No. 15-1719

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ALEXANDER YERSHOV,
Plaintiff-Appellant,
v.
GANNETT SATELLITE INFORMATION NETWORK, INC., D/B/A USA TODAY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF A. H. BELO CORPORATION, ACT - THE APP ASSOCIATION, ADVANCE PUBLICATIONS INC., AOL INC. - THE HUFFINGTON POST, ATLANTIC MEDIA INC., CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION, THE CENTER FOR INVESTIGATIVE REPORTING, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, CTIA - THE WIRELESS ASSOCIATION, COX MEDIA GROUP, INC., THE DAILY BEAST COMPANY LLC, DIGITAL CONTENT NEXT, DIGITAL FIRST MEDIA, DOW JONES & COMPANY, INC., THE E.W. SCRIPPS COMPANY, INTERACTIVE ADVERTISING BUREAU, INTERNET ASSOCIATION, INTERNET COMMERCE COALITION, INVESTIGATIVE REPORTING WORKSHOP AT AMERICAN UNIVERSITY, THE MCCLATCHY COMPANY, THE MEDIA INSTITUTE, MPA - THE ASSOCIATION OF MAGAZINE MEDIA, MOTION PICTURE ASSOCIATION OF AMERICA, NATIONAL PUBLIC RADIO, INC., THE NEW YORK TIMES COMPANY, NEWSPAPER ASSOCIATION OF AMERICA, NORTH JERSEY MEDIA GROUP INC., ONLINE NEWS ASSOCIATION, RADIO TELEVISION DIGITAL NEWS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SINCLAIR BROADCAST GROUP, INC., SOFTWARE AND INFORMATION INDUSTRY ASSOCIATION, TEGNA INC., TRIBUNE PUBLISHING COMPANY, TULLY CENTER FOR FREE SPEECH, AND THE WASHINGTON POST AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR REHEARING *EN BANC*

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IDENTITIES AND INTEREST OF *AMICI CURIAE*[1]

Amici curiae are associations, organizations and companies that depend daily on the laws that apply to the mobile content ecosystem. They represent and include companies that deploy innovative technologies such as mobile applications to deliver video content, publishers that fund groundbreaking content with video advertising, producers of content that is distributed on mobile applications, and others with a crucial interest in ensuring that digital content remains widely available and relevant to consumers. The distribution of free and low-cost video content is threatened by the panel's decision, which could expose those who provide online content to liability based upon the use of anonymous and aggregated data that is routinely used to improve the user experience and provide viewers with relevant advertising and content.

INTRODUCTION

Amici write separately to underscore the importance of rehearing the panel decision in light of its impact on the ability of *amici* and other publishers to continue providing valuable video content to American consumers.

[1] Pursuant to Fed. R. App. P. 29(c)(5), *amici* state that no party's counsel authored this brief; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *amici*, their members or their counsel—contributed money that was intended to fund preparing or submitting the brief. *Amici* have sought leave of Court to file this brief. Defendant-Appellee has consented to the filing of this brief; Plaintiff-Appellant has not.

The VPPA was passed in 1988 with "a brick-and-mortar video rental store in mind," *Sterk v. Redbox Automated Retail, LLC*, 770 F.3d 618, 625 (7th Cir. 2014), after a reporter obtained the titles of specific videotapes rented by Judge Robert Bork during his Supreme Court confirmation hearings. (Slip Op. at 5–6.) It was intended to prevent the potential embarrassment of an individual being publicly identified as having rented certain videotapes.

This case, however, does not involve a single allegation that the plaintiff was publicly identified as having watched specific video content. To the contrary, it relies on a highly technical reading to apply the VPPA to the transmission of an anonymous device code to an analytics provider used by USA Today to help serve an interest-based video advertisement, privately seen only by the plaintiff, in support of plaintiff's free use of the USA Today mobile application ("app"). The VPPA is being strained to reach this result not because any individual has a legitimate privacy interest in whether an anonymous device code is shared with a publisher's service provider for data analytics, but because the VPPA permits a statutory damages award that VPPA plaintiffs seek on a class basis.[2] Because the VPPA is being strained beyond any legitimate bounds, "deciding VPPA cases

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[2] *See* 18 U.S.C. § 2710(c); *see also, e.g., Sterk v. Best Buy Stores, L.P.*, No. 11 C 1894, 2012 WL 5197901, at *3 (N.D. Ill. Oct. 17, 2012) ("Plaintiff seeks statutory damages of $2,500 per violation of 18 U.S.C. § 2710(b) and punitive damages pursuant to 18 U.S.C. § 2710(c).").

today is thus akin to placing 'a square peg . . . into a round hole.'" *Robinson v. Disney Online*, No. 14-CV-4146 (RA), 2015 WL 6161284, at *8 (S.D.N.Y. Oct. 20, 2015).

The panel's unwarranted and unprecedented expansion of the VPPA risks exposing companies to broad class action liability for routine digital transactions that are essential to online content distribution. The panel finds that anonymous mobile device identifiers "personally" identify any viewer, holding that transferring a device identification code generated by the Android operating system to the data analytics company hired by USA Today, along with geographic identifiers, is sufficient to "personally" identify the user of the device. It further holds that the download of any app on a smartphone or tablet is the same as "subscribing" to a video rental service. This conclusion effectively reads the "subscriber" limitation completely out of the VPPA, thereby exposing to liability the publishers of the more than 1.5 million apps available today.[3]

By reaching beyond any prior construction of the concepts of "personally identifiable information" ("PII") and "subscriber" under the VPPA, the panel's holding risks undermining innovation in the mobile ecosystem and reducing

[3] *See* Daisuke Wakabayashi, *Apple's App Store Sales Hit $20 Billion, Signs of Slower Growth Emerge*, WALL STREET JOURNAL (Jan. 6, 2016), http://www.wsj.com/articles/apples-app-store-sales-hit-20-billion-signs-of-slower-growth-emerge-1452087004.

significantly the free video content that is available to American consumers on mobile apps. Scores of companies contract with service providers to analyze anonymous data about their users, often sharing some sort of numerical user or device identifier to facilitate that analysis. Some content providers rely on the resulting information to serve relevant, interest-based advertising to viewers of videos. Others use aggregate data such as usage patterns to make programming decisions and otherwise improve the user's experience. The analytics provider here is not provided with the name of the user, or with other information that is typically considered personal information, and certainly has no incentive to determine (let alone publish) that identity. Congress could never have anticipated in 1988 that the VPPA would be violated by such an exchange, when Congress was concerned solely with the embarrassment video tape renters could suffer when their names were publicly associated with particular rentals.

By threatening VPPA liability for certain transfers of anonymized information over the Internet for purposes of serving advertising, the panel decision may encourage companies to constrain the free video content they make available to users. American consumers today enjoy access to a vast and diverse array of free or low-cost digital content from content providers big and small, established and new, precisely *because* their non-personal data can be analyzed and then used to provide them with advertising and content that is better suited to

their interests.[4] In practical terms, the panel's expansion of the VPPA to reach "effective" disclosures of PII raises the prospect of liability when a company discloses certain information to an analytics provider.[5]

This concern is not mitigated by the panel's suggestion that its holding—though not its "broad" reasoning—is limited because it arises in the context of a motion to dismiss. (*See* Slip Op. at 16.) If the panel's overly broad standards apply to motions to dismiss VPPA claims, such claims will almost certainly proceed to the summary judgment phase, and companies—especially small or early-stage companies—will likely choose to curtail free or low-cost video content

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[4] *See* Digital Advertising Alliance, *Poll: Americans Want Free Internet Content, Value Interest-Based Advertising* (Apr. 18, 2013), http://www.aboutads.info/DAA-Zogby-Poll.

[5] The panel's claim that its holding does not apply to circumstances that would necessitate "unforeseeable detective work," (slip op. at 9), is no solace because, as *Robinson* recognized, defining PII to include any piece of information that could be combined with other information possessed by the recipient to identify an individual is a "limitless" expansion of the scope of PII under the VPPA, 2014 WL 6161284, at *4.

The panel's extension of the VPPA to "effective" disclosures also erodes the VPPA's knowledge requirement and risks exposing content providers to broad liability. *See id.* In this regard, the panel's emphasis on whether a third-party recipient's ultimate use of information to identify a particular individual is "readily foreseeable," (slip op. at 9), also conflicts with the VPPA's prohibition on "knowingly disclos[ing]" PII, 18 U.S.C. § 2710(b)(1). The statutory "emphasis is on disclosure, not comprehension by the receiving person." *In re Hulu Privacy Litig.*, No. C 11-03764 LB, 2014 WL 1724344, at *14 (N.D. Cal. Apr. 28, 2014); *see also Eichenberger v. ESPN, Inc.*, No. C14-463 TSZ, 2015 WL 7252985, at *5–6 (W.D. Wash. May 7, 2015).

rather than bear the substantial, one-sided discovery costs to proceed through discovery to summary judgment.[6] Nor is this concern mitigated by the potential to obtain "consent" for sharing under the 2013 amendments to the VPPA. *See* 18 U.S.C. § 2710(b)(2)(B). These amendments were sought to permit explicit sharing of personal information to facilitate social video viewing.[7] But that consent model cannot reasonably be adapted to the sharing of non-personal data such as device identifiers to permit behind-the-scenes advertising and content delivery. That would be akin to reading the VPPA to mandate opt-in consent for interest-based advertising, which is decidedly distant from Congress's intent in passing the legislation and is not the law in the United States.[8]

[6] The panel's holding has nationwide impact because many of the companies providing Internet-delivered video content do not geographically limit the availability of that content within the United States.

[7] *See* Steven Musil, *Obama Signs Netflix-backed Amendment to Video Privacy Law*, Cnet.com (Jan. 10, 2013), http://www.cnet.com/news/obama-signs-netflix-backed-amendment-to-video-privacy-law/.

[8] *See* Federal Trade Commission, *Self-Regulatory Principles for Online Behavioral Advertising* (Feb. 2009), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-staff-report-self-regulatory-principles-online-behavioral-advertising/p085400behavadreport.pdf.

ARGUMENT

I. The Panel Expands the Scope of "Personally Identifiable Information" Far Beyond the Bounds of Accepted Definitions.

The panel adopted a construction of the VPPA's definition of "personally identifiable information" ("PII") that includes a device identifier combined with the GPS coordinates of the device at the time a given video is viewed on that device. This construction not only ignores the reality of how mobile devices are used today, but it also diverges from every other court to previously address the scope of PII under the VPPA. Indeed, the panel (and district court) opinion in this case appears to be the only decision to adopt such an expansive view of PII.

According to the panel, the term PII in the VPPA is "awkward and unclear." (Slip op. at 7.) We disagree. When interpreted properly, the VPPA's use of the term is actually quite straightforward. The panel acknowledged that the "focus" of the PII inquiry under the VPPA is "whether the information identifies *the person* who obtained the video." (Slip Op. at 7 (emphasis added).) This is the correct focus, but the panel strayed from this formulation in holding that a device identifier, combined with the GPS coordinates of the device at the time a video is viewed, "effectively reveal[s] the name of the video viewer." (Slip Op. at 8.) That is not the case, and nothing in the complaint supports this reading of the statute—which clearly requires more. Without additional data, the only information a recipient could reasonably discover from a device identifier and the device's

location is the *device* used to watch a given video—*not* the identity of the person who watched that video.

Contrary to the panel opinion's implication, this remains true regardless of the precision with which the location can be identified. (*See* Slip Op. at 8 & n.3.) Indeed, there could be hundreds of individuals at the same GPS coordinates at the same time, for instance, in a typical office or apartment building. Identifying the GPS coordinates for a given device in that office or apartment building would thus provide little insight into *who* specifically was viewing a particular piece of content. And because the device at issue is a mobile device, a video can be viewed by the device owner anywhere, not just in a person's home or office as the panel suggests, and it can be viewed by individuals other than the device owner. Because the information identified by the panel here as "personally identifiable" only identifies devices and the devices' location at a particular point in time—as opposed to the people that watch videos on those devices—the decision improperly shifts the statutory focus away from "*personally* identifiable information."[9] *See*

[9] The legislative history demonstrates that the *type* of disclosure is central to the PII inquiry. *See* S. Rep. No. 100-599, at 11-12 (1988) (PII is "transaction-oriented" and "identifies a particular person as having engaged in a specific transaction with a video tape service provider"). This focus on "transaction-oriented" disclosure is further supported by the 2013 amendments to the VPPA, which expanded the consent provisions and referenced "other legal or financial obligations of the consumer." *See* Video Privacy Protection Act Amendments Act of 2012, Pub. L. No. 112-258, 126 Stat. 2414 (2013).

Robinson, 2015 WL 6161284, at *2 (disclosure "must, at the very least, identify a *particular* person—not just an anonymous individual—and connect this particular person with his or her viewing history." (citing *Hulu*, 2014 WL 1724344, at *7)).

Further, the Court's reasoning in finding a disclosure in violation of the VPPA is flawed because it does not rely on the conduct of the defendant or even the nature of the data disclosed. Instead, it relies entirely on the purported conduct of the recipient (here, Adobe) in using the data disclosed, in combination with other data obtained from other sources, to identify a person. As the panel acknowledged, "there is certainly a point at which the linkage of information to identity becomes too uncertain, or too dependent on too much yet-to-be-done, or unforeseeable detective work," such that a particular disclosure would not result in VPPA liability. (Slip Op. at 9.) But drawing that line creates an amorphous standard that will result in uncertainty for content providers.

Given this context, it is unsurprising that the panel's holding here conflicts with the approach adopted by every other court to consider this issue. The Southern District of New York's recent opinion in *Robinson* is illustrative of this consistent line of cases. The *Robinson* court expressly considered and rejected the district court's view in this case, joining "[t]he majority of courts [other than the district court in this case] to address this issue" in adopting "a narrower definition of PII." *See* 2015 WL 6161284, at *3–4 (collecting cases). *Robinson* held that a

device identifier does not identify a specific person, but rather "identifies a specific device, and nothing more."[10] *Id.* at *7. *Robinson* is just one example of the overwhelming majority view of the scope of PII under the VPPA.[11] These decisions, arising from district courts across the country, exclude from the scope of the VPPA information that does not by itself identify a particular person and the video watched. The panel's holding to the contrary improperly expands the scope of PII to an effectively "limitless" degree, because "nearly any piece of information can, with enough effort on behalf of the recipient, be combined with other information so as to identify a person." *Id.* at *4.

[10] *Robinson* noted that the plaintiff had not alleged that the device identifier amounted to a "geographic identifier," which might have constituted PII under the VPPA *if* it was akin to a home address. 2015 WL 6161284, at *7. While the plaintiff here did allege the disclosure of geolocation information, as explained above, these GPS coordinates still do not "tie[] a specific person to a specific place" and therefore do not constitute PII under the VPPA. *See id.*; *see also In re Nickelodeon Consumer Privacy Litig.*, MDL No. 2443 (SRC), 2014 WL 3012873, at *11 (D. N.J. July 2, 2014) ("[E]ven 'geolocation information' does not identify a specific individual" under the VPPA.).

[11] *See, e.g.*, *Perry v. Cable News Network, Inc.*, No. 1:14-cv-02926-ELR, slip op. at 9–10 (N.D. Ga. Apr. 20, 2016); *Eichenberger*, 2015 WL 7252985, at *6; *Locklear v. Dow Jones & Co., Inc.*, 201 F. Supp. 3d 1312, 1318 (N.D. Ga. 2015), *abrogated on other grounds by Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251 (11th Cir. 2015); *Ellis v. Cartoon Network, Inc.*, No. 1:14-CV-484-TWT, 2014 WL 5023535, at *3 (N.D. Ga. Oct. 8, 2014), *aff'd on other grounds*, 803 F.3d 1251 (11th Cir. 2015); *Nickelodeon*, 2014 WL 3012873, at *10; *Hulu*, 2014 WL 1724344, at *9–12.

II. The Panel's Interpretation of "Subscriber" Misinterprets How Mobile Applications Work and Should Be Reconsidered.

Even though Yershov's downloading and unregistered use of Gannett's free USA Today app was his sole connection to the company, the panel disagreed with the district court's decision that Yershov was not a "subscriber"—a construction that yet again goes against the majority of courts that have considered the issue. This decision is based on a misreading of the VPPA and a fundamental misconstruction of how mobile applications function. Expanding the definition of subscriber in this manner would render all free app users "subscribers" under the VPPA. This was certainly not Congress' intent in passing the VPPA, and would render the "subscriber" limitation completely superfluous.

The majority of courts that have considered the question of what constitutes a "subscriber"—including the only other federal appellate court to address the issue—have held that it is not enough simply to visit a website or download an app. Rather, a person must do something more to indicate an ongoing commitment, such as creating an account.[12] The two most recent cases—*Perry*

[12] *See e.g., Perry v. Cable News Network*, No. 1:14-cv-02926-ELR (N.D. Ga. Apr. 20, 2016) (holding that a person who downloaded the CNN app to his cell phone and watched videos through it was not a "subscriber" under the VPPA); *Ellis*, 803 F.3d at 1256-57 (holding that something more than just downloading an app or visiting a website is necessary to be a "subscriber"); *Austin-Spearman v. AMC Network Entm't LLC*, 98 F. Supp. 3d 662, 669-72 (S.D.N.Y. 2015) (concluding (continued…)

and *Ellis*—concerned nearly identical facts to those in this case. In both cases, the plaintiff downloaded a company's free app and used it exactly how it was designed—to provide an easy way to watch video clips or other content that could otherwise be viewed using a web browser. These cases offer particularly apt comparisons, as the apps at issue, like the USA Today app, are functionally identical to the content provider's website, as opposed to new content that cannot be accessed for free by other means. *See Ellis,* 803 F.3d at 1257 ("downloading of an app . . . is the equivalent of adding a particular website to one's Internet browser as a favorite, allowing quicker access to the website's content").

In finding that the plaintiff was not a "subscriber," the district court in *Perry* followed the Eleventh Circuit in *Ellis*, which last year held that to qualify as a "subscriber" under the VPPA, a user must download the app in question *and* engage in some additional action typical of subscriber relationships. He or she might, for instance, establish an account or register, sign up for periodic services or transmissions from the company, or do anything to gain access to restricted content

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that a person who merely visits a provider's website and watches video clips is not a "subscriber" under the VPPA).

Although a minority of courts has held that simply visiting a website and watching videos there is enough to be considered a subscriber, both of those cases were abrogated by the Eleventh Circuit's recent decision in *Ellis*, which adopted the majority view. *See Locklear*, 101 F. Supp. 3d at 1315-17, *abrogated by Ellis*, 803 F.3d 1251 (11th Cir. 2015); *Ellis*, 2014 WL 5023535, at *3, *abrogated by* 803 F.3d 1251 (11th Cir. 2015).

not otherwise available to the public on the company's website. Failing these additional steps, the plaintiff is simply a user, "free to delete the app without consequence whenever he likes." 803 F.3d at 1257.

Additionally, the panel's interpretation of "subscriber" unreasonably stretches the statutory language to essentially cover any user of any app that provides video content. Under the panel's reading, unless the app collects no information whatsoever, the person who downloads it becomes a "subscriber" simply by virtue of that download. The panel states that its reading avoids superfluity, because if the term "subscriber" required a monetary payment, it would be rendered superfluous by the preceding terms "purchaser" and "renter." (Slip op. at 11-12.) That is true—indeed, every court to previously consider the same statutory language has agreed that payment is not a necessary element of the definition of "subscriber" in the VPPA. But the term "subscriber" must require *something* in terms of an ongoing relationship beyond mere use. The panel's decision makes "subscriber" superfluous by bringing within that category any and all users, regardless of their connection (or lack thereof) to the company that provides the app. Indeed, as the district court stated, a "user," in common parlance, is someone who downloads an app to watch a video, or watches that same video on a website, but does not engage in any further interaction with the company. *See Yershov*, 104 F. Supp. 3d at 148. This category of individual is easy

enough to understand. Congress could have written or amended the VPPA to cover any "user" of video content. Critically, it did not do so. It limited the statute to renters, purchasers, or subscribers. *See* 18 U.S.C. § 2710(a)(1). The panel's failure to distinguish between generalized users and "subscribers," in the context of an act as ubiquitous and noncommittal as downloading an app,[13] indicates a miscomprehension of how smartphone users use mobile applications.

This is further demonstrated by the panel's equating downloading an app to a company installing a telephone "hotline" in one's home. (Slip Op. at 15-16.) As the panel itself acknowledges, this example is "unrealistic," *id.* at 15—not only because installing a "hotline" is more expensive than maintaining an app, as the panel claims, but also for a host of other reasons. There is a distinct difference between the panel's example and the download of a mobile app: the degree of permanence and invasiveness implied by an individual inviting a company to physically install a "hotline" in her home bears no resemblance to the actual installation (and deletion) of an app, which can be accomplished by a few taps on the screen of a smartphone. Additionally, there can only be a finite, and

[13] A 2014 study showed that Android users have an average of 95 apps installed on their phones. Paul Sawers, *Android Users Have an Average of 95 Apps Installed on Their Phones, According to Yahoo Aviate Data*, THE NEXT WEB (Aug. 26, 2014), http://thenextweb.com/apps/2014/08/26/android-users-average-95-apps-installed-phones-according-yahoo-aviate-data/.

presumably small, number of "hotlines" to a home, whereas smart phone users can and do have literally hundreds of apps on their phones. These differences show that the relationship between user and app is tenuous, potentially fleeting, and very unlike a typical, more permanent relationship between subscriber and content provider.

CONCLUSION

These issues are of exceptional importance and warrant this full Court's consideration. Accordingly, *amici* respectfully submit that Defendant-Appellee's petition for rehearing *en banc* should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a) AND RULE 35(b)(2)

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d), 32(a)(7)(B) and 35(b)(2) because this brief contains 3,685 words, excluding material not counted under Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: May 17, 2016

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