See* Yershov v. Gannett Satellite Info. Network, Inc., 820 F.3d 482, 484 (1st Cir. 2016) (determining whether downloading and using a free cellphone app gave the consumer subscriber status); *Ellis*, 803 F.3d at 1257 (determining whether the downloader of a free app can be considered a subscriber under the VPPA); *Austin-Spearman*, 98 F. Supp. 3d at 668-69 (determining whether watching a television show online indicated the viewer was a subscriber).

124. *See* Koo, *supra* note 27, at 38 (reviewing the conflicting holdings of the First and Eleventh Circuits); *Yershov*, 820 F.3d at 484; *Ellis*, 803 F.3d at 1252.

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

126. *See Ellis*, 803 F.3d at 1252.

127. *See Yershov*, 820 F.3d at 484.

128. *See id.* (quoting 18 U.S.C § 2710(a)(1), (b)(1) (2012)) (reviewing how "the district court found that the information Gannett disclosed 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' of or to Gannett's video content and, therefore, not a 'consumer' protected by the Act").

129. *See id.*

The court reviewed what occurred once Yershov downloaded the free USA Today Mail App.[130] Once downloaded onto a user's phone, the app collects the user's GPS coordinates, identification information about the user's cell phone, and the title of each video watched.[131] The collected data is sent to a third party, Adobe, for consumer behavior analysis and marketing strategies.[132] Accordingly, Adobe collected Yershov's data every time he watched a video clip[133] and was able to identify Yershov using these three forms of information.[134]

The First Circuit made two preliminary determinations to discern whether Gannett violated the VPPA.[135] First, it held that the information Yershov provided was PII because it could easily identify him.[136] Although each piece of data could not identify Yershov on its own, the court concluded that, collectively, it was still PII because Gannett disclosed it to Adobe knowing Adobe had the

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130. *See id.*

131. *See id.* (explaining how "each time the user views a video clip on the App, Gannett sends to Adobe . . . (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").

132. *See id.* at 484-85. The Court in *Yershov* indicated:

> Adobe is an unrelated third party that offers data analytics and online marketing services to its clients by collecting information about consumers and their online behavior. A unique identifier such as an Android ID allows Adobe "to identify and track specific users across multiple electronic devices, applications, and services" that a consumer may use. Adobe takes this and other information culled from a variety of sources to create user profiles comprised of a given user's personal information, online behavioral data, and device identifiers. 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.

Id. This compiled information was then used to create targeted advertisements for Adobe's clients, including Gannett. *See id.* at 485.

133. *See id.* (explaining the collection and disclosure of Yershov's personal information).

134. *See id.* (describing how by "[u]sing this information, Adobe was able to identify Yershov and link the videos he had viewed to his individualized profile maintained by Adobe").

135. *See id.* at 486-89 (determining whether the information collected was PII and if Yershov was a subscriber).

136. *See id.* at 486 (noting that while the term PII is ambiguous, "the language reasonably conveys the point that PII is not limited to information that explicitly names a person. Had Congress intended such a narrow and simple construction, it would have had no reason to fashion the more abstract formulation contained in the statute").

ability to combine the content and identify which users watched which videos.[137] Second, the court concluded that Yershov was a subscriber.[138]

To determine that Yershov was a subscriber, the court needed a definition of *subscriber* to use.[139] While acknowledging many potential definitions of *subscriber*,[140] the court concluded that definitions requiring payment were incorrect because they would render the terms *renter* and *purchaser* superfluous.[141] The First Circuit reviewed definitions of *subscribe* and *subscriber* from multiple dictionaries, and the court accepted a definition of *subscribe* as an agreement to have access to content.[142] The court believed that in downloading the app and providing his valuable personal information, Yershov made a commitment to Gannett in a way that made him a subscriber.[143] This holding was an important step in

137. *See id.* (explaining that once Adobe had all of the information Gannett provided, it was relatively easy for Adobe to combine the information in a way that would clearly identify Yershov).

138. *See id.* at 487.

139. *See id.* (reviewing definitions of *subscriber* to determine which definition to apply).

140. *See id.* (noting that "there are other common definitions of the term 'subscribe' that include as an element a payment of some type and/or presume more than a one-shot transaction").

141. *See id.* (explaining how "if the term 'subscriber' required some sort of monetary payment, it would be rendered superfluous by the two terms preceding it"); *see also* Video Privacy Protection Act of 1988, 18 U.S.C. § 2710(a)(1) (2012).

142. *Yershov*, 820 F.3d at 487 (citing THE AMERICAN HERITAGE DICTIONARY 1726 (4th ed. 2000)) (discussing definitions of *subscriber*). The court cited that this dictionary defined *subscribe* as "to receive or be allowed to access electronic texts or services by subscription" and defined *subscription* as "an agreement to receive or be given access to electronic texts or services." *Id.* The court ultimately stated that these definitions reflected Yershov's exact situation 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 without going through other distribution channels." *Id.* Interestingly, the court pointed out that this relationship was "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." *Id.*

143. *See id.* at 489 (explaining that Yershov's "access was not free of a commitment to provide consideration in the form of that information, which was of value to Gannett. And by installing the App on his phone, thereby establishing seamless access to an electronic version of *USA Today*, Yershov established a relationship with Gannett").

defining the term *subscriber*,[144] as other courts' analyses have not resulted in the same conclusion.[145]

B. How the Eleventh Circuit Determined a User of a Free App Was Not a Subscriber

In 2015, the Eleventh Circuit reviewed whether Mark Ellis, a user of a free cell phone app, was a subscriber under the VPPA.[146] Ellis downloaded the Cartoon Network's free "CN app" to watch television shows and video clips on his Android cell phone.[147] Downloading the CN app allows users to watch free videos or log in with television provider information for more content.[148] Regardless of whether the user logs in or not, the CN app will identify and track Android smartphone users through an identifier that is generated for each cell phone.[149] This unique identifier remains consistent on the device for various apps and services on the phone.[150]

Without his consent, Cartoon Network collected Ellis's identifier and viewing history and disclosed it to a third-party analytics company, Bango, each time he closed the app.[151] Bango utilizes a user's Android ID to account for each user's activity on

144. *See id.* (using disclosure of personal information to signify a commitment between a consumer and video content provider, thus creating a subscriber relationship between the two).

145. *See, e.g.*, Ellis v. Cartoon Network, Inc., 803 F.3d 1251, 1252 (11th Cir. 2015) (holding that a user providing personal information to video content provider to use a free app was not a subscriber under the VPPA).

146. *See id.* at 1252.

147. *See id.* at 1253-54 (describing how "Cartoon Network provides a free mobile application ('app' for short) for smartphones called the CN app. Persons can download the app to watch clips or episodes of TV shows on Cartoon Network").

148. *See id.* at 1253 (explaining that users of the app can freely view content without creating an account or can supply information to login with their television provider details).

149. *See id.* at 1254 (describing that "Cartoon Network identifies and tracks an Android smartphone user on the CN app through his mobile device identification or Android *ID,* which is 'a 64-bit number (hex string) that is randomly generated when a user initially sets up his device and should remain constant'" for the life of the device).

150. *See id.* (explaining how the ID is used to log actions on the device, including tracking CN app activity).

151. *See id.* (describing how "[t]he CN app does not ask users for their consent to share or otherwise disclose personally identifiable information to third parties").

multiple electronic devices and from various content providers.[152] By composing and connecting the data it receives about users, Bango can link Android IDs to specific individuals along with their viewing history.[153] As such, Bango used Ellis's ID to identify him and connect it with his viewing history on the app.[154] However, the district court concluded that this information was not PII because, without being combined with other data, it could not identify Ellis.[155]

The Eleventh Circuit held that, by itself, the act of downloading and using a free app does not make the user a subscriber.[156] While payment is one of the factors to consider when determining if a user is a subscriber, it is not the only element to look for when making this determination.[157] The court emphasized that the subscriber relationship requires an elevated commitment[158] and noted that there is not much inherent commitment in downloading an app that can be deleted at any time.[159] Because Ellis did not sign up for an account, disclose any personal information, or make payments, the court

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152. *See id*. (describing how Bango collects information about Android users and combines it in a way that they can track their actions).

153. *See id*. The court explained how Bango will

> "automatically" link an Android ID to a particular person by compiling information about that individual from other websites, applications, and sources. So when Cartoon Network sends Bango the Android ID of a CN app user along with his video viewing history, Bango associates that video history with a particular individual.

Id.

154. *See id*. Although Cartoon Network did not give Bango Ellis's name, Cartoon Network provided a "combination of Mr. Ellis'[s] Android ID and video viewing records. Because Bango is able to identify Mr. Ellis from his Android *ID,* it knows which videos he watched." *Id*.

155. *See id*. The district court held that this information was not PII because, on its own, it could not connect an individual to a viewing history. *See id*. at 1255.

156. *See id*. at 1252 (determining that "a person who downloads and uses a free mobile application on his smartphone to view freely available content, without more, is not a 'subscriber' (and therefore not a 'consumer') under the VPPA").

157. *See id*. at 1257 (clarifying that "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 which owns and operates the app").

158. *See id*. at 1256 (explaining how a "'subscription' involves some type of commitment, relationship, or association (financial or otherwise) between a person and an entity").

159. *See id*. at 1257 (explaining that a user who simply downloads an app "is free to delete the app without consequences whenever he likes, and never access its content again").

concluded that he was not a subscriber under the VPPA.[160] It can be inferred from this conclusion that had Ellis met any of those three criteria, he would have been considered a subscriber under the VPPA,[161] and if so, the First and Eleventh Circuit's analysis may have produced more similar conclusions.[162]

C. Distinguishing the Two Circuits' Holdings

While the analyses of the First and Eleventh Circuits may initially appear similar,[163] there is a stark contrast between the two courts' ultimate conclusions.[164] The most important difference between the two analyses is how the courts viewed the disclosed information.[165] The First Circuit explained that the disclosed information was PII; even though Yershov could not be identified by the information on its face, it was PII because Gannet was able to identify Yershov by combining the information.[166] Providing this valuable personal information was also an element that persuaded the

160. *See id.* (noting that Ellis did not make a meaningful connection with CN; rather, he just viewed content that was on a free app). The court believed that "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 which owns and operates the app." *Id.*

161. *See id.* Because the court lists particular forms of commitment that Mr. Ellis did not make, including that he did not provide "payments to Cartoon Network for use of the CN app[,] . . . become a registered user[,] . . . receive a Cartoon Network ID, . . . [create a] profile, . . . sign up for any periodic services or transmissions, . . . [or] make any commitment" to Cartoon Network, it appears the court would consider these forms of commitment signs of a possible subscriber. *Id.*

162. *See infra* Section II.C (comparing the First Circuit's analysis in *Yershov* to the Eleventh Circuit's in *Ellis*).

163. *See* Yershov v. Gannett Satellite Info. Network, Inc., 820 F.3d 482, 487 (11th Cir. 2016) (concluding that monetary payment is not necessary for a user to be a subscriber under the VPPA); *Ellis*, 803 F.3d at 1256 (same).

164. *See Yershov*, 820 F.3d at 490 (concluding the plaintiff was a subscriber under the VPPA); *Ellis*, 803 F.3d at 1257 (concluding the plaintiff was not a subscriber under the VPPA).

165. *See Yershov*, 820 F.3d at 489 (determining that because Yershov disclosed his own personal information, this established a commitment between himself and the video content provider); *Ellis*, 803 F.3d at 1254, 1257 (determining that Ellis's information provided was insufficient to create a commitment between himself and the video content provider).

166. *See Yershov*, 820 F.3d at 489 (explaining that once Adobe had all of the information Gannett provided, it was relatively easy for Adobe to combine the information in a way that would clearly identify Yershov).

court to hold that Yershov was a subscriber.[167] Contrastingly, the Eleventh Circuit found that even though Bango could identify Ellis from the information Cartoon Network provided,[168] the data was not PII.[169] The court also held that Ellis displayed no forms of commitment to indicate that he should have been considered a subscriber under the VPPA.[170]

It is possible that if the Eleventh Circuit found the information Ellis disclosed was more personal in nature—such as PII—the court would have determined his disclosure to be a commitment.[171] In its analysis, the Eleventh Circuit lists actions Ellis did not take that may have exemplified a commitment between himself and Cartoon Network, such as making a payment or creating a profile on the app.[172] Within the court's list of absent commitment factors, the court specifically points out that Ellis provided no personal information.[173] Because the Eleventh Circuit found, among other factors, that Ellis's lack of disclosure of personal information indicated a lack of commitment[174]—and thereby concluded Ellis was not a subscriber—it is logical to conclude that, had the court determined that the

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167. *See id.* (discerning that "[w]hile he paid no money, access was not free of a commitment to provide consideration in the form of that information, which was of value to Gannett").

168. *See Ellis*, 803 F.3d at 1254 (describing how "when Cartoon Network sends Bango the Android ID of a CN app user along with his video viewing history, Bango associates that video history with a particular individual").

169. *See id.* at 1255. The district court determined that because the data provided could not identify Ellis on its own, it was not PII. *See id.*

170. *See id.* at 1252.

171. *See id.* 1257 (pointing out that no commitment was made by listing examples of absent actions that may have been an indication of commitment).

172. *See id.* The court explained that:

> Mr. Ellis did not sign up for or establish an account with Cartoon Network, did not provide any personal information to Cartoon Network, did not make any payments to Cartoon Network for use of the CN app, did not become a registered user of Cartoon Network or the CN app, did not receive a Cartoon Network ID, did not 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.

Id. The court found that Mr. Ellis's lack of actions displaying commitment indicated that he did nothing more than download an app and thereby did not require protection under the VPPA. *See id.*

173. *See id.*

174. *See id.* (explaining how "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 which owns and operates the app").

information Ellis provided was PII, it would have impacted the court's determination of whether he was a subscriber.[175]

The First Circuit's differing assessment on the value of consumer information as it relates to the user's status under the VPPA is critical because changes in marketing trends have increased consumer information's value.[176] In the unique assessment in *Yershov*, the First Circuit recognized how profitable consumer information has become[177] by noting that the disclosure of this information indicates a commitment.[178] Although Bango could use Ellis's information to identify him, the Eleventh Circuit did not conclude Ellis provided anything of value.[179] To further bring the VPPA into the digital age[180] and continue protecting consumers,[181] it is necessary to recognize the value of personal information, the prevalence of consumer data markets, and the ease of collecting consumer information online.[182]

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175. *See id.* (determining that the absence of personal information disclosure to the content provider indicated a lack of commitment between consumer and video content provider).

176. *See* Ciocchetti, *supra* note 38, at 576 (explaining how valuable PII is because it is so useful to create effective direct marketing).

177. The court recognized that the information Yershov provided was valuable and understood that his personal information was provided for in exchange for the video content he received. *See* Yershov v. Gannett Satellite Info. Network, Inc., 820 F.3d 482, 489 (11th Cir. 2016); *see also* Ciocchetti, *supra* note 38, at 576 (explaining how valuable PII is today).

178. *See Yershov*, 820 F.3d at 489 (acknowledging that "[w]hile he paid no money, access was not free of a commitment to provide consideration in the form of that information, which was of value to Gannett").

179. *See Ellis*, 803 F.3d at 1255 (determining that the information Ellis provided was not PII because it could not identify him on its own and needed to be combined with additional information to do so).

180. *See* 158 CONG. REC. H6849-50 (daily ed. Dec. 18, 2012) (statement of Rep. Goodlatte) (explaining that the amendment was made to the VPPA in order to continue to protect consumers when online media use is so prevalent); *see also* Video Privacy Protection Act Amendments Act of 2012, Pub. L. No. 112-258, § 2, 126 Stat. 2414, 2414 (amending the VPPA to allow for consumer consent to be provided online to protect privacy in the digital age).

181. *See* Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (2012) (describing that the VPPA was enacted "to preserve personal privacy with respect to rental, purchase, or delivery of video tapes or similar audio visual materials"); *see also* H.R. 3523, 100th Cong. (1987). Representative Al McCandless introduced House Bill 3523, which became the foundation for the VPPA "to preserve personal privacy with respect to the rental or purchase of video tapes by individuals." *Id.*

182. *See* Schwartz & Solove, *supra* note 42, at 1820.

III. SUBSCRIBERS IN RELATION TO THE INFORMATION THEY PROVIDE

In the 1960s, concerns about the sharing of personal information arose with the advent of computers.[183] Fast-forward to today's digital age, where so many transactions occur online, and such concerns reach new levels as individuals' personal information is scattered across the Internet.[184] Companies have realized consumer data's inherent value to understand buyers' habits, and a market for this data developed.[185] A consumer's personal information, including PII, has become a valuable commodity.[186]

A. Who Is Collecting This Information, What Are They Collecting, and Why?

Since the rise in Internet use in the 1990s, consumer transactions have overwhelmingly transformed to rely on online technology.[187] As a result, individuals knowingly and unknowingly leave a trail of personal information as they travel through the online world.[188] Almost simultaneously, the world of marketing and

183. *See id.* (describing how "the rise of the computer . . . permitted public bureaucracies and private companies to process personal data. The computer did not merely increase the amount of information that entities collected—it changed how that data could be organized, accessed, and searched").

184. *See* Solove, *supra* note 43, at 1394; *see also* Jay P. Kesan & Carol M. Hayes, *Creating a "Circle Of Trust" to Further Digital Privacy and Cybersecurity Goals*, 2014 MICH. ST. L. REV. 1475, 1483 (explaining how "[p]rivacy law has evolved over the last 125 years, with the issues becoming even more complicated in the last twenty years as the Internet grew in popularity").

185. *See* Solove, *supra* note 43, at 1408 (explaining that companies with databases "are realizing that their databases are becoming one of their most valuable assets and are beginning to sell their data"). Solove explains how "[t]echnology enables the preservation of the minutia of our everyday comings and goings, of our likes and dislikes, of who we are and what we own. Companies are constructing gigantic databases of psychological profiles, amassing data about an individual's race, gender, income, hobbies, and purchases." *Id.* at 1394.

186. *See* Ciocchetti, s*upra* note 38, at 576. Ciocchetti explains that "[b]uyers are incentivized to purchase PII because such information arrives prepackaged—collected, mined, and correlated into categorized lists—and ready to use." *Id.*

187. *See* Solove, *supra* note 43, at 1394 (explaining that the way we conduct our daily tasks has completely transformed to accommodate methods that depend on using digital technology).

188. *See id.* In this new digital era, the way we conduct our daily lives so heavily on the Internet has "resulted in an unprecedented proliferation of records and data. The small details that were once captured in dim memories or fading scraps of

advertising transformed in a related way.[189] The bits and pieces of individuals' information regarding their everyday lives have become incredibly valuable for the purpose of large-scale marketing strategies directed at particular groups or individuals.[190] Companies use consumer information to create persuasive ads to convince consumers to buy their products or use their services.[191] The ability to collect such information online has changed the world of marketing.[192]

Beginning in the 1970s, companies began marketing to groups of consumers with similar interests and tastes.[193] This strategy is known as targeted marketing, and it is considered the most successful form of marketing.[194] Marketers quickly realized that targeted marketing was most effective, and thus most profitable, when they had access to more information.[195] Given the abundance of personal information strewn throughout the Internet,[196] a market dedicated to collecting online consumer data to sell to companies for marketing purposes developed into a booming industry.[197] The two

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paper are now preserved forever in the digital minds of computers, vast databases with fertile fields of personal data." *Id.*

189. *See id.* at 1404 (explaining the grand transition from local, small-scale marketing to mass marketing relying heavily on the use of consumers' personal information obtained online).

190. *See id.*; *see also* Schwartz & Solove, *supra* note 42, at 1849 ("The holy grail of modern advertising is 'one-to-one' marketing . . . to create 'advertising crafted to uniquely engage' each individual. . . . [T]he idea is for advertisers to record a person's behavior, analyze it, and shape the kinds of offers directed to that party based on the patterns that emerge.").

191. *See* Solove, *supra* note 43, at 1404 (explaining how "corporations are desperate for whatever consumer information they can glean, and their quest for such information is hardly perceived by the general public as democratic").

192. *See id.* at 1407 (describing how marketing companies work to collect as much information on consumers as possible and how the Internet makes this easier).

193. *See id.* at 1404-05 (explaining how "[t]he turn to targeting was spurred by the proliferation and specialization of mass media throughout the century, enabling marketers to tap into groups of consumers with similar interests and tastes").

194. *See id.* at 1407.

195. *See id.* (explaining how the "effectiveness and profitability of targeted marketing depend upon data, and the challenge is to obtain as much of it as possible").

196. *See id.* at 1408. Notably, "[t]he average consumer is on around 100 mailing lists and is contained in at least fifty databases." *Id.*

197. *See id.* at 1407-08 (describing the database industry as "an information age bazaar where personal data collections are bartered and sold"). "Over 550 companies comprise the personal information industry with annual revenues in the

main ways an individual's personal information is collected online are either through compiling information he or she provided through online transactions or by tracking an individual's Internet browsing from site to site.[198]

One very popular form of targeted marketing is behavioral marketing.[199] Behavioral marketing involves tracking a person's online conduct in order to create the most effective advertisements based on the advertiser's collected information about the individual.[200] Marketers are hired to track, collect, and organize information on individuals, and they gather data such as geographical location, recent purchases, and frequently viewed movies.[201] The names of individuals are not usually linked to the compilation of data collected.[202] However, companies are able to connect and combine consumer information to make it more pervasive.[203]

B. How Is This Information Being Used?

Because Internet use is inescapable, it has become the most common platform to collect and share consumers' personal information.[204] The more information that can be provided about an

billions of dollars. The sale of mailing lists alone . . . generates three billion dollars a year."). *Id.*

198. *See id.* at 1411. Solove explains that "there are two basic ways personal information is collected in cyberspace: (1) by directly collecting information from users (registration and transactional data); and (2) by surreptitiously tracking the way people navigate through the Internet (clickstream data)." *Id.*

199. *See* Schwartz & Solove, *supra* note 42, at 1849 (explaining that the goal in behavioral marketing is "for advertisers to record a person's behavior, analyze it, and shape the kinds of offers directed to that party based on the patterns that emerge from this collected data").

200. *See id.* (explaining how directed marketing is the ideal form of marketing to engage the individual with personal information).

201. *See id.* at 1851. Marketers access databases that track "people's online and offline behavior. They are able to cross-reference online activity with offline records including home ownership, family income, marital status, zip code, and a host of other information, such as one's recent purchases as well as favorite restaurants, movies, and TV shows." *Id.*

202. *See id.* at 1855.

203. *See* Latanya Sweeney, *Simple Demographics Often Identify People Uniquely* 2 (Carnegie Mellon Univ., Working Paper No. 3, 2000). Sweeney explains how "combinations of few characteristics [from the U.S. Census] often combine in populations to uniquely or nearly uniquely identify some individuals." *Id.*

204. *See* Paige Norian, Comment, *The Struggle to Keep Personal Data Personal: Attempts to Reform Online Privacy and How Congress Should Respond*,

individual, the more an advertising company is willing to pay for it.[205] Marketing agencies use software to create a dossier on each individual they have collected data from.[206] Using personal data to arrange for a more personalized advertisement experience for consumers is one of the most popular and effective methods of advertising today,[207] and anyone who can provide such data to a marketing company can earn a significant profit.[208]

The facts from *In re Hulu Privacy Litigation* illustrate how a video service provider can collect data about users to make money from third parties.[209] Originally, Hulu, a video service provider, made profits from running advertisements on its website and disclosing audience size to advertisers.[210] However, Hulu began coordinating with Facebook to collect consumer information, thus changing Hulu's model for generating revenue.[211] Facebook makes money by sharing its users' information with marketers to create targeted advertisements.[212] When Hulu added a Facebook button to its watch pages, users who clicked the button were identified as Facebook users, and the social media site could see what content users were watching.[213] This identification and trailing was used to track

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52 CATH. U. L. REV. 803, 809 (2003) (explaining how "[t]he Internet provides companies with the ability to collect information about their users and to distribute that information to others").

205. *See* Schwartz & Solove, *supra* note 42, at 1854 (discussing how the FTC found that "the more that is known about someone, the more that advertisers will pay to send her an advertisement").

206. *See id.* (explaining how companies have created mechanisms to track individuals and combine information that is collected on each of them individually).

207. *See id.* at 1849 (explaining how targeted marketing through the use of collected consumer personal information is very popular because it is so effective).

208. *See id.* (describing the huge market for buying and selling consumer information).

209. *See generally In re* Hulu Privacy Litig., 86 F. Supp. 3d 1090, 1091 (N.D. Cal. 2015) (assessing how a video content provider linked with a social media site to collect consumers' information and shared it with marketers to create targeted advertisements).

210. *See id.* at 1093. (describing Hulu's "main source of income [as] advertising revenue. Advertisers pay Hulu to run commercials . . . [and] pay Hulu based on how many times an ad is viewed").

211. *See id.* at 1093-94. The case provides a detailed explanation of Hulu's agreement with Facebook regarding information gathering. *See id.*

212. *See id.* at 1093. Facebook collects the information based on what Facebook users share and "provides that information to marketers. Facebook shares its members' information with marketers so that they can target their ad campaigns." *Id.*

213. *See id.* at 1093-94.

advertisement effectiveness, which eventually generated revenue for both Facebook and Hulu.[214]

While directed advertising can be seen as beneficial to the economy,[215] many individuals feel uncomfortable being tracked to receive advertising aimed specifically at them.[216] When consumer data contains greater detail about an individual, the data's value increases.[217] Thus, PII is a very valuable commodity to marketers conducting targeted marketing because it directly links consumers to their digital actions.[218] The purpose of the VPPA is to protect consumers' PII.[219] Given this legislative intent, any definition of *subscriber* under the VPPA must include an evaluation of whether the consumer has provided PII.[220] Importantly, given the inherent value of PII, [221] it is logical that in providing such a valuable commodity, the consumer has forged a committed relationship with

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214. *See id*. at 1102-03. Facebook and Hulu would send the advertisement tracking information "to an advertiser[, which shows Hulu's] ability to track advertising effectiveness through Facebook's logged-in cookie." *Id*. at 1103.

215. *See* Schwartz & Solove, *supra* note 42, at 1853-54 (explaining how it is possible that a free market economy could set its own price for consumer information and that "marketing online is a billion-dollar growth industry").

216. *See id*. at 1853; *see also* Solove, *supra* note 43, at 1398 (describing how uncontrollable data collection has been described as a "dehumanizing" world, "where people feel powerless and vulnerable, without any meaningful form of participation in the collection and use of their information").

217. *See* Schwartz & Solove, *supra* note 42*,* at 1854; *see also* Ciocchetti, s*upra* note 38, at 576 (explaining how "[b]uyers are incentivized to purchase PII because such information arrives prepackaged—collected, mined, and correlated into categorized lists—and ready to use").

218. *See, e.g.*, Video Privacy Protection Act of 1988, 18 U.S.C. § 2710(a)(3) (2012) (defining PII as "information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider"); *see also* Ciocchetti, *supra* note 38, at 562 (explaining how "companies collect PII to: (1) facilitate and process transactions; (2) conduct marketing campaigns; (3) mine for demographics, clickstream data, purchasing behavior, and customer interests; and (4) sell for a fee").

219. *See* § 2710(b); s*ee also Video and Library Privacy Protection Act of 1988*, *supra* note 17, at 29-30 (explaining that this legislation was created to protect individuals' privacy in their video-watching choices).

220. *See infra* Part IV (explaining that the VPPA's intent is to protect consumers' PII from being distributed by video content providers, thus necessitating that users who disclose PII to content providers be labeled as subscribers to adequately protects the Act's intent).

221. *See* Ciocchetti, s*upra* note 38, at 576 (explaining how valuable PII is, specifically in popular marketing and advertising strategies).

the video content provider that courts demand[222]—a status that qualifies the user as a subscriber.[223]

IV. USERS WHO PROVIDE PERSONALLY IDENTIFIABLE INFORMATION TO CONTENT PROVIDERS SHOULD BE REGARDED AS SUBSCRIBERS AND AFFORDED PROTECTIONS UNDER THE VIDEO PRIVACY PROTECTION ACT

In response to the challenge of determining when a user of a free cell phone app is considered a subscriber under the VPPA,[224] any potential solution must involve utilizing another prominent term within the Act: PII.[225] Because PII is widely understood to be information valuable enough to be protected,[226] a consumer supplying such information in exchange for video content can be viewed as supplying consideration, thereby creating a contractual relationship between the content-user and the content-provider.[227] A contractual relationship clearly evidences a commitment, thus elevating the consumer's status to a protected subscriber standing.[228]

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222. *See* Yershov v. Gannett Satellite Info. Network, Inc., 820 F.3d 482, 489 (1st Cir. 2016) (explaining that within the VPPA, the subscriber status is recognized as a heightened relationship between the consumer and video content provider); Austin-Spearman v. AMC Network Entm't L.L.C., 98 F. Supp. 3d 662, 669 (S.D.N.Y. 2015) (emphasizing "casual consumption" of online media is not enough to qualify a consumer to be a subscriber).

223. *See infra* Part IV (proposing a definition of *subscriber* that protects individuals who provide PII in exchange for video content).

224. *See* Koo, *supra* note 27, at 38 (describing the discrepancies between the First Circuit's and the Eleventh Circuit's holdings on this issue); *see generally Yershov*, 820 F.3d 482 (evaluating whether a user downloading a free cellphone app should qualify as a subscriber under the VPPA); Ellis v. Cartoon Network, Inc., 803 F.3d 1251 (11th Cir. 2015) (same).

225. *See infra* Section IV.A (explaining how using the disclosure of PII to determine if an individual qualifies as a subscriber under the VPPA gives effect to the legislators' intent for the Act and evidences the elevated commitment needed for the subscriber status).

226. *See* Schwartz & Solove, *supra* note 42, at 1816 (describing how "privacy regulation focuses on the collection, use, and disclosure of PII, and leaves non-PII unregulated").

227. *See* Matwyshyn, *supra* note 35, at 8 (explaining how a consumer's "act of sharing data is a form of legally sufficient consideration" to form a contract). The contract between the parties is essentially providing video content in exchange for PII. *See id.*

228. Courts have often discussed that the subscriber relationship under the VPPA requires a heightened relationship and something more than merely downloading a free cell phone app. *See, e.g.*, *Yershov*, 820 F.3d at 489; *Ellis*, 803 F.3d at 1257; Austin-Spearman v. AMC Network Entm't L.L.C., 98 F. Supp. 3d

While there are potential drawbacks to any new strategy,[229] given the current state of consumer privacy protection, recognizing PII's value and understanding it as consideration to create a contractual relationship between consumers and providers will adequately protect what the VPPA intended—PII and consumer privacy.[230] This solution addresses the need for specific parameters of who is a subscriber and provides the necessary privacy protection from the widespread sharing of personal data that occurs today.[231]

A. Expanding on the First Circuit's Analysis: Using PII as Consideration to Create a Contractual Relationship Between Consumer and Provider to Protect Subscribers

The clearest way to determine whether a user of a free app is a subscriber under the VPPA is by building off of the First Circuit's analysis in *Yershov*.[232] In this case, Yershov downloaded a free app to his cell phone that collected his GPS coordinates, a unique cell phone identifier, and each video clip he watched; the app then shared this information with a data analytics and online marketing company.[233] The First Circuit affirmed the district court's holding that the information Gannett disclosed to the data analytics company qualified as PII.[234] In the Eleventh Circuit's conclusion that Yershov was a subscriber, it opined that Yershov's provision of personal

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662, 669 (S.D.N.Y. 2015) (explaining that, within the VPPA, a subscriber is recognized as having a heightened relationship with the content provider).

229. *See infra* Section IV.B (reviewing counter arguments to this solution).

230. *See infra* Section IV.C (discussing the policy considerations and why this solution addresses the needs legislators recognized and attempted to rectify in creating the VPPA).

231. *See* Solove, *supra* note 43, at 1394 (describing the "information revolution" that has resulted in a "dramatic transformation in the way we shop, bank, and go about our daily business—changes that have resulted in an unprecedented proliferation of records and data").

232. *See Yershov*, 820 F.3d at 489 (determining that, although Yershov did not pay for access to the video content, he provided "consideration in the form of that information," which was of sufficient value to qualify him as a subscriber under the VPPA).

233. *See id.* at 484 (explaining how the USA Today Mobile App collected personally identifiable information and shared it with Adobe without Yershov's permission).

234. *See id.* at 486 (concluding that because "Gannett disclosed information reasonably and foreseeably likely to reveal which *USA Today* videos Yershov has obtained," this information was PII).

information was valuable and exemplified commitment.[235] By expanding the court's concept of *subscriber*, the elevated relationship that many courts have called for[236] can be fulfilled by a simple contractual relationship. When consumers provide valuable PII to video content providers, it serves as consideration to form a contract between the parties because the consumer provides PII in exchange for video content.[237] Thus, a user who provides PII for the use of an otherwise free video service app should be considered a subscriber under the VPPA and afforded the Act's protections.[238]

Under the VPPA, the definition of *consumer* includes a *purchaser*, *renter*, and *subscriber*.[239] Legislators chose to include three separate terms and give each term its own unique meaning to avoid redundancy.[240] Because *purchaser* and *renter* unequivocally

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235. *See id.* at 489. The court explained that:

> While he paid no money, access was not free of a commitment to provide consideration in the form of that information, which was of value to Gannett. And by installing the App on his phone, thereby establishing seamless access to an electronic version of *USA Today*, Yershov established a relationship with Gannett that is materially different from what would have been the case had *USA Today* simply remained one of millions of sites on the web that Yershov might have accessed through a web browser.

Id.

236. *See* Ellis v. Cartoon Network, Inc., 803 F.3d 1251, 1257 (11th Cir. 2015) (concluding that downloading and using a free cell phone app cannot make the user a subscriber under the Act because "there is no ongoing commitment or relationship between the user and the entity which owns and operates the app"); *see also* Austin-Spearman v. AMC Network Entm't L.L.C., 98 F. Supp. 3d 662, 669 (S.D.N.Y. 2015) (emphasizing "casual consumption" of online media is not enough to create a subscriber relationship).

237. *See* Matwyshyn, *supra* note 35, at 8 (concluding that a consumer providing personal information is sufficient in value to constitute consideration to form a contract between the parties).

238. *See* Video Privacy Protection Act of 1988, 18 U.S.C. § 2710(a)(1) (2012). The Act protects the PII of "subscribers," "purchasers," and "renters," collectively known as "consumers." *See id.*

239. *See id.* The VPPA defines *consumer* as a "renter, purchaser, or subscriber of goods or services from a video tape service provider." *Id.*

240. *See Yershov*, 820 F.3d at 487 (determining that "if the term 'subscriber' required some sort of monetary payment, it would be rendered superfluous by the two terms preceding it"); *see also* § 2710(a)(1) (including three separate terms within the definition of *consumer*: *purchaser*, *renter*, and *subscriber*); Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 35 (2003) (holding that "statutory interpretation that renders another statute superfluous is of course to be avoided").

imply a monetary exchange,[241] the term *subscriber* must mean something unique. Courts have agreed that an exchange of money is not a necessary feature of a subscriber relationship under the VPPA.[242] However, in order to keep the definition of *subscriber* consistent with *purchaser* and *renter*, a subscriber must provide the video content provider with something to indicate a commitment between the parties.[243] Because it can be bought and sold in its own market,[244] consumer information should be treated as equivalent to a monetary exchange.[245]

When a user of a free video content app shares PII with a video content provider, the user is providing the kind of value that evidences a commitment between the parties.[246] A consumer should be afforded a subscriber's level of protection when providing PII[247] because personal information is a valuable commodity that benefits the video content provider.[248] Whether a consumer knowingly or unknowingly discloses PII to a video content provider, the video

241. *See Yershov*, 820 F.3d at 487 (explaining that because both *purchaser* and *renter* indicate an exchange of money for permanent or temporary ownership, *subscriber* must have its own distinct meaning).

242. *See id*. at 488 (concluding that payment is not necessary for a user to be considered a subscriber under the VPPA).

243. *See* 18 U.S.C. § 2710(a)(1). *Consumer* is defined as "purchaser," "renter," or "subscriber," and because *purchaser* and *renter* indicate a need for money in exchange for the video content, it would follow that *subscriber* would likely require something of value in exchange for video content as well. *See id*. *See also* United States v. Williams, 553 U.S. 285, 294 (2008) (explaining "the common-sense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated" is helpful when discerning the meaning of an ambiguous statutory term).

244. *See* Ciocchetti, s*upra* note 38, at 576 (explaining how valuable PII is because of its usefulness in creating effective direct marketing); *see also* Solove, *supra* note 43, at 1407-08 (describing how "[t]he database industry is an information age bazaar where personal data collections are bartered and sold").

245. *See* Matwyshyn, *supra* note 35, at 8 (supporting the theory of consumer information having sufficient value to qualify as contractual consideration and thus forming a contractual relationship between consumers and service providers).

246. *See Yershov*, 820 F.3d at 489 (describing Yershov's disclosure of personal information as a valuable exchange that evidenced a commitment).

247. *See id*. (describing how Yershov's "access was not free of a commitment to provide consideration in the form of that information, which was of value to Gannett").

248. *See* McClurg, *supra* note 39, at 71-72 (describing the extensive, billion-dollar data mining industry and its efforts to collect and organize individuals' personal information "because consumer information is an extremely valuable commercial asset").

content provider benefits from it.[249] Video content providers with access to PII have the opportunity to sell it or use it for their own marketing purposes.[250] In either case, content providers reap the benefits;[251] thus the valuable PII provided by the consumer serves as consideration to form a contract between the parties.[252] In this contract, the video service provider provides video content to the consumer in exchange for PII.[253] This contractual relationship serves as the heightened relationship that courts are looking for[254] and indicates the commitment needed for a user to qualify for subscriber status and protection of his or her PII under the VPPA.[255]

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249. Companies collecting consumers' PII can benefit from the information through marketing data. *See, e.g.*, *Yershov*, 820 F.3d at 485 (explaining that Gannett gives its users' PII to Adobe, and Adobe then creates digital dossiers, which give Adobe's clients insight into consumers' lives in order to create the most effective targeted advertisements for them). Alternatively, video content providers can sell the PII and gain huge profits. *See* Solove, *supra* note 43, at 1408 (explaining how companies with aggregated data on their users can sell this information as a new form of business).

250. *See* Solove, *supra* note 43, at 1408 (describing how "an increasing number of companies with databases . . . are realizing that their databases are becoming one of their most valuable assets and are beginning to sell their data, . . . [and] a new breed of firms devotes their primary business to the collection of personal information").

251. Video content providers can benefit by making profits directly off the sale of consumers' PII. *See* Schwartz & Solove, *supra* note 42, at 1854 (describing an entire marketplace devoted to buying and selling consumer information). Video content providers can also benefit by using the valuable PII in targeted marketing, which has proven to be very effective. *See also* Ciocchetti, s*upra* note 38, at 576 (explaining how personally identifiable information is so valuable in popular marketing strategies).

252. *See Consideration*, BLACK'S LAW DICTIONARY (10th ed. 2014). Consideration is defined as "[s]omething (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee; that which motivates a person to do something, [especially] to engage in a legal act." *Id.*

253. *See* Matwyshyn, *supra* note 35, at 8 (supporting the theory that consumer information has sufficient value to qualify as contractual consideration and thus form a contractual relationship between a consumer and service provider).

254. *See Yershov*, 820 F.3d at 489 (explaining that, within the VPPA, the subscriber status is recognized as a heightened relationship between the consumer and video content provider); Austin-Spearman v. AMC Network Entm't L.L.C., 98 F. Supp. 3d 662, 669 (S.D.N.Y. 2015) (emphasizing "casual consumption" of online media is not enough to qualify a consumer to be a subscriber).

255. *See* Video Privacy Protection Act of 1988, 18 U.S.C. § 2710(b)(2)(D) (2012) (protecting consumers' PII through penalizing video content providers who disclose consumers' PII without consent).

Beyond that, the VPPA was specifically created to protect consumers from the dissemination of PII.[256] Today, the concern with the unbridled sharing of PII far extends initial privacy concerns[257] because of how prominently companies use consumer data in their marketing strategies.[258] Video content providers with unregulated control over PII could have dangerous consequences for consumer privacy protection; if a content provider has access to a consumer's PII, a heightened relationship already exists between the parties.[259] By disclosing PII to the content provider, consumers provide a valuable commodity and put themselves at risk for distribution of their private information; an individual who downloads a free app but does not exchange PII for video content does not face such risks or provide such benefits.[260] Thus, a consumer's act of downloading a free app in conjunction with the act of providing PII to this app's content provider clearly indicates a commitment and evidences the heightened subscriber relationship that requires protection under the VPPA.[261]

Further, content providers using and sharing PII as they please is the type of damage the VPPA aimed to protect.[262] The easiest way

256. *See* Video Privacy Protection Act of 1988, Pub. L. No. 100-618, 102 Stat. 3195, 3195 (codified as amended at 18 U.S.C. § 2710 (2012)) (describing how the VPPA was enacted to "preserve personal privacy with respect to rental, purchase, or delivery of video tapes or similar audio visual materials").

257. *See id.*; *see also Video and Library Privacy Protection Act of 1988, supra* note 17, at 24 (explaining that the VPPA "stems from the incident . . . when a newspaper reporter found out from a video store what video films Judge Bork rented and published a story about his preferences" and sparked the concern for consumer privacy).

258. *See* Ciocchetti, s*upra* note 38, at 576 (explaining how valuable PII is due to its usefulness in direct marketing).

259. *See* Recent Case, *supra* note 65, at 2018 (describing how problematic it would be if courts followed the Eleventh Circuit's analysis and did not ensure protection for a user of a free app who provided personal information to the video content provider because "a similar application would be excluded from the VPPA and thus free to share *any* clearly personally identifiable information it gathered from one's phone along with the viewing history," which is "directly at odds with the mischief that the VPPA was enacted to protect against").

260. *See id.* at 2019.

261. *See* § 2710(a)(1) (protecting the PII of subscribers); *see also* Austin-Spearman v. AMC Network Entm't L.L.C., 98 F. Supp. 3d 662, 669 (S.D.N.Y. 2015) (emphasizing "casual consumption" of online media is not enough to qualify a consumer to be a subscriber).

262. *See* Recent Case, *supra* note 65, at 2019 (explaining how the evaluation of what is considered PII is important when determining who qualifies as a

to ensure the goal of the legislation is met[263] is to protect the individuals providing the exact information legislators deemed needed protection.[264] Given the constant changes in technology, there is a higher demand for new ways to protect consumer data, and labeling the individuals who provide PII when receiving video content as subscribers ensures the protection of many individuals' highly sensitive information.[265] In a world where almost all transactions can occur online, downloading an app and subsequently disclosing PII is much more substantial than visiting a website, and it warrants higher protection.[266]

With the many ways people are online sharing bits and pieces of their data, individuals leave information in many places.[267] The culmination of seemingly general information can easily be combined to identify an individual.[268] Information that at first appears to be non-PII can be pieced together to create PII.[269] Given this substantial risk of identifying individuals with otherwise non-

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subscriber under the VPPA because the Act was created to protect consumers' PII); *see also* § 2710(b)(1).

263. *See* Video Privacy Protection Act of 1988, Pub. L. No. 100-618, 102 Stat. 3195, 3195 (codified as amended at 18 U.S.C. § 2710 (2012)) (describing how the VPPA was enacted to "preserve personal privacy with respect to rental, purchase, or delivery of video tapes or similar audio visual materials"); *see also* H.R. 3523, 100th Cong. (1987). Representative Al McCandless introduced House Bill 3523, which became the foundation for the VPPA "to preserve personal privacy with respect to the rental or purchase of video tapes by individuals." *Id.*

264. *See* § 2710(d) (prohibiting video service providers from disclosing consumers' PII to third parties).

265. *See, e.g.*, 158 CONG. REC. H6849 (daily ed. Dec. 18, 2012) (discussing how to best amend the VPPA to continue to protect consumers when online media use is so prevalent); *see also* Robert W. Hahn & Anne Layne-Farrar, *The Benefits and Costs of Online Privacy Legislation*, 54 ADMIN. L. REV. 85, 86 (2002).

266. *See* Yershov v. Gannett Satellite Info. Network, Inc., 820 F.3d 482, 489 (1st Cir. 2016) (explaining that downloading an app is a more substantial commitment than visiting a web page because "by installing the App on his phone . . . Yershov established a relationship with Gannett that is materially different from what would have been the case had *USA Today* simply remained one of millions of sites on the web that Yershov might have accessed through a web browser").

267. *See* Hahn & Layne-Farrar, *supra* note 264, at 103 (discussing the "immense amounts of data about any given individual already in the public domain").

268. *See* Sweeney, *supra* note 202, at 2. A study at Carnegie Mellon University indicated that 87% of individuals in the United States could be identified simply by the combination of their zip code, date of birth, and gender. *Id.*

269. *See* Schwartz & Solove, *supra* note 42, at 1842 (explaining how "[t]echnology increasingly enables the combination of various pieces of non-PII to produce PII").

identifying information, it is essential to protect individuals who provide information that, on its face, identifies them—PII.[270] The best way to protect this valuable and personal information as the VPPA was intended to[271] is to protect the class of individuals who provide PII in exchange for video content as subscribers.

B. Resistance to Protecting PII-Providing Subscribers Under a Contractual Relationship

An important concern with labeling an individual providing PII in exchange for free video content as a subscriber relates to the economic benefits associated with sharing consumers' personal information.[272] Fewer regulations on consumer personal information promote societal and economic growth through free exchange of information.[273] Additionally, freely flowing PII can result in economic benefits due to lower prices and thriving businesses caused by successful advertising.[274] While these benefits are possible, a country of consumers would benefit from structure and predictability in their information privacy more than lower prices,[275] particularly in

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270. *See* Video Privacy Protection Act of 1988, 18 U.S.C. § 2710(a)(3) (2012) (defining PII as "includ[ing] information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider").

271. *See id.*

272. *See* Hahn & Layne-Farrar, *supra* note 264, at 146-50 (describing how mandating limitations on the sharing of consumers' personal information is unnecessary and would have detrimental effects on the economy).

273. *See id.* at 146-47 (explaining that a mandate to limit personal information sharing in a contract form would "significantly reduce the economic gains from trading information" and negatively impact all of society).

274. Maureen K. Ohlhausen, *Reactions to the FCC's Proposed Privacy Regulations*, FED. TRADE COMMISSION 5-6 (June 8, 2016), https://www.ftc.gov/system/files/documents/public_statements/955183/160608kellydrye.pdf [https://perma.cc/L45H-Z63G] (describing "burdens imposed by overly restrictive privacy regulation, such as broad opt-in requirements for non-sensitive data, may also slow innovation and growth, harming all consumers").

275. *See* Schwartz & Solove, *supra* note 42, at 1853. Many people feel as though the sharing of their information without their knowledge for marketing purposes is "deceptive, otherwise unfair, or even [] a force capable of chilling their free behavior. Moreover, the very complexity of the marketing ecosystem heightens the general ignorance of these corporate techniques, and reduces the value of the tools that some companies are making available to users." *Id.*

light of the recent changes in the scope of the FTC's and FCC's powers to protect consumer information.[276]

Further, in *Austin-Spearman*, the United States District Court for the Southern District of New York critiqued this type of solution.[277] The court determined that defining *subscriber* as an individual who has provided personal information to the content provider would render the consumer clause of the Act superfluous.[278] While it is true that courts must avoid any statutory interpretation that reduces a portion of the statute to be redundant,[279] such an interpretation does not render the consumer clause superfluous.[280] Within the VPPA, *consumer* is defined as "any renter, purchaser, or subscriber of goods or services from a video tape service provider."[281] Defining *subscriber* as a user who provides PII in exchange for video content from the video content provider ensures that *subscriber* retains a unique meaning because neither purchaser nor renter share such a definition.[282]

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276. *See* Fed. Trade Comm'n v. AT&T Mobility L.L.C., 835 F.3d 993, 1003 (9th Cir. 2016) (removing regulation of common carriers from the scope of the FTC's jurisdiction); *see also* Diener, *supra* note 9 (noting the FCC's new regulations' failure to regulate edge providers).

277. *See* Austin-Spearman v. AMC Network Entm't L.L.C., 98 F. Supp. 3d 662, 670 (S.D.N.Y. 2015) (discussing why labeling subscribers as users who provide personal information is a problematic categorization). In 2015, the court reviewed a consumer's use of AMC's website to watch television shows. *See id.* at 664 (explaining that "AMC maintains a website that provides information about its television programming, on which it offers video clips and episodes of many of its television shows").

278. *Id.* at 670. The court explains that:

> [T]urning "subscription" into a mere proxy for whether the provider has received access to personal information . . . all but writes out the statute's limitation to "consumers," as the requirement that the provider have disclosed personal information necessarily presupposes that it gained access to such information, therefore rendering the "consumer" clause superfluous.

Id.

279. *See* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 35 (2003) (explaining that "statutory interpretation that renders another statute superfluous is of course to be avoided").

280. *See* Video Privacy Protection Act of 1988, 18 U.S.C. § 2710(a)(1) (2012) (defining *consumer* as a "renter, purchaser, or subscriber of goods or services from a video tape service provider"); *see also* Yershov v. Gannett Satellite Info. Network, Inc., 820 F.3d 482, 487 (1st Cir. 2016) (explaining that each of the three terms within the definition of *consumer* in the VPPA retains its own unique meaning).

281. § 2710(a)(1).

282. *See Yershov*, 820 F.3d at 487. The court in *Yershov* stated that:

This proposed solution is also more specific than the broad definition the court warned against[283] because it uniquely requires an exchange of PII, not just *any* personal information, to be considered a subscriber. Legislators who created the VPPA strived to specifically protect consumers' personally identifiable information.[284] In various other federal statutes involving PII, concluding if information is PII requires a threshold determination of whether the information identifies an individual; if it does not, the information is not protected.[285] PII is widely understood to be important and valuable, which is why it often triggers privacy protection.[286] Logically, the best way to protect the collection of information legislators proposed to safeguard is to protect the consumers who disclose this information to video content providers. [287] Consumer information is all over the Internet,[288] and choosing to set a higher standard for the protection of the most valuable information[289] is appropriate because the VPPA's purpose is to protect PII.[290]

> [A] person in 1988 who exchanged payment for a copy of a video either retained ownership of the video outright, thereby becoming a "purchaser" of the video, or received temporary possession of the video for a set period of time, thereby becoming a "renter." Congress would have had no need to include a third category of persons protected under the Act if it had intended that only persons who pay money for videos be protected, which militates against an interpretation of the statute incorporating such an element.

Id.

283. *See Austin-Spearman*, 98 F. Supp. 3d at 670.

284. *See* § 2710(b). The VPPA specifically penalizes video service providers who disclose consumers' PII. *See id*. (describing how "[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").

285. *See* Schwartz & Solove, *supra* note 42, at 1816 (explaining how "[i]nformation privacy law rests on . . . Personally Identifiable Information (PII). Information that falls within this category is protected, and information outside of it is not").

286. *See id*. (describing how "PII is one of the most central concepts in privacy regulation. It defines the scope and boundaries of a large range of privacy statutes and regulations. Numerous federal statutes turn on this distinction").

287. *See* § 2710(b) (explaining how "[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").

288. *See* Solove, *supra* note 43, at 1394 (describing how small portions of information are left scattered throughout the Internet as individuals conduct their daily online tasks).

289. *See* Schwartz & Solove, *supra* note 42, at 1816 (explaining that PII is a very important concept because a plethora of legislation relies on this term to set

A final concern surrounding many data-privacy regulations is triggered by concerns for property rights and free expression because the concept of "privacy-as-property"—giving individuals a right to their own personal information—risks violating the First Amendment.[291] There is concern that legitimizing a marketplace for information will not fix privacy problems[292] but will create greater confusion because personal data are forms of facts, and giving someone the ability to own facts could damage freedom of expression.[293] However, scholars have noted that contract law serves as a better protection for First Amendment rights than tort remedies.[294] Regulating the disbursement of PII as a contracted exchange of PII for video content gives consumers the decision-making power to determine where and to whom their information goes, and this autonomy protects their own freedom of expression by protecting a consumer's own "speech."[295] Labeling consumer information as a commodity that can be controlled and exchanged protects consumers' interests and rights to use their identity as they choose.[296]

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parameters and thresholds and that a more precise definition is necessary for the term).

290. *See* § 2710(b)(1). The VPPA specifically aims to prevent and penalize video service providers from disclosing consumers' PII without permission. *See id*.

291. *See* Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1294 (2000) (explaining how "[p]roperty rights in any sort of information raise significant policy and free speech issues"). Litman further explains that to "recognize property rights in facts, we endorse the idea that facts may be privately owned and that the owner of a fact is entitled to restrict the uses to which that fact may be put. That notion is radical." *Id.* at 1294-95.

292. *See id.* at 1301 (noting that a "market in personal data is the *problem*. Market solutions based on a property rights model won't cure it; they'll only legitimize it").

293. *See id.* at 1294. Facts are "building blocks of expression; of self-government; and of knowledge itself. When we recognize property rights in facts, we endorse the idea that facts may be privately owned and that the owner of a fact is entitled to restrict the uses to which that fact may be put." *Id.*

294. *See* Matwyshyn, *supra* note 35, at 38 (explaining that "a contract-based construction of privacy avoids the First Amendment pitfalls that may accompany many tort-based and other statutory approaches").

295. *See id.* at 39. Scholars have discussed how allowing individuals to control their own privacy may even further protect First Amendment rights because "consumers seek control over 'selectively embedding' their identities and information into various economic contexts—an act of economic self-realization" and thus, involves their freedoms of speech and expression. *Id.*

296. *See id.* (explaining how "[c]onsumers want the ability to control the audience for their online speech in the ways they would otherwise be able to control in physical space. The practical dynamics of the consumer privacy debate are driven

C. What Will Happen in the Future: Policy Considerations

As technology quickly evolves, legislation cannot keep up.[297] Consumers need protection—particularly in light of the change in who regulates privacy rights.[298] Due to the Ninth Circuit's decision discussed above,[299] greater clarity is needed for undefined terms in the VPPA because of the FTC's new limited scope.[300] In the past, the FTC took on most issues regarding protection of personal information.[301] However, there is now concern that any content provider can evade review of its consumer privacy procedures simply by acquiring a form of communication sufficient to gain common-carrier status.[302] Moreover, federal statutes that work to protect consumers' information, such as the VPPA, will become extremely useful in helping to curb the spread of consumer information, particularly in situations in which a common carrier also serves as a video content provider—a noted loophole in the FTC's and FCC's protections. [303]

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in large part by this consumer interest in limited self-commodification and controlled economic self-realization").

297. *See* Schwartz & Solove, *supra* note 42, at 1872 (describing how setting standards for labeling PII is challenging because of how quickly technology evolves and "the technology of tracking and the science of re-identification will continue to develop in ways that legal decision makers are unlikely to anticipate").

298. *See generally* Fung, *supra* note 2 (explaining that the new challenges of determining particular privacy regulation situations fall within the purview of the FCC or the FTC).

299. *See generally* Fed. Trade Comm'n v. AT&T Mobility L.L.C., 835 F.3d 993 (9th Cir. 2016) (determining that the FTC's jurisdiction over common carriers should be eliminated because common carriers are under the purview of the FCC).

300. *See* Fung, *supra* note 2; *see generally AT&T*, 835 F.3d at 1003 (making a determination that limited the FTC's jurisdiction over common carriers).

301. *See* Fung, *supra* note 2 (referring to the FTC as "the government's top privacy watchdog").

302. *See id.* (stating that "[a] company . . . could acquire its own broadband provider and claim common-carrier status. As a consequence . . . any company with telephony or broadband operations could engage in fraudulent or misleading activity of any kind without risk of blowback from the federal government").

303. *See id.* (explaining how "[b]etween the FCC's inability to regulate much beyond the communications-related units of a company and the FTC's newfound prohibition on regulating any part of a company that owns a communications business, the 9th Circuit decision creates a gap in consumer protection law").

Given the high demand for consumer information,[304] and in particular the increased value for more particularized information, PII is unsurprisingly highly sought after.[305] Because of its ability to identify a specific individual, protecting PII must be the focus when determining who a subscriber is under the VPPA.[306] In order to carry out the intent of the VPPA, consumers who provide PII to video content providers in exchange for free video content should be afforded protection under the Act as subscribers.[307] This protection is necessary in order to continue protecting consumers' PII even as the FTC has lost some jurisdiction in this area.[308]

Because nothing about the VPPA needs to be changed to implement this solution—just a precise meaning of an undefined term needs to be affirmed—the simplest way for this definition of *subscriber* to be confirmed would be for the Supreme Court to rule on a case involving this issue.[309] If either *Yershov*[310] or *Ellis*[311] were brought before the Supreme Court, it would give the Court the opportunity to rule that a consumer sharing PII with a video content provider on a free app in exchange for otherwise free content creates a contractual relationship between the parties, which qualifies the consumer to be a subscriber under the VPPA and thus affords the

304. *See* Solove, *supra* note 43, at 1407-08. (stating that "[t]he sale of mailing lists alone (not including the sales generated by the use of the lists) generates three billion dollars a year").

305. *See* Schwartz & Solove, *supra* note 42, at 1854 (explaining that the more information available about an individual, the more companies are willing to pay for it); *see also* Ciocchetti, *supra* note 38, at 576 (explaining how valuable PII is because of its usefulness in direct marketing because it directly identifies an individual).

306. *See supra* Section IV.A (arguing that a determination of which consumers qualify as subscribers under the VPPA requires a strategy based on what the VPPA specifically protects—PII).

307. *See supra* Section IV.A (arguing that because the VPPA aims to protect consumers from video content providers distributing their PII, when consumers do provide such valuable information to providers, it should be protected).

308. *See* Fed. Trade Comm'n v. AT&T Mobility L.L.C., 835 F.3d 993, 1003 (9th Cir. 2016) (concluding that the FTC can no longer regulate common carriers).

309. *See* Video Privacy Protection Act of 1988, 18 U.S.C. § 2710(a) (2012). Because the VPPA is an accepted piece of legislation and enacting this solution would only require a ruling on the meaning of the term and application of a precise definition, a ruling from the Supreme Court would be able to address these needs without amending the VPPA itself. *See id.*

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

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

user the Act's protections.[312] This suggested contractual method of delegating who is a subscriber is true to the intent of the Act because it continues to prevent an individual's PII from being used against him or her.[313]

In a world where personal information is commoditized,[314] and the use of cell phone apps is immensely prevalent,[315] PII's inherent value must be recognized if the intent of the VPPA is to be upheld.[316] Given the rapid spread of an individual's information online, it is not currently feasible to protect against a video content provider's use of any information because there is too much out there.[317] However, choosing to create a heightened exchange, creating a contractual relationship only for the most personal of information—PII—would mark the continued protection of the original intent of the Act.[318]

CONCLUSION

The VPPA was created to protect consumers' privacy rights.[319] If a consumer and provider of video content share a relationship of enough significance to compel the consumer to share PII, the

312. *See* § 2710(a)(1). The Act prevents disclosure of the PII of "buyers," "renters," and "subscribers" of video content. *See id.*

313. *See id.* The Act prevents unlawful disclosure of a consumer's PII. *See id.*

314. *See* Solove, *supra* note 43, at 1407-08 (describing how "[t]he increasing thirst for personal information spawned the creation of a new industry: the database industry").

315. *See* Christian de Looper, *Apple Announces 100 Billion App Downloads Since App Store Launch*, TECH TIMES (June 8, 2015, 2:40 PM), http://www.techtimes.com/articles/58867/20150608/apple-announces-100-billion-app-downloads-store-launch.htm [https://perma.cc/Q5GT-J99J] (discussing the prominence of apps in today's culture and noting that "the average person has 119 apps").

316. *See generally* Matwyshyn, *supra* note 35, at 8 (supporting the theory of consumer information having sufficient value to qualify as contractual consideration and thus forming a contractual relationship between consumers and service providers).

317. *See* Solove, *supra* note 43, at 1394 (explaining how the constant use of the Internet has led to a collection of information on individuals and their online transactions).

318. *See* Video Privacy Protection Act of 1988, Pub. L. No. 100-618, 102 Stat. 3195, 3195 (codified as amended at 18 U.S.C. § 2710 (2012)). The VPPA was enacted to "preserve personal privacy with respect to the rental, purchase, or delivery of video tapes or similar audio visual materials." *Id.*

319. *See id.*; *see also* H.R. 3523, 100th Cong. (1987). Representative Al McCandless introduced House Bill 3523 "to preserve personal privacy with respect to the rental or purchase of video tapes by individuals." *Id.*

relationship is significant enough for the consumer to qualify as a subscriber.[320] Thus, if an individual downloads a free cell phone app and provides PII in order for a provider to supply said consumer with video content, this consumer should be considered a subscriber under the VPPA and afforded such protections.[321] A lot has changed since 1988, when the VPPA was enacted,[322] but it is still a crucial concern to protect the privacy of technology users.[323] This Note's proposed solution to label an individual providing PII to a video content provider in exchange for otherwise free video content as a subscriber is the most effective way to adequately protect consumers.[324] Most Americans are concerned about the safety of their information online.[325] This proposed solution addresses these fears as it limits the spread of consumers' most personal information—PII.[326] As the world of technology has continued to evolve and grow, the need to protect consumers' privacy that was identified in 1988 has persisted,

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320. *See supra* Section IV.A (describing how the intrinsic value of PII can serve as consideration to form a contract between consumer and video content provider so as to qualify the consumer as a subscriber under the VPPA and afford him or her protections under the Act).

321. *See supra* Section IV.A (explaining that a consumer providing such valuable PII creates the heightened relationship that courts have sought after for the subscriber relationship); *see also* Yershov v. Gannett Satellite Info. Network, 820 F.3d 482, 488-89 (1st Cir. 2016) (explaining that, within the VPPA, the subscriber status is recognized as a heightened relationship between the consumer and video content provider); Austin-Spearman v. AMC Network Entm't L.L.C., 98 F. Supp. 3d 662, 669 (S.D.N.Y. 2015) (emphasizing that "casual consumption" of online media is not enough to qualify a consumer to be a subscriber).

322. *See* Recent Case, *supra* note 65, at 2011 (explaining that although the VPPA originally was aimed to protect consumers from physical video stores, it "has seen a newfound applicability in the modern era of streaming video and 'big data' analytics").

323. *See id*. (describing how although consumers' worlds have changed given the new ways they interact with the technology in their lives, the VPPA still retains the purpose of protecting consumers' privacy when interacting with video content providers).

324. *See supra* Section IV.A (explaining how this solution achieves the VPPA's intent to protect consumers' PII from being distributed by video content providers and adequately defines the undefined term *subscriber* in a world where online interactions are at an all-time high); *see also* Video Privacy Protection Act of 1988, 18 U.S.C. § 2710(a) (2012) (failing to provide a definition for *subscriber*); Norian, *supra* note 203, at 809 (describing the high frequency of online consumer transactions).

325. *See* Schwartz & Solove, s*upra* note 42, at 1815 (explaining that "Americans are extremely concerned about privacy, both on and off the Internet").

326. *See supra* Section IV.A (describing how this solution works to protect consumers' PII).

and because technology has become interwoven into everyday life, concern for consumers' privacy protection has developed into more of an issue than ever before.[327]

327. *See* Video Privacy Protection Act of 1988, Pub. L. No. 100-618, 102 Stat. 3195 (codified as amended at 18 U.S.C. § 2710 (2012)) (identifying the need to protect consumers' PII); *see also* Norian, *supra* note 203, at 809 (explaining that the increased use of the Internet to complete daily tasks has sparked the need to protect consumers' privacy).