CABLE TELEVISION PRIVACY REQUIREMENTS ENTER THE WORLD OF INTERNET SERVICE PROVIDERS

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Cable television companies have entered the Internet service business, joining local and long distance telephone companies along with an array of entities unregulated by federal communications law. The arrival of cable companies in cyberspace will add a new dimension to the increasingly serious debate about privacy on the Internet. Although the Federal Communications Commission (the "Commission") has not yet determined how, if at all, to regulate the new "Cable-Internet" service, courts may apply current cable television privacy requirements to Cable-Internet. This means that Cable-Internet will be subject to the most stringent privacy requirements of any commercial Internet Service Provider ("ISP"), perhaps setting a new standard for application to other providers of Internet service.

This article explores the privacy requirements cable companies will face when providing Cable-Internet service and how those requirements compare to the privacy restrictions imposed on other ISPs, particularly local telephone companies. Part I briefly describes Cable-Internet service. Part II outlines the regulatory regimes the Commission may apply to Cable-Internet service, even though the courts may apply the cable privacy rules in Section 631 of the Communications Act to the new service regardless of the Commission's regulatory categorization. Part III describes the privacy requirements currently imposed on other ISPs, specifically local telephone companies. Part IV sets forth the cable television privacy requirements and applies them to Cable-Internet, showing that these requirements are more stringent than those faced by any other type of ISP. Finally, Part V suggests that, if policymakers believe that privacy rules should be

standardized among ISPs, the cable model provides a useful baseline. Such standardization may be achieved legislatively or by the market.

I. Description of Cable-Internet Service

Cable television companies have begun to offer Internet service by upgrading their existing infrastructure facilities to two-way capability and providing customers with "cable modems." The cable modem connects an end user's personal computer to the Internet through the cable operator's upgraded broadband cable facilities. Cable firms will provide both gateway and content services, just as current commercial ISPs like America Online ("AOL") or Prodigy do today.

The most important competitive advantages of Cable-Internet are speed and the provision of high-quality multimedia information. By using their current coaxial infrastructure, which has a broadband capacity several hundred times greater than the capacity of telephone lines, including ISDN, cable companies will offer a faster link to the Internet and greater capacity for full motion video and high fidelity sound via the Internet.

To take advantage of their superior capacity, cable companies cache (i.e., store) popular web sites closer to end users in computer servers at the cable systems' "head ends." A customer logs onto the cable

1 In some cases, a two-way infrastructure upgrade is not required, where a telephone line return path is used to send subscribers information "upstream" to the cable operator and the Internet.


3 See, David Streus, Cable Modems, WINDWOWS SOURCES, June, 1996, at 185.
provider's system through a home page on the World Wide Web, using the cable company's customized web browser software. The customer then visits web sites non-cable users see, but she actually views the sites stored at the head end without ever accessing the Internet per se. Customers have the ability to access the Internet directly, bypassing the head end web sites, but do not experience as much of an increase in speed as they do when visiting sites stored at the head end. The cable companies also provide their own content, stored at the head end. Parent companies, such as TCI or Time Warner, provide national content while the local service provider (i.e., the franchisee cable operator) adds local content. Finally, Cable-Internet service includes other offerings besides Internet web browsers, including e-mail, telnet and others.

II. The Commission's Regulatory Options

As an industry already regulated by the Commission, cable companies probably will face regulatory scrutiny of their new Internet service. The Commission has yet to determine the regulatory status of Cable-Internet service. The regulatory paradigms from which the Commission may choose include: (1) cable service; (2) enhanced/information service; (3) interactive computer service, or (4) advanced telecommunications capability. Each category carries with it a different set of requirements. Cable companies probably would prefer to have the Commission categorize Cable-Internet as a "cable service."  

The statutory provision governing cable companies' protection of subscriber privacy is enforced by the courts, not the Commission. Courts may apply Section 631 to any cable operator. Therefore, regardless of the Commission's regulatory classification of Cable-Internet, courts may impose on cable operators the same statutory privacy requirements that such operators follow with respect to video service. Nevertheless, to the extent Section 631 also applies to providers of a "cable service," it is important to understand the choices faced by the Commission in determining how to classify Cable-Internet service. The following Sections describe the regulatory regimes potentially applicable to Cable-Internet.

A. Cable Service

In order to regulate Cable-Internet under the rubric of cable television law, the Commission must first decide whether Cable-Internet falls within the definition of "cable service." The Telecommunications Act of 1996 (the "1996 Act") amended the definition of cable service to mean infrastructure to competitors under a common carrier regime or risking unfavorable future regulations under the new regime, cable companies probably will ask the Commission to categorize Cable-Internet as a "cable service." Of course, there are trade-offs to any regulatory classification. For example, as a cable service, Cable-Internet revenues would be subject to cable operators' 5% franchise fee.


5 This is because, unlike "enhanced services," the "cable service" designation does not carry with it common carrier obligations. See, 47 U.S.C. § 541(c) (1996) ("Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service"). Among the common carrier obligations cable firms would avoid are (1) unbundling; (2) resale; and (3) interconnection, each of which requires a provider to share its infrastructure with other providers. Cable companies probably will not advocate classifying Cable-Internet as an interactive computer service or an advanced telecommunications capability because those paradigms are relatively new and untested. Thus, to avoid opening its infrastructure to competitors under a common carrier regime or risking unfavorable future regulations under the new regime, cable companies probably will ask the Commission to categorize Cable-Internet as a "cable service." Of course, there are trade-offs to any regulatory classification. For example, as a cable service, Cable-Internet revenues would be subject to cable operators' 5% franchise fee.


7 See, Section 631(f) (damages).

8 See, Warner v. American Cablevision, 699 F. Supp. 851, 854 (D.Kan. 1988) (holding a cable operator liable under Section 631 based, in part, on the statutory definition of cable operator). This was the first case to apply Section 631. See also, Scotfield v. Telenet of Overland Park, 973 F.2d 874, at 7 (10th Cir. 1992) (despite emphasis in legislative history on "two way" communication, the definitions of "cable operator" and "cable system" led the court to apply Section 631 to the defendant cable company).

9 See, Section 631(a)(1) (placing restrictions on a cable operator providing "any cable service or other service . . .").

10 Communications Act of 1934, Title VI, Communications Act of 1934, §§ 601 et seq.
(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.11

As stated in the conference report accompanying the 1996 Act, by changing the definition of cable service, Congress intended "to include interactive services such as game channels and information services made available to subscribers by the cable operator."12

Since Cable-Internet service is an "interactive service" that is "made available to subscribers by the cable operator," the Commission may construe Cable-Internet as a "cable service" under the revised definition. If it does so, the cable privacy requirements13 will apply to Cable-Internet service. Moreover, as stated above, even if the Commission finds that Cable-Internet service does not fall under the definition of "cable service," Section 631 still applies.

B. Enhanced/Information Service

In the 1970s and 1980s, the Commission created a new regulatory classification for data-processing type services called "enhanced services."14 Enhanced services generally face no regulation at the federal level.15 To meet the "enhanced services" definition, a service must be offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.16

Such services, according to the Commission, include voice mail, electronic mail, data processing, and gateways to online databases.17 The 1996 Act codified the notion of "enhanced service" by defining "information service" as the "offering of a capability for generating, retrieving, utilizing, or making available information via telecommunications."18

Whereas enhanced services somehow alter the format and content of a user's message, or involve subscriber interaction with stored content, "basic services," by contrast, provide information carriage over a facility, without changing in any way the information sent by the user. In other words, basic service, like telephony, acts as a pure pipeline to get


14 See generally, Computer II, 77 F.C.C.2d 384, 425 (1980) (everything outside the scope of "basic service" would be left to competitive markets).

15 47 C.F.R. § 64.702(a) (1996).


17 See, generally, 1996 Act at § 3(a), codified at 47 U.S.C. § 153(20) (1996). Although it is possible that information services, which do not always involve subscriber interaction with stored information, may not be enhanced services, for the purposes of this article the two are treated as synonymous.
a user's unaltered message from one point to another. The 1996 Act codified the concept of "basic service" by defining "telecommunications" as "the transmission, between or among points specified by the user . . . without change in the form or content . . . "

Cable-Internet service involves more than simply the passive transmission of a user's unattended information. Users receive additional reformatted information and interact with stored data by accessing web pages stored at the head end. Thus, the Commission may categorize Cable-Internet as an enhanced service.

C. Interactive Computer Service/Advanced Telecommunications Capability

Two additional categories are available to the Commission when it decides how to regulate Cable-Internet: "interactive computer service" and "advanced telecommunications capability," both of which were created by the 1996 Act. Section 509 sought to limit ISPs' liability with respect to obscene or otherwise objectionable content created and disseminated by third parties. In doing so, the 1996 Act applied this safe harbor to any "interactive computer service," defined as an information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

This definition, which essentially describes all ISPs, clearly includes Cable-Internet providers.

Similarly, the 1996 Act gave the Commission broad authority to forbear from regulating any "advanced telecommunications capability," defined as any "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." Cable-Internet service arguably fits this broad definition and may be regulated by the Commission under this rubric. However, it is not clear how or whether the Commission would regulate privacy or any other matter under either category. Both categories are deregulatory in nature and have not yet been widely applied.

The Commission may regulate Cable-Internet under any of the aforementioned categories. Regardless of its choice, however, as noted above, courts have the authority to apply cable privacy requirements under Section 631 to providers of Cable-Internet. By designating Cable-Internet a "cable service," the Commission would reinforce the application of Section 631 to providers of the service but, even without such a designation, Cable-Internet is subject to the privacy requirements of Section 631.

III. ISP Privacy Protection Requirements for Personally Identifiable Information

Before examining how Section 631 applies to cable companies providing Internet service, it is important to understand the privacy requirements faced by other ISPs. Thus, this Section describes the three types of "privacy" and how ISPs, particularly Bell Operating Companies ("BOCs"), must treat customer information. The following Section then compares those requirements to the

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19 Supra, Computer II, 77 F.C.C.2d 384, 420 (1986) ("in a basic service, once information is given to the communication facility, its progress towards the destination is subject only to those delays caused by congestion within the network or transmission priorities given by the operator.")

20 1996 Act at § 3(a), codified at 47 U.S.C. § 153(43).


23 Supra, id., § 706(a).

24 Id., § 706(c)(1). The statute sought to create an incentive for telecommunications firms to improve primary and secondary schools' access to high-speed networks. See, Id., § 706(a), (b).

25 "Privacy requirements," in this case, refers to federal statutory and regulatory requirements, primarily under federal communications law, placed on non-governmental communications service providers. It does not include the government's (state or federal) privacy invasion restrictions.
restrictions faced by Cable-Internet providers under Section 631.

A. Three Types of Privacy: Message Content, Customer Information, and Customer Activity

Information which raises privacy concerns on the Internet may be divided into three categories: (1) the contents of a message as it travels from sender to receiver; (2) the ISP customer's personal information such as his or her name, address, telephone number, age, or income; and (3) the activities of the customer or subscriber, such as his or her transactions on the Internet.

The "privacy" issues related to the first category, message content, have to do with the level of encryption used to protect the confidential nature of the message. The proper level of encryption is currently the subject of debate between industry and government. In general, encryption allows messages to be encoded such that only the intended receiver may read the message. In one form of encryption, the sender of a message has both a "public key number" and a "private key number." Sender A gives her public key number to her intended receiver B, who then attaches that number to every message sent to A. To decipher her messages from B, A must use her private key number.26

The Electronic Communications Privacy Act27 ("ECPA") is the primary federal statute designed to protect the security of message content. Generally speaking, ECPA prohibits private parties and government agents from intercepting any digital communications, voice or non-voice, either during transmission or while stored.28 Voice messages on a public system may not be intercepted during a conversation or while in storage unless the provider accidentally discovers material sought by the government or the provider is cooperating with government agents. Non-voice messages may not be intercepted during transmission but providers may review stored non-voice messages if they do not share the content with third parties.29 In any instance where the government intercepts a message in any form, it must receive a warrant if the message is less than 180 days old or an administrative subpoena if the message is older.30

The second category of information on the Internet which raises privacy concerns is the customer's personal information. Whenever a customer subscribes to a service, such as telephone, cable, or Internet access, the customer provides basic billing information including an address, telephone number, and perhaps a driver's license or credit card number.31 This is valuable information to marketers seeking to target their advertising, but it becomes even more valuable when combined with the third category of information: customer activity. The telephone numbers the customer dials, the cable channels he views, or the websites he visits create a picture of a consumer, enabling marketers to find the most promising targets of their sales pitches.32

With respect to ISPs, different companies will face different restrictions on their use of personally identifiable information ("PII") depending on what type of ISP they are and what medium they use.

B. Most ISPs Have Few, if Any, Restrictions on Use of Personally Identifiable Information

Outside of the cable regulatory scheme, most ISPs face few restrictions on their use of customers'...
PILI. ISPs like AOL or Prodigy which are unaffiliated with telephone or cable companies face no restrictions, under federal communications law, on their use of PILI. AOL has sold its customer lists without any scrutiny by the Commission or any threat of liability under a federal communications statute. Likewise, non-dominant long distance carriers which provide Internet services probably will not face any Commission scrutiny with respect to their use of customer information.

BOCs and GTE face a more stringent regulatory regime with respect to collection and disclosure of customer information. The Commission, in granting some BOCs authority to provide Internet services, has specified that the BOCs must continue to meet their existing restrictions on the use of Customer Proprietary Network Information ("CPNI"). For example, the Commission recently granted Bell Atlantic authority to provide Internet service to business and residential customers, along with supporting services such as access to the World Wide Web and Usenet, electronic mail, and "chat" rooms. In its order, the Commission characterized the offering as an "enhanced service" and specified that Bell Atlantic will have to comply with those pre-1996 CPNI requirements which are consistent with changes made by the 1996 Act's new privacy provisions. The Commission also stated that Bell Atlantic will have to comply with any regulatory requirements promulgated by the Commission in implementing the Act's new privacy provisions. The pre-1996 CPNI restrictions and the additional restrictions imposed by the 1996 Act mean BOCs must comply with more privacy restrictions than do the unaffiliated ISPs described above, but less privacy restrictions than those imposed on Cable-Internet providers.

1. Pre-1996 CPNI Restrictions:
Notice and Consent—Sometimes

Before 1996, BOCs faced restrictions on their ability to use CPNI, as established in the Commission's orders creating the new "enhanced services" category. The Commission defined CPNI as information that BOCs collect in order to provide telephony services and stated that it encompasses any information about customers' network services and their use of those services that a telephone company possesses because it provides those network services. [CPNI includes] information related to the type, location, and quantity of all services to which a customer subscribes, how much the customer uses them, and the customer's billing records.

One could argue that CPNI collected by a BOC in the course of providing Internet service does not fall within the scope of CPNI regulations because the information was not collected while providing telephony. This would leave BOCs free to use CPNI without any restrictions. However, for the purpose of

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33 See id.

34 See, e.g., NII at n. 55 (in 1995, the Commission recategorized AT&T as non-dominant thereby freeing it from, inter alia, rules regarding Customer Proprietary Network Information ("CPNI"). But see AT&T Non-Dominant Order, 11 Commission Rel. 327 (1995), para. 159-160 (although one commenter suggested that the Commission explicitly apply CPNI rules to AT&T as part of the Non-Dominant Order, the Commission stated that it would not impose such a condition but would generally apply the "nonstructural safeguards," including CPNI rules, referenced by the commenter to AT&T). Thus, as an ISP, AT&T may eventually be subject to CPNI rules. The Commission, however, has tentatively concluded that, in light of the Non-Dominant Order, such rules will not apply to AT&T. See, Telecommunications Carrier Use of Customer Proprietary Network Information and Other Customer Information, FCC Docket No. 96-115, Commission 96-221 (Notice of Proposed Rulemaking) at ¶ 3, Released May 17, 1996 (hereinafter "CPNI NPRM").

35 Hereinafter "BOCs" refer to the Bell Operating Companies and GTE.

36 See, Bell Atlantic Internet Access Services, 11 Commission Rel. 6919 (Common Carrier Bureau) (1996), ¶ 1, 7.

37 See, id. at ¶ 1.
argument, this article assumes that BOCs must comply with CPNI regulations even if the information was gathered while providing Internet, not telephony, service.

Any data collected by a BOC while providing Internet service, such as the customer's name, address, and telephone number (i.e., the "customer information" type of privacy), would fit the above definition of CPNI. The information would be a part of the customer's billing records and would be necessary for the BOC to provide Internet service.

Moreover, information about the customer's behavior would fall under this definition. For example, the Commission could consider descriptions of the web sites which a customer visits or transactions made at those web sites as "related to the type, location, and quantity" of service used by the customer. Thus, both the personal customer information and the customer's behavioral information collected by a BOC Internet service provider probably would fall within the pre-1996 definition of CPNI.

The pre-1996 rules offer some protection of customer information but are by no means comprehensive. As stated earlier, the Commission promulgated the rules as part of its establishment of the "enhanced services" regulatory classification. In so doing, the Commission sought to minimize BOCs' ability to abuse their overwhelming market power when competing against other firms which offered "enhanced services." For example, BOCs have the ability to take CPNI collected in conjunction with basic service and use it to market enhanced services, severely disadvantaging competitors who do not have access to CPNI. To avoid this outcome and, as an equal or even secondary consideration, to protect customer confidentiality, the Commission restricted BOCs' use of CPNI.

Under the pre-1996 rules, if a customer affirmatively requests that his CPNI be withheld from the BOC's "enhanced services" marketing personnel, the BOC must comply with that request. Absent such a request, the BOC may disclose the CPNI. This broad authorization to disclose CPNI without customer consent does not apply to business customers. For customers with 20 or more lines, a BOC must receive affirmative permission before using that customer's CPNI to market "enhanced services." Moreover, BOCs must annually notify business customers of multiline (i.e., 2 or more) services of their CPNI rights. Finally, with respect to business and residential customers, a BOC must receive prior customer authorization before disclosing CPNI to enhanced service providers which compete with the BOC. Thus, due to a pro-competition policy goal, the pre-1996 CPNI restrictions offer business customers greater protection of their CPNI than residential customers.

2. CPNI Restrictions Added by the 1996 Act

The 1996 Act added new restrictions to the use of CPNI by "telecommunications carriers." Like the pre-1996 rules, these rules are designed to prevent abuse of market power in addition to enhancing customer privacy. The new provisions

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42 CPNI NPRM at § 4. NII at n. 53 (citing Computer III).

43 Id. at § 5.

44 Id. See also, NII at n. 56 citing Computer III at para 89; see also, Laura V. Fag, Note, "Blocking Preemption: Convergence, Privacy, and the Commissioner's Misguided Regulation of Caller ID," 14 Cardozo Arts & Ent. L. J. 407, at n. 206 (1996) citing Caller ID Order, 9 F.C.C.R. at 1764, 1774.

45 The statute uses the term "telecommunications carrier," which includes BOCs.

46 See § 222; CPNI NPRM at n. 60 (quoting the 1996 Conference Report discussion of § 222). Although Section 222 is self-implementing, the Commission, in response to requests from various parties, has initiated a rulemaking proceeding to implement and hopefully clarify the Section. See, CPNI NPRM.

The Commission stated that the new statute's definition of CPNI is similar to the pre-1996 definition. The statute defined CPNI, for the purpose of § 222, as

(A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and

(B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier, except that such term does not include subscriber list information [defined elsewhere], § 222(5)(1).

Information about a customer, including the customer's behavior,
allow a BOC to use, disclose, or permit access to CPNI only in connection with the "telecommunications service" from which such CPNI is derived or in connection with the activities necessary to provide such service, unless the customer approves otherwise.48 The Commission tentatively interpreted this to mean that, without prior customer approval, BOCs may not use CPNI derived from one BOC service to market another BOC service.49

The 1996 Act establishes three exceptions to the CPNI prohibitions. A BOC may use CPNI to "initiate, render, bill, and collect" payments; to protect the BOC's property; or "to provide any inbound telemarketing" if the customer initiates a call to the BOC.50 The third exception means that, whenever a customer calls the BOC for any reason, the BOC may use that customer's CPNI, without prior consent, to market any service during the course of the conversation.51

As stated above, BOCs must receive customer approval before using CPNI for purposes such as marketing different categories of services. The Commission tentatively concluded that such authorization would be meaningful only if the customer has also been notified of her rights to restrict the use of her CPNI.52 The Commission also tentatively concluded that written, rather than oral

authorization is preferable because it better informs customers of their rights and offers clear proof of their approval.53 The statute explicitly requires BOCs to share a customer's CPNI with third parties whenever those parties present the customer's written consent.54

Thus, ISPs such as AOL or Prodigy, along with long distance carriers like AT&T, face virtually no privacy regulation under federal communications law.55 When BOCs provide Internet service, the Commission restricts their use of customer information in some, but not all, instances. Only with respect to multilink customers must BOCs give complete notice and receive consent before using CPNI. Those restrictions are based just as much on pro-competition policy as they are on privacy concerns and, as the following section explains, are less restrictive than the rules governing cable companies' use of customer information.56

IV. As Internet Service Providers, Cable Operators Must Comply with the Requirements of Section 631 ("Protection of Subscriber Privacy")

Services offered by cable operators face an entirely different regulatory regime with respect to customer information than do the services described above. When Congress passed the Cable Communications Policy Act of 1984,57 it squarely

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48 See § 222(c)(1).
49 CPNI NPRM at ¶ 21-26.
50 § 222(d).
51 The statute also allows a BOC to use aggregate CPNI without the restrictions described supra. See § 222(c)(3). N.B.: The statute also addresses use of "subscriber list information," requiring telecommunications carriers to provide their CPNI to directory publishers. See § 222(c). This provision is not addressed here.
52 CPNI NPRM at ¶ 28.
53 Id.
54 See § 222(c)(2), CPNI NPRM at ¶ 34. By requiring BOCs to disclose CPNI to competitors who have written customer authorization, as opposed to stating simply that any disclosure requires customer authorization, Congress revealed its intention to maximize competition between carriers, not necessarily to protect customer privacy.
55 The same may be said of the more than 1,000 independent local exchange carriers, non-wireline cellular carriers, interexchange carriers, competitive access providers, or other providers of telecommunications services, all of which may offer Internet services in the near future.
56 Many BOCs and long distance companies have imposed their own internal standards for the use of customer information but still have been known to release customer data in derogation of their own policies. See NII at 10-11, n. 41-49.
addressed the issue of customer privacy. Congress adopted these privacy provisions in response to concerns about the power of the new, widespread and increasingly popular communications medium of cable television, concerns which sounded very much like those being raised today with respect to the Internet.

A. Requirements of Section 631

Section 631 restricts cable operators' use of customers' personal information. The statutory language, its legislative history, and interpretations by the courts create a set of obligations cable operators must meet before using customers' personal information.

1. Personally Identifiable Information

In enacting Section 631, Congress responded to the "enormous capacity" of cable companies to collect "personally identifiable information" ("PII"), particularly by using the cable systems' "two-way capability," through which cable companies could collect details about "bank transactions, shopping habits, political contributions, viewing habits and other significant personal decisions." Under the statute, PII does not include aggregate data about all customers. It does, however, apply to all "individually identifiable information" about cable customers, collected by cable companies via their own systems, "whether collected in the course of providing a cable service or other service." This includes lists of customers' names or addresses. Thus, Section 631 applies to information about a customer, collected by a cable company in the course of providing services, including Cable-Internet service.

2. Notice

Section 631 requires cable operators, at the time they enter into an agreement with a customer and at least once a year thereafter, to provide notice about the collection of PII. The notice must be in writing and must "clearly and conspicuously" inform the customer about the types of information collected and the company's use of such information.

The "clearly and conspicuously" standard is a fundamental aspect of the statute. The only Circuit Court to apply Section 631 stated that the "clearly and conspicuously" standard is analogous to the Truth in Lending Act's requirement of "meaningful disclosure." The court stated that this implies "a common sense approach, rather than a technical approach," then enumerated four factors in analyzing whether notice is meaningful.

First, to determine whether notice is sufficiently detailed, the court must look at the language of the statute. If the statute requires notice of the "nature" or "type" of person to whom disclosure will be made, as Section 631 does, the notice need not include everything collected and every person to whom disclosures will be made. Second, the notice at least should be such that the subscriber "could

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61 1984 House Report at 76.
62 Id. at 79.
63 Id. § 631(a)(1).
64 Id. The specific requirements are discussed in more detail infra.
65 Scefield v. Telecable of Overland Park, 973 F.2d 874, 879 (10th Cir. 1992) (hereinafter, "Scefield"). The court noted that many other statutes also contain a "clear and conspicuous" standard. Id. at n.5. It is conceivable, therefore, that other circuits could analogize to statutes other than the Truth in Lending Act to expand upon the notion of "clear and conspicuous" in Section 631.
66 Id.
67 Scefield, 973 F.2d at 879.
reasonably be expected to have understood its meaning.\footnote{Id., citing 15 U.S.C. § 1602(j) (the Truth in Lending Act).} Third, the court must consider the purpose of the statute, which in this case is protecting the customer's privacy. Notice would not be sufficient if it were couched in terms "so broad that it fails to warn an ordinary subscriber of practices that materially affect his privacy interests," yet the notice need not provide "redundant or marginally useful" information.\footnote{Id.} Finally, the court said that a notice would be meaningful even if more detailed forms of notice were available. Even under the Truth in Lending Act, the court, "perfect disclosure" is not required.\footnote{Id.} The court then applied these standards to determine whether the defendant met each of Section 631's notice requirements, described below.

Under Section 631, cable companies must notify customers of the nature of the PII to be collected and of the uses to which it will be put.\footnote{Scofield, 973 F.2d at 881 (quoting defendant's notice). Defendant was not required to specify in its notice that it would disclose PII to independent service contractors, premium channels wishing to send consumer guides, programmers, attorneys, accountants, or prospective purchasers of the cable system.} In Scofield, the defendant cable company met this requirement by telling customers that it maintained information about them, including name, address, billing and payment information, number of television sets connected to cable, and service options. The notice further stated that the information would be used "to provide reliable, high quality service" and "to make sure [the customer is] being billed properly" which, the court reasoned, provided a clear enough picture of the types of information that the company would collect.\footnote{Id.}

Notice under Section 631 must also describe the "nature, frequency and purpose" of any disclosure of the information by the cable company and the "types of persons to whom the disclosure may be made."\footnote{Id. § 631(a)(1)(A).} The defendant in Scofield met this requirement by stating that it would disclose customer information if "necessary to render cable service and other services," which included giving information to a bill collection agency.\footnote{Scofield, 973 F.2d at 881.} The court reasoned that this was sufficient to describe the "types" of persons who might receive the information, except with regard to defendant's sale of customer information to a consumer research organization retained by NBC.\footnote{Scofield, 973 F.2d at 882. Section 631 requires destruction of PII if the information is no longer necessary. § 631(c).} That action was allowable, however, given a separate part of the notice which stated that, unless the customer objected, the cable company would occasionally disclose mailing lists.\footnote{Id. § 631(a)(1)(D). Cable companies must make customer information available "at reasonable times and at a convenient place" for subscribers. § 631(d).} Thus, under Scofield, notice of the types of persons to whom information will be disclosed may include a general description of collected information and its intended uses, plus a negative consent agreement (e.g., the customer must affirmatively ask to have her name removed).

Cable companies also must notify customers of the period during which the company will maintain PII,\footnote{Scofield, 973 F.2d at 879.} the times and places at which the subscriber may have access to such information,\footnote{Id. § 631(a)(1)(C).} and the customer's rights under Section 631.\footnote{Id. § 631(a)(1)(E).} The Scofield court held that a company may retain PII for as long as necessary for accounting and tax purposes.\footnote{Scofield, 973 F.2d at 881.} It also held that defendants met their notice requirements by stating when and where customers could access their information.\footnote{Scofield, 973 F.2d at 882-883.}

Thus, Section 631 establishes a detailed set of notice requirements which cable companies must follow when providing any service. Cable companies face a far more rigorous privacy notice regime than do ISPs described in the previous...
Sections. ISPs like AOL, Prodigy, and AT&T face no privacy regulation under federal law. BOCs' notice requirements under the CPNI rules vary depending upon the type of customer (i.e., business, multiline, or residential), whereas the cable privacy provisions require notice in all instances. Moreover, the Commission has established few guidelines for what constitutes meaningful notice (or disclosure) in the context of CPNI, whereas the Scfield court developed a detailed analysis of when notice is meaningful.

3. Consent

Section 631 prohibits a cable company from using or disclosing PII without the customer's consent. The cable company may not use its system to collect such information unless the customer has given "prior written or electronic consent" to the company for the collection and use of such information. This is in contrast to CPNI consent rules, which as noted above only apply to disclosure, not collection of information. Similar to a BOC under CPNI rules, the cable company does not need customer consent to obtain information necessary to provide a service or to detect unauthorized reception of cable communications.

Moreover, prior electronic or written subscriber consent is required before the cable company may disclose PII to third parties. Also, the company must take such actions as are necessary to prevent unauthorized access to such information by third parties. There are three exceptions to these disclosure prohibitions: First, the cable operator may disclose a customer's PII without prior consent if doing so is necessary to perform a "legitimate business activity" related to rendering a cable or other service; second, the disclosure may be made pursuant to a court order; and third, the cable company may disclose customer information, without prior consent, if the company has given subscribers an opportunity to prohibit or limit such disclosure and the information does not reveal either (1) the extent of the customer's use of a service, or (2) the nature of any transaction made by the subscriber. (The fact that the cable company may not reveal viewing or transactional information is important in the context of Cable-Internet service, as discussed in Section IV.B.2 infra). Thus, Section 631's consent requirements are more stringent than those faced by the ISPs described above. Most notably, whereas CPNI rules require BOCs to receive customer consent only for disclosure of personal information, Section 631 requires cable companies to receive consent for collection and disclosure of personal information. Moreover, Section 631 explicitly singles out information about a customer's behavior (viewing) and transactions as particularly worthy of protection.

\[631(b)(1)\]
\[\text{See infra Section} \ 631.\]
\[\text{See also infra Section} \ 631.\]
\[\text{See infra Section} \ 631.\]
\[\text{See infra Section} \ 631.\]
\[\text{See infra Section} \ 631.\]
\[\text{See infra Section} \ 631.\]

Section 631 requires cable operators to provide a customer with access to her PII at "reasonable times and at a convenient place . . . ." The cable operator also must destroy PII if it is no longer necessary for its original purpose, if there are no outstanding customer requests to see their personal data, or if there are no court orders regarding such data. Other ISPs generally face no such requirements regarding their customers’ access to personal data.

B. Application of Section 631 to Cable-Internet Service

The previous Section described privacy requirements with which cable companies must comply, requirements which are more stringent than any privacy regulations faced by other ISPs. In 1984, Congress expressly sought to mitigate against privacy invasion via "two-way" communications over the cable infrastructure. With the advent of Cable-Internet, Congress's statement seems especially relevant.19 As cable companies offer Internet service, they will have to apply cable television privacy rules to the new service, making Cable-Internet the most privacy-sensitive Internet service.

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96 § 631(d).

97 § 631(e). As previously stated, however, the cable company may keep such information for accounting and tax purposes.

98 See supra n. 62. The Scofield court stated that the legislative history of Section 631 "reveals that Congress was chiefly concerned with the privacy implications of two-way systems." Scofield, 973 F.2d at n. 7, citing 1984 House Report at 76. The court added that "the emphasis found on the face of the statute and in the legislative history on two-way systems stems from the threat to privacy that two-way systems uniquely pose." Id. (emphasis added).

99 In 1992, Congress amended Section 631. The House bill, which was incorporated into the final amendment, redefined "cable operator" and "other service" to ensure that new communications services provided by cable operators are covered by the privacy protections embodied in Section 631 of the Communications Act." H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 93-94, reprinted in 1992 U.S.C.A.A.N. 1275-1276.

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1. Notice and Consent: A Click Will Suffice

Given cable companies' requirement to give meaningful notice in writing, will it be sufficient to provide the customer notification on the web page as opposed to a written mailing? The answer probably is yes, given the Scofield court’s adoption of a "common sense" approach as opposed to a "technical" approach.100 Such notice probably will have to meet the Scofield court's general guidelines for "meaningful" notice described above. Thus, cable companies will have to do more than simply allow customers to access a web page, for example, describing their privacy rights. More likely, cable companies probably will have to ensure that customers must view a web page describing their rights before being able to go forward with their use of the Cable-Internet service, just as the customers in Scofield could only receive cable television service after receiving (and presumably reading) written notice under Section 631. The text of that page could be exactly the same as the text used by cable companies in providing their other services, assuming such notices meet the requirements of Section 631. In addition, since customers may give their consent electronically101 under Section 631, customer consent need only be a "click" of the mouse on a web page.

Regarding a customer's access to her own PII, a cable company could easily make such information available to individual subscribers, not by providing office hours at the cable company's headquarters, but by allowing a customer to input a Social Security number or personal identification number to access all information about him- or herself stored by the cable company. However, Section 631's requirement to protect that data from third parties probably

100 Scofield, 973 F.2d. at 879. One could argue that the Scofield court’s conclusions are inapposite to Cable-Internet because the defendant cable company in that case was incapable of two-way communication. See supra n. 87. The court recognized that notice for two-way systems may have to offer greater detail. Scofield, 973 F.2d at n. 7. This suggests that the requirements spelled out by the Scofield court are the minimum privacy requirements for cable companies, not simply inapposite when it comes to Cable-Internar.

101 See, § 631(e)(1).
means cable companies must install an adequate security mechanism.

2. The Customer's Activities

As stated earlier in Section III.A, there is a difference between information about who a customer is and what the customer does. These two categories tend to blur in the context of PII as defined by Section 631. The statute and its legislative history describe PII, but only two types of information are singled out by the statutory language: without customer consent or opportunity to limit disclosure, a cable company may not disclose information about a customer’s viewing habits or the nature of the customer’s transactions. 102

In the context of Internet service, the cable company may not divulge information about a customer’s web visits, absent the customer’s prior consent, because such activities are analogous to "viewing" under Section 631. 104 To comply with Section 631, cable companies must not disclose to third parties information about a customer’s web site visits or similar Internet activities, unless the customer has so consented.

In a similar vein, if a Cable-Internet customer accesses a web site designed to conduct transactions, such as an on-line mail order catalogue, disclosure of such information probably would reveal the "nature of the transaction" under Section 631. 105 Thus, to comply with Section 631, cable companies must not disclose to third parties information about a customer’s transactions on the Internet, unless the customer has so consented and has been given the opportunity to limit disclosure of such information.

V. Conclusion: Policy Implications of the Cable Model

In its report regarding privacy in the National Information Infrastructure, the Clinton Administration advocated a system which (1) provided customers with notice regarding the types and uses of personal information and (2) required customer consent before such information could be disclosed. 107 As the above Sections indicate, such a system has been operating for more than a decade with respect to cable and will be a applicable to cable companies' provision of Internet service. Other ISPs will not be subjected to the same standard of privacy protection. This suggests a need for policy change and an ideal candidate, Section 631, to provide a model privacy regulation system.

The NII stated that there should be a standard privacy policy which would apply equally to all ISPs and other participants on the information infrastructure. 108 Moreover, members of the Commission have stated their desire for regulatory parity between competing providers of similar services. 109 The existing notice and consent requirements imposed on cable companies are more comprehensive than BOCs' CPNI requirements, even after passage of the 1996 Act, and more protective of customer information than the wholly unregulated ISPs like AOL and Prodigy. Thus, Section 631 is an appropriate baseline for other ISPs to follow.

Standardization of privacy policy may be imposed legislatively or adopted voluntarily by the market. In the 104th Congress, Rep. Bruce Vento (D-MN) introduced a bill to impose notice and consent requirements, like those in Section 631, on all ISPs. 110 In the previous Congress, Rep. Edward

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102 See supra Section IV(a)(1).
103 See supra Section IV(a)(1).
104 Id. On the one hand, Congress may have intended "viewing" to mean customer consummation of full motion video services. However, Congress's recognition of the potential for "two-way" services over the cable infrastructure suggests that "viewing" could refer to the use of any cable service which utilizes images delivered to a screen. See supra n. 62.
105 Lands End Direct Merchants have such a website at http://www.landsend.com.
106 Here, Congress's mention of at-home banking suggests that Internet transactions fall squarely within the protection of Section 631. See supra n. 62.
107 See, NII at 7-9.
108 Id.
109 See, e.g., Remarks of Commissioner Rachelle Chong to the Personal Communications Industry Association's PICS '95 Conference, Orlando, Florida, 1995 Commission Lexicon 6318, 6 (1995) ("similarly-situated companies [should] compete according to similar ground rules").
Markey (D-MA) introduced a bill to protect CPNI and subscriber information derived from consumers’ telephone usage. 111 Rep. Markey also introduced a bill in the 104th Congress which would have required the Commission and Federal Trade Commission to conduct hearings and rulemakings to update their rules and account for new privacy concerns raised by the Internet. 112 Although these bills were not enacted, they suggest that some members of Congress are aware of the need for privacy policy standardization on the Internet.

Industry may effectively preempt Congressional action by standardizing its own, self-imposed privacy rules. For example, a consortium of corporations has developed a self-rating system called “eTRUST” which will rate web sites according to the sites’ privacy protection. 113 In addition, Cable-Internet providers might promote themselves as the most privacy-sensitive Internet service available. Depending on the market’s response, other ISPs could follow suit, not in conformance with a government mandate, but simply to remain competitive. Thus, privacy policy standardization could take place before Congress takes action, thereby mitigating the need for government intervention.

Unless privacy policy among Internet service providers changes, Cable-Internet will remain, by law, the most privacy-protective Internet service in the United States. Whether this turns out to be an advantage or an albatross for cable companies is yet to be seen.

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113 See, Margie Semilof, Web Companies Push for Idore Privacy, COMMUNICATIONS WEEK, October 14, 1996, at 64.