IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-13031

D.C. Docket No. 1:14-CV-02926-ELR

RYAN PERRY,

Plaintiff-Appellant,

versus

CABLE NEWS NETWORK, INC., and
CNN INTERACTIVE GROUP, INC.,

Defendants-Appellees.

On appeal from the United States District Court for the Northern District of Georgia

---

CABLE NEWS NETWORK, INC. AND CNN INTERACTIVE GROUP, INC.'S MOTION TO DISMISS APPEAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Rules

Other Authorities

PRELIMINARY STATEMENT

Defendants Cable News Network, Inc. and CNN Interactive Group, Inc. ("CNN") move to dismiss this appeal pursuant to Fed. R. App. P. 27 because Plaintiff has no standing under Article III to bring his claim. The Supreme Court's recent decision in *Spokeo Inc. v. Robins*,136 S. Ct. 1540 (2016) ("*Spokeo*") clarifies that a plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right … to sue." *Id.* at 1549. Rather, "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* To be "concrete," an injury must be "real," and not "abstract"—*i.e.* "it must actually exist." *Id.* at 1548.

Here, Plaintiff/Appellant Ryan Perry ("Plaintiff" or "Perry") fails to allege that he or the hypothetical class suffered any qualifying injury from CNN's alleged disclosures. He does not allege the he suffered any actual injury, much less a concrete injury sufficient for this matter to proceed. Nor does he allege that CNN's disclosures create a risk of real harm, which *Spokeo* said could be enough to confer Article III standing. Instead, Perry relies entirely on the alleged violation of the Video Privacy Protection Act (the "VPPA") itself as his injury-in-fact, claiming that he and the class "have had their statutorily defined right to privacy violated." ECF # 25, First Am. Compl. ("Compl.") ¶ 57. This is not enough under *Spokeo*.

Addressing subject matter jurisdiction is both appropriate and required at this stage of the case. Article III's justiciability requirements extend throughout all stages of federal proceedings, including appeal. When a plaintiff lacks standing at any point during the case, the court loses jurisdiction. That is the case here. *Spokeo* confirms that Perry lacks standing. Accordingly, his appeal should be dismissed for lack of subject matter jurisdiction.

BACKGROUND

A. Plaintiff's Allegations

Perry alleged that CNN violated the VPPA by sharing records relating to the use of CNN's mobile web application, or "App," with CNN's analytics provider, Bango. Compl. ¶ 14. The VPPA, enacted in 1988, prohibits "video tape service providers" from knowingly disclosing, to a third-party, "personally identifiable information concerning any consumer." 18 U.S.C. § 2710(b). Personally identifiable information "includes information which identifies a person as having requested or obtained specific video materials." *Id.* § 2710(a)(3). The Senate's section-by-section analysis of the VPPA explains that personally identifiable information is information "that identifies a particular person as having engaged in a specific transaction with a video tape service provider." S. Rep. No. 100-599, at 5, *reprinted in* 1988 U.S.C.C.A.N. 4342, 4342-12. The VPPA "does not restrict the disclosure of information other than personally identifiable information." *Id*.

Perry alleged in his complaint that CNN disclosed only two pieces of information to Bango, who CNN retained to count video views: (1) records of what videos users watched on the CNN App, and (2) the random media access control address ("MAC address") assigned to App users' iPhones. Compl. ¶ 14. Perry did not allege that identifying information other than the user's MAC address (such as a name) was provided to Bango.[1] Nor did he allege that CNN even had such information about users (who merely downloaded a free app that they could delete at any time). The Amended Complaint identified no actual concrete harm Perry suffered from CNN's alleged disclosures—economic or otherwise. Nor did the Amended Complaint claim that CNN's alleged disclosures created a "risk of real harm" to Perry or the class. *See Spokeo* at 1549. The only "injury" alleged in the Amended Complaint was that "Plaintiff and the Class have had their statutorily defined right to privacy violated." Compl. ¶ 57.

[1] The Amended Complaint described Bango as a data analytics company that specializes in "tracking individual user behaviors across the Internet and mobile applications." Compl. ¶ 14 n.2. It alleged that "to gain a broad understanding of a given consumer's behavior across all of the devices that he or she uses" companies like Bango "have to find ways to 'link' his or her digital personas." *Id.* ¶ 15. And that these companies' "primary solution has been to use certain unique identifiers to connect the dots." *Id.* The Amended Complaint did not allege any facts showing that Bango performed such "dot connecting" to identify Perry or any other CNN App user by name. Nor did it allege any facts showing that Bango already had identifying information about Perry from other sources.

B. The Initial District Court Proceedings

CNN moved to transfer the case from the Northern District of Illinois, where it was originally filed, to the Northern District of Georgia. ECF # 18, Motion to Transfer or in the Alternative Dismiss Plaintiff's Class Action Complaint. The Northern District of Illinois granted CNN's motion, noting the similarity between this case and another VPPA case against CNN's sister company, Cartoon Network, then pending in the Northern District of Georgia (the "Cartoon Network Case"). ECF #33, Memorandum Opinion and Order. The court recognized that the two cases "involve similar legal and factual questions, evidenced by the *nearly verbatim allegations in the complaints*." *Id*. at 9 (emphasis added). Once transferred to the Northern District of Georgia, CNN moved to dismiss the case on a variety of grounds, including that Perry lacked Article III standing. ECF # 49, Motion to Dismiss, at 24. By that time, however, the Cartoon Network Case was before this Court on Ellis's appeal of Chief Judge Thrash's order dismissing the case for failure to state a claim. At Perry's request, the District Court stayed the proceedings pending this Court's ruling on that appeal. ECF # 59, Order.

C. The Cartoon Network Case Decisions

Cartoon Network sought dismissal on the ground that plaintiff Ellis failed to state a claim under the VPPA—both because Ellis was not a "consumer" subject to the VPPA's protections and because the device identifier allegedly disclosed to

Bango was not personally identifiable information. *See Ellis v. Cartoon Network*, 1:14-cv-484, 2014 WL 5023535 (N.D. Ga. Oct. 8, 2014). Cartoon Network also sought dismissal on the ground that Ellis had alleged no actual, concrete, injury and therefore lacked Article III standing. *See id.* Chief Judge Thrash granted Cartoon Network's Motion to Dismiss Plaintiff's Amended Class Action Complaint on October 8, 2014. *Id.* at *4.

Judge Thrash first found that Ellis had standing to assert a VPPA claim. In a short, two-paragraph analysis, Judge Thrash noted that the VPPA "expressly grants a right to relief," and that because Ellis was "alleging a violation of the VPPA, he alleges an injury." *Id*. at *2. Judge Thrash went on, however, to find that an Android ID—a unique device identifier just like the MAC address here—was not "personally identifiable information" as required by the VPPA. *Id*. at *3. Therefore, "[b]ecause the Plaintiff has not alleged the disclosure of personally identifiable information, he fails to state a claim under the VPPA." *Id*. Ellis appealed Judge Thrash's decision.

After briefing and oral argument, this Court decided Ellis's appeal on October 9, 2015, affirming the district court on different grounds. *See Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251 (11th Cir. 2015). While the district court based its dismissal on a determination that an Android ID was not "personally identifiable information" under the VPPA, this Court found that Ellis was not a "subscriber" of

Cartoon Network, and thus was not a "consumer" subject to the VPPA's protections. *Id* at 1255-56.[2]

The Court looked to the ordinary meaning of the term "subscriber," explaining that a subscription "involves some type of commitment, relationship, or association (financial or otherwise) between a person and an entity." *Id.* at 1256. Applying that standard to the facts of the Cartoon Network Case, the Court held that

> downloading an app for free and using it to view content at no cost is not enough to make a user of the app a "subscriber" under the VPPA, as there is no ongoing commitment or relationship between the user and the entity which owns and operates the app. Importantly, such a user is free to delete the app without consequences whenever he likes, and never access its content again.

Id. at 1257. The Court reasoned that "Congress could have employed broader terms in defining 'consumer' when it enacted the VPPA (e.g., 'user' or 'viewer') or when it later amended the Act (e.g., 'a visitor of a web site or mobile app'), but it did not." *Id.* at 1256-57. The Court affirmed dismissal of the Amended Complaint. *Id*. at 1258.[3]

D. The District Court Proceedings Post Cartoon Network

Following this Court's affirmance in the Cartoon Network Case, the District

---

[2] The VPPA only places limitations on disclosure of information about someone that is a "consumer" of a video tape service provider. Under the VPPA, "the term 'consumer' means any renter, purchaser, or subscriber of goods or services from a video tape service provider." 18 U.S.C. § 2710(a)(1).

[3] Because the Court concluded that Ellis was not a subscriber and therefore not a consumer, it expressed "no view on the district court's reading of the term 'personally identifiable information' in the VPPA." *Id.* at 1258, n.2.

Court in this case lifted its stay and invited the parties to submit supplemental briefing addressing the impact of this Court's decision. ECF # 61, Order. After the parties did so, Judge Ross granted CNN's Motion to Dismiss. ECF # 66, Order. Judge Ross found that Perry had standing under the then-current law, but that he was not a "subscriber" of CNN and that the MAC Address allegedly transmitted to Bango was not "personally identifiable information." *Id*. at 5-6.

Like Judge Thrash in the Cartoon Network Case, Judge Ross addressed Perry's Article III standing in two brief paragraphs. Quoting Judge Thrash's opinion, Judge Ross concluded 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 (emphasis in original). Judge Ross also rejected Perry's argument that he was a "renter" of CNN, electing to "follow[] the reasoning of courts in this and other districts holding that the term renter necessarily implies payment of money." *Id.* at 7. Judge Ross therefore concluded that Perry was not a "consumer" as contemplated by the VPPA. *Id.* at 8.

Judge Ross also analyzed whether the MAC address of Perry's iPhone and video history constitute "personally identifiable information" under the VPPA, concluding that "even if Plaintiff could establish he was a consumer, the Court would nonetheless find dismissal appropriate because the MAC address and associated video logs do not qualify as personally identifiable information." *Id*. Because Plaintiff did not plead "any facts to establish that the video history and MAC address were tied to an actual person and disclosed by Defendants . . . Plaintiff has not established that Defendants disclosed any personally identifiable information, [and] his claim must fail." *Id*. at 10.

Judge Ross rejected Perry's request that he be allowed to amend his complaint a second time. Judge Ross found that such "amendment would be futile" for several reasons. *Id*. at 7 n.5. First, she failed to see "how the addition of these facts would alter the Court's conclusion as to whether Plaintiff is a subscriber." *Id.* Second, she was "not persuaded that CNN's motivation in creating the app would alter the conclusion reached in [Cartoon Network]," and "the [Cartoon Network] court already addressed whether the downloading of a free app, without more, makes an individual a 'subscriber' under the statute." *Id*. Third, adding a claim "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*.

E. The Supreme Court's *Spokeo* Decision

One month after Judge Ross granted CNN's Motion to Dismiss, the Supreme Court decided *Spokeo*. Plaintiff Thomas Robins had alleged that Spokeo.com violated the Fair Credit Reporting Act ("FCRA"), including by disseminating inaccurate information about his financial and educational status and other personal details. The district court dismissed Robins' case for lack of standing. *Spokeo* at 1544. The Ninth Circuit reversed, holding that alleged violations of a statute were sufficient to confer standing, even without any actual injury. *Id.* at 1546. The Supreme Court vacated the Ninth Circuit's ruling, finding that a plaintiff does not "automatically [satisfy] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id. at* 1549. Rather, "Article III standing requires a concrete injury even in the context of a statutory violation," or at least a "material risk of harm." *Id*. at 1549-50. In doing so, the Supreme Court noted that a "bare procedural violation" is not enough to confer standing. *Id*.

ARGUMENT

Spokeo clarifies that a plaintiff cannot rely solely on a statutory violation as injury-in-fact sufficient to demonstrate standing under Article III. Article III's requirements extend throughout "all stages of federal judicial proceedings, trial and appellate." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990); *see also Beta*

Upsilon Chi Upsilon Chapter at the Univ. of Fla. v. Machen, 586 F.3d 916 (11th Cir. 2009) (explaining that "[t]he law is clear that if, pending an appeal, events transpire that make it impossible for this court to provide meaningful relief, the matter is no longer justiciable"). "The rule that federal courts may not decide cases that have become moot derives from Article III's case and controversy requirement." *Sierra Club v. U.S. E.P.A.*, 315 F.3d 1295, 1299 (11th Cir. 2002). A case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome. A case can become moot either due to a change in factual circumstances, or due to a change in the law." *BankWest, Inc. v. Baker*, 446 F.3d 1358, 1364 (11th Cir. 2006) (internal citations and quotations omitted).

Here, the District Court found Perry had standing based entirely on his assertion that CNN's alleged disclosures violated the VPPA. *Spokeo* rejected the notion that a statutory violation, without any concrete injury, is a sufficient injury-in-fact to confer standing. Without standing, this Court lacks jurisdiction, and this appeal should be dismissed. *See Beta Upsilon Chi*, 586 F.3d at 916 ("[D]ismissal is compulsory as federal subject matter jurisdiction vanishes at the instant the case is mooted.")

I. *Spokeo* Dictates that Perry Lacks Standing

Perry lacks standing because *Spokeo* is clear that "Article III standing requires a concrete injury, even in the context of a statutory violation," and that a plaintiff

does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo* at 1545. Here, Perry alleges no injury other than a violation of the VPPA, let alone a legally cognizable injury.

Article III requires an injury to be concrete and particularized. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). In *Spokeo*, the Supreme Court emphasized that concreteness and particularization are district requirements. *Spokeo* at 1545. To be "concrete," an injury "must be 'de facto'; that is, it must actually exist." *Id*. at 1548 (citation omitted). The Supreme Court explained in *Spokeo* that the adjective "concrete" is "meant to convey the usual meaning of the term—'real,' and not 'abstract.'" *Id.*

Applying these principles, the Supreme Court in *Spokeo* rejected the notion that the mere disclosure of inaccurate information was itself sufficient to confer Article III standing to bring a FCRA claim. Instead, the Supreme Court remanded the case to the Ninth Circuit to determine whether including alleged inaccurate information in plaintiff's credit report (which included misinformation about his education, family situation, and economic status) caused the plaintiff harm (or created a material risk of harm) sufficient to meet the concreteness requirement. *Spokeo* at 1550.

The District Court's basis for concluding that Perry had standing no longer holds after *Spokeo*. The District Court's analysis of standing was cursory. Like the district court in the Cartoon Network Case, the District Court here first pointed to *Federal Election Commission v. Akins*, 524 U.S. 11, 19 (1998) for the proposition that the use of the word "aggrieved" in the VPPA indicates that Congress meant to "cast the standing net broadly." ECF # 66, Order, at 4. The District Court then quoted Judge Thrash's conclusion in the Cartoon Network Case that "because the Plaintiff is alleging a violation of the VPPA, he alleges an injury." *Id.* at 5. This was the District Court's entire standing analysis. But this analysis predates *Spokeo*'s clarification that alleging a violation of a statute is ***not*** enough to allege injury-in-fact. Rather, courts must look beyond the alleged statutory violation and determine whether plaintiff suffered a "concrete" injury that "actually exist[s]." *Spokeo* at 1548.

The Amended 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 does the Amended Complaint identify any risk of harm that might occur because of CNN's alleged disclosures. It alleges only that "Plaintiff and the Class have had their statutorily defined right to privacy violated." Compl. ¶ 57. *Spokeo* is clear that Article III standing "requires a concrete injury even in the context of a statutory violation." *Spokeo* at 1549.

II. Following *Spokeo*, District Courts Have Held that They Lack Subject Matter Jurisdiction to Hear Claims Like Perry's

Following *Spokeo*, district courts have similarly held that alleging a mere statutory violation with no concrete injury does not confer Article III standing. In *Smith v. Ohio State University*, No. 2:15-CV-3030, 2016 WL 3182675 (S.D. Ohio June 8, 2016), plaintiffs alleged that defendant Ohio State University ("OSU") violated the FCRA by including extraneous information on a credit report disclosure and authorization. *Id.* at 1. Plaintiffs argued that the FCRA "created legal rights for the Plaintiffs which were violated by OSU's conduct, and thus, that the violation is an injury sufficient to provide standing." *Id.* at 6. Citing *Spokeo*, the court rejected this argument, concluding that where "Plaintiffs admitted that they did not suffer a concrete consequential damage as a result of OSU's alleged breach of the FCRA" the court "cannot find that Plaintiffs have suffered an injury-in-fact." *Id.* at 8. The court reached this conclusion notwithstanding plaintiffs' allegation that they suffered harm because "their privacy was invaded and they were misled as to their rights under the FCRA." *Id.*

These decisions are not just limited to the FCRA context. In *Gubala v. Time Warner Cable Inc.*, No. 15-CV-1078, 2016 WL 3390415 (E.D. Wis. June 17, 2016), the Eastern District of Wisconsin dismissed a claim brought under the Cable Communications Policy Act ("Cable Act") for lack of standing. In that case, plaintiff alleged defendant violated the Cable Act's requirement that cable operators destroy

personally identifiable information once no longer necessary for the purpose for which it was collected. *See id.* at *1; Cable Act, 47 U.S.C. §551(e). Citing heavily to *Spokeo*, the court dismissed the case for lack of standing. The court reasoned that there were "no allegations in the thirteen pages of the second amended complaint showing that the plaintiff has suffered a *concrete* injury as a result of the defendant's retaining his personally identifiable information." *Gubala*, 2016 WL 3390415 at *4 (emphasis in original). And that "[a] statement that consumers highly value the privacy of their personally identifiable information . . . does not demonstrate that the plaintiff has suffered a concrete injury." *Id.* The court noted that even if plaintiff had alleged that the defendant disclosed his information to a third party, "he does not allege that the disclosure caused him any harm. He does not allege that he has been contacted by marketers who obtained his information from the defendant, or that he has been the victim of fraud or identity theft." *Id*.

In *Khan v. Children's National Health Systems*, No. 15-2125, 2016 WL 2946165 (D. Md. May 19, 2016), plaintiff who was the victim of a data breach argued that the violations of certain state statutes established standing. *Id.* at *7. The court, citing *Spokeo*, rejected this argument on the ground that plaintiff "failed to connect the alleged statutory . . . violations to a concrete harm." *Id.* In doing so, the court noted that plaintiff conflated the question whether she had a cause of action under the statute "with the question whether she has Article III standing to pursue

that cause of action in federal court." *Id.* Similarly, in *Wall v. Michigan Rental*, No. 15-13254, 2016 WL 3418539 (E.D. Mich. June 22, 2016), the Eastern District of Michigan found that plaintiffs lacked standing to pursue a claim under a Michigan statute regulating landlords' use of security deposits in residential tenancies. *Id.* at *3. Citing *Spokeo*, the court reasoned that where plaintiffs "do not assert a risk that exposed them to 'real' financial harm," but instead "divine[d] harm from the possibility of a violation of the statute" it was "not the sort of 'concrete' injury for which Plaintiffs have standing to seek redress in federal court." *Id*.

Conversely, where district courts have found that a plaintiff has adequately alleged injury-in-fact sufficient to confer standing post-*Spokeo*, it has been because he or she had allegedly suffered some concrete harm from the statutory violation. *See, e.g.*, *Booth v. Appstack, Inc.*, No. 13-1533 JLR, 2016 WL 3030256, at *8 (W.D. Wash. May 24, 2016) (finding alleged time wasted in answering or otherwise addressing a "massive" number of robocalls to be sufficient injury to pursue claims under Telephone Consumer Protection Act ("TCPA") and similar state statutes); *In re Barclays Bank PLC Sec. Litig.*, No. 09 Civ. 1989, 2016 WL 3235290, at *6 (S.D.N.Y. June 9, 2016) (finding an alleged diminution in value of shares to be sufficient injury in fact); *Rogers v. Capital One Bank (USA), N.A.*, No. 1:15-cv-4016-TWT, 2016 WL 3162592, at *2 (N.D. Ga. June 7, 2016) (finding concrete injury under the TCPA where junk faxes made the line unavailable for legitimate

use); *Boelter v. Hearst Commc'ns, Inc.*, No. 15 Civ. 3934, 2016 WL 3369541, at *3 (S.D.N.Y. June 17, 2016) (finding standing where complaint claimed that defendants' conduct "deprived [p]laintiffs of their right to keep their information private, subjected them to unwanted solicitations and the risk of being victimized by 'scammers,' and unjustly retained the economic benefit the value of that information conferred."); *Mey v. Got Warranty, Inc.*, No. 5:15-CV-101 (N.D. W. Va. June. 30, 2016) (finding in the TCPA context that "unwanted calls cause direct, concrete, monetary injury by depleting limited minutes that the consumer has paid for…").[4]

[4] In *In re Nickelodeon Consumer Privacy Litigation*, No. 15-1441, 2016 WL 3513782 (3d Cir. June 27, 2016), the Third Circuit found that plaintiffs had standing to bring their VPPA claims notwithstanding *Spokeo*. *See id.* at *7-8. In that case, however, the parties 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). The court thus interpreted *Spokeo* differently than many other courts, including by disregarding *Spokeo*'s statement that a plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *See Spokeo* at 1549. For example, the *Nickelodeon* court cited *Spokeo*'s statement that intangible harms that give rise to standing include harms that "may be difficult to prove or measure." *In re Nickelodeon* at *7 (quoting *Spokeo* at 1549-50). But an "intangible harm" is different than "no harm," and the cases *Spokeo* cited as support for its statement did not hold that the violation of a statutory right, with no harm, was an injury-in-fact. In *Federal Election Commission v. Akins*, 524 U.S. at 24-5, the Supreme Court held that the denial of information necessary to cast an informed vote was a deprivation "directly related to voting, the most basic political rights," and therefore "sufficiently concrete and specific." Similarly, in *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 449 (1989), the Court found standing where interest groups "sought and were denied specific agency records" needed to scrutinize the "workings" of government that the law required the government to disclose. The *Nickelodeon* court also reasoned that "[i]nsofar as *Spokeo* directs us to consider whether an alleged injury-in-fact 'has

III. Congress's Decision to Enact the VPPA Does Not Do Away with Article III's Injury-in-Fact Requirement

That Congress enacted the VPPA does not alter the requirement that Perry 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." *Id*. 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. The alleged disclosures at issue here are similarly "procedural" in nature. The VPPA allows video tape service providers to disclose information to vendors assisting in debt collection activities, order fulfillment, request processing, and the transfer of ownership. *See* 18 U.S.C.

---

traditionally been regarded as providing a basis for a lawsuit,' previous Third Circuit precedent had "noted that Congress has long provided plaintiffs with the right to seek redress for unauthorized disclosures of information that, in Congress's judgment, ought to remain private." *In re Nickelodeon* at *7 (quoting *Spokeo* at 1549). But what *Spokeo* said was that because the case-in-controversy requirement was "grounded in historical practice," courts should consider whether an alleged harm has a close relationship to a harm that "has traditionally been regarded as providing a basis for a lawsuit ***in English or American courts***." *Spokeo* at 1549 (emphasis added). That is a different question than whether there are other statutes proscribing similar conduct. Although it found standing, the *Nickelodeon* court ultimately affirmed the District Court's dismissal of plaintiffs' VPPA claims, holding that the VPPA's prohibition on the disclosure of personally identifiable information "applies only to the kind of information that would readily permit an ordinary person to identify a specific individual's video watching behavior," and that disclosures "involving digital identifiers like IP addresses, fall outside the [VPPA's] protections." *In re Nickelodeon* at *1.

§§ 2710(b)(2)(e), (a)(2). It just did not specifically authorize disclosure to vendors who perform analytics (or those who host servers or store backup tapes for that matter). If anything, the harm Congress elevated with the VPPA was ***public*** disclosure of video viewing information (such as was the case with Judge Bork), not vendor disclosure—especially where such vendors are themselves prohibited from making further disclosures (either by the VPPA itself, or by contract). Thus, without any allegation that the disclosure to such a vendor created an identifiable harm to Perry, the Complaint fails to allege a "concrete" injury.

Even if the disclosures at issue here are considered "substantive" as opposed to "procedural," *Spokeo* does not limit the requirement of a concrete injury to only procedural violations. To the contrary, the Supreme Court stated in *Spokeo* that even where a violation of FCRA led to the disclosure of false information (a "substantive" violation), "not all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm." *Spokeo* at 1550. The Court reached this conclusion even though it recognized that through FCRA, Congress had identified and elevated an intangible harm—the risk of "the dissemination of false information." *Id*. In *Gubala*, the court likewise found no standing even though Congress, through the Cable Act, "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 information about each cable subscriber.'" 2016 WL 3390415 at *4.

The same goes here. Perry must suffer some concrete injury to bring suit, regardless of Congress's aims in enacting the VPPA. But Perry does not claim that CNN's disclosures caused him any injury distinct from the alleged violation of the VPPA's requirements. And while this is not surprising given the conduct Perry complains about—CNN's disclosure of a device identifier to a service provider used to count video views on the CNN App—it is not enough to satisfy the injury-in-fact requirement.

CONCLUSION

For the foregoing reasons, CNN respectfully requests that the Court dismiss Plaintiff's appeal.

Dated: July 5, 2016

Respectfully submitted,

Cable News Network, Inc. & CNN Interactive Group, Inc.

By: /s/ Jeffrey Landis
Marc Zwillinger
Jeffrey Landis
ZWILLGEN PLLC
1900 M St. NW, Ste. 250
Washington, DC 20036
(202) 706-5203
marc@zwillgen.com
jeff@zwillgen.com

and

James Lamberth
TROUTMAN SANDERS LLP
600 Peachtree Street NE, Suite 5200
Atlanta, GA 30308
(404) 885-3362
james.lamberth@troutmansanders.com

Attorneys for Defendants-Appellees Cable News Network, Inc. & CNN Interactive Group, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2016, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Jeffrey Landis
Attorney for Defendants/Appellees

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

RYAN PERRY, individually and on behalf of all others similarly situated,	*	
Plaintiff,	*	
v.	*	1:14-CV-02926-ELR
CABLE NEWS NETWORK, INC., a Delaware corporation, and CNN INTERACTIVE GROUP, INC., a Delaware corporation,	*	
Defendants.	*	

O R D E R

This matter is before the Court on Defendants' Motion to Dismiss Plaintiff's First Amended Class Action Complaint. (Doc. No. 49.) For the reasons set forth herein, the Court grants Defendants' motion.

I. BACKGROUND[1]

Defendant Cable News Network Inc. ("CNN"),[2] a Delaware corporation with its principal place of business in Atlanta, Georgia, is one of the largest

[1] As it must, the Court accepts as true all well-pled factual allegations contained in the First Amended Complaint.

[2] Defendant CNN Interactive Group, Inc. is CNN's subsidiary responsible for development and distribution of the CNN mobile app.

producers of television news programming worldwide. In addition to its television programming, it offers content via a mobile device application ("the CNN App"). With the CNN App, users can access breaking news and watch video clips of coverage. To gain access to the CNN App on an iPhone, one need only download the app from the Apple iTunes Store. Beginning in early 2013, Plaintiff began using the CNN App on his iPhone to read news stories and watch video clips. At no point did Plaintiff consent or otherwise permit CNN to disclose any of his personally identifiable information to any third parties.

Unbeknownst to users, however, the CNN App maintains a record of each time a user views a news story, video clip, or headline. After the user closes the CNN App, a complete record of the user's activities, as well as a media access control address ("MAC address"), is sent to non-party Bango, a data analytics company specializing in tracking individual user behaviors via the Internet and mobile applications.[3] Bango then uses identifiers, such as the MAC address, "to actually identify users and attribute their private viewing habits to their digital dossiers." (First. Am. Compl. ¶ 26, Doc. No. 25.)

Plaintiff brought this putative class action action on February 18, 2014, asserting just one cause of action: violation of the Video Privacy Protection Act ("VPPA"), 18 U.S.C. § 2710. He alleges that the MAC address and video viewing

[3] "A MAC address is a unique numeric string assigned to network hardware in the iPhone." (First Am. Compl. ¶ 14 n. 3, Doc. No. 25.)

records constitute personally identifiable information, as contemplated by the statute.

II. LEGAL STANDARD

When considering a 12(b)(6) motion to dismiss, the Court must accept as true the allegations set forth in the complaint drawing all reasonable inferences in the light most favorable to the plaintiff. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–56 (2007); U.S. v. Stricker, 524 F. App'x 500, 505 (11th Cir. 2013) (per curiam). Even so, a complaint offering mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" is insufficient. Ashcroft v. Iqbal, 556 U.S 662, 678, 129 S.Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Twombly, 550 U.S. at 555); accord Fin. Sec. Assurance, Inc. v. Stephens, Inc., 500 F.3d 1276, 1282–83 (11th Cir. 2007).

Further, the complaint must "contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" Id. (citing Twombly, 550 U.S. at 570). Put another way, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. This so-called "plausibility standard" is not akin to a probability requirement; rather, the plaintiff must allege sufficient facts such that it is reasonable to expect that discovery will lead to evidence supporting the claim. Id.

Even if it is extremely unlikely that a plaintiff will recover, a complaint may nevertheless survive a motion to dismiss for failure to state a claim, and a court reviewing such a motion should bear in mind that it is testing the sufficiency of the complaint and not the merits of the case. Twombly, 550 U.S. at 556; see Wein v. Am. Huts, Inc., 313 F. Supp. 2d 1356, 1359 (S.D. Fla. 2004).

III. ANALYSIS

A. Standing

Defendants assert that Plaintiff lacks standing to bring this cause of action. To successfully establish standing, "a plaintiff must show that (1) it suffered an actual injury that is concrete and particularized, not conjectural or hypothetical; (2) the injury was caused by the challenged conduct; and (3) there is a likelihood the injury could be redressed by a favorable decision." Blue Martini Kendall, LLC v. Miami Dade Cty. Fla., No. 14-13722, 2016 WL 1055826, at *4 (11th Cir. Mar. 17, 2016). Defendants suggest that Plaintiff is unable to show an actual injury.

The VPPA expressly provides that "[a]ny person *aggrieved* by any act of a person in violation of this section may bring a civil action in a United States district court." 18 U.S.C. § 2710(c)(1) (emphasis added). "History associates the word 'aggrieved' with a congressional intent to cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested." Fed. Election Cmm'n v. Akins, 524 U.S.

11, 19 (1998). "Here, therefore, because the Plaintiff is alleging a violation of the VPPA, he alleges an injury." Ellis v. Cartoon Network, Inc., No. 1:14-cv-484-TWT, 2014 WL 5023535, at *2 (N.D. Ga. Oct. 8, 2014). See also Sterk v. Redbox Automated Retail, LLC, 770 F.3d 618, 623 (7th Cir. 2014).

B. The VPPA Claim

The VPPA was enacted "to preserve personal privacy with respect to the rental, purchase, or delivery of video tapes or similar audio visual materials . . . ." 134 Cong. Rec. S5396–08, S. 2361 (May 10, 1988). Generally speaking, the VPPA prohibits video tape service providers from knowingly disclosing personally identifiable information concerning a consumer. 18 U.S.C. § 2710(b)(1). "Under the VPPA, the term consumer means any renter, purchaser, or subscriber of goods or services from a video tape service provider." Ellis v. Cartoon Network, Inc., 803 F.3d 1251, 1253 (11th Cir. 2015) (quoting 18 U.S.C. § 2710(a)(1) (internal quotation marks omitted)). "The term personally identifiable information includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider." Id.

a. Whether Plaintiff is a "Consumer"

Plaintiff alleges that he qualifies as either a subscriber or a renter, and therefore is a consumer as contemplated by the VPPA.

Addressing the definition of a subscriber under strikingly similar circumstances,[4] the Eleventh Circuit recently held that an individual who viewed video content on a free mobile app was not a consumer under the statute:

> 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. Mr. Ellis simply watched video clips on the CN app, which he downloaded onto his Android smartphone for free. In our view, downloading an app for free and using it to view content at no cost is not enough to make a user of the app a "subscriber" under the VPPA, as there is no ongoing commitment or relationship between the user and the entity which owns and operates the app. Importantly, such a user is free to delete the app without consequences whenever he likes, and never access its content again. The downloading of an app, we think, is the equivalent of adding a particular website to one's Internet browser as a favorite, allowing quicker access to the website's content. Under the circumstances, Mr. Ellis was not a "subscriber" of Cartoon Network or its CN app.

Ellis, 803 F.3d at 1257.

For 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

[4] Not only did the plaintiff in Ellis allege identical facts, with the exception of the type of smartphone used, but also the plaintiff in Ellis had many of the same counsel as Plaintiff today.

with Defendants, such that he could not simply delete the CNN App without consequences.[5]

Plaintiff additionally argues that he qualifies as a "renter" under the statute, arguing that the term "rent" merely implies the exchange of benefit between parties. The Court is not persuaded by Plaintiff's overly expansive definition of the term, and instead follows the reasoning of courts in this and other districts holding that the term renter "necessarily impl[ies] payment of money . . . ." In re Hulu Privacy Litig., No. C 11-03764 LB, 2012 WL 3282960, at *8 (N.D. Cal. Aug. 10, 2012); Locklear v. Dow Jones & Co., Inc., 101 F. Supp. 3d 1312, 1316 (N.D. Ga. 2015), abrogated on other grounds by Ellis, 803 F.3d 1251. The Court finds that the plain and ordinary meaning of the term "rent" supports this conclusion. MERRIAM-WEBSTERS'S COLLEGIATE DICTIONARY 1054 (11th ed. 2014) (defining

[5] Plaintiff, in response to the Eleventh Circuit's decision in Ellis, requests the opportunity to amend his complaint. Specifically, he states that he will plead facts sufficient to establish that he was a subscriber. First, he would plead that CNN's express purpose in creating the app was to create an ongoing relationship with its users. Second, he will allege facts showing the relationship he had with CNN was as close to, if not closer than, a user who completes a formal registration process. Finally, he will allege that he subscribes to CNN's television programming through his cable service provider, creating the requisite relationship.

While ordinarily leave to amend shall be freely given, such leave is not required where any amendment would be futile. Hall v. United Ins. Co. of Am., 367 F.3d 1255, 1263 (11th Cir. 2004). As will be discussed more *infra*, the Court finds that amendment would be futile where, as here, Plaintiff's complaint is due to be dismissed for an independent reason. Second, the Court fails to see how the addition of these facts would alter the Court's conclusion as to whether Plaintiff is a subscriber. For one, the Court is not persuaded that CNN's motivation in creating the app would alter the conclusion reached in Ellis. Indeed, it is extremely likely that Cartoon Network's motivation for its app was the same. In the same vein, the Ellis court already addressed whether the downloading of a free app, without more, makes an individual a "subscriber" under the statute. Finally, 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.

"rent" as "an agreed sum paid at fixed intervals by a tenant to the landlord"); BLACK'S LAW DICTIONARY 1489 (10th ed. 2014) (defining the verb "rent" as "to pay for the use of another's property"). Because the CNN app was free of charge, and Plaintiff has not indicated that he made any sort of payments to Defendants, he is not a "renter."

Based on the foregoing, the Court finds that Plaintiff does not qualify as a "consumer" as contemplated by the VPPA. Accordingly, Defendants' motion to dismiss is due to be granted.

b. Whether Plaintiff's MAC Address and Video History are "Personally Identifiable Information"

Even if Plaintiff could establish he was a consumer, the Court would nonetheless find dismissal appropriate because the MAC address and associated video logs do not qualify as personally identifiable information.

Personally identifiable information is defined as "information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider." 18 U.S.C. § 2710(a)(3). As one court put it, "[t]he VPPA requires identifying the viewers and their video choices." In re Hulu Privacy Litig., No. C 11-03764 LB, 2014 WL 1724344, at *12 (N.D. Cal. Apr. 28, 2014). Stated differently, "personally identifiable information is that which, in its own right, without more, links an actual person to actual video materials." Ellis, 2014 WL 5023535, at *3 (quoting In re Nickelodeon Consumer

Privacy Litig., MDL No. 2443 (SRC), 2014 WL 3012873, at *10 (D.N.J. July 2, 2014) (internal quotations and alterations omitted)), affirmed on other grounds by Ellis, 803 F.3d 1251.

A number of courts, addressing similar factual situations, have held that an anonymous string of numbers, such as the MAC address here, is insufficient to qualify as personally identifiable information. Eichenberger v. ESPN, Inc., No. C14-463 TSZ, 2015 WL 7252985, at * (W.D. Wash. May 7, 2015) ("In light of the VPPA's text and legislative history, 'personally identifiable information' under the VPPA means information that identifies a specific individual and is not merely an anonymous identifier. As the Court noted in its previous Minute Order, plaintiff's allegation that defendant disclosed his Roku device serial number and a record of what he watched does not sufficiently plead that defendant disclosed PII."); Ellis, 2014 WL 5023535, at *3 (disclosure of the plaintiff's Android ID, a randomly generated number unique to each user and device, does not qualify as personally identifiable information because the ID was not akin to a name and did not specifically identify any person);[6] In re Nickelodeon, 2014 WL 3012873, at *10 (disclosure of each plaintiff's "anonymous username, IP address, browser setting, unique device identifier, operating system, screen resolution, browser version, and

[6] While the Eleventh Circuit expressly declined addressing the merits of the district court's holding regarding personally identifiable information, the Ellis decision left the holding of the district court in tact.

detailed URL requests and video materials requested and obtained," even considered in the aggregate, do not identify a plaintiff and therefore do not qualify as personally identifiable information under the VPPA); In re Hulu, 2014 WL 1724344, at *12 (finding that disclosure of a unique identifier, without more, does not violate the VPPA).

The Court is persuaded by the reasoning of these courts, and reaches the same conclusion today.[7] Plaintiff has merely pled that Defendants disclosed his MAC address along with the viewing history tied to that address. He has not, however, pled any facts to establish that the video history and MAC address were tied to an actual person and disclosed by Defendants. Because Plaintiff has not established that Defendants disclosed any personally identifiable information, his claim must fail.

[7] Plaintiff also argues that Bango is able to automatically identify individuals based on CNN's disclosure. As the district court held in Ellis, however, emphasis falls "on disclosure, not comprehension by the receiving person." 2014 WL 5023535, at *3. Further, "[f]rom the information disclosed by [Defendants] alone, Bango could not identify the Plaintiff or any other members of the putative class." Id. In fact, the Hulu court recognized an important distinction: had Defendants disclosed the unique identifier along with some sort of correlating look-up table, a violation might be present. 2014 WL 1724344, at *11. Here, however, Plaintiff does not allege that Defendants provided both pieces to the puzzle. Rather, Plaintiff alleges that Bango could, with the information provided by Defendants, achieve such a result. Accordingly, Plaintiff fails to establish that Defendants, and not the third party, disclosed personally identifiable information. Eichenberger, 2015 WL 7252985, at *6; see also Locklear, 2015 WL 1730068, at *6.

IV. CONCLUSION

For the reasons stated herein, the Court **GRANTS** Defendants' Motion to Dismiss. (Doc. No. 49.) The Court also **GRANTS** Defendants' Motion for Leave to File Response to Plaintiff's Supplemental Brief (Doc. No. 64.) The Court **DIRECTS** the Clerk to **CLOSE** this case.

SO ORDERED, this 20th day of April, 2016.

Eleanor L. Ross
United States District Judge
Northern District of Georgia