



Cable's Internet service may involve a wide range of functions including connecting customers to the Internet via a computer server in the cable headend; and providing interactive content, locally-originated programming, menus, navigational support, and e-mail. It is also capable of providing a host of other advanced Internet-based applications. Some cable operators provide these services through joint ventures and affiliation agreements with other companies, such as @Home or RoadRunner, Optimum Online, and PowerLink. These companies provide both national and local programming and information content to customers.

With the development of online website technology, cable program networks are using this medium to enhance their video programming content. Cable networks, such as Nickelodeon, the Disney Channel, and Fox Family Channel, have created interactive websites to complement their innovative children's programming. Other cable networks operate websites that appeal to children as well as general audiences.

NCTA applauds the government's efforts to protect the privacy of children using the Internet by enacting the Children's Online Privacy Protection Act of 1998 (the "Act").<sup>1</sup> Children are particularly vulnerable to the use and misuse of personal information divulged through Internet-related activities. By prohibiting unfair and deceptive practices in connection with the collection and use of personally identifiable information from and about children, Congress took a major step in safeguarding children from careless, and in some cases, unscrupulous operators of Internet websites directed to children.

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<sup>1</sup> Pub. L. 105-277, 112 Stat. 2681.

At the same time, Congress wanted children's access to valuable and appropriate Internet sites to flourish.<sup>2</sup> As the Commission recognizes in the Notice of Proposed Rulemaking ("Notice"), the Internet offers children "unprecedented opportunities for learning, recreation, and communication in ways scarcely imagined a decade ago."<sup>3</sup> One of its greatest benefits is its global, interactive nature — linking people, institutions, companies and countries around the world. This vibrant and multi-dimensional medium should be free to develop without extensive government regulation.

In that regard, we support the Commission's endorsement of industry self-regulatory guidelines (that take into account industry-specific concerns and technological developments) as a safe harbor in enforcement actions under the Act.<sup>4</sup> The comments filed by members of our association demonstrate that cable online service providers and cable program networks are implementing policies and developing standards to protect the privacy of subscribers to Internet services.<sup>5</sup>

In implementing the Act, however, we caution the Commission not to sweep under the rules those entities within the cable industry which facilitate Internet access but do not collect or maintain information about children. In particular, the Commission should make clear that *cable operators* are not encompassed within the meaning of "operator" in the statute or proposed rules, except to the extent they operate websites or online services

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<sup>2</sup> Statement of Sen. Bryan, 144 Cong. Rec. at S.11657 (Oct. 7, 1998) (describing Act as "preserv[] the interactivity of children's experience on the Internet and preserv[] children's access to information.")

<sup>3</sup> Notice at 4.

<sup>4</sup> Notice at 27, discussing section 312.10 of the proposed rules.

<sup>5</sup> See e.g. Comments of Time Warner Cable, Viacom, and Disney.

directed at children. *Cable operators* simply do not engage in the kinds of activities targeted by the Act -- the collection of personal information from a child's online participation in a game, prize offer, registration, chat room, bulletin board or other website-sponsored activity.

In those cases where an entity is subject to the proposed rules, we make one recommendation. The FTC should incorporate flexibility into its parental consent standards under the rules given the current state of technology. As the technology for online consent (such as digital signatures) develops, the Commission will have the opportunity to reassess the various approved methods for obtaining consent as part of its statutorily-mandated review and report to Congress in five years.<sup>6</sup>

## **DISCUSSION**

### **A. Background**

The cable television industry has a long history of protecting the privacy of its customers. In 1984, the industry worked with Congress to draft comprehensive federal privacy protections that have been implemented successfully by the industry.<sup>7</sup> Under Section 631 of the 1984 Cable Act, cable companies generally may not use customer-specific viewing information without the customer's consent.<sup>8</sup> Section 631 also prohibits a cable operator from using personally identifiable information concerning any subscriber collected in the course of providing service without the subscriber's prior written or

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<sup>6</sup> 15 U.S.C. §6506.

<sup>7</sup> There have been few instances of customers complaining that their privacy rights have been violated. The leading case on the adequacy of a cable operator's notice is Scofield v. TeleCable of Overland Park, Inc., 973 F. @d 874 (10th Cir. 1992).

<sup>8</sup> 47 U.S.C. §551.

electronic consent. These provisions are enforced through notice to the subscriber, opportunity to correct errors, the obligation to destroy unneeded personal information, and the award of damages in appropriate cases. The privacy provisions are intended to protect consumers against both the commercial misuse of individual identifiable information, and the misuse of this information by government agencies.

The cable industry is at the very early stages of offering high speed Internet access services to its customers. Based on its extensive experience with customer privacy, the industry is self-policing its data collection practices and developing new guidelines regarding the collection, use or disclosure of personal information for all users. Some companies are members of the Online Privacy Alliance, an inter-industry coalition of more than 70 corporations and associations, whose goal is to protect personal data collected from individuals over the Internet and in electronic commerce.<sup>9</sup>

In addition to these voluntary efforts, those cable entities that operate websites or online services directed to children will now be subject to the data collection requirements of the Act and its regulations, most notably obtaining verifiable parental consent before collecting information from a child. As we discuss below, however, a cable *operator* typically does not conduct the type of activity that Congress was trying to regulate under the Act.

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<sup>9</sup> See Online Privacy Alliance website at [www.privacyalliance.org](http://www.privacyalliance.org). The Alliance has developed guidelines for online privacy, a framework for self-regulatory enforcement mechanisms, and a special policy concerning the collection of information from children. The basic principles endorsed by the Alliance for children's privacy protection include parental consent and notification; opportunity for the parent to prevent use of the information and participation in the activity; no disclosure of information collected to third parties without prior parental consent; no public posting of information from children without parental consent; and no enticement of children to divulge more information than needed through game, prize or another activity. See also "Online Privacy Alliance White Paper: Online Consumer Data Privacy in the United States", November 9, 1998.

## **B. Definition of Operator**

The Act makes it unlawful for “any operator of a website or online service directed to children, or any operator that has actual knowledge that it is collecting personal information from a child” to conduct such activity without compliance with the notice, parental consent, parental review and other requirements of the Act.<sup>10</sup> We believe that the definition of the term “operator” in the proposed rules may confuse some cable customers who obtain Internet service from their cable “operator.” Under section 312.2 of the rules, “operator” means:

Any person who operates a website located on the Internet or an online service and who collects or maintains personal information from or about the users of or visitors to such website or online service, or on whose behalf such information is collected or maintained, where such website or online service is operated for commercial purposes, including any person offering products or services for sale through that website or online service, . . .<sup>11</sup>

As noted above, cable operators generally do not collect or maintain personal information from Internet access service users in either a direct or passive manner. Cable operators do not request personal information online; collect information via chat rooms, message boards, or other public posting; or engage in passive tracking through the use of identifying codes linked to an individual. The typical cable system provides online access to the Internet through joint ventures or affiliations with companies such as HSA, @Home or RoadRunner. In some instances, the operator may provide Internet service and content without a partner. In either case, the cable operator does not have access to

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<sup>10</sup> 15 U.S.C. 6502.

<sup>11</sup> Notice at 7-8; 15 U.S.C. 6501.

information collected by websites that a customer accesses via the cable plant.

Accordingly, the FTC should clarify that a cable operator is not an “operator” for purposes of the Act and the proposed rules.<sup>12</sup>

This clarification would be in line with the functional purpose of the statute. The Act’s goals, as outlined in the legislative history, are (1) to enhance parental involvement in a child’s online activities in order to protect the child’s privacy; (2) to help protect the child’s safety in online activities such as chat rooms, pen-pal services and other public postings of identifying information; (3) to maintain the security of a child’s personal information collected online; and (4) to limit the collection of personal information from children without parental consent.<sup>13</sup> Where an entity functions in a manner that addresses these concerns, the Act should apply. Where it does not, it should not.

NCTA’s proposed interpretation is bolstered by the legislative history of the Act, which states that the definition of operator is “intended to hold responsible the entity that collects the information, as well as the entity on whose behalf the information is collected. This definition, however, would not apply to an online service to the extent that it does not collect or use the information.”<sup>14</sup>

In formulating the rules, the Commission should be guided by the statutory intent to safeguard children’s use of websites on the Internet. The Commission’s rules should not serve as a dragnet to pull in every Internet-based entity whether or not its service threatens children’s privacy. We urge the Commission to direct its rules specifically to operators of

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<sup>12</sup> Notice at 8.

<sup>13</sup> Notice at 2, quoting 144 Cong. Rec. S12741 (Oct. 7, 1998) (Statement of Sen. Bryan).

<sup>14</sup> Statement of Sen. Bryan (emphasis added).

websites and online services whose activities could potentially place children's privacy at risk and to ensure that the rules do not unnecessarily impede the flow of information on the Internet.

**C. Flexibility in Parental Consent Methods**

Where an entity is subject to the proposed rules, such as a cable program network operating a website directed at children, NCTA would like to make one comment. We believe the FTC, in balancing the Congressional interests in protecting children's online privacy while preserving the interactivity of children's online experiences, should allow companies to use a variety of approaches to obtaining verifiable parental consent. This would be consistent with the statutory definition of "verifiable parental consent" as meaning "any reasonable effort (taking into consideration available technology)" to ensure parental authorization and Congress's desire, as expressed in the legislative history, to interpret the term verifiable parental consent "flexibly."<sup>15</sup>

As advanced technologies for online consent become more feasible, the FTC will have the opportunity to reevaluate the various authorized methods for obtaining consent as part of its mandated review and report to Congress in five years.

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<sup>15</sup> 15 U.S.C. section 6501(9); Bryan Statement at S. 11657.



**CONCLUSION**

For the foregoing reasons, cable operators should be excluded from the definition of “operator” under the children’s online privacy rules, unless they operate a website directed at children or otherwise knowingly collect information from children online. The Commission also should adopt a flexible approach to the verifiable parental consent requirements where the proposed rules would apply.

Respectfully submitted,

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