DOCKET NO. 16-13031

United States Court of Appeals

for the

Eleventh Circuit

RYAN PERRY,

Plaintiff-Appellant,

v.

CABLE NEWS NETWORK, INC., a Delaware corporation and CNN INTERACTIVE GROUP, INC., a Delaware corporation,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
CASE NO: 1:14-cv-02926-ELR
(Hon. Eleanor Louise Ross)

RESPONSE BRIEF OF APPELLEE

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Certificate of Interested Persons and Corporate Disclosure Statement

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, Defendants-Appellees Cable News Network, Inc., and CNN Interactive Group, Inc. certify that the following parties have an interest in the outcome of this appeal:

1. Ryan D. Andrews (attorney for Plaintiff-Appellant)
2. Alan W. Bakowski (attorney for Defendants-Appellees)
3. Rafey S. Balabanian (attorney for Plaintiff-Appellant)
4. Courtney C. Booth (attorney for Plaintiff-Appellant)
5. Cable News Network, Inc. (Defendant-Appellee)
6. Clinton E. Cameron (attorney for Defendants-Appellees)
7. CNN Interactive Group, Inc. (Defendant-Appellee) (wholly owned subsidiary of Cable News Network, Inc.)
8. Historic TW Inc. (parent company of Turner Broadcasting System, Inc.)
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18. Hon. Eleanor L. Ross (presiding district court judge)

19. Jacob A. Sommer (attorney for Defendants-Appellees)

20. Time Warner, Inc. (NYSE:TWX) (parent company of Historic TW Inc.)

21. Turner Broadcasting System, Inc. (parent company of Cable News Network, Inc.)

22. Marc J. Zwillinger (attorney for Defendants-Appellees)

No person or entity holds more than 10% of Time Warner Inc.'s (NYSE:TWX) outstanding common stock.

Dated: September 1, 2016

Signature: /s/ Marc Zwillinger

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STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellees Cable News Network, Inc. and CNN Interactive Group, Inc. believe that oral argument in this matter is unnecessary because the dispositive issues in this matter have been authoritatively and correctly decided by this Court in *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251 (11th Cir. 2015), as well as other courts, and because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. Should oral argument be deemed appropriate, however, Defendants-Appellees do not waive their participation.

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STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. § 1331, the District Court has jurisdiction over claims asserted under the federal Video Privacy Protection Act ("VPPA"), 18 U.S.C. § 2710. As discussed in Part II of the Argument below, however, the District Court did not have subject matter jurisdiction over Plaintiff's claim because he lacks standing to pursue this action under Article III of the United States Constitution.

The District Court granted Defendants' motion to dismiss and entered a final judgment on April 20, 2016. (Dkt. 66 at 11; Dkt. 68. at 1.) Plaintiff filed his Notice of Appeal on May 23, 2016. (Dkt. 70 at 1.) This Court has appellate jurisdiction over this appeal under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether a person that downloads a free application to his or her smartphone to watch free videos is a "subscriber" and therefore a "consumer" under the VPPA such that disclosure of that person's "personally identifiable information" violates the Act.

2. Whether a device identifier associated with a mobile device is "personally identifiable information" under the VPPA such that disclosure of that identifier, along with a video watched using the device, violates the Act.

3. Whether a mere violation of the VPPA, without any concrete harm, is an injury-in-fact as required for Article III standing.[1]

STATEMENT OF THE CASE

This case involves the appeal of a single-count VPPA complaint dismissed by the U.S. District Court for the Northern District of Georgia on two distinct grounds, one of which was based on binding precedent set by this Court less than a year ago in a case brought by "many of the same counsel" and involving virtually "identical facts" as the present one, *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251 (11th Cir. 2015) ("*Ellis*"). (Order on Defendants' Motion to Dismiss ("Mot. to Dismiss Order") at 6 n.4, Dkt. 66.)

I. The Video Privacy Protection Act.

"The VPPA was enacted 'to preserve personal privacy with respect to the rental, purchase, or delivery of video tapes or similar audio visual materials . . . .'" (Mot. to Dismiss Order at 5 (quoting 134 Cong. Rec. S5396-08, S. 2361 (May 10, 1988)).) Congress passed the VPPA in 1988 after a reporter obtained a list of Judge Robert Bork's video rentals from a video store and published that list in a newspaper. *Ellis* at 1252. The VPPA makes liable any "video tape service provider [("VTSP")] who knowingly discloses, to any person, personally

[1] This question is presently before this Court as a separate, fully-briefed motion. (*See* CNN's Mot. to Dismiss Appeal.) CNN also addresses it here in the event that the Court prefers to entertain the issue as part of its consideration of the merits of the appeal.

identifiable information [("PII")] concerning any consumer of such provider." 18 U.S.C. § 2710(b).

A VTSP is "any person, engaged in the business . . . of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials." *Id.* A "consumer" is defined as "any renter, purchaser, or subscriber of goods or services from a [VTSP]." *Id.* PII "includes information which identifies a person as having requested or obtained specific video materials or services from [VTSP]." *Id.* The VPPA requires disclosure of both: (1) the viewer's identity and (2) the specific video materials. *See, e.g.*, *In re Hulu Privacy Litig.*, No. C11-03764, 2014 WL 1724344, at *8 (N.D. Cal. Apr. 28, 2014). The term PII is "intended to be transaction-oriented," *i.e.*, "information that identifies a particular person as having engaged in a specific transaction with a [VTSP]." S. Rep. No. 100-599, at 11-12 (1988). The VPPA "does not restrict the disclosure of information other than [PII]." *Id.* at 12.

The VPPA was amended in 2013 to "allow videotape service providers to facilitate the sharing on social media networks of the movies watched or recommended by users." 158 Cong. Rec. H6850 (daily ed. Dec. 18, 2012) (statement of Rep. Goodlatte), *available at* https://www.congress.gov/crec/2012/12/18/CREC-2012-12-18.pdf. The amendment did not "change the scope of who

is covered by the VPPA or the definition of 'personally identifiable information.'" *Id.*

II. CNN and its App.

Cable News Network, Inc. and CNN Interactive Group, Inc. (together, "CNN") are Delaware corporations with their headquarters in Atlanta, Georgia. (First Amended Class Action Complaint ("Compl.") ¶¶ 6-7, Dkt. 25.) CNN produces and distributes a variety of content. (*Id.* ¶ 1.) Like virtually all media companies today, it distributes this content through different mediums. For example, CNN telecasts content on its television network bearing the same name. (*Id.*) It also offers content through a free mobile software application, or "app," that can be downloaded to devices such as the Plaintiff's iPhone. (*Id.*) To download the CNN app (the "App") to an iPhone, a user must visit the Apple iTunes Store. (*See id.* ¶ 11.) According to iTunes' "Description" of the App, users of the App can watch "video clips and coverage of live events as they unfold." (*Id.* ¶ 10.) Individuals can also view CNN content on CNN's website,[2] and listen to CNN content if they subscribe to certain satellite radio services.[3]

[2] CNN, http://www.cnn.com/ (last visited Aug. 30, 2016).

[3] *See* SiriusXM, *CNN Simulcast*, https://www.siriusxm.com/cnn (last visited Aug. 30, 2016).

III. The Alleged Misconduct.

Plaintiff-Appellant Ryan Perry ("Perry" or "Plaintiff") alleges that each time an iPhone user views "a news story, video clip or headline," the App "compiles a record of such activities." (*Id.* ¶ 14.) According to Plaintiff, this record is sent along with the unique media access control address ("MAC address") associated with the user's iPhone to "an unrelated third-party data analytics company called Bango." (*Id.*) Plaintiff describes the MAC address as "a unique numeric string assigned to network hardware in the iPhone." (*Id.* at n.3.)

This is Plaintiff's only allegation against CNN. He does not allege that identifying information other than the user's MAC address is provided to Bango. Nor does he allege that CNN even has any additional information about the users of its free App. He also makes no allegations of misconduct relating to the CNN television channel, or any other CNN offering. Rather, the statutory violation he alleges relates only to CNN's App.

According to Plaintiff, Bango is a data analytics company that specializes in "tracking individual user behavior across the Internet and mobile applications." (*Id.* ¶ 14, n.2.) He alleges that companies like Bango "find ways to 'link'" a consumer's "digital personas" in order "to gain a broad understanding of [the] consumer's behavior across all of the devices that he or she uses," and that these

companies' "primary solution" for doing so "has been to use certain unique identifiers to connect the dots." (*Id.* ¶ 15.)

Plaintiff does not allege, however, that Bango performed any such "dot connecting" to identify him or any other CNN App user by name, or allege any facts showing that Bango had any identifying information about him from other sources from which such identification could be accomplished. Instead, the Complaint weaves together various generic marketing statements and images from Bango's website in an effort to suggest the possibility of such identification. (*Id.* ¶¶ 16-17, 21-25.) Plaintiff then combines these generic statements and images with his own speculation that Bango and other analytics companies maintain "digital dossiers" on consumers and that "[o]nce a consumer's identity is matched with a device's MAC address, a wealth of extremely precise information can be gleaned about the individual." (*Id.* ¶ 20.)

Plaintiff alleges a single cause of action for violation of the VPPA. Plaintiff seeks to bring this action on behalf of "[a]ll persons in the United States [that] used the [App] on their iPhone and who had their Personally Identifiable Information disclosed to Bango." (*Id.* ¶ 33.) Plaintiff does not identify any actual injury that he or other potential class members suffered. Rather, he alleges only that he "and the Class have had their statutorily defined right to privacy violated." (*Id.* ¶ 50.)

IV. Procedural Background.

Plaintiff filed his single count complaint against CNN on February 18, 2014. (Dkt. 1.) One day later, the same attorneys representing Perry filed a separate VPPA complaint on behalf of another person against CNN's sister company, Cartoon Network (the "Cartoon Network Case"). Class Action Compl., *Ellis v. Cartoon Network, Inc.*, No. 1:14-cv-00484-TWT (N.D. Ga.), Dkt. 1. The allegations in these two actions were "nearly verbatim," the only substantive difference being that the Cartoon Network Case involved a different form of device identifier (Android ID rather than MAC address) on a different type of smartphone (Android rather than iPhone). (*See* Order on CNN's Mot. to Transfer, at 9, Dkt. 32; CNN's Reply Mem. in Supp. of Mot. to Transfer at 3-5, Dkt. 31 (comparing allegations).) Given these similarities, CNN moved to transfer this action from the Northern District of Illinois where it was originally filed to the Northern District of Georgia to join the Cartoon Network Case. (Dkt. 18.) In response, Plaintiff filed an amended complaint on June 30, 2014. (Dkt. 25.) The Northern District of Illinois granted CNN's motion on August 25, 2014. (Dkt. 32.)

On November 14, 2014, CNN moved to dismiss the Complaint on a number of grounds. (Dkt. 49.) Shortly before that motion was filed, Chief Judge Thrash in the Cartoon Network Case granted Cartoon Network's motion to dismiss for failure to state a claim, finding that an Android ID—a unique device identifier just

like the MAC address here—was not PII as required by the VPPA. *Ellis v. Cartoon Network, Inc.*, No. 1:14-CV-484, 2014 WL 5023535, at *2-3 (N.D. Ga. Oct. 8, 2014). The plaintiff appealed Judge Thrash's dismissal to this Court, and CNN's motion to dismiss in the present action was stayed at Perry's request pending the resolution of that appeal. (Dkt. 59.)

After briefing and oral argument, on October 9, 2015 this Court affirmed Judge Thrash's order on different grounds, holding that the plaintiff was not a "subscriber" within the meaning of the VPPA, and therefore was not a "consumer" subject to the Act's protections. *Ellis* at 1252. This Court recognized that the ordinary meaning of the term "subscriber" involves "some type of commitment, relationship, or association (financial or otherwise) between a person and an entity." *Id.* at 1256-57. Accordingly, it found that "downloading an app for free and using it to view content at no cost"—exactly the behavior engaged in here by Plaintiff—does not create an "ongoing commitment or relationship between the user and the entity which owns and operates the app" sufficient to render the app user a "subscriber." *Id.* This Court did not reach the question of whether a unique device identifier constitutes PII under the VPPA. *Id.* at 1258 n.2.

Following the *Ellis* decision, the parties to this action submitted supplemental briefing to address the impact of this Court's holding on CNN's pending motion to dismiss. In his supplemental briefing, Plaintiff for the first time

sought permission to add new allegations to his complaint, including an allegation that he "subscribed" to CNN's separate television network "through his cable provider."[4] (*See* Pl.'s Suppl. Memo. of Law Regarding *Ellis v. Cartoon Network* at 8-9, Dkt. 63.)

The District Court granted CNN's motion to dismiss for failure to state a claim on April 20, 2016. (Dkt. 66.) Judge Ross found that Plaintiff had standing based on a brief analysis under then-current law, concluding that "because the Plaintiff is alleging a violation of the VPPA, he alleges an injury." (*Id.* at 4-5.) Relying on this Court's opinion in the Cartoon Network Case, however, Judge Ross went on to hold that

> [f]or the same reasons as the Court in *Ellis*, this Court finds that Plaintiff does not qualify as a subscriber. Plaintiff has not alleged that he did anything other than watch video clips on the CNN App, which he downloaded onto his iPhone for free. Further, there is no indication that he had any ongoing commitment or relationship with Defendants, such that he could not simply delete the CNN App without consequences.

(*Id.* at 6-7.) Judge Ross therefore concluded that Plaintiff was not a "consumer" as contemplated by the VPPA. (*Id.* at 8.) Judge Ross further held that dismissal was appropriate on the independent ground that CNN's alleged disclosures "do not

[4] The plaintiff in the Cartoon Network Case raised an identical argument to this Court in his petition for rehearing en banc. *See* Plaintiff-Appellant's Petition for Rehearing En Banc at 14 n.3, *Ellis v. Cartoon Network*, No. 14-15046 (11th Cir. Oct. 30, 2015) (seeking opportunity to amend to add allegations including that he "is a longtime subscriber to Cartoon Network through DirecTV"). The petition was denied. Order, *Ellis*, No. 14-15046 (Dec. 11, 2015).

qualify as [PII]" under the VPPA because Plaintiff failed to plead "any facts to establish that the video history and MAC address were tied to an actual person and disclosed by Defendants." (*Id.* at 8-10.)

The District Court rejected Plaintiff's request to amend his complaint a second time to add further allegations—including the one he now seeks to add here—finding that such amendment would be futile for several reasons. One was that the additional proposed allegations would not "alter the Court's conclusion as to whether Plaintiff is a subscriber" because the fact "that Plaintiff has a cable television account wherein he pays a third-party cable service provider and can view CNN programming does not somehow convert Plaintiff into a subscriber of CNN's free mobile app." (*Id.* at 7 n.5.) Further, the District Court found that Plaintiff's complaint must be dismissed regardless "for [the] independent reason" that it would still fail to allege that any PII was disclosed. (*Id.*) The District Court entered judgment (Dkt. 68), from which Plaintiff appealed to this Court.

V. Standard of Review

This Court has jurisdiction to review the District Court's order of dismissal under 28 U.S.C. § 1291. The Court reviews a district court's order on a motion to dismiss under Fed. R. Civ. P. 12(b)(6) *de novo* and may affirm on any ground supported by the record. *Hardison v. Cohen*, 375 F.3d 1262, 1269 (11th Cir. 2004). The Court also reviews *de novo* the district court's legal conclusions on a

motion to dismiss for lack of standing pursuant to Fed. R. Civ. P. 12(b)(1). *McElmurray v. Consol. Gov't of Augusta–Richmond County*, 501 F.3d 1244, 1250 (11th Cir.2007); *Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008).

Under Fed. R. Civ. P. 12(b)(6), dismissal is proper if a plaintiff cannot allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663, 129 S. Ct. 1937, 1940 (2009) (citing *Twombly*, 550 U.S. at 556, 127 S. Ct. at 1965). Under *Iqbal*, "conclusory allegations . . . are not entitled to an assumption of truth; legal conclusions must be supported by factual allegations." *Randall v. Scott*, 610 F.3d 701, 709-10 (11th Cir. 2010). A district court may properly deny leave to amend the complaint under Fed. R. Civ. P. 15(a) when such amendment would be futile because "the complaint as amended is still subject to dismissal." *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1320 (11th Cir.1999) (citation omitted).

Dismissal for lack of standing is proper if plaintiff cannot allege that he "suffered an actual injury that is concrete and particularized, not conjectural or hypothetical." *Blue Martini Kendall, LLC v. Miami Dade Cty. Fla.*, 816 F.3d

1343, 1348 (11th Cir. 2016). "Because standing is jurisdictional, a dismissal for lack of standing has the same effect as a dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1)." *Cone Corp. v. Fla. Dep't of Transp.*, 921 F.2d 1190, 1203 n. 42 (11th Cir.1991). A dismissal for lack of subject matter jurisdiction is not a judgment on the merits and is entered without prejudice. *Crotwell v. Hockman–Lewis Ltd.*, 734 F.2d 767, 769 (11th Cir.1984).

SUMMARY OF THE ARGUMENT

This appeal is a long shot attempt by Plaintiff to evade the impact of this Court's recent binding decision in *Ellis v. Cartoon Network* on a case that two judges have already recognized as functionally identical to *Ellis*. Even Plaintiff concedes that *Ellis* disposes of his operative Complaint (Pl.-Appellant's Br. ("Pl. Br.") at 22), and thus he hinges his entire case on one new allegation he seeks to add (having abandoned on appeal a number of others he raised before the District Court): that because he subscribes to a cable package from an unrelated third-party provider which includes the CNN television network, he should be considered a "subscriber" of CNN under the VPPA with respect to his allegations regarding the separate CNN App.

As the District Court rightly recognized, this proposed additional allegation does not save Plaintiff's claim. It would not introduce any of the factors signifying a subscription relationship ***with respect to CNN***—registration, payment,

commitment, access to restricted content, and the like—which this Court found lacking in the essentially identical *Ellis* complaint. At best, Plaintiff's proposed allegations dictate that he is a subscriber of his ***cable company***—not CNN, a single network in his cable bundle that the cable provider can remove at its discretion, with which he has no direct relationship or recourse, and to which no information is provided. Plaintiff relies on distortions and speculation in an effort to portray a durable connection between him and CNN that does not exist. The mere consumption of content from one outlet of a large media company does not render Plaintiff a "subscriber" for VPPA purposes of another, separate service from that same company. Plaintiff's effort to string together his incidental interactions with different CNN content into some sort of coherent relationship suffers from a fundamental flaw: that viewing CNN's television network and downloading the CNN App involve entirely separate and different kinds of relationships. Moreover, Plaintiff's proposed approach would lead to absurd real-world results and serious practical problems for many companies that offer multiple products and services to the public. Thus, the District Court properly dismissed Plaintiff's Complaint and denied his motion for leave to amend as futile.

The District Court also properly held that the Complaint is subject to dismissal with prejudice on the independent ground that a random alphanumeric device identifier—the sole allegedly identifying piece of information disclosed by

CNN—does not constitute "personally identifiable information" under the VPPA since it does not itself identify any actual person. The District Court's conclusion accords with the one the Third Circuit recently reached after extensive analysis of the VPPA, as well as nearly every other court to consider the issue. The First Circuit decision on which Plaintiff bases his arguments does not dictate a different outcome, because it is premised on significantly different facts—namely the disclosure of GPS coordinates, which Plaintiff has not alleged were disclosed here. Even setting that aside, the decision is an outlier that relied on superficial reasoning to craft a fundamentally unworkable, "I know it when I see it" PII standard, which should be disregarded in favor of the Third Circuit's more comprehensive analysis and the virtual consensus among district courts.

Plaintiff's arguments also collectively fail because he does not allege that Bango ***actually identified him***, or even any facts showing that Bango had any information from which it could personally identify him based solely on his iPhone's random device identifier. Instead, the Complaint simply weaves together generic statements from Bango's website and conclusory statements by Plaintiff to create the specter of such identification. The conclusions Plaintiff draws, however, are not only speculative, but not even the most plausible interpretation of the sources he cites. Finally, Plaintiff's remaining disparate arguments concerning canons of statutory interpretation and common law doctrines should be similarly

ignored, as they have never been recognized or endorsed by any court interpreting the VPPA and are plagued by dubious logic and misuse of inapposite legal principles.

While Plaintiff's allegations are insufficient to state a claim under the VPPA, the Court need not even go that far, as he lacks standing under Article III to bring his claim due to his failure to allege any qualifying injury from CNN's alleged disclosures. Rather than alleging any actual, concrete harm (or material risk of harm), Plaintiff relies entirely on the alleged VPPA violation itself as his injury-in-fact, but the Supreme Court's recent decision in *Spokeo, Inc. v. Robins* makes clear that alone is not enough to demonstrate standing.

ARGUMENT

I. The District Court Correctly Denied Leave to Amend Because Plaintiff's Proposed Amendment Would Be Futile.

Plaintiff concedes that the operative Complaint in this case was properly dismissed under this Court's decision in *Ellis*, recognizing that his "allegations no more permitted an inference of an 'ongoing commitment or relationship' than did the allegations in *Ellis*." (Pl. Br. at 22.) He now seeks to amend that inadequate complaint to add just one allegation: that he has a cable subscription that includes CNN's television network. The District Court correctly recognized that such an amendment would be futile. (Mot. to Dismiss Order at 7.)

Plaintiff's amended claim would remain legally insufficient for two reasons. First, he does not propose to allege anything that would make him a subscriber to CNN under *Ellis*. Second, even he could do so, his amended complaint would still only allege disclosure of a random device identifier which, as the District Court and nearly every other court to consider the issue has concluded, is not "personally identifiable information" under the VPPA. Plaintiff has already submitted two complaints in this case. In the face of this Court's recent binding decision addressing nearly identical allegations, he should not be given a third opportunity.

A. This Court's Decision in *Ellis* Makes Clear That Plaintiff is Not a "Subscriber."

The primary question presented in this case is not new to this Court. A little over a year ago, Perry's counsel argued to this Court in *Ellis* that a smartphone user who installs a free app and uses it to browse free video clips should be considered a subscriber under the VPPA. *See* Pl.-Appellant's Reply Br. at 29-33, *Ellis*, No. 14-15046 (Mar. 26, 2015). This Court concluded, however, 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." *Ellis* at 1257. Based on that directly controlling precedent, the District Court here dismissed Plaintiff's complaint, finding that he "does not qualify as a subscriber" for the "same reasons [identified] by the Court in *Ellis*." (Mot. to Dismiss Order at 6.)

In an effort to salvage his Complaint, Plaintiff proposed to add a number of cumulative or irrelevant allegations which Judge Ross rejected, recognizing that they would have no effect on this Court's decision in *Ellis*. (Mot. to Dismiss Order at 7 n.5.) Plaintiff silently acknowledges the same, as he has abandoned most of those proposed allegations on appeal.

Plaintiff now rests his entire case on a single argument: that because he subscribes to a cable television package through an unidentified third-party provider that includes (but does not guarantee) access to CNN's television network, he should be considered a "subscriber" of CNN under the VPPA with respect to his allegations regarding the separate CNN App. (*See* Pl. Br. at 22.) Plaintiff depicts his proposed amended allegations as "materially different from those at issue in *Ellis*." (Pl. Br. at 11.) But save for his single proposed allegation regarding his cable subscription, *Ellis* and this case are identical. And this Court in *Ellis* was already squarely presented with, and rejected, the allegation Plaintiff now tries to reintroduce: in his petition for en banc rehearing, the *Ellis* plaintiff sought leave to amend his complaint to allege that he "is a longtime subscriber to Cartoon Network through DirecTV." *See* Pl.-Appellant's Pet. for Reh'g En Banc at 14 n.3, *Ellis*, No. 14-15046 (Oct. 30, 2015); Order, *Ellis*, No. 14-15046 (Dec. 11, 2015) (denying petition).

Plaintiff's argument rests on two fundamental misconceptions. First, application of the factors identified in *Ellis* makes clear that Plaintiff is a subscriber of ***his cable company***, not CNN. Second, the fact that Plaintiff has access to CNN's television network "does not somehow convert [him] into a subscriber of CNN's free mobile app" (Mot. to Dismiss Order at 7), because watching CNN's television network and downloading the CNN App to view prerecorded video clips involve two separate and distinct relationships. Because Plaintiff's proposed allegation does not add any of the characteristics of subscribership identified in *Ellis* with respect to CNN's App, this Court should affirm the District Court's dismissal of Plaintiff's complaint with prejudice.

1. Plaintiff is a Subscriber of His Cable Provider, not CNN.

Plaintiff's new allegation is a rhetorical sleight of hand. He takes his alleged subscription relationship with an unnamed cable provider—through which he receives a bundle of television networks that includes CNN—and tries to recast that relationship as one with CNN, a single network in that bundle.

When a cable subscriber chooses and pays for a cable TV package, he is granted access by the cable provider to a changing list of hundreds of networks. The cable provider independently makes financial arrangements with television networks to offer their program services. The cable subscriber does not engage

with individual networks, much less form a "subscriber" relationship with them. He "watches" them. But watching TV is not covered by the VPPA.

These widely understood facts can be illustrated in several ways.[5] For instance, cable companies can add or remove networks from their bundles. *See* FCC Consumer Help Center, *Choosing Cable Channels*, https://consumercomplaints.fcc.gov/hc/en-us/articles/202951430-Choosing-Cable-Channels (last visited Aug. 30, 2016) (noting that cable providers "have the right to offer whatever channels they wish on their cable systems" without consumer recourse, and that such determinations are based on negotiations with television networks). A cable subscriber has no recourse with the network itself regarding such changes. When cable providers and networks are in disputes, for example, if the cable provider stops telecasting the networks' program services, the viewers would have no recourse against the network. *See* FCC Media Bureau, *Cable Television – Where to File Complaints Regarding Cable Service* (last visited Aug. 30, 2016), https://www.fcc.gov/media/cable-television-where-file-complaints-regarding-cable-service (advising consumers to "contact [their] cable system if it has dropped a particular channel").

[5] Courts may take judicial notice of "generally known" facts. *See Dippin' Dots, Inc. v. Frosty Bites Distribution, LLC*, 369 F.3d 1197, 1204 (11th Cir. 2004).

Ellis identified a number of factors as relevant to a subscriber relationship, finding in that case 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 that would allow him to have access to exclusive or restricted content.

Ellis at 1257. These statements are equally true about Perry's relationship with CNN, even with the new allegations. When Perry signed up for a cable package that included CNN, he did not register with CNN, provide personal information to CNN, pay CNN, commit to CNN, receive services from CNN or access restricted CNN content (other than the content available to all cable subscribers). Taking Plaintiff's approach to its logical conclusion leads to an absurd result: that he (and every other cable subscriber) has a subscriber relationship with hundreds of individual networks—many of whom undoubtedly have websites and mobile apps potentially subject to the VPPA—regardless of whether he ever watches them or interacts with them, or whether they have any idea who he is.

Plaintiff notably fails to support his argument with any factual allegations concerning the details of his cable subscription: he does not identify his cable provider, nor does he point to anything in the contract governing his relationship with that provider indicating how—contrary to the common understanding of how

cable TV works—that relationship could extend to include individual networks. Lacking supporting factual allegations, Plaintiff's bare legal conclusion is "not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 664.

Instead, Plaintiff relies only on extrinsic materials, which are neither relevant nor helpful to his argument. For instance, his contention that consumers who receive a certain channel in their cable bundle are "commonly called 'subscribers' of that channel" is both inapposite and premised on distortions of the sources he cites. He says that ***he*** "pays CNN, via his cable provider, sixty-one cents per month in exchange for regular access to content that is available only to CNN subscribers"—but in fact, the same article he cites makes clear that it is referring to how much "***distributors*** pay." (Pl. Br. at 23 (citing Brian Stetler, *Fox News to earn $1.50 per subscriber*, CNN Money (Jan. 16, 2015, 11:14 AM), http://cnnmon.ie/1IIpGqp) (emphasis added).) Similarly, Plaintiff's assertion that CNN's parent company refers to its television viewers as subscribers (Pl. Br. at 23-24) mischaracterizes the report he cites, which explains that it is referring to ***subscribers of affiliates (which include cable providers)***. *See* TimeWarner, *2015 Annual Report to Shareholders* at 4, *available at* http://ir.timewarner.com/phoenix.zhtml?c=70972&p=irol-reportsAnnual ("Turner's programming is distributed by cable system operators, satellite service distributors, telephone companies and other distributors (known as affiliates) and is

available to subscribers of the affiliates for viewing . . . .") And even if CNN referred to viewers of its network as "subscribers" at some point, that has no bearing on whether they are subscribers under the VPPA. In fact, this Court's decision in *Ellis* already rejected a similar argument. *See* Pl.-Appellant's Reply Br. at 30 n.11, *Ellis*, No. 14-15046 (Mar. 26, 2015) (arguing that the "industry practice of referring to app users as subscribers" supports treating them as such under the VPPA).

2. Watching CNN's Television Network Does Not Make Plaintiff a "Subscriber" of CNN's App.

Plaintiff's argument also relies on the improper conflation of two distinct and unrelated concepts—an alleged subscription to a company's television network and subscription to a mobile app that happens to be offered by that same company. But subscribing to a company's service that is distinct from its provision of video tape services does not make someone a "subscriber" for purposes of the VPPA. (*See* Mot. to Dismiss Order at 7 n.5); *In re Nickelodeon Consumer Priv. Litig.*, No. CIV.A. 12-07829, 2014 WL 3012873, at *8 (D.N.J. July 2, 2014) ("[T]he VPPA only contemplates civil actions against those VTSP from whom 'specific video materials or services' have been requested.") The VPPA's legislative history confirms this, noting that "simply because a business is engaged in the sale or rental of video materials or services ***does not mean that all of its products or***

services are within the scope of the bill." S. Rep. No. 100-599, at 12 (emphasis added).

Live television is outside the scope of the VPPA. It is subject to its own comprehensive regulatory scheme, which includes privacy protections for the "personally identifiable information" of "subscribers" as contemplated by the relevant statutes. *See, e.g.*, 47 U.S.C. § 551 (cable television); 47 U.S.C. § 338 (satellite television). In fact, federal privacy protections for cable subscribers predate the passage of the VPPA by four years. *See* PL 98–549, October 30, 1984, 98 Stat 2779. Thus, being a "subscriber" of a company's cable programming service does not bring a person under the VPPA's ambit for the same company's video tape services.[6]

Finding otherwise would lead to absurd results. Companies can offer multiple products and services, but only be a video tape service provider for one of them. For example, a person who subscribes to the New York Times in print is not a "subscriber" under the VPPA if that person watches a free video on the New York Times website. Plaintiff's approach also creates serious practical problems.

[6] Plaintiff tries to over-read this Court's statement in *Ellis* that the relevant relationship is "between the user and the entity which owns and operates the app." (Pl. Br. at 26 (quoting *Ellis* at 1257).) But the allegations considered by the Court only involved Cartoon Network's actions with respect to the mobile app at issue. When this Court ***was*** subsequently presented with allegations involving subscription to Cartoon Network's separate TV network, it did not change its mind. (Order, *Ellis*, No. 14-15046 (Dec. 11, 2015).)

Many companies that have TV networks, for instance, also offer freely accessible websites and mobile apps that include videos. Plaintiff's logic would result in those companies being subject to the VPPA any time an Internet user watching videos also happens to have that company's network in her TV bundle, but not otherwise—despite the company not being able to know who does and does not fit in which category.

Plaintiff tries to distinguish his case by arguing that "a larger two-way commitment" between CNN and its viewers exists because cable subscribers are able to watch CNN's television network through different means, including the mobile App.[7] (Pl. Br. at 25.) But the fact that Plaintiff's subscriber relationship with his cable provider enabled him to watch CNN's television network on the CNN App—by signing in with his cable provider—does not make him a subscriber of CNN. That feature, which Plaintiff does not claim to have used, involves a relationship that is distinct from the ephemeral one that results from a user's downloading of the free CNN App, which this Court held in *Ellis* to be insufficient to establish a "subscriber" relationship. Installing the App does not itself provide a user access to the CNN TV network. And there is nothing a user can do in the

[7] Plaintiff's citations to generic marketing articles and speculation regarding mobile app users' motivations (Pl. Br. at 24-25) are simply a bid to re-litigate issues already decided in *Ellis*, and add nothing that would alter this Court's conclusion 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.'" *Ellis* at 1257.

App, or any arrangement he can make with CNN, to enable such access. Rather, the user must establish a ***separate relationship*** with a third-party cable provider, and then verify that relationship—through the provider, not CNN—in order to get access to that provider's live CNN feed via the App. *See* CNN, *Watch Live TV – CNNgo*, http://www.cnn.com/specials/about-live-tv (last visited Aug. 30, 2016) (explaining access to CNN TV requires "sign[ing] in through your TV service provider").

Plaintiff alleges no plausible connection between his use of unrelated CNN services that would render him a "subscriber" of the App. Rather, those uses involve wholly distinct and separate relationships. With respect to the TV network, he is a customer of a cable provider and not individually known to CNN, regardless of how he watches such programming. With respect to the CNN App, he is merely an unknown device number to CNN. No matter how many hours Plaintiff watched the CNN network, spent on the CNN's website or listened to CNN programming on satellite radio, it remains the fact that Plaintiff did not register with CNN, pay anything to CNN, establish any commitment or anything similar. Thus, Plaintiff's additional allegation does not supply any of the missing

factors that previously led this Court to conclude that downloading and using a free app does not make someone a "subscriber" under the VPPA.[8]

B. A MAC Address is not "Personally Identifiable Information" Under the VPPA.

1. Courts Are in Near-Unanimous Agreement That Random Device Identifiers Are Not PII.

Even if Plaintiff were a "subscriber" of the CNN App by virtue of his subscription to a cable bundle that included the CNN network, amendment would nonetheless be futile because, as the District Court correctly found, a device identifier is not "personally identifiable information" under the VPPA. Plaintiff does not allege that CNN identified him (or even knew him) by name, address, telephone number, or social security number. The sole piece of allegedly identifying information at issue is a random identifier associated with his iPhone (a MAC address), which he alleges CNN disclosed to a third-party analytics provider (Bango).

The District Court explained that PII is information which, "in its own right, without more, links an actual person to actual video materials." (Mot. to Dismiss

[8] *Amicus curiae* the Electronic Privacy Information Center ("EPIC") takes a more extreme position than Plaintiff, arguing that mobile app users should be considered "consumers" under VPPA solely by virtue of disclosing random device identifiers (which EPIC contends are PII). (EPIC Amicus Br. at 22-24.) Setting aside the brief's numerous other deficiencies, this circular argument directly contradicts the *Ellis* decision reached by a panel of this Court, and must be disregarded for that reason alone. *Julius v. Johnson*, 755 F.2d 1403, 1404 (11th Cir. 1985) ("One panel of this Circuit cannot overrule another panel's decision.").

Order at 8 (quoting *Ellis v. Cartoon Network, Inc.*, No. 1:14-cv-484-TWT, 2014 WL 5023535, at *3 (N.D. Ga. Oct. 8, 2014).) Because the single allegedly identifying data point at issue here—the MAC address—is a string of numbers that does not identify a specific person, the District Court found that it did not constitute PII under the VPPA. (Mot. to Dismiss Order at 9-10.) At the time of the District Court's decision, every other case to consider whether a random device identifier constitutes PII under the VPPA but one had concluded that it was not.[9]

Since the decision, two federal appellate courts have also weighed in. Most recently, the Third Circuit reached the same conclusion as the District Court following a lengthy examination of the VPPA, its legislative history, and subsequent developments. *In re Nickelodeon Consumer Privacy Litigation*, No. 15-1441, 2016 WL 3513782 (3d Cir. June 27, 2016) ("*Nickelodeon*"). Prior to that, the First Circuit reached the opposite result, affirming a district court decision after a two-paragraph analysis based primarily on the alleged disclosure of users'

[9] *See Ellis*, 2014 WL 5023535, at *2 (aff'd on other grounds by *Ellis* (11th Cir. 2015)); *Locklear v. Dow Jones & Co.*, 101 F. Supp. 3d 1312, 1318 (N.D. Ga. 2015), abrogated on other grounds by *Ellis*, 803 F.3d 1251; *Eichenberger v. ESPN, Inc.*, No. C14-463 TSZ, 2015 WL 7252985, at *5 (W.D. Wash. May 7, 2015); *Robinson v. Disney Online*, 152 F. Supp. 3d 176, 183 (S.D.N.Y. 2015); *In re Nickelodeon Consumer Privacy Litig.*, No. CIV.A. 12-07829, 2014 WL 3012873, at *11 (D.N.J. July 2, 2014); *see also In re Hulu Privacy Litig.*, 2014 WL 1724344, at *9 (granting summary judgment in favor of defendant who disclosed unique identifier assigned to registered users even though it was possible for recipient to look up users' profile information using that identifier on ***defendant's own website***).

GPS coordinates—something Plaintiff does not allege was disclosed in this case. *Yershov v. Gannett Satellite Information Network, Inc.*, 820 F.3d 482 (1st Cir. 2016) ("*Yershov*").

The *Nickelodeon* court dealt with much more extensive alleged disclosures than are present here. Plaintiffs there alleged disclosure of "at least eleven pieces of information about children who browsed its websites," including IP addresses, users' "browser fingerprint[s]," and unique device identifiers. *Nickelodeon* at *14. Like Perry, the plaintiff in *Nickelodeon* alleged that disclosure of this information enabled the recipient, Google, to track users across time and thus "effectively disclosed 'information which identifies a particular child as having requested or obtained specific video materials" in violation of the VPPA. *Id.*

The Third Circuit observed that potentially identifying information falls on a spectrum, with a person's actual name on one end, followed by information "from which it would likely be possible to identify a person" by consulting publicly available sources (such as an address or telephone number), and information "associated with individual persons" (such as social security numbers) that requires consultation with another entity. *Id.* The court found that unique device identifiers "fall[] even further down the spectrum," because to the average person they would "likely be of little help in trying to identify an actual person." *Id.* at 15.

Recognizing that the "precise scope" of the statutory PII definition was unclear and that privacy norms on the Internet were "constantly in flux," the court looked to the VPPA's legislative history and original purpose for guidance. *Id.* at 16.[10] Tracing the VPPA's legislative history, the court determined that the statute's purpose was "to prevent disclosures of information" allowing "an ordinary recipient to identify a particular person's video-watching habits." *Id.*[11]

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[10] Plaintiff incorrectly asserts that the *Nickelodeon* Court "explicitly abandon[ed] any reliance" on the VPPA's text. Both the First and the Third Circuits have recognized that the definition of PII is ambiguous. *See Yershov* at 486 ("statutory term '[PII]' is awkward and unclear . . . [and] adds little clarity"); *Nickelodeon* at *16 (meaning of PII is "not straightforward" and "difficult to discern from the face of the statute"). The Third Circuit thus properly looked to the VPPA's legislative history and purpose to interpret the statutory text—as this Circuit also counsels. *See, e.g.*, *Lindley v. F.D.I.C.*, 733 F.3d 1043, 1055 (11th Cir. 2013) (when statutes are subject to "more than one reasonable interpretation," courts "determine their meaning by looking to the legislative history and employing the other canons of statutory construction" (citation omitted)).

[11] Plaintiff argues that the VPPA's legislative history "points away from the Third Circuit's conclusion" (Pl. Br. at 32 n.5), excerpting a statement in the accompanying Senate Report expressing concern as to "the trail of information generated by every transaction that is now recorded and stored in sophisticated record-keeping systems." S. Rep. 100-599, at 6-7. But Plaintiff omits the context of Congress's concern: that "[e]very day Americans are forced to provide to businesses and others personal information," motivating Congress to protect "customer[s] and patron[s]" against unauthorized disclosure of information "that links [them] to particular materials or services" by "video stores." *Id.* at 7. That context makes clear that the "sophisticated record-keeping systems" Congress was worried about were those of businesses (in the video sale and rental industry) tracking the transactional activity of the customers with whom they had long-term relationships—not those of websites and apps serving videos to unidentified users.

The court found further reinforcement in subsequent legislative developments. *Nickelodeon* at *19. Congress amended the VPPA in 2013, in order to make it ***easier*** for people to share videos they have watched through social media. *See* 158 Cong. Rec. H6850 (daily ed. Dec. 18, 2012) (statement of Rep. Goodlatte). The court noted that in revisiting the VPPA, Congress was "keenly aware of how technologies changes have affected the original Act." *Nickelodeon* at *19 (citing S. Rep. 112-258, at 2 (2012)). In fact, it noted that the Electronic Privacy Information Center, *amicus curiae* in this case and in *Nickelodeon*, warned Congress that the VPPA "does not explicitly include Internet Protocol (IP) Addresses in the definition [of PII]," which "can be used to identify users and link consumers to digital video rentals," and proposed that IP addresses and "account identifiers" be added to the definition. *Nickelodeon* at *19 (citation omitted). But they were not.

Despite these warnings and "the passage of nearly thirty years since its enactment," Congress chose leave the law "almost entirely unchanged." *Id.*[12] The Third Circuit also noted the "expansion of privacy laws since the [VPPA]'s

[12] Plaintiff asserts that the Third Circuit drew a "disfavored inference from Congress's decision to leave the term '[PII]' intact in 2013." (Pl. Br. at 32 n.5.) But this Court drew exactly the same conclusion in *Ellis* with respect to the term "consumer," noting that "Congress could have employed broader terms in defining 'consumer' . . . when it enacted the VPPA . . . or when it later amended the Act . . . but did not." *Ellis* at 1256-57. And Plaintiff himself makes the same kind of inference, asserting that Congress's inaction in 2013 meant that it "understood its

passage," which indicate that Congress knows how to craft definitions that encompass the "kinds of information at issue in this case" (such as unique device identifiers)—and correspondingly that it chose not to do so in the VPPA's definition of PII, both in 1988 and in 2013. *Id.* at *17-18 (comparing PII under the VPPA with the term "personal information" under the Children's Online Privacy Protection Act ("COPPA") passed a decade later, the latter of which "built flexibility into the statute to keep pace with evolving technology").[13]

Applying these principles, the *Nickelodeon* court found the allegation that "otherwise anonymous pieces of data" would be assembled—by Google, no less, "a company whose entire business model is purportedly driven by the aggregation of information about Internet users"—in order to "unmask the identity of individual[s]" to be "simply too hypothetical to support liability" under the VPPA. *Id.* at 20. In other words, the unique device identifiers, IP addresses, and other data

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originally provided definition" of "consumer" to provide the same protection "in the digital age." (Pl. Br. at 5 (quoting *Yershov* at 488).) Plaintiff cannot have it both ways.

[13] Plaintiff also asserts "the Third Circuit recognized that in prohibiting '[PII]' Congress was using a 'term of art'" (Pl. Br. at 35 (quoting *Nickelodeon* at *22 n.186))—suggesting that PII should be construed based on its modern usage in other contexts. (Pl. Br. at 35.) But this disingenuous partial quotation gets what the *Nickelodeon* court said completely backwards: that "'personally identifiable information' is a term of art ***properly understood in its 'legislative and historical context,'"*** a point it made while distinguishing the VPPA's definition of PII from the general term "personal information" in the defendant's privacy policy that was the subject of a non-VPPA claim. *Nickelodeon* at *22 n.186 (emphasis added).

points allegedly disclosed did not constitute "the kind of information that would readily permit an ordinary person to identify a specific individual's video-watching behavior." *Id.* at 21.

2. The First Circuit's Approach in Yershov *is An Outlier Lacking Any Meaningful Limiting Principle.*

The First Circuit's decision in *Yershov* does not dictate that this Court should reach a different conclusion than the Third Circuit or the District Court. The First Circuit's conclusion was premised on the disclosure of GPS coordinates, and thus its analysis has no bearing here. Even if that were not the case, *Yershov* is an outlier that sets up an unworkable PII standard, breaking with the conclusion of nearly every other court to consider the issue: that to constitute PII, disclosed information "must itself do the identifying that is relevant for purposes of the VPPA . . . —not information disclosed by a provider, plus other pieces of information collected elsewhere by non-defendant third parties." *Robinson v. Disney Online*, 152 F. Supp. 3d 176, 182 (S.D.N.Y. 2015).

The holding in *Yershov* primarily focused on the disclosure of a different type of identifying information—GPS coordinates—not allegedly transmitted here. *See Yershov* at 486. The Third Circuit recognized as much, noting that its decision did not create a circuit split due to the First Circuit's different area of focus. *Nickelodeon* at *20. Plaintiff's maligning of this aspect of the Third Circuit's opinion as a "strained, almost disingenuous reading of *Yershov*" does not accord

with the plain text of the *Yershov* opinion. The single paragraph in *Yershov* applying its new PII test to the facts discusses only GPS coordinates and its view that such information "would enable most people to identify what are likely the home and work addresses of the viewer." *Yershov* at 486. The court did not consider the drastically more attenuated link between a random device identifier and an actual person's identity. It may well be that the First Circuit, evaluating the disclosure of such an identifier by itself, would have concluded that it crosses the point where "the linkage of information to identity becomes too uncertain, or too dependent on too much yet-to-be-done, or unforeseeable detective work," to trigger VPPA liability. *Id.*

Additionally, the *Yershov* court's conclusion regarding PII was based on flawed reasoning. The court started from an uncontroversial premise, that the VPPA's language suggests "PII is not limited to information that explicitly names a person." *Id.* But the court did not then attempt to delineate what the proper scope of PII is. Instead, its entire analysis consisted of a recitation of two examples of "information other than a name [that] can easily identify a person"—social security numbers[14] and athletes' jersey numbers. *Id.* It made no effort to

[14] Plaintiff fixates on the Third Circuit's description of the PII definition as "static," suggesting the court's reading is an unrealistically rigid one that would "plainly exclude[] data like social security numbers from the Act's protection." (Pl. Br. 32.) This is both untrue and a distortion of the court's point. The court explicitly recognized that social security numbers and similar identifiers

explain why—or even whether—a random device identifier (in that case, an Android ID), standing alone, constitutes PII. And the examples highlighted by the court illustrate the superficiality of its analysis. A social security number exists solely to identify ***a person***: it is assigned at birth by the government; unique; cannot be transferred or changed; and is collected by countless companies, educational institutions, and other entities as a reliable form of identity verification. And a jersey number is meaningless without additional context, such as a team's identity and a time period, all of which the court's example simply assumes to be available. In contrast, a device identifier such as a MAC address does not identify a person, but rather a physical device—which can be used by more than one person concurrently and owned by multiple people over time.[15] And there are no government records associating MAC addresses with individuals, nor does CNN have any idea to whom the devices from which it receives MAC addresses belong.

"associated with individual persons" (which were not at issue in the case) occupy a different place on the spectrum of PII than unique device identifiers. *See Nickelodeon* at *15. And its reference to the VPPA's definition of PII as "more static" was in comparison to a similar concept under COPPA, due to the fact that in the latter law Congress intentionally "built flexibility into the statute to keep pace with evolving technology" by giving the Federal Trade Commission authority to expand the meaning of PII over time. *Id.* at 18.

[15] *See, e.g.*, Press Release, Gartner, *Gartner Says Worldwide Market for Refurbished Smartphones to Reach 120 Million Units by 2017* (Feb. 18, 2015), http://www.gartner.com/newsroom/id/2986617 (estimating worldwide refurbished smartphone market to increase from 56 million units in 2014 to 120 million in 2017 due to consumer desire to replace their devices with newer models).

When the First Circuit issued its opinion, every court to consider whether a device identifier constitutes PII (except the district court in the same case) had concluded it does not. (*See supra* Section I.B.1.) But despite being out of step with this overwhelming consensus—later bolstered by the Third Circuit—the First Circuit did not acknowledge or address ***any*** of those cases. Instead, it created its own so-called test, which this Court should decline to adopt: that any information which a recipient could foreseeably use to identify a person as having watched a video constitutes PII, even if that information does not identify a person on its face, and even if the provider is not capable of making such identification itself. *Yershov* at 486.

This amorphous, "I know it when I see it" test, which Plaintiff now asks this Court to embrace, provides no meaningful standard by which providers can determine what types of information can and cannot be legally disclosed—a problem the *Yershov* court tacitly acknowledges, noting that "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." *Id.* But it does not say where that point lies. As another court observed, "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." See *Robinson*, 152 F. Supp. 3d at 181. The *Nickelodeon* court also recognized the "lack[] [of] a limiting principle"

in the sort of approach advocated in *Yershov*, creating a risk that disclosure of unique device identifiers that form the building blocks of the Internet, like IP addresses and third-party cookies, could become "presumptively illegal." *Nickelodeon* at *20.

Plaintiff asserts that these "practical concerns" should not concern this Court because "the VPPA only imposes liability where the violation is knowing," meaning that "disclosure of information that the recipient can use to identify a person is not actionable if the defendant is unaware that the recipient has that capability." (Pl. Br. at 42.) The statute's use of "knowing," if anything, confirms that what matters is the ***nature of the specific information being disclosed*** by the discloser, at the time of disclosure, not what the recipient may be able to do with it in the future. And more importantly, that is ***not*** the test articulated by *Yershov*; the test is whether the information disclosed is "foreseeably" likely to enable identification by the recipient. *Yershov* at 489. If the Court credits Plaintiff's allegations regarding the capabilities of analytics providers like Bango (which it should not, *see infra* Section I.B.3), then any piece of information that is potentially re-identifiable with the aid of additional data and efforts becomes a

potential statutory violation.[16]

A company considering whether disclosures of such information are permissible would thus need to continuously examine the capabilities of each recipient. And if commercial providers with capabilities like those Plaintiff claims exist, is it not "foreseeable" that ***any*** recipient could potentially retain those providers to re-identify individuals? The logical consequence of Plaintiff's approach is a massive chilling effect on any type of data sharing out of fear of incurring VPPA liability. This case involves exactly what Plaintiff says it does not—"the outer bounds of [PII]": the disclosure of a random device identifier alone, for which no index exists, and which can only be theoretically associated with a particular person by reference to a trove of additional information collected by unrelated parties. The vast gap between the present scenario and what Congress sought to address makes clear why this Court should follow the approach favored by the Third Circuit and the vast majority of district courts.

[16] The conception of PII advanced by EPIC's amicus brief is even farther afield than that of Plaintiff, and has been clearly rejected by the Third Circuit in *Nickelodeon* (where EPIC also submitted an amicus brief raising substantially similar arguments). EPIC advocates for PII to include any information that "does identify ***or could identify*** a particular individual," and thus that "information should be considered PII unless it ***cannot be traced*** to a particular person." In doing so, EPIC relies on a selective and overreaching reading of legislative history, inapposite academic theories, and needless technical detail—and repeating many of Plaintiff's arguments. Accordingly, EPIC's brief fares even worse with respect to the problems identified herein with Plaintiff's arguments.

3. Plaintiff's Conclusory and Implausible Allegations Regarding Bango's Capabilities Should Be Disregarded.

Even if an unknown device identifier could be PII, Plaintiff fails to sufficiently allege that Bango could (let alone did) use that identifier to identify him or anyone else. Plaintiff alleges that the information CNN disclosed is "information that Bango publically admits it uses to automatically identify Mr. Perry," and that "CNN knows" this. (Pl. Br. at 37 (citing Compl. ¶¶ 16-19, 21-25).) But Plaintiff does not allege that CNN disclosed any identifying information other than his MAC address. His allegations concerning Bango's activities are thus the linchpin of his Complaint.

Plaintiff alleges that companies like Bango develop ways to "link" consumers' "digital personas" across devices, primarily by using "certain unique identifiers to connect the dots." (Compl. ¶ 15.) But he never alleges that Bango performed any "dot connecting" to identify him or any other CNN App user by name, nor does he allege any facts showing Bango had identifying information about Perry from other sources. ***This alone warrants dismissal.*** *See In re Nickelodeon Consumer Privacy Litig.*, No. CIV.A. 12-07829, 2015 WL 248334, at *3 (D.N.J. Jan. 20, 2015), aff'd in part and vacated in part in *Nickelodeon* (3d Cir.) (VPPA claim fails because complaint "simply includes no allegation that Google can identify the individual Plaintiffs in this case, as opposed to identifying people generally").

Instead, Plaintiff relies on conclusory allegations—based on stitched-together, out-of-context excerpts from Bango's generic marketing materials—to create the implication that his identification was possible. But those materials do not plausibly show that Bango had data that likely would have identified Perry, or any person. "[C]ourts need not accept factual claims," such as Plaintiff's allegations about Bango, "that are internally inconsistent; facts which run counter to facts of which the court can take judicial notice; conclusory allegations; unwarranted deductions; or mere legal conclusions asserted by a party." *Gross v. White*, 8:05-CV-1767-27TBM, 2008 WL 2795805, at *2 (M.D. Fla. July 18, 2008), aff'd, 340 F. App'x 527 (11th Cir. 2009).

Plaintiff's conclusory pronouncements about Bango unravel upon even cursory examination. For example, Plaintiff purports to quote Bango's website for the proposition that Bango "automatically identifies" consumers as they act across the Internet. (Compl. ¶ 23.) The website statement from which Plaintiff excerpts the word "automatically," however, is not about the service Bango provided to CNN at all; rather, it relates to Bango's distinct mobile billing service (which CNN was not alleged to have used). *See Mobile Payments and Analytics*, Bango (Feb. 14, 2014, 10:11 AM), http://www.bango.com [https://web.archive.org/web/

20140214101149/http://www.bango.com/] (discussing "Bango Payments Platform," which "automatically identif[ies] and bill[s]" users).[17]

Nor do any of the Bango website excerpts or images in the Complaint state that Bango knows the real world identities of App users, including Plaintiff. For instance, Bango's statement that its technology "reveals customer behavior, engagement and loyalty across and between all your websites and apps" (Compl, ¶ 14, n.2), does not suggest that any real-world personal identification—as required by the statute—has been made, could be made, or will be made, much less that such identification is tied to CNN. The same is true of the images depicting

[17] In reviewing the District Court's ruling, this Court may consider the contents of Bango's website, which are central to Plaintiff's claim and cited extensively in the Complaint. *See, e.g., Brooks v. Blue Cross and Blue Shield of FL., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997) (noting "where the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the court may consider the documents as part of the pleadings for purposes of Rule 12(b)(6) dismissal"); *Knievel v. ESPN, Inc.*, 223 F. Supp. 2d 1173, 1176 (D. Mont. 2002) (considering website whose "contents . . . are at the center of Plaintiffs' allegations"), aff'd, 393 F.3d 1068 (9th Cir. 2005); *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 693 n.3 (S.D.N.Y. 2009) (same). To reflect Bango's website as it existed at the time this action was filed, CNN cites to an archived version preserved by the non-profit Internet Archive. *See State Nat. Ins. Co. v. Highland Holdings, Inc.*, No. 8:14-CV-00524-EAK, 2015 WL 3466215, at *1 (M.D. Fla. June 1, 2015) (explaining that the Internet Archive "preserves Internet website publications at a specific date and time through a service identified as the Wayback Machine"); *Erickson v. Nebraska Mach. Co.*, No. 15-cv-01147-JD, 2015 WL 4089849, at *1 n.1 (N.D. Cal. July 6, 2015) (recognizing that "[c]ourts have taken judicial notice of the contents of web pages available through the Wayback Machine as facts that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned").

"Bango IDs." At best, the materials Plaintiff cites are consistent with the notion that Bango tracks device identifiers between or across networks—but none suggest that Bango ties such identifiers back to an actual person, a prerequisite for CNN to be liable under Plaintiff's theory.

Moreover, Plaintiff's naked assertion that CNN knows that Bango will identify specific people based on their MAC address—and that this is in fact "why CNN is disclosing it to Bango in the first place"—makes no sense. Plaintiff provides no plausible explanation as to why CNN would care about identifying him or any other CNN App user. If anything, the more plausible interpretation of the statements on Bango's website is that its so-called "digital dossiers" on users contain information only from a ***single company's*** deployment of Bango across its various websites, apps and other services, as opposed to the all-knowing repository about which Plaintiff speculates.[18] (Compl. ¶ 20-26.) This would render

[18] *See, e.g.*, *Bango Mobile Analytics*, Bango (Feb. 9, 2014, 5:35 AM), http://bango.com/mobile-analytics/ [https://web.archive.org/web/20140209053542/http://bango.com/mobile-analytics/] ("Bango reveals customer behaviour . . . across and between all ***your*** websites and apps," and "***[y]ou own*** the data you collect with Bango") (emphasis added); *Terms & Conditions*, Bango (Feb. 12, 2014, 4:55 PM), http://bango.com/corporate/terms-conditions/ [https://web.archive.org/web/20140212165513/http://bango.com/corporate/terms-conditions/] (Bango agrees "to ***keep confidential any information*** provided by You [provider] or ***generated by your interactions with Bango***") (emphasis added); *Privacy Statement*, Bango (Feb. 9, 2014, 9:25 AM), http://bango.com/corporate/privacy-statement/ [https://web.archive.org/web/20140209092538/http://bango.com/corporate/privacy-statement/] (Bango "***never disclose[s] [personal information]*** or pass[es] to a third party ***other than the CP*** or mobile network operator without

Plaintiff's "automatic" identification theory utterly implausible, since the only way Bango could conceivably identify Perry from his MAC address would be if CNN itself had previously obtained his identifying information from a separate interaction on another CNN property, and stored that information with Bango. But Plaintiff does not allege that he interacted with any other CNN property where such tracking could conceivably have occurred.

In the absence of specific, plausible allegations regarding Bango's conduct, the Complaint instead conjures up the image of widespread privacy invasions, calling CNN's activities a "particularly flagrant" violation of the VPPA because it allegedly submits its users' personal information to a "big data" company whose business model involves the development of "comprehensive profiles about consumers' entire digital lives . . . [to be] used for targeted advertising, sold as a commodity to other data brokers, or both." (*Id.* ¶ 3.) But these inflammatory suggestions are not backed up by a single factual allegation relating to Bango's or CNN's conduct. To the contrary, Plaintiff acknowledges that Bango has specifically denied "that it re-sells consumer data to advertisers," and he makes no allegations that CNN engaged in any targeted advertising based on identifying him. Regarding that denial, Plaintiff comments—confusingly, and in stark contradiction

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explicit prior consent," and Bango's server "is protected . . . to ensure that ***only authorized clients use it to access only their own data***") (emphasis added).

to his own earlier allegations in the same Complaint—that this "point is not at issue in this lawsuit." (*Id.* at ¶ 26 n.10.)

In light of Plaintiff's internally contradictory allegations and the glaring gaps in what his allegations cover, Plaintiff's speculative and implausible theory about the "frightening array of information" Bango supposedly collects on "hundreds of millions of consumers as they act across the Internet" should be rejected. (*Id.* ¶¶ 21, 23.) And the inadequacy of his allegations is fatal to his case since, even under *Yershov*, the MAC address allegedly disclosed by CNN cannot foreseeably be linked by Bango to an identified person.

4. Plaintiff's Other Arguments Are Based on Flawed Logic and Irrelevant Principles Not Considered by Courts in Actually Interpreting the VPPA.

Plaintiff devotes much of his brief to arguing that his broad construction of PII is consistent with canons of statutory interpretation and common law principles. None of the lines of reasoning he advances have ever been recognized or endorsed in the substantial decisional law interpreting the VPPA (even in *Yershov* itself), and Plaintiff's focus on such diversions is emblematic of his unwillingness to address the actual findings of the numerous courts that have addressed what constitutes PII under the VPPA. Further, his arguments are plagued by tenuous reasoning based on stringing together different concepts with hardly any connective tissue, as well as mischaracterization and overextension of

inapposite cases and doctrines. *Cf. Howell v. Mississippi*, 543 U.S. 440, 443, 125 S. Ct. 856, 858 (2005) (criticizing litigant's improper "daisy chain" argument, "which depends upon a case that was cited by one of the cases that was cited by one of the cases that petitioner cited"). And ultimately none of this matters, since Plaintiff cannot even meet the *Yershov* court's PII test for which he advocates—due to the lack of alleged disclosure of location information that the First Circuit found critical to satisfying the PII definition (*see supra* Section I.B.2) and the contradictory and wholly inadequate nature of his allegations regarding Bango's activities (*see supra* Section I.B.3).

Plaintiff first takes issue with the *Nickelodeon* court's reliance on guidance from the Supreme Court that "[w]hen technological change has rendered its literal terms ambiguous, [a law] must be construed in light of [its] basic purpose." *Nickelodeon* at *16 (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156, 95 S. Ct. 2040, 2044 (1975)). Plaintiff contends that *Aiken* and subsequent Supreme Court decisions "flatly contradict[]" the Third Circuit's conclusion, and instead counsel an expansive approach to statutory interpretation that "encompass[es] the onward march of science and technology." (Pl. Br. at 33-

35.)[19] But Plaintiff's tenuously reasoned argument overlooks the actual outcome of the Supreme Court cases from which he selectively quotes. *Aiken* and *Fortnightly Corp. v. United Artists*, 392 U.S. 390, 88 S. Ct. 2084 (1968), were copyright cases in which the Supreme Court sought to map principles contained in antiquated statutes to more modern technology. But in both cases, they did so in a way that sought to ***preserve*** the original underlying principles, rejecting attempts to expand copyright protection to new uses.[20] Thus, rather than dictating the result Plaintiff suggests, *Aiken* and *Fortnightly* demonstrate that adapting a statute's scope to evolving changes in technology does not always mean expanding it—especially when such expansion would conflict with basic principles undergirding

[19] This Court's decision in *Ellis* that plaintiff was not a "subscriber" for purposes of the VPPA rejected a similar argument to the one made by Plaintiff here, that "[c]ourts often apply old statutes to new technologies, even if the technology was not within the contemplation of the enacting legislature." Pl.-Appellant's Reply Br. at 29-33, *Ellis*, No. 14-15046 (Mar. 26, 2015).

[20] *Aiken*, 422 U.S. at 158-163 (holding reception of copyrighted music broadcast by a speaker radio in a restaurant did not constitute infringing public performance); *Fortnightly*, 392 U.S. at 396-400 (holding that receiving TV programs via community antenna and transmitting them through cables to paying customers did not constitute infringing public performance). The Supreme Court in *Fortnightly* declined the Solicitor General's invitation to render a more policy-driven decision, observing "[t]hat job is for Congress" and that the Court "take[s] the Copyright Act . . . as we find it." 392 U.S. at 401-02.

the law.[21]

Plaintiff also urges the Court to borrow defamation law's subjective liability standard, on the premise that defamation is part of "privacy torts" forming the VPPA's "common-law background." (Pl. Br. at 37-40.) That is wrong—defamation has nothing to do with the VPPA. First, nothing in the VPPA's history indicates that Congress considered defamation or any other common law torts. Plaintiff points to a statement in the VPPA's Senate Report that the Act shares a "central principle" with the Privacy Act of 1974, and then quotes the Supreme Court's observation that the Privacy Act protects interests similar to those covered by defamation and privacy torts. (*Id.* at 38.) But the "central principle" noted in the Senate Report was not derived from the common law—it came from a July

[21] The remaining cases Plaintiff relies on fare even worse, as they have little to do with the points for which he cites them, or technological progress generally. *See West v. Gibson*, 527 U.S. 212, 119 S. Ct. 1906 (1999) (interpreting EEOC authority under Title VII of the Civil Rights Act to award compensatory damages); *DeLima v. Bidwell*, 182 U.S. 1, 197, 21 S. Ct. 743, 754 (1901) (explaining that the precise subjects of a statute which enter existence after the statute is enacted fall within its scope, *e.g.*, statute forbidding sale of liquor to minors applies not just to minors in existence at the time of enactment but all those subsequently born); *Browder v. United States*, 312 U.S. 335, 61 S. Ct. 599 (1941) (prohibition on use of passports obtained by false statements applies to their use to facilitate reentry into the U.S., an activity for which passports were not customarily used at the time).

1973 report from the U.S. Department of Health, Education and Welfare.[22] Second, defamation is not within the common-law right to privacy; the 1905 Georgia Supreme Court case Plaintiff cites as his sole support recognized as much, as have other courts. *See Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 76 (1905) (recognizing defamation and invasion of privacy as distinct causes of action preventing different forms of harm); *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1088 (5th Cir. 1984) (same).[23]

Finally, Plaintiff cites a number of cases purportedly illustrating how courts, in light of the "close relationship between defamation and the law of privacy," have "adopted a subjective approach to interpreting statutory protections." (Pl. Br. at 40-41.) But those cases have nothing to do with defamation, common law privacy torts, or the VPPA. Further, each of them involves different legal

[22] *See* U.S. Dep't of Health, Education, and Welfare, Report of the Secretary's Advisory Committee on Automated Personal Data Systems: Records, Computers, and the Rights of Citizens 41 (1973), *available at* https://www.justice.gov/opcl/docs/rec-com-rights.pdf ("There must be a way for an individual to prevent information about him that was obtained for one purpose from being used or made available for other purposes without his consent"); *Ostergren v. Cuccinelli*, 615 F.3d 263, 278 (4th Cir. 2010) (explaining that following the publication of the influential report, Congress responded by enacting the Privacy Act of 1974.).

[23] If anything, the defamation law principles Plaintiff highlights favors CNN. Making a defamatory statement about someone ***presupposes*** knowledge of the subject's identity by the speaker, whether or not the statement reveals that identity directly. But that is exactly the opposite of CNN's situation—it is not disclosing information that identifies people, because it does not know who its App users are.

standards and fundamentally different kinds of disclosures than are at issue here. *See Speaker v. U.S. Dep't of Health & Human Servs. Centers for Disease Control & Prevention*, 623 F.3d 1371 (11th Cir. 2010) (considering whether CDC violated record-keeping confidentiality obligations as to plaintiff's medical records by disclosing them, including ***his name***); *Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004) (quashing subpoena seeking detailed medical records of patients who had late-term abortion procedures); *Press-Citizen Co., Inc. v. Univ. of Iowa*, 817 N.W.2d 480, 492 (Iowa 2012) (prohibiting disclosure of educational records of students accused of sexual assault, because incident was so notorious that "no amount of redaction" would prevent identification of those involved).

II. *Spokeo* Dictates that Plaintiff's Allegations Do Not Establish the Concrete Injury Required for Article III Standing.

Plaintiff has no standing under Article III to bring his claim because he fails to allege that he or the hypothetical class suffered any qualifying injury from CNN's alleged disclosures. The Complaint identifies no concrete injury that actually exists to Plaintiff or the putative class from CNN's alleged disclosure of MAC addresses and video viewing information to Bango, nor any risk of harm that might occur. He does not claim CNN's actions affected him at all. Instead, Plaintiff relies entirely on the alleged VPPA violation itself as his injury-in-fact, claiming that he and the class "have had their statutorily defined right to privacy violated." (Compl. ¶ 57.) In light of the Supreme Court's recent decision in

Spokeo, Inc. v. Robins, which issued after the District Court granted CNN's Motion to Dismiss, that is not enough. 136 S. Ct. 1540 (2016) ("*Spokeo*").

A. *Spokeo* Requires Concrete Injury.

Plaintiff argues that he suffered injury-in-fact because "CNN violated his personal legal rights" under the VPPA, and that *Spokeo* has no impact in this case. (Pl. Br. at 13.) He is wrong. The Supreme Court in *Spokeo* emphasized that concreteness was a critical and distinct inquiry, "even in the context of a statutory violation." *Spokeo* at 1545, 1549. To be "concrete," an injury "must be 'de facto'; that is, it must actually exist." *Id.* at 1548 (citation omitted). The Supreme Court rejected the notion—relied upon by the District Court to find standing here—that a statutory violation without any concrete injury is always a sufficient injury-in-fact to confer standing.

Plaintiff's conception of standing—that "invasion of the interest protected by the VPPA is a concrete injury"—assumes that Congress's passage of the law automatically confers standing to anyone with the right to sue under it. (*See* Pl. Br. at 16.) But this is exactly what *Spokeo* cautioned against. *Spokeo* at 1549 (injury-in-fact requirement is not "automatically satisfie[d] . . . whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right"). Plaintiff consistently fails to recognize that Congress's determination informs, but does not control, whether harm is sufficiently concrete to support

Article III standing. For example, *Spokeo* is clear that "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Spokeo* at 1548. Plaintiff ignores this passage. He also ignores that while "the violation of a procedural right granted by statute ***can*** be sufficient in some circumstances to constitute injury in fact," that is not always the case. *Id.* at 1549 (emphasis added).[24]

The Supreme Court remanded *Spokeo* to the district court to determine if the FCRA violation in that case created an injury in fact. The Court clarified that "a

[24] Moreover, the cases cited in *Spokeo* as examples of such circumstances did not involve the mere enactment of a statute—violation of which may not result in any concrete injury—but rather statutes through which Congress elevated concrete informational injuries to legally cognizable status. *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 118 S. Ct. 1777 (1998) (finding injury in voters' inability to obtain information made public by statute, affecting their ability to evaluate political candidates); *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 109 S. Ct. 2558 (1989) (finding injury in denial of access to certain government records required to be disclosed, which were necessary to participate more effectively in the judicial process). After *Spokeo*, courts have applied *Akins* and *Public Citizen* this way. *See, e.g.*, *Lane v. Bayview Loan Servicing, LLC*, No. 15 C 10446, 2016 WL 3671467, at *4 (N.D. Ill. July 11, 2016) (denial of information required by Fair Debt Collection Practices Act was concrete injury, citing *Akins* and *Public Citizen* and noting "the right to get information to verify a debt is arguably more concrete than the right to obtain government records"); *Friends of Animals v. Jewell*, No. 15-5223, 2016 WL 3854010, at *2 (D.C. Cir. July 15, 2016) (noting *Spokeo* indicated injury in "informational standing" was concrete). This Court's recent ruling in *Church v. Accretive Health, Inc.* is in accord, as it was also an FDCPA case that found standing because plaintiff was deprived of statutorily required information needed to evaluate and respond to debt collection letter. *See* No. 15-15708, 2016 WL 3611543 (11th Cir. July 6, 2016) (per curiam). Perry has not suffered a similar informational injury. He does not claim CNN's actions affected him.

violation of one of the FCRA's procedural requirements may result in no harm" and that "not all inaccuracies cause harm or present any material risk of harm." *Id.* at 1550. It did so despite recognizing that "Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk." *Id.* If Plaintiff were correct, the Court would not have remanded the case, but instead concluded that Congress created a "concrete right by statute" and the alleged violation of that statute was therefore a "concrete injury." (Pl. Br. at 15-16.) *Spokeo*'s result shows that harm to plaintiff, not Congressional interest, is the key inquiry. Such harm can, of course, be intangible. *Id.* And a "risk of real harm" (which Plaintiff does not allege) can also be a concrete injury. *Id.* But a statutory violation alone is not always enough. *Id.*

B. Plaintiff Has Not Alleged Intangible Injury Sufficient to Confer Standing.

Plaintiff cannot save his claim by rebranding a statutory violation as "intangible" injury. *Spokeo* recognized that intangible injuries could be concrete. And that "[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." *Spokeo* at 1549. Plaintiff seizes on this language to argue that he has suffered an "intangible" injury sufficient to confer standing. He has not. In *Spokeo*, the court pointed to decisions identifying the type of concrete intangible harms that could confer standing, such as depriving someone of free speech or the free exercise of religion. *Spokeo* at

1549 (citing *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 129 S. Ct. 1125 (2009) (free speech); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 113 S. Ct. 2217 (1993) (free exercise)). Plaintiff, however, does not claim that CNN's alleged disclosures similarly deprived him, or negatively affected him in any way, such as embarrassing him or hurting his employment prospects.

The fact that Congress enacted the VPPA does not alter the requirement that Plaintiff suffer some actual injury to bring suit. *Spokeo* is clear that while Congress can identify "concrete, de facto injuries" not previously recognized, a plaintiff "cannot satisfy the demands of Article III by alleging a bare procedural violation." *Spokeo* at 1549-50. The Supreme Court emphasized, for example, that a credit report that violates FCRA's requirements "may result in no harm" because it could still be "entirely accurate." *Id.* at 1550. Similarly, a disclosure that technically violates the VPPA may result in no harm.[25] Indeed, the VPPA already allows video tape service providers to disclose information to third-party vendors in a number of cases—it just did not specifically authorize disclosure to vendors who perform analytics (or those who host servers or store backup tapes for that

[25] In *Nickelodeon*, the Third Circuit found that plaintiffs had standing to bring their VPPA claims notwithstanding *Spokeo*. *See Nickelodeon* at *7-8. The parties there, however, never fully briefed *Spokeo*'s meaning and impact. Rather, each party submitted a letter of less than two pages. *See* No. 15-1441 (3d Cir. 2016), Doc # 003112302629 (May 20, 2016), and Doc # 003112315524 (June 3, 2016). For the reasons explained herein, CNN believes that the court interpreted *Spokeo* incorrectly, and differently than many other courts.

matter). *See* 18 U.S.C. §§ 2710(b)(2)(e), (a)(2). Thus, without any allegation that the disclosure to such a vendor created an identifiable harm to Plaintiff, the Complaint fails to allege a "concrete" injury.[26]

Further, Plaintiff offers no evidence Congress determined that every violation of the VPPA constitutes an injury. He alludes to legislative statements about the privacy of viewing choices. (Pl. Br. at 15.) But if such statements were sufficient, all violations of statutes with a legislative history would be sufficient to confer standing. But *Spokeo* says the opposite. *See Spokeo* at 1549; *see also Sartin v. EKF Diagnostics, Inc.*, No. 16-1816, 2016 WL 3598297, at *3 (E.D. La.

[26] Plaintiff wrongly suggests he need only allege a statutory violation because the right at issue in *Spokeo* was procedural, whereas the interest allegedly violated here is substantive. (*See* Pl. Br. at 16.) But even if the disclosures at issue here are considered "substantive," *Spokeo* does not limit the concrete injury requirement to only procedural violations—as Plaintiff has previously conceded. (Appellant's Opp. to Appellee's Mot. to Dismiss, at 15.) To the contrary, the Supreme Court stated that even where a violation of FCRA led to the disclosure of false information, "not all inaccuracies cause harm or present any material risk of harm"—despite recognizing that through FCRA, Congress had identified and elevated an intangible harm, the risk of "the dissemination of false information." *See Spokeo* at 1550; *see also Gubala v. Time Warner Cable Inc.*, No. 15-CV-1078-PP, 2016 WL 3390415, at *4 (E.D. Wis. June 17, 2016) (post-*Spokeo*, dismissing claim for failure to comply with Cable Act's PII destruction requirements on standing grounds, notwithstanding recognition that Congress had "identified and elevated an intangible harm—the risk to subscribers' privacy created by the fact that cable providers have an 'enormous capacity to collect and store personally identifiable data about each cable subscriber'"). Both kinds of violations require the statutory violation to cause some real injury that actually exists to confer standing. Here, the disclosure to a non-qualified service provider caused Plaintiff no more (and arguably less) harm than the procedural violation in *Spokeo*.

July 6, 2016) ("[V]ague reference to Congress and the FCC provides no factual material from which the Court can reasonably infer what specific injury, if any, [plaintiff] sustained through defendants' alleged statutory violations."). The fact that the VPPA unquestionably allows disclosure to some service providers confirms that Congress did not view all disclosures as *per se* injurious. *See* 18 U.S.C. § 2710(e) & (a)(2).

In addition, disclosing viewing information to an analytics provider does not bear "a close relationship to a harm traditionally providing a basis for a lawsuit in English or American courts." *Spokeo* at 1549. The existence of a handful of relatively recent cases using the word "confidentiality" is not the "historical practice" *Spokeo* contemplated. *See id.* at 1549 (citing *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 774-77, 120 S. Ct. 1858, 1863-65 (2000) (examining long tradition of *qui tam* actions in England and American Colonies)). The law review article Plaintiff relies on states that breach of confidence was not "cemented as a common law action" in England until 1948. Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 Geo. L.J. 123, 161 (2007). And even then, it requires "unauthorised use of th[e] information to the detriment of the party communicating it." *Id.* at 161-62. Plaintiff thus argues that he need not allege actual injury

because the VPPA creates a right similar to a uniquely British tort that requires actual injury.

Similarly, the cases Plaintiff cites that include the term "confidentiality" do not support his arguments, as they turn on ***property*** rights over letters in dispute. *Grigsby v. Breckinridge*, 65 Ky. 480 (Ky. 1867), *Woolsey v. Judd*, 11 How. Pr. 49 (N.Y. Sup. Ct. 1855), and *Denis v. Leclerc*, 1 Mart. (o.s.) 297 (Orleans 1811), turned on property rights over letters in dispute. *See, e.g.*, *Woolsey*, 11 How. Pr. at 57-8 ("The exclusive right . . . is his right of property in the words, thoughts and sentiments . . . which his manuscript embodies and preserves."). And *Grigsby* expressly recognized that courts "have not yet assumed jurisdiction to enforce duties merely moral, or to prevent a breach of epistolary confidence . . . in no way affecting any interest in *property*." *Grigsby*, 65 Ky. at 486 (emphasis in original).

CONCLUSION

For the reasons stated above, this Court should remand this case to the District Court with instructions to dismiss for lack of jurisdiction. However, should the Court determine that Plaintiff has Article III standing, then the District Court's order dismissing Plaintiff's claims with prejudice should be affirmed.

Dated: September 1, 2016

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on September 1, 2016.

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Dated: September 1, 2016

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