

May 27, 2016

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Protecting the Privacy of) WC Docket No. 16-106
Customers of Broadband and)
Other Telecommunications Services)

COMMENTS OF THE AMERICAN ASSOCIATION OF LAW LIBRARIES

The American Association of Law Libraries (AALL) respectfully submits the following comments in response to the Protecting the Privacy of Customers of Broadband and Other Telecommunications Services Notice of Proposed Rulemaking (NPRM).¹

AALL commends the Federal Communications Commission (FCC) for its adoption of the *2015 Open Internet Order*, which reclassified broadband internet access service (BIAS) as a common carrier “telecommunications service” under Title II of the Communications Act of 1934 (as amended). In addition, AALL supports the FCC’s proposal to strengthen privacy rules with regards to broadband internet service, in accordance with the NPRM.

These comments focus on the privacy interests of internet users who access commercial broadband in public libraries, including public law libraries.

I. Libraries, Information, and Privacy in a Democratic Society

A vibrant and engaged democracy depends upon unfettered access to information. Public libraries have always served as a fundamental and essential source of information for the citizens and residents of the United States. According to a study released in December of 2013, 54 percent of Americans ages 16 and older had used a public library within the previous 12 months, and 72 percent stated that they lived in a “library household”.² In the United States, public libraries, including public law libraries, have come to symbolize what it means to live in a democratic society, where the

¹ Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, 81 Fed. Reg. 23360 (April 20, 2016) (amending 47 CFR Part 64).

² Pew Research Center, How Americans Value Public Libraries in Their Communities (December 2013), http://libraries.pewinternet.org/files/legacy-pdf/PIP_Libraries_in_communities.pdf. In addition, 90 percent of Americans ages 16 and older said that the closing of their local public library would have an impact on their community.

government actively promotes and supports the attainment of knowledge and self-education.

The image of a public library as just a place to borrow the latest in popular fiction is completely outmoded in modern society. Today's library usage touches upon all aspects of a patron's life, including politics, religion, employment, finance, health issues, and legal problems, all matters of intimate personal interest that deserve privacy. As the NPRM noted, "Privacy protects important personal interests. Not just freedom from identity theft or financial loss but also from concerns that intimate, personal details should not become grist for the mills of public embarrassment or harassment or the basis of opaque, but harmful judgments, such as discrimination."³ The need for such protection is of special concern at public law libraries, which provide access to legal information for the courts, the bar, self-represented litigants, small business owners, and members of the public. Patrons at these libraries may be researching sensitive topics such as domestic violence, bankruptcy information, criminal histories, and confidential business matters.

In the United States of the 21st Century, the "online ecosystem" is omnipresent. As the use of computers and the internet has increased dramatically among the population, the rise of broadband internet usage in public libraries and public law libraries has correspondingly increased. Almost 98 percent of public libraries now offer public wireless internet access.⁴ In addition, recent statistics show that 33 percent of Americans do not have access to broadband internet at home⁵; for a good portion of Americans, the public library or public law library may be their *only* means of access to the internet.

Although libraries are public places, patrons should not and cannot lose their right to privacy once they pass through the library doors, including when using the internet. A lack of privacy protection will discourage free and unconstrained usage of libraries and the pursuit of information. Public law libraries, because they play a central role in the nexus between information, privacy, and democracy, have been committed to safeguarding the privacy needs of library patrons throughout their history.

II. Privacy Concerns with Broadband Internet Usage in Public Law Libraries

Providers of broadband internet access occupy a unique and powerful role in today's digital world. As gatekeepers to the massive trove of online information and entertainment, they routinely collect an immense and varied amount of information about internet users' lives through the users' communications, web searches, and media consumption. This data collection has the potential to provide internet providers

³ Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, 81 Fed. Reg. 23360, 23361 (April 20, 2016) (amending 47 CFR Part 64).

⁴ Information Policy and Access Center, 2014 Digital Inclusion Survey: Survey Findings and Results (October, 2015).

<http://digitalinclusion.umd.edu/sites/default/files/uploads/2014DigitalInclusionSurveyFinalRelease.pdf>.

⁵ Pew Research Center, Home Broadband 2015 report (December 2015).

<http://www.pewinternet.org/files/2015/12/Broadband-adoption-full.pdf>.

with a broad view of consumer behavior, which in turn can be monetized by the providers. Without proper regulation, there is little the online downstream consumer can do to avoid data collection by these providers. Users also have no control over how their personal information is collected, stored, and shared.

Public law library patrons using library computers in order to access the internet are, in effect, the last port of online downstream consumers, vulnerable to data collection and privacy violations. Under the *Open Internet Order*, the customer of the broadband internet provider is the library. A consumer purchasing broadband internet for their home has at least some choice in the matter. Patrons in public law libraries have no choices or options in the broadband internet service available to them, nor can they implement any additional personal security procedures or privacy protections. In fact, most library patrons will be unaware of the data that might be collected on them.

III. FCC's Proposed Privacy Rules Are Necessary for the Protection of Public Law Library Patrons

Library patrons are dependent upon their library to protect their private information. This was true of libraries in the era of card catalogs, and is even truer for libraries in the digital era. The protections in the FCC's proposed rules would be a step in providing the tools libraries need to safeguard their users' privacy.

The FCC seeks to clarify, under its new Title II authority, the privacy obligations of BIAS providers with regard to collecting and collected consumer data. Opponents argue that this type of policing function should remain within the Federal Trade Commission (FTC). However, as Senator Patrick Leahy noted during a hearing on the FCC's NPRM, "... in the specialized area of broadband privacy, case-by-case enforcement by the FTC cannot substitute for clear rules created through the expert rulemaking process at the FCC".⁶ Indeed, the FTC itself has offered no resistance to this division of regulatory authority and has stated that it "has a long history of successful cooperation with the FCC on consumer protection issues, including issues related to privacy and data security."⁷

AALL agrees with the FCC that BIAS providers need access to certain types of private information from their customers, in order to provide the service the customer has purchased. This type of information is used to ensure that the broadband service is functioning correctly, as well as other activities such as billing and offering upgrades. At the creation of the customer-BIAS provider relationship there is implied consent on the part of the consumer for the use of information for these purposes, and no additional

⁶ Prepared Statement of Senator Patrick Leahy, Ranking Member, Senate Judiciary Committee. Hearing before the Senate Judiciary Subcommittee on Privacy, Technology and the Law on "Examining the Proposed FCC Privacy Rules", Washington, D.C., May 11, 2016, <https://www.judiciary.senate.gov/imo/media/doc/05-11-16%20Leahy%20Statement.pdf>.

⁷ Prepared Statement of the Federal Trade Commission. Hearing before the Senate Judiciary Subcommittee on Privacy, Technology and the Law on "Examining the Proposed FCC Privacy Rules", Washington, D.C., May 11, 2016, <https://www.judiciary.senate.gov/imo/media/doc/05-11-16%20Ramirez-Ohlhausen%20Joint%20Testimony.pdf>.

consent is required. However, AALL strongly urges the FCC to adopt regulations requiring that *all other uses* of customer data by BIAS providers require express, affirmative opt-in consent from the customer. The NPRM, as it stands now, takes a strong stance on opt-in consent for the majority of uses of private information. However, it still allows for an opt-out structure that would allow BIAS providers to share their customer data with business affiliates in order to market and sell the services of those businesses. For this type of data use, consent is considered given, unless the customer decides against it and takes the affirmative action of opting out. We believe that this type of opt-out system does not adequately protect the privacy concerns of consumers.

Opt-out options are often deliberately buried among the fine print, which consumers do not always look for nor recognize when they see. If the FCC is serious about its stated goal of BIAS transparency in providing customers with clear and conspicuous notice about what data it collects and shares, then the best privacy system is to have all of the consumers' choices be deliberate and affirmative.

AALL also supports the FCC in its commitment to data security. The greater the quantity of information collected, the longer the information is retained, and the more that information is shared, then the greater the likelihood of data breaches. Due to the personal information involved in communications data, there must be clear and strict rules in regard to the protection of customer information. BIAS providers should be required to analyze their data security risks and implement effective data security systems, designate responsible personnel and train appropriate staff, have a breach response plan and notification system in place, and take responsibility for use and protection of customer personal information when shared with third parties.

Total opt-in systems and data security roles are especially important in public law libraries. Due to the sensitive nature of the communications data that flow across the internet, law libraries have a heightened responsibility to protect their patrons from the misuse, abuse, and potentially dangerous use of their personal data. They are entrusted with making the right privacy decisions in regards to their patrons, which includes the critical choice of a BIAS provider. Law libraries must have the information and controls necessary to make well-informed decisions in order to protect their library patrons.

IV. Conclusion

AALL supports the FCC's move towards protecting the three core privacy principles – transparency, choice, and security – for American consumers of broadband internet, as outlined in its NPRM. The certainty that comes from clear rules, rules that give customers meaningful choices and controls, will ensure that the private data of consumers is protected in the modern digital world.