No. 16-13031

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RYAN PERRY,
Plaintiff-Appellant,

v.

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, Atlanta Division,
Case No. 1:14-cv-02926-ELR
Hon. Eleanor L. Ross, *Judge*.

PLAINTIFF-APPELLANT'S REPLY BRIEF

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IN THE UNITED STATES COURT OF APPEALS
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No. 16-13031
D.C. Docket No. 1:14-CV-02926-ELR

RYAN PERRY,

Plaintiff-Appellant,

versus

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

Defendants-Appellees.

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

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, Plaintiff-Appellant certifies 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 the Plaintiff-Appellant)
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6. Cable News Network, Inc. (Defendant-Appellee)
7. Clinton E. Cameron (attorney for Defendant-Appellee)
8. CNN Interactive Group, Inc. (Defendant-Appellee) (wholly owned subsidiary of Cable News Network, Inc.)
9. Electronic Privacy Information Center (*amicus curiae*)
10. Historic TW Inc. (parent company of Turner Broadcasting System, Inc.)
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19. Benjamin H. Richman (attorney for Plaintiff-Appellant)

20. Hon. Eleanor L. Ross (presiding district court judge)
21. Marc Rotenberg (attorney for *amicus curiae*)
22. Jacob A. Sommer (attorney for Defendants-Appellees)
23. Aimee D. Thomson (attorney for *amicus curiae*)
24. Time Warner, Inc. (NYSE:TWX) (parent company of Historic TX Inc.)
25. Turner Broadcasting System, Inc. (parent company of Defendants-Appellees)
26. 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: October 3, 2016

Respectfully submitted,

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ARGUMENT IN REPLY

In *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251 (11th Cir. 2015), this Court held that a proper plaintiff under the Video Privacy Protection Act ("VPPA"), 18 U.S.C. § 2710, must have a relationship with the defendant that involves something "more" than simply downloading a mobile smartphone application. In the district court, Mr. Perry sought to offer that something more, seeking leave to allege facts showing a second aspect of his relationship with defendants Cable News Network, Inc. and CNN Interactive Group, Inc. (collectively "CNN") that distinguished his case from the allegations before this Court in *Ellis*. The district court rejected that effort, concluding that Mr. Perry's situation was not materially different from the plaintiff's in *Ellis* and that, in any case, his claim could not proceed because the information disclosed by CNN, the court thought, was not protected by the VPPA.

Before this Court CNN effectively concedes that the court erred in the first half of its analysis. Not only has Mr. Perry literally provided "more," but CNN acknowledges that Mr. Perry's new allegation—that he also receives CNN's cable channel through his cable package—establishes that Mr. Perry's relationship with CNN is different from the

relationship present in *Ellis*. Among other things, CNN acknowledges that Mr. Perry's proposed allegation shows that he has access to restricted content on CNN's proprietary mobile smartphone application (the "CNN App"). *Ellis* held that such access bears directly on the question whether an individual was a subscriber under the Act. 803 F.3d at 1257. CNN tries to downplay its effective concession by conjuring a slippery slope, but Mr. Perry's allegations cabin VPPA liability in a predictable way.

CNN also declines to offer a full-throated defense of the district court's conclusion that Mr. Perry does not allege that CNN disclosed "personally identifiable information." CNN notably does not endorse the court's statement that Mr. Perry has not alleged that CNN disclosed information "tied to an actual person." Of course, that is precisely what Mr. Perry alleges. Instead, CNN offers a welter of arguments that generally decline to grapple with the statutory language, often point in differing directions, and frequently do little more than quarrel with the finer points of Mr. Perry's argument. At bottom, CNN's only argument for affirming the judgment is that the VPPA bars the disclosure only of information that itself identifies a particular person. That argument,

which interprets the VPPA in a cramped way divorced from Congress's privacy-protecting aims, goes nowhere.

In significant part, CNN's arguments appear driven by its own normative judgment that its conduct is valuable. But in this litigation that judgment must yield to Congress's appraisal: CNN's disclosures are barred because Congress determined that the information they convey should, absent consent, remain private. If CNN wants to make these disclosures, it needs to do only one thing—get consent. The judgment below should be vacated and the case remanded.

I. Both appellate and subject-matter jurisdiction are secure.

CNN posits some jurisdictional problems with this suit, so we begin there. First, CNN again calls into question the Court's jurisdiction over the appeal (albeit unintentionally): In its jurisdictional statement, CNN asserts that Mr. Perry's notice of appeal was filed three days late. (See CNN Br. 1.) That is incorrect. CNN cites not to the filing of the notice of appeal, which was timely, but to an entry by the clerk of the district court providing notice that the notice of appeal was filed. (See Dkt. 70.) Jurisdiction over the appeal is secure.

CNN fares no better with respect to subject-matter jurisdiction. In asserting that *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), requires dismissal, CNN focuses on the Court'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." *Id.* at 1549. But this does not mean that violation of a statutory right will never result in a cognizable injury. Indeed, the Court recognized that in some cases "a plaintiff ... need not allege any additional harm beyond the one Congress has identified." *Id.*; *see Matera v. Google Inc.*, 2016 WL 5339806, *9 (N.D. Cal. Sept. 23, 2016) (Koh, J.) ("*Spokeo* clearly rejects [defendant's] position that a plaintiff may never rely solely on the purported statutory violations alone as the basis for Article III standing.") (emphasis and internal quotations omitted).

Determining whether a statutory violation alone is an Article III injury requires a focus on the interest protected and right created by statute. *See Hancock v. Urban Outfitters, Inc.*, __ F.3d __, 2016 WL 3996710, *3 (D.C. Cir. July 26, 2016) (recognizing that, to have standing, "the plaintiff must allege some 'concrete interest'") (quoting

Spokeo, 136 S. Ct. at 1548, 1549). This Court got it right in *Church v. Accretive Health, Inc.*, __ F. App'x __, 2016 WL 3611543, *3 (11th Cir. July 6, 2016): Congress may, by statute, "create[] a new right ... and a new injury" that will be cognizable in federal court.

That is precisely what Congress did through the VPPA. By enacting the statute, Congress created a new right—the confidentiality of an individual's video-viewing choices—and a new injury—the disclosure of that information. As in *Church*, allegations that a defendant has caused that injury permit a plaintiff, like Mr. Perry, to have his claim heard in federal court. *See In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 272-74 (3d Cir. 2016) (concluding that allegations that a defendant disclosed information in violation of the VPPA established a concrete, cognizable injury-in-fact); *see also Austin-Spearman v. AMC Network Entm't LLC*, 98 F. Supp. 3d 662, 666 (S.D.N.Y. 2015) ("Notably, every court to have addressed this question has reached the same conclusion, affirming that the VPPA establishes a privacy right sufficient to confer standing through its deprivation.").

CNN's rejoinders all miss the mark. First, CNN notes that Congressional action cannot *always* create injury-in-fact and argues

that, notwithstanding Congress's judgment, Mr. Perry's injury is nonconcrete. (CNN Br. 52-53.) Courts have recognized "that not every harm recognized by statute will be sufficiently 'concrete' for standing purposes." *Matera*, 2016 WL 5339806, *9; *see also Braitberg v. Charter Commcn's, Inc.*, __ F.3d __, 2016 WL 4698283 (8th Cir. Sept. 8, 2016). But apart from Congress's judgment, *Spokeo* also noted that "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as the basis for a lawsuit in English or American courts." *Spokeo*, 136 S. Ct. at 1549 As Mr. Perry noted in his opening brief, there is a long tradition of common-law courts' adjudicating similar claims for wrongful disclosure of protected information. (Op. Br. 17-18; *see also* Opp. to Mot. to Dismiss (filed 7/15/16), at 10-11.) In the wake of *Spokeo*, courts likewise have recognized that injuries like Mr. Perry's have a common-law lineage that establishes that they are concrete. The court in *Yershov v. Gannett Satellite Info. Network*, __ F. Supp. 3d __, 2016 WL 4607868 (D. Mass. Sept. 2, 2016), in rejecting similar arguments to those raised by CNN, observed that "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his

or her person." *Id.* at *8 (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 763 (1989)). Remarking that "it is well-settled that Congress may create a statutory right to privacy in certain information that strengthens or replaces the common law," *id.* (quoting *Thomas v. FTS USA, LLC*, __ F. Supp. 3d __, 2016 WL 3653878, *10 (E.D. Va. June 30, 2016)), the court held that injury resulting from an alleged violation of the VPPA was concrete because of this history. And the Eighth Circuit, even while it rejected the notion that unlawful *retention* of private information constituted a legally cognizable harm, explicitly distinguished claims of unlawful retention from claims of unlawful disclosure (like Mr. Perry's), and noted that "there is a common law tradition of lawsuits for invasion of privacy" that encompasses claims that private information was unlawfully disclosed. *See Braitberg*, 2016 WL 4698283, *4; *see also Potocnik v. Carlson*, 2016 WL 3919950, *2 (D. Minn. July 15, 2016) ("Here, the type of harm at issue—the viewing of private information without lawful authority—has a close relationship to invasion of the right to privacy, a harm that has long provided a basis for tort actions in the English and American courts." (citing Restatement (Second) of Torts § 652A cmt. a)).

Second, CNN suggests that the VPPA does not even reflect any Congressional judgment that disclosures of video-viewing history are harmful because the law permits such disclosures in certain, narrow instances. (CNN Br. 52-54.) This argument suffers from two fatal flaws. First, it leaves Congress with an all-or-nothing choice when legislating. Yet it is well-settled that Congressional "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955). Second, this argument is inconsistent with *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374-75 (1982). In *Havens*, the Court noted that, under the Fair Housing Act, the cognizable injury-in-fact that established standing was the receipt of incorrect information about the availability of housing, but that recovery could be had only for *discriminatory* misrepresentations. *Id.* In other words, recovery was not available in all instances in which an individual suffered a cognizable injury-in-fact. CNN's theory cannot account for *Havens*' holding.

Finally, CNN argues that if Mr. Perry has standing here, then the Supreme Court would not have concluded that Thomas Robins lacked

standing in *Spokeo*. (CNN Br. 50-51.) Yet the Court did not reach that result at all, instead remanding to the Ninth Circuit to conduct the appropriate analysis in the first instance. *See* 136 S. Ct. at 1550 & n.8. The Court simply did not address whether Robins did or did not have standing to sue Spokeo, Inc. In that regard, nothing can be gleaned from the Court's decision to remand the case. *See id.* at 1555 (Ginsburg, J., dissenting) ("I part ways with the Court, however, on the necessity of a remand to determine whether Robins' particularized injury was 'concrete.' Judged by what we have said about 'concreteness,' Robins' allegations carry him across the threshold.").

II. Mr. Perry is a subscriber under the VPPA.

Turning to the merits, CNN's argument that Mr. Perry is not a "subscriber" entitled to invoke the protections of the VPPA attempts to distract the Court by misconstruing Mr. Perry's argument and drawing a series of irrelevant distinctions. But when stripped of extraneous material, CNN demonstrates exactly why Mr. Perry is a subscriber.

CNN derides Mr. Perry's argument that his proposed amended allegations are "materially different" than those in *Ellis* (CNN Br. 17), yet also concedes that Mr. Perry's proposed new allegation "involves a

relationship that is distinct from the ephemeral one that results from a user's downloading of the free CNN App." (CNN Br. 24.) And CNN's assertion that "Plaintiff's additional allegation does not supply any of the missing factors" that this Court in *Ellis* held could establish a subscriber relationship (CNN Br. 25-26) simply is not true.

For instance, *Ellis* reasoned that "access to exclusive or restricted content" is evidence of the kind of durable relationship that renders one a subscriber under the VPPA. 803 F.3d at 1257. In its brief CNN concedes that someone like Mr. Perry, who subscribes to CNN through his cable provider, can access content on the CNN App that is off-limits to others. (CNN Br. 24-25.) *Ellis* further instructs that "payment" permits an inference of a subscriber relationship. 803 F.3d at 1257. CNN does not dispute that sixty-one cents from Mr. Perry's pocket goes to CNN every month. (CNN Br. 21.)

Instead, CNN argues that it is Mr. Perry's relationship with his cable provider—not his relationship with CNN—that allows him to access restricted content on the CNN App (CNN Br. 24), but again, that is not true. As CNN itself explains "[w]hen you sign in through your TV service provider, *you confirm your CNN TV subscription*." (Op. Br. 25)

(quoting CNN, *Watch Live TV-CNNGo*, http://cnn.it/1Oeb1so (accessed June 29, 2016)) (emphasis added). It is "your CNN TV subscription" that allows for access to restricted content on the CNN App, not your relationship with your TV service provider. If Mr. Perry's cable television package did not include a CNN subscription, logging in through his TV service provider would not provide access to the CNN App's restricted content. By the same token, a portion of Mr. Perry's cable bill is earmarked for CNN only because it is included in the cable package; no money from Mr. Perry's pocket would make its way to CNN if the channel were not part of his cable package. So CNN's observation that cable providers can remove channels from their bundles (CNN Br. 19) is irrelevant, and its related assertion that a provider's ability to remove a channel means, as a categorical matter, that consumers never subscribe to cable channels is without merit.

Apart from its factual flaws, CNN's argument is analytically flawed, as well: CNN analyzes Mr. Perry's proposed allegation in isolation. But the inquiry is not whether Mr. Perry's proposed allegation by itself renders his claim plausible. The inquiry is whether Mr. Perry's allegations and proposed allegations *taken as a whole* state a plausible

claim for relief. *See Adinolfe v. United Techs. Corp.*, 768 F.3d 1161, 1173 (11th Cir. 2014) (concluding that plaintiff's allegations "taken together" stated a claim for relief); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007) (even under a heightened pleading standard "the inquiry ... is whether all of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard").

Taken as a whole, Mr. Perry's allegations plausibly establish that he has the kind of durable relationship with CNN necessary to render him a subscriber under the VPPA. (See Op. Br. 19-26.) As Mr. Perry has explained, his decision to consume CNN content on multiple platforms says something significant about his decision to download the CNN App. Mr. Perry's new allegation permits the reasonable inference that he has the kind of durable relationship *Ellis* held was required to constitute a subscription under the VPPA. *See* 803 F.3d at 1256-57.

CNN does not dispute this line of argument. Indeed, as mentioned, CNN acknowledges that consumers like Mr. Perry—who receive CNN's cable television channel and have also downloaded the CNN App—stand on a different footing than individuals who simply

download the App. (CNN Br. 24-26.) Neither does CNN dispute that Mr. Perry spends an identifiable portion of his cable bill for the privilege of watching CNN cable television or that, in common parlance, Mr. Perry "subscribes" to CNN.

Instead, CNN seeks to cast aspersions on Mr. Perry's proposed allegation in isolation and draw inferences from Mr. Perry's allegations in its own favor. CNN, for instance, notes that "watching CNN television does not make Plaintiff a 'subscriber.'" (CNN Br. 22.) True, but beside the point: Mr. Perry's claim to being a subscriber does not rest exclusively on watching CNN's television channel. CNN also notes that "live television is outside the scope of the VPPA," and cites the legislative history noting that not all of the products or services offered by a videotape servicer provider are subject to the provisions of the VPPA. (CNN Br. 22-23.) Again, irrelevant: Mr. Perry does not seek to hold CNN liable for disclosing what he watches on television, but what he watches on the App.[1]

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[1] CNN's recognition that VTSPs may offer products or services beyond the provision of "similar audiovisual materials," 18 U.S.C. § 2710(a)(1), effectively undercuts its insistence that the VPPA requires Mr. Perry to be a subscriber of the CNN App only. (CNN Br. 23 n.6.) CNN acknowledges that *Ellis* reasoned that a "subscriber" must have a

CNN also bizarrely suggests that Mr. Perry's proposed allegation may be disregarded because it is a "bare legal conclusion" lacking factual support. (CNN Br. 21.) CNN does not explain, nor is it apparent, how this factual allegation could be a legal conclusion at all. Rather it is, as Mr. Perry explained in his opening brief, a factual allegation that gives rise to the plausible inference that Mr. Perry has the kind of durable relationship with CNN necessary to render him a "subscriber" within the meaning of the VPPA. And, in any case, CNN's demand for even more facts is out of step with the dictates of Rule 8. *See, e.g.*, *Greene v. Mizuho Bank Ltd.*, __ F. Supp. 3d __, 2016 WL 4493451, *5 (N.D. Ill. Aug. 26, 2016) (Feinerman, J.) ("Mizuho protests that this is a conclusory assertion, and it enumerates several possibly relevant facts that are absent from the complaint. But to survive a Rule 12(b)(6) motion, Plaintiffs need not plead every conceivable fact to support a claim.").

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subscription relationship "with the entity that owns and operates the app." 803 F.3d at 1257. But rather than make any argument that Mr. Perry has misread the statute or this Court's prior decision, CNN asserts that this Court's decision to deny rehearing en banc forecloses Mr. Perry's argument that he subscribes to CNN. Not so. "A summary denial of rehearing en banc is insufficient to confer an implication or inference regarding the court's opinion relative to the merits of a case." *Luckey v. Miller*, 929 F.2d 618, 622 (11th Cir. 1991).

Finally, CNN asserts that deeming Mr. Perry's claim plausible "would lead to absurd results." (CNN Br. 23.) But the "absurd results" CNN has in mind do not flow at all from Mr. Perry's theory. CNN suggests that any company with a TV network might be exposed to liability "any time an Internet user watching videos also happens to have that company's TV network in her TV bundle." (CNN Br. 24.) First, no exposure to liability occurs when that or any company declines to disclose personally identifiable information about its consumers or when it seeks consent to do so up front. But in any case Mr. Perry's theory explicitly would *not* conclude that CNN's imaginary plaintiff is a consumer under the Act. Only individuals who download the CNN App in addition to receiving the CNN channel are subscribers under his theory. As Mr. Perry explained in his opening brief, the decision to download an app is materially different than the decision to use a company's website. (Op. Br. 24-25.) This is especially true when the app supplements content accessible on television. (Op. Br. 24-25.) In fact, under Mr. Perry's argument, only CNN App users who also get the CNN cable channel are subscribers under the VPPA. CNN's slippery slope simply does not exist.

III. CNN disclosed personally identifiable information.

Perhaps recognizing that Mr. Perry has persuasively distinguished *Ellis*, CNN devotes the lion's share of its briefing to arguing that it did not disclose "personally identifiable information" to Bango. (CNN Br. 26-48.) The dispute here essentially turns on an omission from the statutory definition of "personally identifiable information." The term is defined as "including information that identifies a person as having requested or obtained specific video materials or services," 18 U.S.C. § 2710(a)(3), and that definition invites a crucial question: Identifies to whom?

The two appellate courts to address the question have provided disparate answers. The First Circuit concluded that the information must identify the person to the entity receiving the information. *Yershov v. Gannett Satellite Info. Network, Inc.*, 820 F.3d 482, 486 (1st Cir. 2016). The Third Circuit, by contrast, has concluded that the disclosed information must identify its subject to the "average person." *In re Nickelodeon*, 827 F.3d at 283. CNN offers a third answer: the information itself must do the identifying. (CNN Br. 32.)

CNN's approach (which mirrors the approach taken by the district court) is nonsense. How can information itself do the identifying? The short answer is that it can't. One person might understand a particular piece of information to intelligibly point to a particular person, but another person might find that same information incomprehensible. All information can do is aid in identifying individuals. *Cf. Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 943-44 (7th Cir. 2015) (concluding that information that "aids in identifying" individuals fell within category of "information that identifies an individual" under 18 U.S.C. § 2725). What's more, the statute's definition is nonexhaustive, yet CNN urges the Court, without justification, to read the law in an exceedingly narrow way. CNN's defense of the district court should be rejected.

As Mr. Perry explained in opening, the approach taken by the *Yershov* court better effectuates the VPPA's text and purpose. (Op. Br. 30-41.) The term "personally identifiable information" is a term of art that encompasses the kinds of information disclosed here by CNN. The statutory definition itself is prefaced by the word "includes," indicating that Congress intended for the term "personally identifiable

information" to be interpreted in an expansive way. Finally, the approach of the *Yershov* court, which focuses on the subjective understanding of the information's recipient, better advances Congress's aim of placing "control over personal information divulged and generated in exchange for receiving services from video tape service providers" in the hand of consumers. *Mollett v. Netflix, Inc.*, 795 F.3d 1062, 1065 (9th Cir. 2015). If a particular recipient can interpret a particular disclosure to identify an individual and the videos they watched, that is just as much an invasion of privacy as the disclosure of a name or address. *Accord Speaker v. U.S. Dep't of Health & Human Servs.*, 623 F.3d 1371, 1384 & n.12 (11th Cir. 2010); *Nw. Memorial Hosp. v. Ashcroft*, 362 F.3d 923, 929 (7th Cir. 2004). This result also accords with the defamation and privacy torts, which form the common-law background for privacy-protecting statutes like the VPPA.

On this understanding Mr. Perry has plausibly alleged that CNN disclosed "personally identifiable information." As Mr. Perry explained in opening, CNN discloses to Bango information that allows Bango to identify Mr. Perry and the videos he watches on the CNN App. (Op. Br. 7-9, 36-37, 41.) *Amicus* Electronic Privacy Information Center also

explains in detail why and how MAC addresses can identify particular individuals. CNN fails utterly to address the factual aspects of *amicus*'s reasoning regarding the operation and use of MAC addresses, essentially conceding that *amicus* has it right. And with respect to Mr. Perry's allegations, CNN writes that Mr. Perry "raises the specter of identification." (CNN Br. 14.) But at this stage, assuming the truth of Mr. Perry's allegations and giving him the benefit of reasonable inferences therefrom, the Court can reasonably infer that Bango identifies Mr. Perry from CNN's disclosures, without the aid of supernatural phenomena.

CNN advances a hodgepodge of objections to this reasoning. These arguments can be divided into protests regarding the content of Mr. Perry's allegations, and disagreements about statutory interpretation. None of CNN's arguments are persuasive at this stage.

a. *CNN's arguments about Mr. Perry's allegations are meritless.*

We'll begin with CNN's arguments centering around the allegations in Mr. Perry's complaint. First, CNN objects in conclusory fashion to Mr. Perry's characterization of *Yershov*. CNN suggests that *Yershov* was all about the transmission of location information. (CNN

Br. 32.) Because Mr. Perry does not allege that CNN disclosed his location when he watched a video on the App, CNN continues, Mr. Perry's claim must fail.

The Court should reject CNN's self-serving reading of *Yershov*. The nub of that court's reasoning was that, under the allegations of the plaintiff, the disclosure's recipient already possessed information "allowing it to link the GPS address and device identifier to a certain person by name, address, phone number, and more." 820 F.3d at 486. That reasoning isn't dependent on location information at all. And Mr. Perry proceeds on the same theory as the plaintiff in *Yershov*: when CNN discloses his MAC address to Bango, it knows that Bango possesses information "allowing it to link the ... device identifier to [him] by name, address, phone number, and more." *Id.* Despite CNN's strenuous insistence, Mr. Perry plainly states a claim under *Yershov*.

CNN next takes issue with the premise of Mr. Perry's allegations—that Bango can identify him from CNN's disclosures. In this regard, CNN's argument is given over to quarreling with Mr. Perry's interpretation of Bango's marketing materials—which CNN repeatedly refers to as "generic" marketing articles. (CNN Br. 6, 14, 24

n.7, 39.) In essence, CNN argues that these articles do not show that Bango can identify Mr. Perry at all. Mr. Perry has no issue with the Court considering these articles at this stage. *See SFM Holdings, Ltd. v. Banc of Am. Securities, LLC*, 600 F.3d 1334, 1337 (11th Cir. 2010). "That consideration, though, provides no license to engage at this stage of litigation in rejecting plausible readings of those [articles.]" *Kaufman v. CVS Caremark Corp.*, __ F.3d __, 2016 WL 4608131, *4 (1st Cir. Sept. 6, 2016). Instead, these articles may be considered for a "limited purpose"—determining whether they, on their face (that is, without fact finding), render Mr. Perry's claim substantively implausible. *Id.*

In light of that "limited purpose," CNN's argument is meritless. In these articles, as Mr. Perry observes, Bango explains that it can identify users across devices, and correlate those users with profiles containing their demographic data, location, and email address, among other information. (Dkt. 25, ¶¶ 23-26.) CNN may interpret these articles differently, but it is hardly implausible to allege that Bango does exactly what it claims to do.[2]

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[2] CNN essentially gives the game away on this point by asserting that Mr. Perry's reading of Bango's marketing materials is "not even the most plausible interpretation" of those materials. (CNN Br. 14.)

CNN next emphasizes that a MAC address is associated with a phone (a "physical device"), not a person. (CNN Br. 34.) This argument fails as a legal, historical, and practical matter. As a legal matter, CNN's argument draws a distinction not found in the statute's text: *any* information that connects an individual to the audio-visual material they have consumed is protected. 18 U.S.C. § 2710(a)(3). Here, Mr. Perry alleges that CNN discloses his phone's MAC address to an entity that is capable of identifying him personally using that information. (Dkt. 25, ¶¶ 14-26.) Moreover, as the statute's text makes plain, an address is "personally identifiable information." *See Yershov v. Gannett Satellite Info. Network, Inc.*, 104 F. Supp. 3d 135, 141 (D. Mass. 2015), *rev'd on other grounds* 820 F.3d 482 (1st Cir. 2016). An address, of course, refers to a house, which is just as much an object as a phone. Moreover, an address is, in many instances, shared among family members, just as a phone might be.

CNN's argument comes dangerously close to invoking the pleading standard applicable to allegations of scienter in cases governed by the Private Securities Litigation Reform Act. *See Tellabs*, 551 U.S. at 324. That pleading standard, of course, doesn't even apply to allegations of fraud under Rule 9, much less allegations, like Mr. Perry's, analyzed through the lens of Rule 8.

As a historical matter, CNN's argument ignores Judge Bork's experience. The video-rental records whose disclosure precipitated the Act's passage were not Judge Bork's personally, but those of his family. *See* Neil Richards, *Intellectual Privacy* 132 (Oxford Univ. Press 2015). Finally, as a practical matter, CNN's argument draws a distinction that is immaterial in this day and age. *See Riley v. California*, 134 S. Ct. 2473, 2484 (2014) (observing that "modern cell phones ... are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude that they were an important feature of human anatomy").

CNN lastly argues that liability in these circumstances must be premised on Bango actually identifying Mr. Perry from CNN's disclosures, and CNN contends that any allegations to that effect are absent from the complaint. (CNN Br. 38-40.) CNN's reading of the complaint must be rejected. Mr. Perry alleges that *every time* CNN disclosed a MAC address to Bango it used that information "to actually identify" the corresponding consumer of CNN's audiovisual programming. (Dkt. 25, ¶ 26.) And CNN's argument fails even on its own terms. The statute prohibits the unconsented-to *disclosure* of

"personally identifiable information." 18 U.S.C. § 2710(b)(1). Liability is premised on disclosure. Mr. Perry's theory is that the information disclosed by CNN is "personally identifiable" because Bango can use that information to identify him. Bango has, in the words of the First Circuit, a "game program" which allows it, if it so chooses, to identify Mr. Perry. *Yershov*, 820 F.3d at 486. Whether Bango opens that game program is irrelevant to whether CNN has violated the statute by disclosing protected information.

b. *CNN's interpretation of the VPPA lacks merit.*

CNN focuses its remaining fire on various arguments about how to interpret the VPPA. CNN's first target is, unsurprisingly, *Yershov*. CNN urges this Court to reject *Yershov* on the ground that it is "unworkable" (CNN Br. 32), but CNN identifies nothing "unworkable" about *Yershov*'s analysis at all. Indeed, CNN's biggest problem with *Yershov* appears to be that the court's analysis is too short. (CNN Br. 27, 33.) *But cf.* Blaise Pascal, *Provincial Letters: Letter XVI* (1657) ("I would have written a shorter letter, but I did not have the time."). And regardless of its length *Yershov*'s analysis accords with common sense—

when information is directly linkable to a particular person, it is "personally identifiable."

CNN also takes issue with Mr. Perry's invocation of the statute's knowledge requirement to mitigate any "slippery slope" concerns that CNN might have regarding *Yershov*. CNN's argument in this regard is self-refuting. It suggests that the knowledge requirement simply amplifies the need to focus on the "nature of the specific information being disclosed." (CNN Br. 36 (double emphasis omitted).) Correct: The specific information disclosed by CNN is of a type that allows Bango to identify Mr. Perry and the videos he watched on the CNN App. That's the whole point. *See Yershov*, 820 F.3d at 486. The relevance of CNN's related point—that *Yershov* did not rely on this element of the VPPA claim—is unclear: The *Yershov* court was not asked to opine on the scope of VPPA liability. It was asked to opine on the meaning of "personally identifiable information."

CNN next advocates for *Nickelodeon*'s contrary result (though notably not its reasoning) on the ground that the Third Circuit's conclusion aligns the law with the public events that led to the law's passage. (CNN Br. 37.) The problem for CNN, though, is that Congress

did not write a law that prohibited only what happened to Judge Bork. The VPPA is not limited to a prohibition on video store clerks handing out handwritten lists of the movies rented by particular customers and their families. Instead, the Act prohibits anyone who rents, sells, or delivers "prerecorded video cassette tapes or similar audio visual materials" from disclosing "personally identifiable information" about their consumers. 18 U.S.C. § 2710(b)(1). Whatever the law's motivation, the bare text of the law covers far more scenarios than the disclosure of the video-rental records of Judge Bork's family to Washington, D.C., reporters. This is not surprising: "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). "Favoring the legislative spirit or purpose over the plain terms of a statute does not supply a superior means of capturing the result the legislature meant to adopt." John Manning, *Federalism and the Generality Problem*, 122 Harv L. Rev. 2003, 2014 (2009).

CNN also is at pains to defend the *Nickelodeon* court's decision to read meaning into Congress's decision to reject certain amendments to the VPPA in 2013. But CNN's argument that Mr. Perry is "trying to have it both ways" with respect to the 2013 amendment to the law completely misunderstands statutory interpretation. (CNN Br. 30 n.12.) Mr. Perry noted that Congress reenacted the VPPA in 2013 without substantive change and asserted that this suggests that the term "personally identifiable information" therefore covers at least as much information as it did in 1988. (Op. Br. 5 (quoting *Yershov*, 820 F.3d at 488).) This is uncontroversial. *Cf. In re Bayou Shores SNF, LLC*, 828 F.3d 1297, 1314-15 (11th Cir. 2016) (noting the presumption against change by recodification). It is quite another thing to say, as the *Nickeldeon* court did, that Congress's decision to reject a proposed amendment means that the substance of the amendment is not encompassed by the law. The Supreme Court has explicitly condemned that line of reasoning. *See United States v. Craft*, 535 U.S. 274, 287 (2002); *see also Carlson v. United States*, __ F.3d __, 2016 WL 4926180, *10 (7th Cir. Sept. 15, 2016) (calling "the history of unsuccessful efforts to change the rules ... notoriously unreliable evidence, even for those

who are sympathetic to legislative history”). At bottom, CNN’s argument does little more than assume the truth of its own conclusions.

In a similar manner CNN objects to Mr. Perry’s observation that “personally identifiable information” is a “term of art” that must be read in light of its technical understanding. (CNN Br. 31 n.13.) CNN directs the Court’s attention to the statement in *Nickelodeon* that “personally identifiable information” is a “term of art properly understood in its legislative and historical context.” 827 F.3d at 292 n.186. But *Nickelodeon*’s statement is simply a paraphrase of the established rule that “[w]hen Congress employs a term of art, it presumptively adopts the meaning and ‘cluster of ideas’ that the term has accumulated over time.” *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1246 (11th Cir. 2008); *see FAA v. Cooper*, 132 S. Ct. 1441, 1449 (2012). And, of course, that canon exists alongside the fixed-meaning canon, which as Mr. Perry explained in opening, encompasses the development or science and technology. (Op. Br. 34.) And, in any case, “where Congress has used technical words or terms of art, it is proper to explain them by reference to the art or science to which they are appropriate.” *Corning Glass Works v. Brennan*, 417 U.S. 188, 201 (1974). “Reliance on expert

definitions of terms of art"—as urged by Mr. Perry—"is a sound 'general rule of construction.'" *Shell Petroleum, Inc. v. United States*, 182 F.3d 212, 220 (3d Cir. 1999) (quoting *Massachusetts v. Blackstone Valley Elec. Co.,* 67 F.3d 981, 986 (1st Cir.1995)).

CNN last objects to Mr. Perry's invocation of the common law. CNN suggests, for instance, that the Court may disregard the teachings of the common law because no other court has seen fit to apply them in the context of the VPPA. CNN's argument appears premised on the idea that traditional rules of statutory interpretation don't apply to the VPPA. In truth, this is an appropriate opportunity to take a cue from the background of the common law. Two appellate courts, one guided by the statutory language and one guided by its interpretation of the legislative history, have come to disparate conclusions regarding the scope of the VPPA. In these circumstances, input from the law's common-law background is especially meaningful. In fact, it was in similar circumstances that the Supreme Court turned to the same background to interpret the Privacy Act. *See Cooper*, 132 S. Ct. at 1450.

In the same vein CNN asserts that the common law has "nothing to do with the VPPA." (CNN Br. 46.) Yet the Supreme Court has

instructed that defamation and privacy torts may inform the meaning of a very similar statute. *See Cooper*, 132 S. Ct. at 1450. Other than its own bald assertion, CNN offers no reason to believe that the Court's reasoning in *Cooper* provides no guide here.

CNN last suggests that the common law provides no meaningful guidance because, according to CNN, "making a defamatory statement about someone ***presupposes*** knowledge of the subject's identity by the speaker." (CNN Br. 47 n.23 (double emphasis in original).) That's simply not true. For instance, at common law a newspaper's proprietor could be liable for libel printed in his paper even if he had no knowledge of the subject or even that the libel was printed. *See Andres v. Wells*, 7 Johns. 260, 263 (N.Y. 1810). And credit reporting agencies could be liable for derogatory statements made regarding an individual's credit, regardless whether the individual who passed the derogatory information along knew who was the subject of the derogatory report. *See, e.g.*, *Vinson v. Ford Motor Credit Co.*, 259 So. 2d 768, 770-71 (Fla. Ct. App. 1972) (ordering entry of judgment in favor of plaintiff on defamation claim related to sale of car, and expressing concern with "the impersonal and unconcerned attitude displayed by business

machines as to the impact of their actions upon an individual consumer"). In fact, in the law of defamation, the only actor who must have knowledge of the defamed's identity is the listener. *See Gnapinsky v. Goldyn*, 128 A.2d 697, 702 (N.J. 1957).

Moreover, the true basis for liability in a defamation action is simply knowledge that the particular statement is defamatory. This is made plain by the fact that entities that transmit libelous statements can be liable to the libeled individual solely on the basis that they know or have reason to know that the transmitted statement is libelous. Restatement of Torts § 581 cmt. e; *see Lesesne v. Willingham*, 83 F. Supp. 918, 922-24 (E.D.S.C. 1949); *Paton v. Great Nw. Tel. Co. of Canada*, 170 N.W. 511, 511-12 (Minn. 1919). In the same way, Mr. Perry alleges that CNN is liable under the VPPA because it transmitted information that it knows or has reason to know would identify him and the videos he watched to Bango.

CONCLUSION

The judgment of the district court should be vacated and the case remanded for further proceedings.

Dated: October 3, 2016

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6357 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: October 3, 2016 s/ J. Aaron Lawson

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I hereby certify that on October 3, 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 the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ J. Aaron Lawson
One of Plaintiff-Appellant's Attorneys