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February 13, 2009

**VIA TELECOPIER AND U.S. MAIL
(858) 759-0711**

Michael J. Flynn, Esq.
1 Center Plaza, Suite 240
Boston, MA 02108

**Re: *Blixseth v. Bresnan*, Civil No. 09-1029 (D. Mass.);
Subpoena to Bresnan Communications**

Dear Michael:

As we discussed, this is in response to the subpoena duces tecum served on Bresnan Communications (“Bresnan”) sometime today. Your subpoena requests that by today Bresnan produce and permit inspection and copying of documents identifying end user subscribers and/or intermediaries using Bresnan-registered IP address 69.144.251.65. First, a specific date and time is needed as IP addresses are dynamically assigned and we need a date and time to match any IP address to a particular subscriber. Notwithstanding, as I will explain below, the Federal Communications Act prohibits Bresnan from providing any of the subpoenaed information to you without prior notice to the affected subscriber(s) *and* a court order, not just a subpoena. Accordingly, Bresnan objects to your subpoena pursuant to Fed. R. Civ. P. 45(c)(2)(B) and no documents will be made available on the date specified unless and until further directed in a court order.

As a cable operator, Bresnan must protect its cable, telephone, and Internet subscribers’ privacy in compliance with federal law. Bresnan may not provide any subscriber’s personally identifiable information to a third party without first ensuring compliance with the requirements of Section 631(c) of the Communications Act, 47 U.S.C. § 551(c). That Section generally prohibits cable operators from disclosing such information without the subscriber’s express written consent and also imposes an affirmative obligation on a cable operator to “take such actions as are necessary to prevent unauthorized access to such information by a person other than the subscriber or cable operator.” 47 U.S.C. § 551(c)(1). Personally identifiable

information, or "PII," would include information that specifically identifies the subscriber, including such information as name, address and phone number. "It would be hard to conceive of information which more personally identifies an individual than his name address, and telephone number." *Warner v. American Cablevision of Kansas City*, 699 F.Supp. 851, 855 (D. Kan. 1988).¹

The PII that cable operators must protect from unconsented disclosures pertains to video, telephone, and Internet subscribers. The reference in Section 631 to "cable or other service" includes Internet and telephone service because "other service" is defined to include "any wire or radio communications service provided using any of the facilities of a cable operator that are used in the provision of cable service." 47 U.S.C. § 551(a)(2)(B). "This specific definition of 'other service' plainly includes internet service transmitted via a cable system." *In Re Application of the United States of America for an Order Pursuant to 18 U.S.C. § 2703(d)*, 157 F. Supp. 2d 286, 291 (S.D.N.Y. 2001). "The term 'personally identifiable information' in [Section 631] thus relates to information regarding subscribers to 'cable service or other service.'"² *Id.*

Even though the Electronic Communications Privacy Act, 18 U.S.C. §§ 2701, *et seq.* ("ECPA"), generally governs access to records held by providers of electronic communications services, including Internet and telephone services, the Communications Act would still prevent the disclosure. "When a cable company provides Internet services to its customers . . . it may appear to be subject to both [ECPA and the Communications Act]. And where those Acts conflict, the company may find itself stuck between the proverbial rock and a hard place." *In Re Application of the United States of America for an Order Pursuant to 18 U.S.C. § 2703(d)*, 36 F.Supp. 2d 430, 432 (D. Mass. 1999). Cable operators are therefore prohibited from disclosing information concerning their Internet and telephone service subscribers, regardless of any provision under ECPA that may permit limited disclosures.³ Accordingly, we look at only those exceptions to the prohibitions on disclosure that are contained in Section 631.

¹ Section 631(a)(2)(A) defines "Personally identifiable information" to exclude "any record of *aggregate* data which does not identify particular persons." 47 U.S.C. § 551(a)(2)(A)(emphasis added). *See also* H.R. Rep. No. 98-934 at 79 (1984) ("Personally identifiable information would include *specific* information about the subscriber...")(emphasis added).

² For purposes of **governmental** inquires seeking a subscriber's PII, information pertaining to a subscriber receiving Internet service was held by one court to be covered exclusively under the Electronic Communications Privacy Act, *In Re Application of the United States of America*, 157 F.Supp. 2d at 291-92. In the Patriot Act, Congress amended the Cable Act to expressly provide that ECPA controls when disclosure of Internet records are sought by a **governmental entity**, except that under no circumstances could such Internet records include those that reveal the subscriber's selection of video programming. 47 U.S.C. § 551(c)(2)(D). Because your client is not a governmental entity, it would not come within the statutory amendment's reference to ECPA.

³ If only ECPA applied, it is possible that voluntary disclosure could be made. 18 U.S.C. § 2702(c)(5) does allow a provider to disclose "a record or other information" on an Internet or telephone subscriber to "any person other than a governmental entity." To the extent this would allow a cable operator to disclose PII of an Internet or telephone subscriber to a private, non-governmental person such as your client, such disclosure would still subject the operator to claims under the privacy provisions in the Communications Act. ECPA does have a general immunization of conduct for disclosures ordered or permitted under ECPA, but such immunization pertains to claims under ECPA itself, not the Communications Act. 18 U.S.C. § 2703(e). In addition, to the extent the federal law governing telephone company records (CPNI) might apply, disclosure would be prohibited as well. 47 U.S.C. § 222.

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Section 631(c)(2) provides three exceptions to the general ban on disclosing personally identifiable information without the subscribers' express consent. Disclosure is permitted: (1) "when necessary to render, or conduct a legitimate business activity related to, a cable service or other service provided by the cable operator to the subscriber," 47 U.S.C. § 551(c)(2)(A); (2) "pursuant to a court order authorizing such disclosure, if the subscriber is notified of such order by the person to whom the order is directed," 47 U.S.C. § 551 (c)(2)(B); and (3) in the form of aggregate customer name and address lists, as long as the cable operator has provided the subscriber the opportunity to prohibit or limit such disclosure and the lists contain no information regarding customers' viewing activities or other transactions. 47 U.S.C. § 551(c)(2)(C).

Under the "necessary to render" exception, the essential issues are whether the disclosure of name, address and phone number is *necessary* to provide either: (a) cable service or other service, or (b) a legitimate business activity related to the cable or other service. Examination of Section 631(c)(2)(A)'s use of the term "necessary" is informative. The Act does not define the term "necessary." Compliance with your subpoena has no relation, necessary or other, with the service we render subscribers. Accordingly, disclosure would not be allowed as one "necessary" to the provision of our services under the Communications Act. Indeed, we have no information on the underlying litigation, your client's defenses or the relevance, if any, of the requested PII.

Therefore, the only exception applicable to your subpoena is contained in Section 631(c)(2)(B), which requires a court order and notice to the subscriber before disclosure of any PII may be made.⁴ A subpoena by itself is not a court order. Accordingly, upon receipt of an order complying with Section 631(c)(2)(B), Bresnan will give notice as directed by the Court and allow any subscriber receiving such notice to appear anonymously and challenge disclosure.

If you have any questions, or would like to discuss the form of a proposed order (attached), please do not hesitate to contact me directly.

Very truly yours,


John Seiver

Attachment/Enclosure

cc: Robert Bresnan (w/attachment/enclosure)

⁴ Such notice must afford the subscriber enough time to challenge anonymously any disclosure before it is made. A decision otherwise would render the notice provision a nullity. See Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 Notre Dame L. Rev. 1537, 1598 (April 2007) (advocating extending the protections of Section 631 in other contexts to "guarantee the defendant has a chance to defend his right to speak anonymously *before it is too late*") (emphasis added).