

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities Proprietary Network Information)	GN Docket No. 00-185
)	
Internet Over Cable Declaratory Ruling)	
)	
Appropriate Regulatory Treatment for Broadband Access to Internet Over Cable Facilities)	CS Docket No. 02-52
)	

To: The Commission

**COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER
June 18, 2002**

Pursuant to the notice published by the Federal Communications Commission on March 15, 2002 regarding Internet Over Cable Declaratory Ruling and other issues, the Electronic Privacy Information Center (EPIC) submits the following comments.

EPIC is a public interest research center in Washington, D.C. It was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values. EPIC both advocates for the right of privacy and pursues access to government records under the Freedom of Information Act. EPIC appreciates this opportunity to comment on privacy issues raised by cable operator collection, use, and dissemination of customer information, as it is an issue of increasing public importance.

The Electronic Privacy Information Center believes the Commission reached the correct result in its Declaratory Ruling that cable modem service is included in the category of "other services" as defined by section 631 of the Cable Communications Policy Act. This determination makes cable modem service operators subject to the privacy mandates of the Act, which meets the Commission's responsibility to protect the privacy interests of those using the Nation's cable services and uphold the Congressional intent of Section 631 which was to protect consumer privacy in the interactive network environment.

**I. Protection of Cable Modem Subscribers from the Invasive Capacity of
Modern Technology Mandates Application of the CCPA to Such Services**

A. The Legal Framework Developed by the CCPA Requires the Application of the Act to Cable Modem Technology

American jurisprudence recognizes a fundamental right to privacy in personal communications, and the courts and federal and state legislatures have recognized the paramount interest a citizen has in protecting her privacy. Privacy is a real and significant interest to most Americans: a survey performed in 1999 revealed that the loss of personal privacy was the number one concern of Americans entering the twenty-first century.¹ For people who have never used the Internet before, privacy is listed as the main reason that they do not go online.²

Congress anticipated these emerging privacy concerns when it passed the Cable Communications Policy Act (the CCPA) in 1984 to amend the Communications Act of 1934. The CCPA establishes a comprehensive framework for cable regulation and sets forth strong protections for subscriber privacy by restricting the collection, maintenance and dissemination of subscriber data. Section 631 of the CCPA explicitly protected the privacy of customers, particularly as those using two-way services. Accordingly, the CCPA included specific provisions to protect the rights of the customer, including the right to receive notice about the information gathered,³ specify how the collected personal information would be used,⁴ and prevent the disclosure of the information to the government unless certain conditions were met.⁵ The last provision recognized the legitimate needs of governmental officials to access customer information but also balanced privacy with effective enforcement.⁶

The CCPA prohibits cable operators from using the cable system to collect “personally identifiable information” concerning any subscriber without prior consent, unless the information is necessary to render service or detect unauthorized reception.⁷ The Cable CCPA also prohibits operators from disclosing personally identifiable data to third parties without consent, unless the disclosure is either necessary to render a service provided by the cable operator to the subscriber or if it is made to a government entity pursuant to a court order.⁸

Congress placed a high priority on consumer privacy through its enactment of the CCPA because of the privacy-invasive capacity of the medium. Cable television, with its

¹ Wall Street Journal/NBC News poll, <http://www.wsj.com>, (Nov. 03, 1999). See also Testimony of Lee Rainie before the Subcommittee on Commerce, Trade, and Consumer Protection of the House Committee on Energy and Commerce (May 8, 2001) (86 percent of internet users surveyed stated that Internet companies should ask people for permission [opt-in] to use their personal information); EPIC Privacy and Public Opinion Page, at <http://www.epic.org/privacy/survey/>

² Fed. Trade Comm'n, Protecting Consumers Online: A Federal Trade Commission Report on the First Five Years of Its Internet Law Enforcement Program 19 (1999), available at <http://www.ftc.gov/os/1999/9912/fiveyearreport.pdf>.

³ 47 U.S.C. § 551(a)(1) (1994).

⁴ *Id.* § 551(c)(1).

⁵ *Id.* § 551(h).

⁶ *Id.* § 551(h)(1).

⁷ *Id.* § 551(a).

⁸ *Id.* § 551(h).

potential for two-way or interactive services, creates particular privacy problems because of the ability of cable operators to directly monitor subscribers' programming choices and on-line activities. In addition, cable television's potential for a wide range of other functions and services could provide its controllers with a vast amount of marketing and personal data that would be of immense interest to both commercial and governmental entities. Furthermore, the infrastructure of the television industry is being transformed as new technologies allow tremendous amounts of personal information about cable modem users to be captured and analyzed. Third parties, such as websites, collect information and can theoretically create a personal profile of each user (including the path of a browser's surfing, her reading preferences, and other personal information); governmental actors then can use this information to intrude into the most intimate details of a person's life in the course of a search for unlawful behavior. Through developing technology, consumers will soon face the increased threats to privacy, and a massive collection of TV viewer information used to create detailed and invasive individual profiles.⁹

The conflicting issues of notice, the use of personal information, disclosure of information to a governmental entity, and disclosure of the contents of electronic communications illustrate that the protection of a cable modem customer's privacy rights rests on the Commission's determination. Therefore, the Commission's determination ensures the privacy of the cable modem subscribers.

B. The Privacy Protections Mandated by the CCPA are Necessary to Protect Cable Modem Customers from Substantial Privacy Invasions

There is a longstanding historical, legal, and legislative record providing that protection of privacy is a real, substantial, and significant concern. Consumer privacy in the digital era is fundamental to ensuring trust between citizens and the owners of nation's communications networks and services. There is a long history of safeguarding consumer privacy with respect to the television viewing habits of consumers through provision of cable service. Many consumers would be understandably concerned if cable operators begin to monitor Americans' use of cable system viewing preferences, or for other services such as telecommunications services, including broadband access to Internet via cable modems. Citizens have a legitimate and significant expectation of privacy with respect to sensitive personal information such as services subscribed to and web browsing habits. In addition, customers have a right to personally determine how those cable service providers in possession of their personal information shall use this information.

Datamarketing based on subscriber information violates the spirit and intent of federal cable communications policy. Additionally, merely collecting personally-identifiable information raises privacy risks because once these records are created, law enforcement agencies or lawyers in civil cases could subpoena the data. A list of subscribers' cable services can indicate quite a bit about a person's viewing habits and beliefs. This becomes especially true as the choices of cable services multiply and become more

⁹ Center for Digital Democracy, "TV That Watches You: The Prying Eyes of Interactive Television" (June 2001)

diverse. Application of the CCPA's privacy protections to cable modem services would restrict such privacy invasive practices.

As technology permits more invasive monitoring and collection of personal information, it is necessary for regulators to empower the individual to protect privacy.

II. The Plain Language of the CCPA of the Statute and Legislative History Indicate that the CCPA Applies to Internet Services

Statutory interpretation and legislative history support the Commission's determination that the CCPA applies to cable operated internet services. First, Congress was aware of potential Internet-like activity over cable lines at the time the CCPA was enacted. The House Report for the CCPA states that e-mail and other Internet-like activity is classified as part of a "cable system."¹⁰ This provision, coupled with the plain language of the statute itself, indicates that the CCPA should control cable modem Internet activities.

The legislative history supports the Commission's reading that cable modems should fall under the authorization of the CCPA. At the time of the CCPA's passage, Congress recognized the potential of broadband cable systems. Discussing the "Background and Need for Legislation," Congress, in House Report 98-934, noted that:

Local cable systems began to develop the capability to provide services other than those essentially resembling television broadcast. This included two-way communications services through which subscribers could call up programming or communicate over the cable system, and institutional networks with the capacity to provide the full range of communications and data transmission services to government and educational institutions and private business.¹¹

The fact that Congress was aware of the potential for Internet services over e-mail illustrates that they were aware of—and supported—the future applicability of the CCPA to the Internet. House Report 98-934 discusses the two-way data transmission capabilities of cable, noting that cable might compete with telephone companies “who currently provide the communications facilities that link almost all individuals and institutions in a universally available communications network.”¹²

Congress, in formulating the CCPA, envisioned a day where it would be possible for content providers to monitor every minute of viewers' behavior. “Cable systems, particularly those with a ‘two-way’ capability, have an enormous capacity to collect and store personally identifiable information about each cable subscriber.”¹³ “Subscriber records from interactive systems,” Congress noted, “can reveal details about bank

¹⁰ H.R. Rep. No. 98-934, at 41, 44 (1984), reprinted in 1984 U.S.C.C.A.N. 4681, 4682.

¹¹ *Id.* at 21, U.S.C.C.A.N. 4655, 4658

¹² *Id.* at 27, U.S.C.C.A.N. 4664.

¹³ H. Rep. No.934, 98th Cong., 2d Sess. at 29 (1984), quoted in *Scofield v. Telecable of Overland Park, Inc.*, 973 F.2d 874 (10th Cir. 1992).

transactions, shopping habits, political contributions, viewing habits and other significant personal decisions.”¹⁴ These envisioned, vastly invasive, capacities of this medium have indeed emerged as the technology has advanced.¹⁵

Furthermore, the plain language of the CCPA supports the Commission’s determination. Section 631 of the CCPA applies the privacy protections of the Act to subscribers to “any cable service or other service” provided by a cable operator.¹⁶ “Other service” is defined as “any wire or radio communications service provided using any of the facilities of a cable operator that are used in the provision of a cable service.”¹⁷ Cable modem service is a service that provides subscribers with high-speed internet access using cable system facilities.¹⁸ Because cable modem services provide a communications service over the cable system facilities, by the plain language of the statute such services are “other services” subject to the privacy mandates of the CCPA.

Therefore, the plain meaning of the statute and legislative history support the Commission’s determination that CCPA applies to internet services.

III. Conclusion

The Commission reached the correct result in its Declaratory Ruling that cable modem service is included in the category of “other services” as defined by section 631 of the CCPA. This determination makes cable modem service operators subject to the privacy mandates of the CCPA, including the right to receive notice about the information gathered, specify how the collected personal information would be used, and prevent the disclosure of the information to the government unless certain conditions were met.

As technologies are begin to merge, the transformation of cable providers can have a real and detrimental effect on the fundamental right of privacy. In the course of surfing the Internet or using e-mail, citizens can unwittingly leave behind an electronic trail that may reveal highly personal information or be picked up and used by governmental officials in an investigation.

Consumer privacy in the digital era is fundamental to ensuring trust between citizens and the owners of nation’s communications networks and services. The Commission’s determination, supported by statutory language and legislative history, that cable modem

¹⁴ Id.

¹⁵ See generally Kevin G. Wilson, *Technologies of Control: The New Interactive Media for the Home* (1988).

¹⁶ 47 U.S.C. § 551(a)(2).

¹⁷ Id. § 551(a)(2)(b).

¹⁸ See generally Vanessa Hwang, *Cable Modems and Privacy in the New Millennium*, 32 COLUM. HUMAN RIGHTS L. REV. 727 (2001)

services are “other services” subject to the privacy guarantees of the CCPA recognizes the substantial privacy interests implicated by technological advancements.

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